IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, DAVID ALLEN LUCAS, Defendant and Appellant.	Case No. S012279 (San Diego Superior Court No. 73093/75195)

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

HONORABLE LAURA PALMER HAMMES, JUDGE, PRESIDING
HONORABLE FRANKLIN B. ORFIELD, MOTIONS JUDGE
HONORABLE WILLIAM H. KENNEDY, MOTIONS JUDGE

APPELLANT'S REPLY BRIEF

DEATH PENALTY

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Court of California

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APPELLANT'S REPLY BRIEF SECTION ONE: FACTUAL MISSTATEMENTS IN RESPONDENT'S BRIEF

A. Respondent's Argument XXXII: Whether The Photo Of Appellant Was "Significantly Different" From The Other Photos In The Lineup From Which Jodie Santiago Identified Appellant? [AOB 863-82; ARB 94-97]

Respondent's brief states:

> ". . . As this Court will observe by viewing the photographic lineup . . . appellant's eyes, hair, and mustache are not significantly different that [sic] the others in the lineup. All six photographs are of white males, generally of the same age, complexion and build, and all six generally resembled each other. Thus, **appellant's photograph did not stand out**. [Citations.]" (RB 240.) [Emphasis added.]

This is a mischaracterization of the record. Only appellant's photo had all the physical characteristics described by Santiago. That is: bulging eyes that appeared to be too big for the sockets, blond hair, mustache stopping at the corner of the mouth and a clean appearance. (RTH 17939-49; 17944; see also RTH 5658-59 [#4 and #6 had mustaches extending below the lips].) Moreover, appellant's photo was noticeably larger than the others. (See RTH 17939-49.) No one aware of the characteristics described by Santiago would have had any difficulty immediately selecting appellant's photo as the only photo in the array as the only suspect possibly fitting Santiago's description. Accordingly, respondent's assertion that "appellant's photograph did not stand out" is a mischaracterization of the record.

B. Respondent's Argument XLII: Whether The Impeaching Evidence Against The Santiago Investigating Officers Was "Ambiguous" And Whether Their Testimony Was "Tangential"? [AOB 967-93; ARB125-29.]

Appellant's Opening Brief argued that exclusion of evidence that in the

Cavanaugh case the Santiago homicide detectives gave false and/or misleading testimony and violated the suspect's *Miranda* rights was prejudicial error. (AOB 967-93.) Respondent inaccurately asserts that the impeaching evidence against the officers was "ambiguous" and that their testimony was "tangential."(RB 280-288.)

1. The Impeaching Evidence Was Not Ambiguous

As detailed in Appellant's Opening Brief, there was ample evidence that the investigating officers not only engaged in deceitful investigation practices in a past murder case (*People v. Cavanaugh*), but also subsequently gave false and/or misleading testimony about that investigation. (AOB 968-84.) This egregious misconduct was not a bare, unsupported accusation as claimed by respondent but was proved by undisputed physical and tape recorded evidence.[1] It led to an Internal Affairs investigation in which Detective Fullmer attempted to assert the Fifth Amendment. (AOB 979.) It was also the basis for the trial judge in *Cavanaugh* to suppress both the defendant's confession and a tape recording of the slaying. (AOB 970.)

There was also evidence that Fullmer gave false statements at the *Cavanaugh* preliminary hearing. Fullmer testified that the purse at the murder scene was positioned so that he could see a tape recorder inside. Scene photographs contradicted any such possibility and Fullmer subsequently changed his story – twice – to match the physical evidence. (AOB 970-74.)

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[1] The entire *Cavanaugh* interrogation conducted by Detective Henderson was recorded by a master tape recorder. This master recording exposed the *Miranda* violation Henderson later sought to cover up. Because Henderson did not know about the master tape system, he was caught off guard by its introduction at the preliminary hearing. The tape revealed that Henderson's prior testimony about the content of the interrogation was grossly misleading. (AOB 970-74.)

In sum, the evidence of the detectives' dishonesty and blatant disregard for a suspect's constitutional rights was not "ambiguous."

2. Detectives Henderson And Fullmer Were Not "Tangential" Witnesses

Detectives Henderson and Fullmer handled all aspects of Santiago's identification of appellant (including the completion of two composite sketches) and Santiago's identification of his house. (AOB 984-86.) The prosecution in turn relied on the Santiago eyewitness evidence – marshaled and testified to by these detectives – to prove its case. (AOB 293-94.) And, the reliability of Santiago's identification of appellant was a heavily contested issue at trial. Thus, the credibility of the detectives was necessarily at issue on that key matter. Had the detectives' dishonesty and misconduct in the *Cavanaugh* case been revealed on cross-examination, it would have painted a materially different picture of the detectives' credibility to the jury. (See *People v. Mickle* (1991) 54 Cal.3d 140, 168-169.) Indeed, the jurors could well have decided that such conduct demonstrated a deliberate intent to mislead the fact finder in order to convict appellant.

C. Respondent's Argument LXXV: Whether Judge Hammes Precluded Voir Dire About Appellant's Prior Rape Conviction? [AOB 1432-39; ARB 82-96]

Appellant's Opening Brief contended that the judge committed reversible error by sustaining the prosecutor's objection to defense questioning of prospective jurors regarding appellant's 1973 rape conviction. (AOB 1432-39.) Respondent does not deny that "[the 1973 rape] was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances. . . ." (*People v. Cash* (2002) 28 Cal.4th 703, 721.)

Nor does respondent deny that it would have been reversible error under *Cash* to "foreclose all questioning regarding appellant's alleged rape." (RB 421.)

Instead, respondent asserts erroneously that the judge's ruling did in fact allow the defense to ask the prospective jurors about the 1973 rape conviction.

The record unquestionably demonstrates that Judge Hammes precluded the defense from asking any specific questions about the prior rape conviction. (See ARB182-93, below.)

Hence, the judgment should be reversed. (*People v. Cash, supra*, 28 Cal.4th 703.)

D. Respondent's Argument LXXXV: Whether Judge Hammes Deliberately Persuaded Appellant To Waive His Right To Personal Presence At The Hearing On His Counsels' Ineffectiveness? [AOB 1567-77; ARB 219-27]

Appellant's Opening Brief argued that the judge erroneously asked appellant to waive his presence at a hearing about defense counsel's ineffectiveness. (AOB 1567-77.) Respondent argues that there was no harm in excluding appellant because he had agreed to be absent from other proceedings during the trial. However, Respondent omits the crucial fact that, unlike the other proceedings as to which appellant waived personal presence, appellant's waiver from the ineffective assistance of counsel hearing was initiated by Judge Hammes in an apparently deliberate effort to prevent him from hearing what was to be said at the hearing. The fact that the judge wanted appellant to waive his presence is reflected by her announcement that "I would like to talk with counsel in chambers alone on the record without Mr. Lucas's presence. Will Mr. Lucas waive his presence for a few moments?" (RTT 13003.) Hence, the record reflects the judge's deliberate intent to keep appellant in the dark about his counsels' ineffectiveness.

E. Respondent's Argument CIV: Whether The Bailiff's Secret Intrusion Into The Deliberation Room Revealed Information About The Jurors' Thought Processes And Whether The Jurors Actually Thought They Were Precluded From Looking At The Guilt Phase Exhibits During Penalty Deliberations? [AOB 1678-90; ARB 250-56]

Appellant's Opening Brief contended that by secretly sending the bailiff into the jury deliberation room Judge Hammes violated the general rule, embraced by this Court, that "no one – including the judge presiding at a trial – has a right to know how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror." Appellant alleged error in the use of the trial judge's and the bailiff's observations of the jury room to: (1) speculate as to the jurors' subjective mental processes and (2) provide a supplemental instruction to the jurors in light of these speculations as to the jurors' mental processes – an instruction that was both biased and prejudicial to appellant.

In responding to this argument respondent mischaracterized the record in two ways.

1. Whether The Intrusion Revealed The Jurors' Thought Processes?

According to respondent, the bailiff's observations in this case "revealed nothing of the jurors' thought processes and, thus, did not implicate the concerns which imposed secrecy on the deliberations." (RB 554.) However, the judge's explicit purpose in directing the bailiff to report on the condition of the jury room was to gather intelligence about the jurors' thought processes. (RTT 13455.) The judge not only believed the observations revealed something about the jurors' thoughts, she acted on that belief. Although the jurors had already been told that guilt phase evidence could be considered in penalty deliberations, the judge speculated that because physical

exhibits were not spread out in the jury room, the jury was excluding guilt phase evidence from their thought processes. In response to the bailiff's observations and her speculative inferences, the judge gave the jury the additional, unrequested instruction on her own motion. (See ARB 250-56, below.)

2. Whether The Jurors Actually Thought They Couldn't Look At The Guilt Exhibits?

Respondent, in an attempt to justify the giving of the supplemental instruction, asserts that "when [the trial court] learned that the jury had not included the guilt phase exhibits in their deliberations even after obtaining the trial court['s] initial answer, the trial court recognized that its answer was not full and complete, and a further answer was appropriate." (RB 554-555.) Ignoring the impropriety of the trial court's invasion of the privacy of the jury's deliberative process, respondent is still wrong as a purely factual matter. Before the supplemental instruction was given, the bailiff had reported to the court that "looking a little more deeply" he had noticed that one exhibit had been moved. (RTT 13476.) This certainly undercut any reason for believing that the jurors thought they couldn't look at the exhibits. Further, the jurors had presumably spent considerable time reviewing the guilt phase exhibits during eight days of guilt phase deliberations, and the fact that they did not pull them out again during penalty deliberations did not mean in any way that they were not considering that evidence in their penalty deliberations. And, the trial court's "initial answer" was a very clear response to a specific question: "Evidence of the circumstances of the crime . . . may be considered in the penalty phase just as if it had been presented in the penalty phase." (CT 24253-24254.) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's

instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

F. Respondent's Argument CVIII: Whether The Record Contains Discrepancies Which Impeach The Accuracy Of The Clerk's Minutes? [AOB 1710-16; ARB 261-63]

Appellant's Opening Brief contended that the judge erroneously failed to notify defense counsel of the note from Juror P.W. advising that her father had died and requesting to be excused for the funeral. Respondent asks this Court to reject a straightforward reading of the minutes because "the clerk's minutes are not literal in sequence and may also not be literal in substance." (RB 565.) However, there are no substantial discrepancies in the Clerk's Minutes.

Respondent claims that the Clerk's Minutes are not accurate because the times on the actual juror notes did not correspond with the times the minutes indicate that the notes were received. (RB 565.) However, as to the first two notes from that morning it is perfectly reasonable that they would have been written before they were actually given to the clerk – especially since they involved scheduling matters relating to events later in the week. Thus, the fact that the notes were written at 9:30 and 10:00 a.m. and received by the clerk during a break at 10:39 a.m. is simply not a discrepancy and does not in any way undermine the accuracy of the Clerk's Minutes.

Nor is the alleged discrepancy as to the third note from that morning significant. The fact that there is a one minute difference between the time on the note and the time it was received is of no significance whatsoever and suggests nothing more than someone's watch being slightly fast or slow.

In sum, respondent has failed to impeach the accuracy of the Clerk's Minutes and that argument should be rejected.

APPELLANT'S REPLY BRIEF SECTION TWO: ARGUMENT

I.

THE DEFENSE SHOULD NOT BE REQUIRED TO PROVE WHAT DISCOVERY WILL SHOW BEFORE GAINING ACCESS TO THE DISCOVERY [AOB Argument 1.4.1, RB Argument I]

In his opening brief appellant contended that the defense did not have a fair opportunity to litigate its challenge to the composition of appellant's jury because, inter alia, it was denied reasonably necessary discovery. (AOB 25-40.) Respondent contends (RB 60-82) that there was no discovery violation because:

1) The actual percentage of Hispanics on the jury panels could have been 10.8% instead of the 8.96% shown by the survey (RB 68-69);

2) Rather than expert estimates, the defense should have presented "data demonstrating the 1985 jury-eligible Hispanic population" (RB 69-70);

3) "[A]ppellant was not denied any discovery" (RB 71-72);

4) There was no prejudice (RB 72);

5) Judge Hammes had no obligation to reconsider Judge Orfield's denial of discovery because the defense "did not offer any new evidence. . . ." (RB 72-73).

None of these contentions justify denial of appellant's discovery requests because they are all based on the unfair premise that the defense must show exactly what the requested discovery will show before gaining access to such discovery.

In 1980 Hispanics were 14.7% of the population in San Diego County according to U.S. Census figures. (RTO[2] 8313-14; In Limine Exhibit 6-C/7-W.) Based on past and present census figures and predicted activity, the

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[2] "RTO" refers to pretrial proceedings before Judge Orfield.

Hispanic population in San Diego County was projected to be 17.25% of the total population in 1985. (RTO 8314-17; In Limine Exhibit 6-C/7-W.)

Dr. Edgar Butler, a recognized expert in the field (RTO 8296-99), testified that the data showed "a possible underrepresentation of Hispanic population" and that a review of the San Diego County jury selection system was warranted. (RTO 8320-21.) Such a review would have been directed toward determining (1) if there was underrepresentation and (2) where the underrepresentation might be occurring within the system. (RTO 8300; 8315; 8336.)

To conduct this two-pronged review it would have been necessary to "go through the various systems in the jury selection procedures [in] the Jury Commissioner's Office and the data collected there to evaluate that in a systematic way." (RTO 8318.) However, there appeared to be limited information about "what happens to people once they are within the system." (RTO 8306; 8321.)[3]

Therefore, Dr. Butler testified that it would be necessary to systematically go through the qualification and impanelment process. (RTO 8306-07.)[4]

Accordingly, two types of discovery not yet provided were needed.

First, there was a need for "specific information regarding the computer

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[3] This lack of knowledge was in part due to the inability of the Commissioner's office to conduct its own independent study. (RTO 8321.)

[4] Dr. Butler observed:

> [T]here is a virtual lack of information about the . . . Spanish-origin population as they go through the jury selection procedures. . .[T]he little bit of information that we do have suggests that there is underrepresentation. (RTO 8321.)

program which is used to help compose jury lists and help, in effect, select the jurors. . . ." (RTO 8416.) "[I]t would be of great assistance to have as much knowledge as possible about the operation and characteristics of the computerized jury processing system in operation in San Diego County. This knowledge, of course, would include a description of the evolution of this computerized system over the past year to access whether there had been any changes made during . . . that time period." (RTO 8417.)

Second, defense needed discovery of the jury selection data, such as the qualified juror list, written excuses, no-shows, etc., for a continuous one year period over the past year to avoid statistical aberrations. (RTO 8323; 8417-18 [the greater the number of months the greater the potential for accuracy].) The previous data were for three noncontiguous months: August 1985 and December 1985-January 1986. (See AOB 25-28, incorporated herein.)

However, the defense never received any of the above.

Nor was the court examination of county personnel during the discovery hearing an adequate substitution for the request to "go through the various systems in the jury selection procedures [in] the Jury Commissioner's Office and the data collected there to evaluate that in a systematic way." (AOB 29; RTO 8318.) Examination on the witness stand is hardly equivalent to a "systematic" evaluation of systems and data. Moreover, by the time the case reached Judge Hammes the computer selection system had been changed. (RTH[5] 4231-37.)

Accordingly, the requested discovery should have been granted by Judge Orfield and also should have been granted by Judge Hammes as well in

[5] "RTH" refers to in limine proceedings before Judge Hammes.

light of the changed computer system and new master jury list.[6]

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[6] Appellate would like to call to the Court's attention a proofreading oversight in Appellant's Opening Brief argument on this issue. At page 31 of the AOB, in arguing that the defense had satisfied the prima facie case standard set in *People v. Jackson* (1996) 13 Cal.4th 1164, 1194-95, as a prerequisite for obtaining discovery, appellant stated:

> In the present case, the defense more than satisfied the *Jackson* standard. The offers of proof suggested over an 8% absolute disparity and close to a 50% absolute disparity as to Hispanics based on projected census figures. Such a disparity was clearly sufficient, especially considering that to this day, over 15 years later, the United States Supreme Court has not resolved the question of what method of disparity analysis should be used. (See *People v. Burgener* (2003) 29 Cal.4th 833, 856-57.)

The second disparity figure noted in the second sentence of the quoted paragraph should be "close to a 50% **relative** disparity."

II.

JUDGE HAMMES IMPROPERLY DENIED THE DEFENSE MEDIA MOTION WITHOUT WEIGHING THE RISKS [AOB Argument 1.4.2, RB Argument II]

Appellant's Opening Brief contended that Judge Hammes abused her discretion by allowing the media to publish the jurors' names and addresses. (AOB 41-48.) Respondent argues that the judge ruled correctly. (RB 83-88.)

However, respondent fails to address the fact that Judge Hammes denied the defense motion without weighing the risks of an unfair and unreliable trial against the First Amendment interests of the media. Moreover, had the judge properly weighed the competing rights involved, she reasonably could have concluded that the inflammatory nature of the case justified granting the defense motion.

III.

IN DISCUSSING CROSS-ADMISSIBILITY RESPONDENT ERRONEOUSLY FAILS TO CONSIDER EACH INCIDENT INDIVIDUALLY [AOB Arguments 2.3.1, 3.8.1 - 3.8.3, 4.7.1 - 4.7.3, 5.2.4.1; RB Argument III]

Appellant's Opening Brief contended that the Jacobs crimes were not admissible to prove identity in Santiago, and accordingly the trial court erred in (1) permitting a joint trial on these incidents and (2) authorizing the jury to consider evidence connecting appellant to the Jacobs crimes as evidence connecting him to the Santiago incident. (AOB 139-212.) Respondent contends that all five incidents were properly joined and cross-admissible. (RB 88-113.)

However, as did Judge Hammes (RTH 25503-13), respondent erroneously addressed all five incidents together rather than evaluating their cross-admissibility separately. (See Argument VI, pp. 17-18, below.)

IV.

THE KEY ELEMENTS OF THE DEFENSE CASE – SUCH AS JOHNNY MASSINGALE'S CONFESSION THAT HE COMMITTED THE JACOBS MURDERS – SHOULD HAVE BEEN CONSIDERED BEFORE ALLOWING CONSOLIDATION [AOB Arguments 2.3.5.1, 3.8.5.1, 4.7.5.1, 5.2.6.1; RB Argument IV]

Appellant's Opening Brief contended that the judge erroneously refused to consider the confession of Johnny Massingale and other defense evidence in deciding the cross-admissibility/consolidation motion. (AOB 277-300.) Respondent contends that the defense evidence is irrelevant to the judge's determination of the cross-admissibility of other offenses. (RB 114-20; 117 [". . . the preliminary fact determination for cross-admissibility was whether there was sufficient similarity between the crimes to support a finding of identity"].) Also, respondent contends that the judge need not consider the defense evidence in weighing the admissibility of other crimes evidence under Evidence Code § 352. (RB 117.)

However, cross-admissibility should require preliminary fact finding as to both similarity between the offenses and the defendant's commission of the other offense. (AOB 278-80.)

Respondent suggests that the defendant's connection to the other offenses is not a preliminary fact relevant to the determination of cross-admissibility and that the authority cited by appellant does not support such a requirement. However, the cases make it clear that the tendency of the prior crime to prove or disprove identity is an essential factor for the judge to consider. (See AOB 279.) Hence, there can be no dispute that any evidence as to whether or not the defendant committed the other offense has a direct bearing on the relevance and probative value of the other offense. (*People v. Leahy* (1994) 8 Cal.4th 587, 598 ["No evidence is admissible except relevant

evidence]; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 849-50 [evidence must be reliable to be admissible].) For example, if there is no reliable evidence that the defendant committed the other crime then it is inadmissible both as irrelevant and under Evidence Code § 352. Similarly, if the defense evidence undermines the evidence that the defendant committed the other crime then such defense evidence should be considered in evaluating the probative value and admissibility of the other crime. (See AOB 284-91.)

In sum, respondent misstates appellant's contention by asserting that he is merely asking that the judge perform the jury's function of assessing "the credibility of the witnesses. . . ." (RB 118-19.) Rather, the judge failed to consider defense evidence relevant to a preliminary fact – defendant's connection to the other offense – which was an essential consideration in evaluating the admissibility of the other crimes evidence under both relevance requirements and Evidence Code § 352.

Finally, respondent incorrectly contends that the error was not prejudicial. (RB 120.) Even though the jurors rejected the prosecution's theory that the same person committed all of the charged offenses, they still likely relied on the cross-admissibility of all the offenses to convict appellant in the Jacobs, Swanke and Santiago counts. (See AOB 293-99.)

V.

THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES

[In response to RB Argument V, appellant relies upon AOB Argument(s) 2.3.5.2, 3.8.5.1, 4.7.5.1, 5.2.6.2.]

VI.

THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY [AOB Arguments 2.3.5.3, 3.8.5.3, 4.7.5.3, 5.2.6.3; RB Argument VI]

Appellant's Opening Brief contended that Judge Hammes prejudicially erred in her cross-admissibility finding and consolidation ruling by failing to consider each offense individually. (AOB 307-11; 1021; 1201; 1334-35.) Respondent acknowledges that the judge's oral ruling did not discuss each case individually. (RB 125-26.) Nevertheless, respondent asserts that no error was committed.

It should be self-evident that cross-admissibility requires individual evaluation of each crime sought to be cross-admitted. The court must individualize its analysis so that the defendant does not unfairly face a "glass mountain" of evidence that multiple murder charges will build. This is so because "an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a pattern and characteristics . . . so unusual and distinctive as to be like a signature." (*People v. Kipp* (1998) 18 Cal.4th 349, 370 [internal citations and quotation marks omitted].) Hence, if any one of the crimes offered to prove identity in the present case did not meet this "signature" requirement, then that crime necessarily should not have been cross-admitted regardless of whether or not any of the others were cross-admissible.

Respondent does not contest that the judge must individually consider and determine cross-admissibility. Instead, respondent contends that Judge Hammes did conduct the required individual analysis even though her oral ruling did not discuss the crimes individually. However, because the judge's oral ruling demonstrates that she didn't properly exercise her discretion and

make findings required by law, her ruling should not be upheld on appeal. (See *People v. Mincey* (1992) 2 Cal.4th 408, 477-78 [failure of judge to state reasons for denial of motion to modify death sentence normally requires remand]; *People v. Crandell* (1988) 46 Cal.3d 833, 862 [failure to properly exercise judicial discretion is error]; *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1091 [Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal]; *Lippold v. Hart* (1969) 274 Cal.App.2d 24, 26 ["The trial judge's comments indicate that, although he made an independent evaluation of the evidence, he failed to base his decision on the motion for a new trial upon that evaluation. That was error."]; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.* (1977) 71 Cal.App.3d 706, 716 , Jefferson, J. Dissenting [comments of the trial judge indicated that he misconceived his duty].)

Accordingly, the judge's ruling was error and the judgement should be reversed.[7]

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[7] Alternatively the matter should be remanded. When the trial court has failed to properly exercise its discretion, remand for a new hearing may be an appropriate remedy. (See e.g., *People v. Leahy* (1994) 8 Cal.4th 587, 610-11; see also *People v. Van Bushkirk* (1976) 61 Cal.App.3d 395, 405-07; cf. *People v. McGlothin* (1998) 67 Cal.App.4th 468 [remand for new sentencing hearing where trial judge failed to consider relevant factors in making Penal Code § 1385 ruling]; *People v. Taylor* (2000) 80 Cal.App.4th 804, 814 [failure to exercise Penal Code § 1385 discretion based on all relevant mitigating factors].) In this case, if the matter is remanded, it should be heard by a different judge. (See AOB 299-300.)

VII.

JUDGE HAMMES'S TENTATIVE PRIOR RULING WAS THE PRODUCT OF IMPROPER BOOTSTRAPPING [AOB Arguments 2.3.5.4, 3.8.5.4, 4.7.5.4, 5.2.6.4; RB Argument VII]

Appellant's Opening Brief contended that by bootstrapping her findings the judge denied appellant a fair and reliable in limine determination as to cross-admissibility and other crucial evidentiary issues.[8] (AOB 312-19.) Respondent argues that Judge Hammes did not prematurely rely on cross-admissibility because she had already made a "tentative ruling" allowing cross-admissibility. (RB 126-29.) However, this assertion begs the question because the "tentative ruling" was itself the product of improper bootstrapping. It is true that the judge stated that "Mr. Lucas is connected up through separate pieces of independent evidence to each of the crimes. . . ." (RTH 25509-10.) However, the "connection" of these "pieces of evidence" to appellant was contested by the defense. (E.g., suggestive identification in Santiago case; Massingale confession and lost fingerprint of Love Insurance note in Jacobs.) By relying on cross-admissibility to reject these defense challenges, the evidence considered by Judge Hammes was not truly independent and, accordingly, the cross-admissibility ruling was the product of improper bootstrapping.

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[8] Judge Hammes's improper bootstrapping and the resulting unwarranted conclusion as to cross-admissibility tainted her rulings on the issues of joinder (AOB Arguments 2.3.5.1), the admissibility of eyewitness expert testimony as to the Santiago incident (AOB Arguments 3.5.1), and the *Hitch-Trombetta* motion relating to the destroyed Love Insurance note (Jacobs homicides, AOB Argument 2.4.1 and 2.4.2). It also led to improper instructions erroneously authorizing the jury to consider non-cross-admissible offenses as evidence of guilt on various counts. (AOB Arguments 2.3.5.3.)

VIII.

THE PROSECUTION SHOULD NOT BE ALLOWED TO BASE PROSECUTORIAL DECISIONS ON VINDICTIVENESS REGARDLESS OF WHETHER OR NOT SUCH VINDICTIVENESS DIRECTLY EXPOSES THE DEFENDANT TO A GREATER SENTENCE [AOB Arguments 2.3.5.5, 3.8.5.5, 4.7.5.5, 5.2.6.5; RB Argument VIII]

Appellant's Opening Brief contended that the judge erroneously denied an evidentiary hearing on whether the prosecution's motion to consolidate was a vindictive response to appellant's attempt to exercise his right to a speedy trial. (AOB 320-30.) Respondent asserts that because the consolidation motion did not increase appellant's potential sentence there was, as a matter of law, no basis for a claim of prosecutorial vindictiveness. (RB 129-133.) Respondent is wrong and accordingly, respondent's claim that there was no need for an evidentiary hearing and no due process violation should be rejected.

A. Respondent Impliedly Concedes That The Joinder Motion Was Made In Response To Appellant's Assertion Of His Right To A Speedy Trial

The prosecution had ample opportunity to consolidate the two cases but did not do so until after the defense obtained an appellate order for a speedy trial in the Jacobs and Garcia cases (hereinafter "CR 75195"). As characterized by Judge Hammes, the consolidation motion was "a surprise change in position for The People." (RTH 25502.) Indeed, it came after CR 75195 had been assigned to Judge Kennedy on November 13, 1986 and sent to trial. (RTO 8970.) Even at that time, the prosecution appeared sanguine about its decision to let the Santiago/Swanke/Strang/Fisher cases (hereinafter "CR 73093") trail behind CR 75195. (RTO 8996.) Apart from appellant's successful speedy trial claim, respondent cites no new facts that caused the

prosecution to suddenly seek joinder.

B. The Prosecution Should Not Be Allowed To Base Any Prosecutorial Decisions On Vindictiveness

Respondent contends that the prosecutor may properly rely on vindictiveness in making prosecutorial decisions so long as the decision does not increase punishment. However, prosecutorial vindictiveness should not have any legitimate role in a prosecutor's decision-making process regardless of whether or not the decision directly exposes the defendant to a greater sentence. Retaliatory or vindictive charging practices by the prosecution "undermine the integrity of the entire proceeding." (*In re Bower* (1985) 38 Cal.3d 865, 878; *United States v. Goodwin* (1982) 457 U.S. 368, 372 ["To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. [Citation to *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.]"].)

Moreover, an essential component of a fair, just and reliable criminal trial is a fair and even-handed prosecutor. The District Attorney's office is "obligated not only to prosecute with vigor, but also to seek justice." (*People v. Conner* (1983) 34 Cal.3d 141, 148.) Hence, the constitutional protection against prosecutorial vindictiveness "is based on the fundamental notion that it 'would be patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' [Citation.]" (*In re Bower, supra,* 38 Cal.3d at 873; see also *United States v. Jackson* (1968) 390 U.S. 570, 581.) A criminal prosecutor's function "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial." (*United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.) His or her goal must be "not simply to obtain a conviction, but to obtain a fair conviction." (*Brown v. Borg*

(9th Cir. 1991) 951 F.2d 1011, 1015, italics omitted.) "Although the prosecutor must prosecute with earnestness and vigor and 'may strike hard blows, he is not at liberty to strike foul ones.' " (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1049, quoting *Berger v. United States* (1935) 295 U.S. 78, 88; see also ABA Model Code Prof. Responsibility, EC 7-13 ["The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict"]; see also *In re Sakarias* (2005) 35 Cal. 4th 140, 159.)

In sum, any trial decision made by the prosecution which is based on vindictiveness violates the above principles and should be considered serious prosecutorial misconduct.

C. Appellant Was Erroneously Denied An Evidentiary Hearing

If prosecutorial vindictiveness is not presumed in this case, the burden is shifted to the defense to show actual vindictiveness. (*People v. Michaels* (2002) 28 Cal.4th 486, 515.) Appellant has a right to an evidentiary hearing to meet that burden. (See AOB 326-27.) As stated in *United States v. Goodwin* (1982) 457 U.S. 368, 384:

> In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do. Fn. 19.

The *Goodwin* court's footnote 19 adds:

> As the Government states in its brief: 'Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity

> of the prosecutor's actions through such a demonstration.' Brief for United States 28, n. 9.

(*United States v. Goodwin, supra*, 457 U.S. 368, 384.)

Nonetheless, Judge Hammes denied appellant's request for an evidentiary hearing and the defense motions on prosecutorial vindictiveness without hearing any testimony. (RTH 25460; 25465.) Respondent cites the comments made by Judge Hammes when she denied appellant's opposition to the consolidation motion. (RB 130-131.) However, those comments show that she denied the motion and hearing on improper grounds. Judge Hammes simply concluded that a hearing was not necessary because, in her view, there were no factual disputes. (RTH 25460.) She also determined that the prosecution did not act vindictively because "none of the motions were legally improper." (RTH 25461.) However, that is not the correct basis for assessing a claim of prosecutorial vindictiveness.

The prosecution's motion to consolidate need not be legally improper in order for prosecutorial vindictiveness to occur. Procedurally, the prosecution was not barred from filing a motion to consolidate. Rather, the question is whether the prosecutor's act was a vindictive response to the defendant's exercise of his right to a speedy trial. Appellant required an evidentiary hearing in order to answer that question. Therefore, it was error for the trial court to deny appellant the opportunity to tender evidence in support of his claim of vindictiveness.

IX.

RESPONDENT MISCHARACTERIZES THE REASONABLE EFFECT OF THE PRETRIAL INSTRUCTION ON CROSS-ADMISSIBILITY

[AOB Arguments 2.3.4.1, 3.8.4.1, 4.7.4.1, 5.2.5.1; RB Argument IX]

Appellant's Opening Brief contended that the preliminary instructions on cross-admissibility gave undue and prejudicial emphasis to the other crimes evidence. (AOB 231-36.) Respondent erroneously asserts that the trial court's preliminary instruction directing the jury on how to consider other crimes evidence was not an improper judicial comment and did not unduly and prejudicially emphasize that other crimes evidence. (RB134-37.)

A. The Preliminary Precautionary Instruction Unduly Emphasized The Other Crimes Evidence

The trial court unduly emphasized the other crimes evidence by instructing the jury on that evidence twice – first as a preliminary precautionary instruction and then again as a final instruction. As stated in *People v. Hill* (1946) 76 Cal.App.2d 330, 343, "The trial judge should take care to give to the jury, once in clear language, every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, no matter how many separate instructions are asked which may include them. Such continual repetition tends to give undue emphasis to the particular point to which they may relate and operates to confuse the jury in their consideration of the evidence. [Citation.]" [Emphasis added.]

The repetition of the cross-admissibility instruction in the present case was particularly prejudicial because the use of the other crimes evidence was – as observed by Judge Hammes – "*necessary to the People's case*. Each case adds an important element to the identification issue. . . ." (RTH 25509-10 [emphasis added].)

B. The Instruction Was Not Neutral

Respondent asserts that the instruction was not improper even though it "was limited to particular evidence. . . ." (RB 137.) However, the lack of neutrality was exhibited by the very fact that a preliminary precautionary instruction on this specific evidentiary matter was given at all.

Moreover, the instruction underscored specifically for the jury just how to find support for the prosecution's theory while failing to inform the jury that if the defendant did not commit one of the other offenses, the jury could consider this as evidence that he did not commit the crime under consideration. (See Argument XII, pp. 31-32, below.)

C. The Biased Instruction Was Prejudicial And Improper Judicial Comment

Respondent states that "appellant points to no authority, nor has respondent found any authority, supporting the implied assertion that a jury instruction can constitute judicial comment on the evidence." (RB 136.) However, this Court has long recognized that jury instructions may constitute erroneous judicial comment on the evidence. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1136, ["We deal here with an instruction, not a judicial comment; although such a comment may address matters of fact, an instruction may not." [underlining added].)

Furthermore, the judge "must [] refuse an instruction that is argumentative, i.e., of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence. [Citation.]" (*People v. Wright, supra,* 45 Cal. 3d at 1135-1138; *People v. Gordon* (1990) 50 Cal.3d 1223, 1276.) It necessarily follows that a court cannot, on its own motion, give such an instruction either.

Therefore, the trial court erred by giving an instruction regarding

particular evidence because it amounted to improper judicial comment favoring the prosecution's theory of the case. Any error in this closely balanced case was not harmless because the prosecution relied heavily on the other crimes to fill in the evidentiary gaps. The prosecution's case was held together only by the alleged interplay between *all* the crimes including Garcia and Strang/Fisher. The effect of the error, therefore, cannot be parsed among such closely balanced and interconnected charges. (See AOB 293-99.)

X.

THE GENERAL CIRCUMSTANTIAL EVIDENCE INSTRUCTION DID NOT CURE THE ERRONEOUS OMISSION OF THE REQUIREMENT OF A FINDING THAT APPELLANT COMMITTED THE OTHER OFFENSES [AOB Arguments 2.3.4.2, 3.8.4.2, 4.7.4.2, 5.2.5.2; RB Argument X]

Appellant's opening brief contended that the other crimes instruction erroneously failed to require the jurors to determine that he committed the other offenses before cross-considering them. (AOB 237-51.) Respondent does not deny that the other crimes instruction omitted the requirement of a threshold finding by the jury that appellant committed the other offense before that offense could be cross-considered. (RB 138-45.) Instead, respondent argues that the omission was cured by the circumstantial evidence instruction which precluded the jury from "relying on anything less than a logically and reasonably drawn inference." (RB 141.) Respondent assumes that this language would have precluded the jurors from relying on a mere suspicion that appellant committed the other offense.

However, in making this assumption respondent violates the settled principle that jury instructions should be evaluated as they would reasonably be interpreted by the jurors in light of their common sense. (See generally *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [instruction interpreted in light of its "most natural and common sense reading"]; see also *People v. Catlin* (2001) 26 Cal.4th 81, 154 [instructions "[r]ead together in a common sense fashion"].) Respondent fails to explain why lay jurors would conclude that an inference based on suspicion was <u>not</u> reasonable and logical. Certainly people make decisions based on suspicions that they would consider to be reasonable and logical. (E.g., not walking in front of a car based on a suspicion that it will not stop; talking to a family member based on a suspicion

that he or she is depressed, etc.)

In sum, it is unlikely that the jurors would have considered the circumstantial evidence language relied on by respondent to preclude cross-consideration of the offenses based on mere suspicion.

Nor was the error harmless as alleged by respondent. (See AOB 293-99.)

XI.

RESPONDENT MISCONSTRUES THIS COURT'S DECISIONS REGARDING THE "SIGNATURE" REQUIREMENT FOR CROSS-ADMISSIBILITY [AOB Arguments 2.3.4.3, 3.8.4.3, 4.7.4.3, 5.2.5.3; RB Argument XI]

Appellant's Opening Brief contends that the instructions impermissibly allowed the jury to cross-consider the charges on the issue of identity without making the prerequisite finding that the other offenses shared signature-like similarities. (AOB 252-59.) Respondent's Brief (RB 142-45) concedes that under Evidence Code § 403(c)(1) the defense has a right, on request, to an instruction informing the jurors that (1) they must determine the existence of a preliminary fact upon which the relevance of evidence depends and (2) they must disregard such evidence unless the jury finds the preliminary fact to exist. (RB 142.) Nevertheless, respondent sees no error in refusing the defense instruction on the preliminary factual finding that the crimes share characteristics so unusual as to be like a signature.

Respondent's argument is unpersuasive because it is founded on the erroneous assumption that there is no significance to the term "signature." It is true that the case relied upon by respondent (*People v. Bradford* (1997) 15 Cal.4th 1229, 1316) did not expressly describe the required showing in terms of a "signature." However, the vast majority of this Court's decisions, both before and after *Bradford*, have made it clear that "an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a pattern and characteristics . . . so unusual and distinctive as to be like a signature." [Emphasis added; internal citations and quotation marks omitted.] (*People v. Carter* (2005) 36 Cal.4th 1114, 1148; *People v. Kipp* (1998) 18 Cal.4th 349, 370 [same]; see also *People v. Rogers* (2006) 39 Cal.4th 826, 832 ["The similarity . . . should amount to a signature."]; *People v. Hughs* (2002)

27 Cal.4th 287, 233 [other offense had "sufficiently distinctive 'signature' characteristics to support an inference that the same person committed both [offenses]"]; *People v. Balcom* (1994) 7 Cal.4th 414, 425 [for other offense "to be relevant . . . it must share with the charged offense characteristics that are 'so unusual and distinctive as to be like a signature.' [Citation.]"].)

Accordingly, the preliminary fact – as described in the defense requested instruction – was without a doubt a correct statement of the law upon which instruction was required per Evidence Code § 403(c)(1).

Nor did the other instructions use language which was equivalent to the requested preliminary fact language. (See AOB 254-55.)[9]

Furthermore, respondent erroneously argues that the jury's acquittal on the Garcia count rendered the error harmless. (See AOB 293-99.)

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[9] Judge Hammes purported to deny the "signature" or "highly distinctive" instruction because that requirement only applies to "the use of M.O. alone. . . ." (RTH 11535-36.) Thus the judge appears to have rejected the requirement of signature-like (i.e., very distinctive) similarities as a prerequisite to cross-admissibility (and cross-consideration) of other crimes evidence on the issue of identity. The judge apparently had some notion that if there "are other pieces of circumstantial evidence" supporting the conclusion that both crimes were committed by the same person, the other crime need not bear a signature-like similarity. (*Ibid.*) Her theory would, in effect, completely undo the strict requirements normally understood to apply in this context. Further, it also suggests that she did not intend her instructions to convey that the jury could not consider other crimes evidence on the issue of identity absent signature-like (highly distinctive) similarities. If she herself didn't understand them that way, there's little reason to expect that the jury would. Her notion seems to be that other crimes are still relevant on the issue of identity even without signature-like similarities – but just entitled to less weight. This view is erroneous in terms of the usual effort to keep out other crimes evidence on the issue of identity unless strongly probative by virtue of highly distinctive similarities, and fails to accord due weight to the potential prejudicial impact of such evidence.

XII.

RESPONDENT ERRONEOUSLY DESCRIBES THE OTHER CRIMES INSTRUCTION AS "NEUTRAL" [AOB Arguments 2.3.4.3, 3.8.4.4, 4.7.4.4, 5.2.5.4; RB Argument XII]

In Appellant's Opening Brief it was contended that the other crimes instruction unconstitutionally failed to present the defense side of the issue. (AOB 260-69.) Respondent's Brief (RB 145-49) contends that the defense was obligated to object to the one-sided instruction on cross-admissibility. (RB 146.) However the instruction at issue was not merely too general or incomplete, it was misleading and unconstitutionally slanted in favor of the prosecution. Therefore, since the instruction impacted appellant's substantial rights, the error is cognizable on appeal. (See Penal Code § 1259; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Moreover, respondent inaccurately describes the instruction as "neutral." (RB 147.) Even assuming *arguendo* that the general language of the instruction encompassed the omitted principle, the following more specific language expressly limited the jury's consideration of the other counts to the prosecution's position:

> You may consider whether or not the evidence as to other counts tends to show a characteristic method, plan or scheme in the commission of criminal acts similar to any method, plan or scheme used in the commission of the offense in the count then under consideration. Whether or not the evidence shows such a characteristic method, plan or scheme is a matter solely for your determination.
>
> If you should find a characteristic method, plan or scheme, you may also consider whether or not such a clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused, that it may be logically concluded that if the defendant

committed the other offense or offenses he also committed the crime under consideration. (CT 14307-08.)

This language was prejudicially slanted toward the prosecution because it did not inform the jury that it could also consider whether it could logically be concluded that if the defendant did not commit the other offense or offenses, he also did not commit the crime under consideration.

And, because this language was more specific than any other instructional language, it is likely that the jurors considered it to be controlling. (See *LeMons v. Regents of University Of California* (1978) 21 Cal.3d 869, 878; *accord*, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [viewing instructions as a whole, where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect to element, more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; *People v. Easley* (1983) 34 Cal.3d 858, 877-879 [where one instruction erroneously and specifically told jurors not to consider sympathy, provision of more general instruction – former CALJIC 8.84.1 – directing jurors to consider "any other circumstance that extenuates the gravity of the crime" did not cure error]; *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1387 and n.8; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975.)

Finally, respondent's assertion that the error was harmless should be rejected. (See AOB 293-99.)

XIII.

THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE

[In response to Respondent's Brief Argument XIII, appellant relies on AOB Arguments 2.3.4.5, 3.8.4.5, 4.7.4.5, 5.2.5.5.]

XIV – XXVII.

LOVE INSURANCE NOTE CLAIMS: INTRODUCTION

Evidence of the allegedly incriminating handwriting sample was improperly admitted, improperly considered without preliminary findings prerequisite to reliability and relevance, improperly lent incriminating significance by inadmissible lay opinion and "expert" witness testimony which the defense was denied a fair opportunity to challenge, and improperly shielded from defense evidence casting doubt on its probative significance. What came into evidence was not the actual writing sample allegedly found at the scene of the crime, but a purported photo of that writing sample. The actual writing on the note was destroyed by the prosecution's repeated efforts to lift a fingerprint from the note, efforts made necessary by the prosecution's having failed to preserve a fingerprint originally raised – a fingerprint that could have excluded appellant as the person who had dropped the note at the crime scene.

The purported photo of the writing sample should not have been admitted for a series of reasons. The prosecution was erroneously permitted to show incriminating significance by introducing both expert and lay opinion testimony that appellant was the author of the note. Expert testimony was improperly admitted because there was no showing as to the reliability of either witnesses' conclusion. And, the trial court compounded the unfairness by not permitting the defense to introduce lay opinion evidence that the printing was that of one of the investigative officers' alternative suspects. The court further erred by refusing instructions essential to proper consideration of the evidence. It further erred by refusing to give a curative instruction – required in light of the prosecution's failure to have preserved the original writing sample and the fingerprint on the note – needed to enable the jury to understand the possible significance of what had been lost and prevent the

evidence that came in from having an unwarranted aura of reliability and seeming incriminatory significance.

XIV.

THE LOVE INSURANCE NOTE WAS INADMISSIBLE AS EVIDENCE BECAUSE THE PROSECUTION LOST A USABLE LATENT FINGERPRINT LIFTED FROM THE NOTE [AOB Argument 2.4.2; RB Argument XIV]

Appellant's Opening Brief contended that loss of the fingerprint from the Love Insurance note violated both 14th Amendment due process principles and the 8th Amendment requirement of heightened reliability. (AOB 333-47.) Respondent contends that there was no error because the fingerprint lifted from the Love Insurance note had no apparent exculpatory value when it was lost. (RB 50-56.) However, due to the loss of the fingerprint and the degradation of the handwriting on the note, the court erred in not excluding the note.

The pivotal legal principles on which this issue turns are stated in *California v. Trombetta* (1984) 467 U.S. 479, 488: "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

The fingerprint on the note had exculpatory value because it could have been used to exclude potential suspects – the essence of exculpatory value. Furthermore, there is no doubt that the defense would have been unable to obtain comparable evidence by other reasonably available means.

Although *People v Hitch* (1974) 12 Cal.3d 641, 650, has been superseded by *Trombetta*, the overarching principle of *Hitch*, that "the

prosecution has a duty to undertake reasonable efforts to preserve the material evidence," has not been repudiated. On the contrary, *Trombetta* only demarcates the duty to preserve such evidence that may play a significant role in marshaling a defense and which has exculpatory value apparent before its loss. Therefore, *Trombetta* merely elucidates which material evidence – which is integral to advancing the defendant's theory of the case – must be preserved.

Moreover, the trial judge's reasoning on this issue was circular: the fingerprint would not have been exculpatory because appellant wrote the note. However, whether or not appellant wrote the note was a disputed fact. Moreover, since Johnny Massingale confessed to the Jacobs murders – and also may have been wearing appellant's clothing from the Salvation Army (see AOB 102-03) – the latent fingerprints raised on the Love Insurance note found at the crime scene could have been Massingale's. If the lost fingerprint had excluded appellant but not Massingale, such evidence would have bolstered the defense theory and could have led to the inference that Massingale touched the note. Such inference would have served as circumstantial proof that Massingale was at the crime scene and – consistent with his confession – committed the murders. Such evidence would have necessarily undermined the prosecution's theory of the case.

Furthermore, the issue is not whether the evidence is exculpatory or apparently exculpatory, but rather if it has "exculpatory value." The two concepts are not synonymous. The latent fingerprint may have been exculpatory because it could have been Massingale's print; its exculpatory value was rooted in that chance.

Additionally, respondent contends that the latent fingerprint could not have been exculpatory because "appellant was not a suspect at that time."

However, the point of preservation of evidence is for exactly such a contingency, that a suspect emerges *after* the evidence has been preserved.

Respondent also relies on two cases – *People v. Medina* (1990) 51 Cal.3d 870, 893 and *People v. Johnson* (1989) 47 Cal.3d 1194, 1235 – but both turned on the fact that the exculpatory value of the lost evidence was *not* apparent to the police before its loss. Further, unlike the present case, *Johnson* involved lost photographs taken of fingerprints that still existed. Thus, in *Johnson*, the defendant could have obtained other comparable evidence. In the present case, however, there were no fingerprints and no photographs of them.

Finally, both the guilt and penalty phases of a capital trial require heightened reliability. (See e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637.) The federal constitutional prohibition against cruel and unusual punishment precludes execution of a criminal defendant based on evidence which is shown to be unreliable. "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases." (*People v. Cudjo* (1993) 6 Cal. 4th 585, 623; see also *Sumner v. Shuman* (1987) 483 U.S. 66, 85 [". . . any legitimate state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures."].) The loss of the fingerprint and destruction of the note compromised the reliability of both the guilty verdict and the death sentence in two ways: (1) the fingerprint was relevant as to who left the note at the scene and (2) the original note (not the photographed copy) was more reliable as handwriting comparison evidence. However, respondent fails to answer appellant's contention that under the above requirement of heightened reliability the Love Insurance note should have been excluded under the 8th Amendment even if non-capital

jurisprudence didn't require such a result.[10]

[10] In response to appellant's heightened reliability contention respondent simply asserts that exclusion was not required under the Due Process Clause. (RB 155-56.)

XV.

ADMISSION OF THE PHOTOGRAPH OF THE LOVE INSURANCE NOTE ABSENT AUTHENTICATION WAS ERROR [AOB Argument 2.4.3; RB Argument XV]

In his opening brief appellant contended that Evidence Code § 403 required the trial judge "to make a preliminary assessment of authenticity before admitting written documents into evidence. . . ." (*People v. Epps* (2001) 25 Cal.4th 19, 27; AOB 348-53.)

Respondent argues that the trial court is presumed to have made the preliminary ruling on the authenticity of the photograph of the Love Insurance note. (RB 157-60.) However, respondent concedes that the trial court should have instructed the jury pursuant to Evidence Code § 403 but claims that the error was harmless. (RB 159-160.)

A. Appellant Rebutted The Presumption That The Trial Court Considered The Preliminary Fact Determination In Admitting The Photographs Of The Note

Absent evidence to the contrary, the trial court is presumed to have performed its official duty. (See Evidence Code § 664; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032; *Younesi v. Lane* (1991) 228 Cal.App.3d 967, 974.)

Here, contrary evidence appears on the record. The trial judge stated: "I don't believe that authentication and those authentication codes in the Evidence Code apply to the Love note." (RTT 11437: 18-20; see also RTT 11338-39.)

Citing no authority, respondent asserts that this contrary evidence does not overcome the presumption because the judge made the statement five months after the photographs of the note were admitted. (RB 158.) However, despite the passage of time, the trial judge's comment clearly revealed her

belief that the photographs of the Love Insurance note did not need to be authenticated. Given that belief, it is implausible that Judge Hammes would have made any preliminary factual determination that the photographs were authentic before admitting them into evidence. Therefore, the presumption that she performed her official duty has been rebutted with contrary evidence.

B. The Trial Judge Erred By Failing To Instruct The Jury

Respondent concedes that pursuant to Evidence Code § 403(c)(1) the trial court erred by refusing the defense request to instruct the jurors to disregard the proffered photographs unless they found the preliminary fact existed. (RB 159-160.)

C. The Errors Were Not Harmless

The Jacobs' evidence was closely balanced and the Love Insurance note was one of the few pieces of evidence even remotely connecting appellant to the scene and therefore the murders. (See AOB 208-210.) Thus, the lack of authentication of the photographs of the note and the failure to instruct the jury to disregard the photographs absent that preliminary fact was a substantial and prejudicial error requiring reversal. (See AOB 293-98.)

XVI.

RESPONDENT ERRONEOUSLY CONTENDS THAT THE LOVE INSURANCE NOTE WAS NOT OFFERED TO PROVE ITS CONTENT

[AOB Argument 2.4.4; RB Argument XVI]

Appellant's Opening Brief contended that the photos of the Love Insurance note were inadmissible because they were not certified. (AOB 354-59.) Respondent's Brief (RB 157-66) erroneously asserts that the photos of the Love Insurance note were not offered to prove their content and were, therefore, not subject to the certification requirements imposed by Evidence Code sections 1551 and 1531. (RB 164.)

A. The Photos Of The Note Were Offered For Purposes Of Utilizing Their Content

The photographs were utilized for their content on two levels. First, the prosecution's handwriting comparison expert used the words and numbers in the photos to analyze the handprinting and compare it to exemplars from appellant. Second, the name and phone number of the insurance company from the photos were used to connect appellant to the scene since he purchased Love insurance himself. (See e.g., RTT 11770-74; see also *People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1696.)

Respondent does not deny that the content of the photos – the words and numbers appearing therein – were utilized by the prosecution. (RB 164.) Indeed, the photographs of the note would have been of no value to the prosecution absent their decipherable words and numbers. The only logical conclusion, therefore, is that the photographs were admitted for their content and were subject to the evidentiary rules of certification.

B. The Certification Issue Was Not Waived

At trial, appellant specifically objected to the lack of certification of the photos of the note required by Evidence Code sections 1531 and 1551. (RTT

11438; CT 11437.) The trial court ruled that the photographs did not need to be certified because they were not offered to prove the content of the writing. (RTT 11437.) There is nothing to suggest that the trial judge's ruling would have been different had it been made any earlier in the proceedings.

Appellant made repeated pre-trial and trial objections to the admission of photographs of the Love Insurance note based on the lack of authenticity of that evidence. (See 51 CT 11217-11228; 5 RTT 655.) The trial judge was not receptive to any of these objections and certification is but a technical facet of that authenticity requirement.[11] (See *People v. Hill* (1998) 17 Cal.4th 800, 820 ["A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile."].)

Moreover, this is not an instance in which the defense was unclear about which piece of evidence was objected to and why. (See *People v. Bob* (1946) 29 Cal.2d 321, 325 ["Notwithstanding the rule that the specific ground for an objection must be given and the particular portion of evidence which is inadmissible must be pointed out where other parts are admissible,

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[11]As explained in *In re Kirk* (1999) 74 Cal.App.4th 1066: "Compliance with the certification requirements of Evidence Code sections 1530 and 1531 ensures that a writing may be relied on as "prima facie evidence of the existence and content of such writing . . . ." (Evid. Code, § 1530(a).) The Law Revision Commission Report regarding Evidence Code § 1530 explains that the statute addresses three evidentiary issues: "First, it is concerned with the problem of proving the content of an original writing by means of a copy, i.e., the best evidence rule. [Citation.] Second, it is concerned with authentication, for the copy must be authenticated as a copy of the original writing. [Citation.] Finally, it is concerned with the hearsay rule, for a certification or attestation of authenticity is 'a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' [Citations.]" (*In re Kirk, supra,* 74 Cal.App.4th 1066, 1073 [underlining added].)

'technicalities should be liberally viewed when urged against a defendant in a criminal case...'"]; see also *People v. Briggs* (1962) 58 Cal.2d 385, 409-410.)

Thus, appellant's claim was not waived for lack of timely objection.

XVII.

RESPONDENT ERRONEOUSLY CONTENDS THAT THE "BEST EVIDENCE RULE" DID NOT APPLY TO THE LOVE INSURANCE NOTE [AOB Argument 2.4.5; RB Argument XVII]

Appellant's Opening Brief contended that failure of the trial judge to exercise her discretion under the best evidence rule was prejudicial error. (AOB 360-66.) Respondent claims that the trial court did not err in ruling that the Best Evidence Rule did not apply to the photographs of the note. (RB 165-66.) Respondent further asserts that any claim of error was forfeited because appellant did not timely object. (*Ibid.*)

A. Having Erroneously Concluded That The Best Evidence Rule Did Not Apply, The Trial Judge Failed To Exercise Her Discretion As To The Admissibility Of The Photographs Of The Note

As argued above (Argument XVI, *supra)*, the photographs of the note were offered to prove their content. Respondent's argument to the contrary is specious. Not only was the shape, formation and style of each letter and numeral evaluated in order to compare them to appellant's handwriting exemplars, the meaning of those words and numbers were utilized to connect appellant to the Jacobs scene because he had purchased Love insurance shortly after the Jacobs murders. Respondent claims this was only circumstantial evidence and that the words and numbers identifying Love Insurance were merely "coincidental." (RB 166.) However, respondent fails to explain how that negates the use of the photos for their content.

Because the photographs which duplicated the note were offered for proof of their content, and a claim of substance was raised as to their accuracy, the trial judge was obligated to exercise her discretion. (See AOB 362-64.) Her failure to do so on this crucial piece of evidence – the primary evidence relied on to connect appellant to the Jacobs scene – was prejudicial error.

B. The Claim Of Error Was Not Forfeited

It is, of course, the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 717 [internal citations and quotation marks omitted]; see also *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 ["defendant failed to make any objection whatever based on any federal constitutional provision"].)

However, the judge made it clear that she thought the Best Evidence Rule did not apply. (RTT 11437.) Hence, any specific objection on this basis would have been futile and, therefore, the issue is cognizable on appeal. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.)

XVIII.

JUDGE HAMMES ERRONEOUSLY DENIED THE DEFENSE REQUEST FOR A *KELLY* HEARING TO CHALLENGE THE RELIABILITY OF EXPERT OPINION TESTIMONY ON HANDPRINTING COMPARISON [AOB Argument 2.5.4; RB Argument XVIII]

A. Overview

Appellant's Opening Brief contended that the judge abused her discretion by denying a hearing under *People v. Kelly* (1976) 17 Cal.3d 24 on the admissibility of expert identification through comparison of handprinting. (AOB 385-94.) Respondent contends that the judge did not abuse her discretion because (1) such testimony has long been authorized by Evidence Code § 1418 and (2) the reliability of the expert's opinion would have been "apparent" to the jurors who "were fully capable of . . . critically assessing the credibility of the expert's opinion." (RB 167-74.) Respondent is wrong on both counts. First, Evidence Code § 1418 does not guarantee the reliability of handprinting identification testimony and no California case has ever so held. Second, because the expert's purported proficiency in making handprinting comparisons and the assumptions underlying the expert's conclusions were never established, the jurors were not capable of accurately assessing the reliability of the expert's opinion.

B. Evidence Code § 1418 Does Not Justify Denying A *Kelly* Hearing On Handprinting Identification

Respondent asserts that because expert testimony on handwriting comparison has long been authorized by Evidence Code § 1418 it is not a "new" technique to which *Kelly* applies. This contention should be rejected.

In *People v. Leahy* (1994) 8 Cal.4th 587 this Court held that the

determination whether a technique was "new" turned not on its history of use in the scientific community but whether it was "settled in law." (*Id.* at 606.) The Court held that if the technique was "repeatedly challenged in court" and had "a recent history of legal challenges to [it's] admissibility . . . it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.*)

Handprinting analysis is precisely the kind of technique the Court in *Leahy* deemed "new" or "novel." It has an extensive "recent history of legal challenges" to its admissibility. Indeed, the current trend is to bar the admission of exactly the kind of handwriting analysis that is at issue here. (See AOB 396-401.)[12]

This Court is in agreement with this forward-looking approach. In *People v. Soto* (1999) 21 Cal.4th 512, 540-541 n. 31, this Court emphasized that "every effort should be made to [rely upon] the very latest scientific

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[12] Respondent argues that these federal cases are inapposite because (1) the federal rule regarding expert testimony is different and (2) the cases cited by appellant post-dated his trial. (RB 169-70.) However, this Court has recognized the applicability of the federal rule in California (*People v. Prince* (2007) 40 Cal.4th 1179, 1225 fn. 8) and the grounds relied on in the federal cases were presented to the trial court in the present case. (See AOB 2.5.5 and 2.5.6; ARB XIX and XX.)

Moreover, even assuming that the grounds for a *Kelly* reliability challenge to handprinting did not come to light until after appellant's trial, this should not preclude appellant from benefitting from a new rule regarding the applicability of *Kelly* to handprinting experts. (See *In re Johnson* (1970) 3 Cal.3d 404, 410-1 [following the policy of the United States Supreme Court of giving retroactive effect to decisions bearing on rights that directly affect the integrity of the fact-finding process].) Additionally, the Eighth Amendment precludes execution of appellant based on evidence which is shown to be unreliable by post-conviction revelations. (See e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637.)

opinions. . . ." (See also, *People v. Allen* (1999) 72 Cal.App.4th 1093, 1101 [the issue is not when a new scientific technique is validated, but whether it is or is not valid; that is why the results generated by a scientific test once considered valid can be challenged by evidence that the test has since been invalidated]; *People v. Smith* (1989) 215 Cal.App.3d 19, 25 [in determining whether a particular technique is generally accepted "defendant is not foreclosed from showing new information which may question the continuing reliability of the test in question or to show a change in the consensus within the scientific community concerning the scientific technique"].)

In sum, *Leahy* expressly opened the door for such challenges in California when it held that even well-established procedures would be subject to reexamination as "new" under the *Kelly* formulation if the general acceptance of those well-established procedures became open to question. That is exactly what has happened to handwriting analysis. Accordingly, Judge Hammes erroneously denied the defense motion for a *Kelly* hearing.

C. The Jurors Were Not Capable Of Assessing The Expert's Reliability

Respondent asserts that *Kelly* is not applicable to handwriting identification because it "simply involve[s] a comparison of physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson. [Citations.] The reliability of that comparison is equally apparent and need not be debated under the standards of *Kelly*." [internal quotation marks omitted.] (RB 173.) This assertion is unpersuasive because the testimony of a handprinting expert brings into play important reliability concerns that would not be apparent to lay jurors.

First, the jurors have no way of accurately assessing an expert's reliability in the absence of evidence regarding the proficiency of handprinting

comparison in general and the testifying expert in particular. Thus, when the expert expresses his or her opinion regarding the authorship of a writing to a "reasonable certainty," the jurors have no basis for assessing how much weight to give that conclusion. The fact that the jurors themselves are able to compare the handprinting does not assure against the jurors giving unwarranted deference to the expert's conclusion simply because it is coming from a purported expert.

Second, the expert's reliability depends entirely on the assumption that the block handprinting of every person is so unique that it can reliably be distinguished from the handprinting of every other person. In the absence of empirical evidence which proves this assumption lay jurors have no reasonable basis upon which to assess the reliability of the expert's authorship conclusions. (See AOB 394; see also *People v. Willis* (2004) 115 Cal.App.4th 379, 386 [". . . a foundation must be laid from academic or scientific sources regarding . . . whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to DNA . . ."]; *People v. Mitchell* (2003) 110 Cal.App.4th 772, 789 [evidence excluded due to "unsubstantiated claim of uniqueness"].)

In sum, Judge Hammes erroneously refused to allow the defense requested *Kelly* hearing regarding the reliability of the expert handprinting testimony.

D. Admission Of Harris's Conclusion That Appellant Authored The Love Insurance Note Was Prejudicial

Respondent contends that even if Harris's opinion had been excluded, it is not reasonably probable that the verdict would have been more favorable

to appellant. (RB 174-75.)[13] This is so, respondent asserts, because the jurors would not have been influenced by Harris's opinion in light of the inherent similarity between the Love Insurance note and appellant's printing. However, respondent fails to recognize the important role Harris played in answering the fundamental question lay persons would have asked: How likely is it someone else's handprinting might be equally similar to the printing on the Love Insurance note? Because Harris's 41 years of experience (RTH 2256) far exceeded any personal experience of the jurors they were likely to have relied on his conclusion to resolve any doubts they may have had based on the possibility that someone could have written the note.[14] In sum, Harris's conclusion that to a "reasonable certainty" appellant authored the note likely eliminated – in the eyes of the jurors – any reasonable doubt that appellant wrote the note.

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[13] Appellant continues to contend, as he did in his opening brief, that the error violated the federal constitution and that the *Chapman* federal standard should apply instead of the state standard employed by respondent.

[14] Because the defense was not permitted to challenge this essential premise, the jurors were free to fully rely on this premise, as did Judge Hammes (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas's printing.

XIX.

RESPONDENT ERRONEOUSLY ADOPTS JUDGE HAMMES'S FAULTY ANALYSIS REGARDING THE HANDPRINTING EXPERTS OFFERED BY THE DEFENSE [AOB Argument 2.5.5; RB Argument XIX]

A. Overview

Appellant's Opening Brief contended that the trial court erred by refusing to consider expert witnesses and in-court testing offered by the defense. (AOB 410-431.) Adopting the trial court's faulty reasoning, respondent (RB 175-182) asserts that because the defense experts were not "practitioners or researchers in the field" of handprinting comparison, their testimony was an inadmissible "third layer" of hearsay. (RB 177-179.) This assertion should be rejected because expert witnesses, such as those offered by the defense, may permissibly rely on hearsay such as relevant literature and the research of other experts.

Furthermore, even if the defense expert testimony was not admissible regarding the handprinting comparison field generally, the testimony should have been admitted as to the proficiency of the specific expert – John Harris – upon whom the prosecution relied. Or, alternatively the defense should have been permitted to test Harris's proficiency in court.

In sum, because the record is devoid of any evidence whatsoever of Harris's ability to reliably identify small samples of block handprinting he should not have been permitted to tell the jurors that he was "reasonably certain" that appellant authored the Love Insurance note.

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B. Respondent Erroneously Contends That The Defense Experts Were Properly Precluded From Testifying Because They Were Not "Practitioners Or Researchers In The Field"

1. Overview

In his opening brief appellant contended that Judge Hammes erroneously concluded that Dr. Saks and Dr. Denbeaux were not qualified to testify about the unreliability of handwriting comparison because they were not practitioners or researchers in the field. (RTH 17518-20; 17584; 25439-40.) Appellant reasoned as follows:

> Surely an academic who has devoted his or her efforts to the study of a field or technique should be able to offer the results of that study without having to first become a practicing purveyor of the technique. This would mean that the only persons qualified to testify as to the unreliability of astrology would be practicing astrologists. Obviously, this is not the rule as illustrated by the field of polygraph testing in which Dr. David C. Raskin, because of his years of research and study in the area "is generally acknowledged as the nation's foremost polygraph expert (*United States v. Cordoba* (C.D. Cal. 1998) 991 F.Supp. 1199, 1201, n. 6) – even though he isn't a practicing polygrapher himself. (AOB 415.)

Respondent does not disagree with appellant's contention that one need not be a practitioner in the field to be considered an expert. (RB 178.) Instead respondent claims that the defense experts were properly excluded because they were not "researcher[s] in the field." (*Ibid.*) They were not "people who are engaged in the actual research into the direct empirical data on handwriting experts." (RTH 17514; RB 177.) They merely studied the research of others and thus their testimony was a "third layer" of hearsay which was insufficient to tell the court "from an expert's position . . . the database or . . . information from which one should work to draw any kind of conclusion." (RB 178.)

However, Judge Hammes's "third layer" ruling was fundamentally

flawed because it is permissible under Evidence Code § 801(b) for experts such as Dr. Denbeaux and Dr. Saks to testify based on their study of the literature in the field and empirical research performed by others.

2. Evidence Code § 801(b) Permitted The Defense Expert To Rely On The Studies and Research Of Other Experts

Judge Hammes's "third layer" of hearsay theory for excluding the defense experts was patently erroneous. It is not the law that an expert must be either a "practitioner or researcher in the field" to offer testimony about factors relevant to the reliability of the field in general or to the reliability of testimony given by a particular expert in the field. Evidence Code § 801(b) permits an expert to rely on any matter which "is of a type that reasonably may be relied on by an expert. . . ." (See generally *People v. Gardeley* (1996) 14 Cal.4th 605, 619; see also Fed. Rules Evid. § 703.) For Dr. Saks and Dr. Denbeaux, who were asked to interpret studies and research in the field of handwriting, it was reasonable to rely on the studies and research of other experts.[15] "When an expert is asked to interpret studies or research in a particular area, the expert need not have personally conducted similar studies or research. [Citation.]" (Simons, *California Evidence Manual* (2005 Edition) § 4.23, p. 253.) "[A]n expert who has consulted books or spoken to other experts is acting properly." (Imwinkelried, et al., *Courtroom Criminal Evidence* (3rd Ed. 1998) § 1410, p. 506.) For example, an eyewitness identification expert may testify even though the witness's testimony "relate[s] primarily to . . . the contents of eyewitness studies reported in the professional

[15] Not only did Dr. Saks review all available writings, journals and studies on handwriting comparison but he also consulted with practitioners including the head document examiner for the Chicago Police Department. (RTH 17500-01.)

literature . . . ." (*People v. McDonald* (1984) 37 Cal.3d 351, 366; see also *People v. Vu* (1991) 227 Cal.App.3d 810, 814 ["While it is true the expert in *McDonald* had done some experimental research on the subject himself . . . his testimony was not limited to his personal studies."]; see also Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West 2002) § 2:5 [expert witnesses may "summarize secondary sources exclusively"].)

Moreover, the rule that "work in a particular field is not an absolute prerequisite to qualification as an expert in that field" is also based on an important policy consideration: "Members of a profession, especially those members who specialize in a particular field . . . will naturally be reluctant to testify against one another. Respect for fellow specialists, understanding of the complexities of the specialty and the margin for error, and fear of retaliation are motivations which could lead any professional to refuse to take the stand against a colleague. [Citation.]" (*Osborn v. Irwin Mem'l Blood Bank* (1992) 5 Cal.App.4th 234, 274.) This policy consideration is relevant to the field of handwriting comparison which — as testified by Dr. Denbeaux – is an "isolated" and "self contained process" which the members have no economic incentive to criticize or challenge. (RTH 17444-46.)

In sum, respondent erroneously asserts that Judge Hammes correctly excluded the defense experts because they relied on hearsay. "An expert may rely on hearsay in forming his opinion. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 184.) Thus, Dr. Saks and Dr. Denbeaux should have been able to rely on handwriting literature and studies, in combination with their acknowledged expertise in empirical research and proficiency testing, to testify regarding factors relevant to the reliability and validity of Harris's conclusions.

3. As Empirical Research Experts, The Defense Experts Were Qualified To Identify The Available Literature And Research Relevant To The Reliability And Validity Of Handprinting Identification

Judge Hammes's rationale for requiring any handwriting expert to be a "practitioner or researcher in the field" was that nobody else could tell the court "from an expert's position . . . the database or . . . information from which one should work to draw any kind of conclusion." (RB 178; RTH 17519-20.) Or, as asserted by respondent , Dr. Saks "had not demonstrated sufficient knowledge of the field to identify the relevant literature upon which to base his criticism." (RB 1778; see also 179.) However, the matters relied on by Dr. Saks and Dr. Denbeaux met the requirements of Evidence Code § 801(b).

Dr. Saks was an expert in proficiency testing and reliability/validity evaluation of empirical conclusions reached by persons claiming to have a special skill or expertise. (See RTH 17488; 17503-06; 17509-11.) Thus, Dr. Saks's expertise was derived from his ability to identify and evaluate the relevant literature, research and proficiency testing in any given field for the purpose of assessing the reliability and validity of the empirical conclusions which practitioners in the field purport to reach. (*Ibid.*)

Under Evidence Code § 801(b) experts such as Dr. Saks are permitted to rely on matters which they have identified through their research of the available materials relevant to the field at issue. (See p. 54, above.) Of course, the process of researching the field must itself comport with the requirements of Evidence Code § 801(b) that the matters relied on would reasonably be relied on by other similar experts. For example, if the expert only reviewed part of the published literature then their testimony would be subject to challenge since it would not be reasonable for a proficiency expert to rely on

an incomplete review of the available materials.

However, the thoroughness of Dr. Saks's handwriting research was not in dispute. He reviewed all the published literature, consulted with experts in the field, including a practitioner from the FBI and the head document examiner from the Chicago Police Department, and identified unpublished materials including five CTS proficiency studies. (RTH 17487, 17500-04.) Indeed, Dr. Saks actually knew more about handwriting literature and research than experienced FDE practitioners. For example, John Harris who had been a practitioner for 41 years, was unaware of the proficiency studies found by Dr. Saks.

In sum, the research conducted by Dr. Saks satisfied Evidence Code § 801(b) because it was "of the type that may reasonably be relied on by a[] [proficiency] expert."

Similarly, the research conducted by Dr. Denbeaux also satisfied Evidence Code § 801(b). Dr. Denbeaux's testimony would have explained the legal history of handwriting expert testimony and demonstrated that the reliability and validity of the field had never been litigated. (See RTH 17445-46.) Hence, it was not necessary for Dr. Denbeaux to be a practitioner or researcher in the field. Instead, it was necessary for him to rely on matters of the type that may reasonably be relied on by a [] [proficiency] expert." Dr. Denbeaux's exhaustive research of the relevant legal history (see RTH 17432-38) fully satisfied this requirement.

C. Even If They Were Not Qualified To Testify About Handprinting Identification Globally, The Defense Experts Should Have Been Permitted To Testify About Factors Relevant To The Reliability Of The Specific Prosecution Expert, John Harris

Judge Hammes admitted Harris's expert handprinting conclusions based on the fact that he did not rely on any "database" other than his own

experience. (RTH 17624-25) Hence, even assuming that Judge Hammes correctly ruled that Dr. Saks and Dr. Denbeaux were not qualified to testify globally about the scope of the literature and "database" for the handwriting comparison field, the defense experts should have been allowed to testify as to the relevance of the fact that Harris himself did not rely on any "database" at all other than his own experience and that the reliability of this "database" of personal experience had never been proficiency-tested. (See RTH 13924 [Harris himself admitted that he had never undergone any empirical proficiency testing of his ability to reliably compare and identify handprinting].) As explained in a well known journal article which Dr. Saks co-authored:

> The question whether someone or some technique can do what it purports to do is fundamental, not only for handwriting identification, but for a great variety of endeavors... [E]mpirical evaluations enable us to separate the more effective from the less effective techniques and the valid from the invalid theories **. . . There is no other way to determine which is which.** [Emphasis added.] (D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: the Lessons of Handwriting Identification "Expertise,"* 137 U. Pa. L. Rev. 731, 735-37 (January, 1989).)

Thus, the defense experts could have explained how the absence of any proficiency database verifying Harris's predictive reliability is a factor to consider in evaluating his conclusion that – to a "reasonable certainty" – appellant authored the small amount of block handprinting on the Love Insurance note.[16]

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[16] Respondent relies on *People v. Ramos* (1997) 15 Cal.4th 1133, 1176 to assert that Judge Hammes did not err in concluding that Dr. Saks lacked an adequate basis for formulating an opinion. (RB 178-79.) *Ramos* is inapposite. In that case the trial court concluded that a professor of sociology was not (continued...)

In sum, even assuming *arguendo* that the defense experts did not have sufficient expertise to testify globally about handprinting comparison, they should have been permitted to testify regarding the significance of the fact that Harris's authorship conclusion was based entirely on his own experience the reliability of which had never been verified by empirical testing. In particular the defense experts should have been allowed to testify that (1) Harris's claimed skills in handprinting could have been empirically tested, and (2) the absence of such empirical testing is relevant in assessing the reliability and validity of Harris's conclusions. Such evidence is clearly admissible because "[t]he jury is permitted to consider the credibility of the expert witnesses, the reasons given for their opinions, and the facts and other matters upon which their opinions are based, in determining what weight, if any, to give such opinion." (*People v. Prince* (1988) 203 Cal.App.3d 848, 858 .) Thus, the absence of a database or "track record" of Harris's predictive reliability and the implications thereof were the proper subject of expert opinion. (*Id.* at 856-57 [defense psychiatrist's opinion as to defendant's competence could properly be impeached by prosecution expert's testimony that – despite the defense expert's years of experience and training – his opinion "had no more validity, and should be accorded no more weight, than a layperson's opinion as to

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[16](...continued)
qualified to explain prison conditions during the relevant time period because the prison conditions at the time were "very fluid" and "very much in flux." (*Id.* at p. 1175.) In the present case by contrast, there was no such 'fluidity." The record was clear and undisputed that there was no proficiency database establishing that Harris was capable of reliably identifying the authorship of any kind of handwriting samples much less the small amount of block handprinting on the Love Insurance note. Thus *Ramos* does not justify the exclusion of the defense experts in the present case.

competence based upon the same observations].)

D. The Judge Compounded Her Error By Refusing To Allow In-Court Testing Of Harris's Ability To Reliably Identify Handprinting

Even without the defense experts, a glaring deficiency in Harris's testimony was the fact that his ability to reliably identify small amounts of block handprinting had never been tested. (RTH 17520-23.) Even the older cases which allowed handwriting experts to testify recognized the importance of allowing in-court testing to verify the proficiency of the expert to reliably do what he or she claimed to be able to do. (See RTH 17435-37 [Dr. Denbeaux's discussion of early cases].)

Hence, even if the judge's exclusion of the defense experts was not reversible error, allowing an untested expert to express his opinion about who wrote the Love Insurance note was.

E. Harris's Conclusion Should Have Been Excluded Or, Alternatively, The Defense Expert Should Have Been Permitted To Challenge His Reliability At Trial

The defense experts would have explained (1) the need for reliability and validity testing of empirical conclusions such as handprinting identification; (2) that the only such testing which had been done showed a high error rate and (3) Harris had never had his own proficiency tested. These facts combined with the judge's refusal to allow in-court testing of Harris's proficiency so undermined Harris's reliability that he should not have been permitted to testify as to his "reasonable certainty" that appellant authored the Love Insurance note. Alternatively the defense experts should have been permitted to testify at trial as to factors relevant to the reliability of Harris's conclusion. (See Argument XXII, p. 29-32, below.)

F. The Error Was Prejudicial

Respondent contends that even if Harris's opinion had been excluded or impeached by the defense evidence, it is not reasonably probable that the verdict would have been more favorable to appellant. (RB 181-82.)[17] This is so, respondent asserts, because the jurors would not have been influenced by Harris's opinion in light of the inherent similarity between the Love Insurance note and appellant's printing.

However, respondent fails to recognize the crucial role Harris played in answering the fundamental question lay persons would have asked: How likely is it someone else's block printing might be equally similar to the printing on the Love Insurance note? Without an answer to this question the similarity of the printing the jurors could likely have viewed the evidence as sufficiently ambiguous to leave them with a reasonable doubt. Thus Harris's conclusion was critical because it provided an answer to this question from an expert with 41 years of experience. (RTH 2256.)[18] Because Harris's experience far exceeded any personal experience of the jurors they were likely to have relied on his conclusion to resolve any doubts they may have had based on the possibility that someone could have written the note. In sum, Harris's conclusion that to a "reasonable certainty" appellant authored the note likely eliminated – in the eyes of the jurors – any reasonable doubt that appellant wrote the note.

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[17] Appellant continues to contend, as he did in his opening brief, that the error violated the federal constitution and that the *Chapman* federal standard should apply instead of the state standard employed by respondent.

[18] Because the defense was not permitted to challenge this essential premise, the jurors were free to fully rely on it, as Judge Hammes did (RTH 25439-40), to conclude that Lucas must have authored the note based on their perceived similarities between the note and Lucas's printing.

Moreover, the risk that Harris's testimony unduly influenced the jurors was present notwithstanding the jurors' ability to compare the evidence themselves:

> "Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." (*United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9, 17-18.)

XX.

EVEN IF THE JUDGE PROPERLY DENIED THE *KELLY* HEARING AND EXCLUDED THE DEFENSE EXPERTS, SHE ERRONEOUSLY ALLOWED HARRIS TO TESTIFY WITHOUT ANY FOUNDATIONAL SHOWING AS TO THE RELIABILITY OF HIS CONCLUSIONS [AOB Argument 2.5.6; RB Argument XX]

A. Overview: The "Handprinting Expert" Should Not Have Been Permitted To Testify Without A Foundational Showing Of His Proficiency

In his opening brief Lucas contended that – apart from his *Kelly* hearing and defense expert claims – as the proponent of the handprinting expert opinion evidence, it was the prosecution's burden to establish that it was sufficiently reliable to be relevant and admissible under Evidence Code § 352, 1418 and due process. (AOB 432-37.) Respondent's Brief (RB 182-84) argues that the prosecution had no such burden in light of the "historical and statutory basis" for its admission. (RB 182.) However, even if global reliability of expert opinions regarding the authorship of short handprinted notes is not required under *Kelly*, this did not give the prosecution a "free pass" to present Harris's testimony and opinion without establishing the foundational reliability of his particular testimony. Yet Judge Hammes did indeed give Harris a "free pass" because she didn't require the prosecution to demonstrate his proficiency. Moreover, Harris himself conceded that his alleged skills had not been proficiency tested. Accordingly, the judge erroneously permitted Harris to offer his opinion, over defense objection,[19] that

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[19] The defense specifically objected in limine to the conclusion portion of Harris's testimony. (See RTH 13914-16 [we don't believe Harris's conclusion is reliable]; 17429 [allowing Harris to give a "conclusion" is misleading].)

to a "reasonable certainty" appellant authored the Love Insurance note.

B. The Judge Did Not Require The Prosecution To Produce Any Empirical Evidence Of Harris's Reliability

The defense articulated the following rationale in objecting to Harris's conclusion that appellant – to a "reasonable certainty" – authored the Love Insurance note:

> Well, as an offer of proof, your honor, Mr. Harris was not aware of any proficiency studies. Apparently there are four years of proficiency studies, each of which have substantial percentages of error involving questioned documents examination.
>
> Does that mean that a person can just ignore what is out there in the community and come into this court, hold himself out to be an expert and we can't question that field because there has been no record made by the person who calls himself an expert of any data or any basis for his opinions? In other words, he has left us with, "I have been looking at this stuff for years so trust me," and we're saying that is an incorrect approach to something which is supposed to be based on an area of analysis (sic) or an area of – that's holding itself out to be an expert field. That one should have to be subjected to some type of scrutiny as to how this is done and whether or not, for instance, is there something that one can point to that says, "Okay. These criteria are the criteria that will be looked at in handwriting and they will be the test which we'll be subjected. Now we are going to subject this to a set of tests – blind tests and proficiency tests to find out whether it works and then we come out with results." That's where this is relevant in there.
>
> At this point the record is without any database, and as the court said certainly we can argue that, but also important in this context is that one should expect that there would be a database before one would allow someone to come in here and, in effect, hold himself out to be an expert on something that has not been tested. (RTH 17520:18-17521:18.)

Importantly, this objection to Harris's conclusion did not hinge on the testimony of the defense experts because Harris himself admitted that he had

not participated in any proficiency testing and was, in effect, asking the jurors to "trust" him without any empirical verification of his alleged skills.

Nevertheless, notwithstanding Harris's admission that there was no proficiency database,[20] the judge overruled the defense objection and erroneously shifted the burden to the defense to "bring in the guy who did the research and have him tell me there is no such thing. . . ." (RTH 17522; see also (RTH 17522 [". . . I am just not going to accept it . . ."].)

C. Neither Evidence Code § 1418 Nor California Case Law Authorized Judge Hammes To Admit Harris's Conclusion About The Authorship Of The Note Without Any Foundational Showing That His Conclusion Was Reliable

Respondent asserts that the prosecution had no burden to demonstrate the reliability of Harris's conclusions because "admission of such expert opinion was long-standing and well-recognized. . . ." (RB 183.) However, respondent fails to recognize or discuss the trial judge's "gatekeeping" responsibility to assess the reliability of all expert testimony, even if it is not scientific and simply based on the witness's experience. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1225, fn. 8 ["We do not mean to imply that expert testimony based upon experience rather than technical expertise is not subject to scrutiny for reliability. (Citing with approval authorities discussing federal "gate keeping responsibility" established by the United States Supreme Court in *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137)]; see also *People v. Holloway* (2004) 33 Cal.4th 96, 146 [judge properly excluded "highly unreliable" expert testimony]; *People v. Wilkinson* (2004) 33 Cal.4th 821, 849-

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[20] RTH 13924; RTH 17523 [". . .he [Harris] specifically said there is no empirical database"].

50.)[21]

Evidence Code § 1418 does not eliminate the judge's "gatekeeping" responsibility as to purported handprinting experts. § 1418 provides that: "The genuineness of writing, or the lack thereof, **may** be proved by a comparison made by an expert witness." [Emphasis added.] Use of the permissive term "may" reasonably requires that the judge assess the expert's reliability before allowing him or her to testify. For example, even though case law has consistently held that expert evidence of dog tracking "may" be presented, such evidence is still not admissible unless the reliability of the individual dog has been established. (See *People v. Craig* (1978) 86 Cal.App.3d 905.)

Thus, in light of the well settled rule that the proponent of any evidence must demonstrate its relevance – which in the case of expert testimony requires reliability – it follows that the "gatekeeping" responsibility of the trial judge requires consideration of a handwriting expert's reliability before that expert may be permitted to offer an opinion as to the authorship of a writing.

Furthermore, the rationale of *People v. Craig, supra,* 86 Cal.App.3d 915 regarding the admissibility of dog tracking evidence applies with equal force to handprinting experts:

> "In the area of new scientific techniques, especially dealing with electronic gadgetry, one piece of testing apparatus is essentially

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[21] This "gate keeping responsibility" is triggered by Due Process and Evidence Code § 352 objections – such as those made in the present case – because reliability bears directly on probative value. (See *People v. Wilkinson, supra*, 33 Cal.4th at 849 [lie detector evidence "not considered reliable enough to have probative value"]; see also *People v. Coddington* (2000) 23 Cal.4th 529, 622 [records were admissible because "they were sufficiently reliable to be relevant . . ."]; *People v. Leahy, supra*, 8 Cal.4th at 598 ["No evidence is admissible except relevant evidence."]; *People v. Douglas* (1990) 50 Cal.3d 468, 529 [evidence was "relevant and reliable"].)

> the same as another of similar design, make and purpose. [Para.] When dealing with animate objects, however, we must assume each and every unit is an individual and is different from all others. Within one breed of dog, or even with two dogs of the same parentage, it cannot be said each dog will have the same exact characteristics and abilities. Therefore, while the reliability of a machine can be duplicated and passed down the assembly line with relative ease, the abilities and reliability of each dog desired to be used in court must be shown on an individual basis before evidence of that dog's efforts is admissible. We simply cannot say all dogs can trail a human, or even that all dogs of specific breeds can do so. [Para.]Therefore, rather than attempt to identify certain specific criteria as being indicative of the ability of dogs, in general, to trail a human, we choose to require each particular dog's ability and reliability be shown on a case-by-case basis. We are not merely assuming a well-trained dog can trail a human; we say that this ability is a fact which, like other facts, may be proven by expert testimony.[Para.]This testimony should come from a person sufficiently acquainted with the dog, his training, ability and past record of reliability."

In sum, even assuming that – as with dog tracking evidence – *Kelly* does not apply to handprinting experts, the expert should nevertheless have to demonstrate a "past record of reliability."

D. The Record Contains No Empirical Evidence Demonstrating Harris's Reliability

The prosecution alleged that Harris could reliably identify the authorship of small amounts of block handprinting. However, the prosecution failed to provide any empirical verification of Harris's purported abilities.

1. Harris Failed To Participate In Proficiency Testing

Harris admitted that he did "not participate . . . in proficiency testing." (RTH 13924.) Nor did the prosecution produce any empirical evidence which demonstrated that Harris could reliably identify the authorship of small block printed notes such as the Love Insurance note.

2. Harris's ABFDE Certification Did Not Demonstrate His Proficiency

Judge Hammes assumed that his certification by the American Board of Forensic Examiners established Harris's proficiency. (RTH 17531.) This assumption was erroneous. Harris's certification did not demonstrate his proficiency because he was "grandfathered" into the organization and signed his own certificate. (RTH 8142.) Thus, he did not undergo any proficiency testing or evaluation as a prerequisite to membership.[22]

3. Harris's Professional Experience Did Not Establish His Reliability

Judge Hammes ultimately relied on Harris's "database" of experience in the field to establish his proficiency. She maintained that even if others had failed proficiency testing "that would [not] discredit and make inadmissible the testimony of [Harris] who has an enormous amount of experience for this kind of area. . . ." (RTH 17632.)

However, Harris's experience – even if actually specified in the record[23] – could not alone demonstrate his proficiency and reliability. To the contrary, handwriting studies have "failed to reveal that certification or experience enhance accuracy." (Risinger, et al at p. 749.) In fact, the 1987 Proficiency Advisory Committee Comments noted the following conclusion:

As usual there were no correlations between right and wrong

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[22] Moreover, even if Harris had been regularly certified this would not have correlated to reliability. The prosecution failed to present any evidence as to what testing, if any, was required for certification. Moreover, studies have shown that there is no correlation between certification and accuracy. (See Risinger, et al, p. 741.)

[23] The prosecution failed to present any evidence as to Harris's experience at the in limine motion.

> answers and . . . certification, experience [or] amount of time devoted to document examination. [Emphasis added.] (Crime Laboratory Proficiency Testing Program (Collaborative Testing Services, Inc., Report No. 87-5), p. 2, In Limine Exhibit 588.)[24]

Hence, instead of simply relying on Harris's certification and experience, the prosecution should have been required to establish that Harris's proficiency had been put "to the test of empirical reality." (Risinger, et al, p. 735.)

> The question whether someone or some technique can do what it purports to do is fundamental, not only for handwriting identification, but for a great variety of endeavors. Can astrology predict the course of a person's life? Can a biomedical test detect the presence of a particular disorder? Can polygraph examiners correctly classify statements as truths or lies? Can phrenology distinguish people with different personality types? How well can meteorologists predict the weather? Does a medical innovation work better, only as well as, or less well than a procedure it seeks to replace? How well can aptitude tests predict how a person will do in school or in a particular profession? Can document examiners determine whether a questioned handwriting sample was or was not made by the same person who produced a known "standard"?
>
> The answers to these and similar questions are generally pursued by conducting empirical studies to evaluate the extent to which the claims are fulfilled. Most simply, the claim is put to the test of empirical reality. Predictions of astrologers, meteorologists, and aptitude examiners can be compared with actual outcomes. The effects of a medical treatment innovation can be compared with the effects of other treatments or no treatment (a "control"). And the classifications made by biomedical tests, phrenologists, polygraph examiners, and document examiners can be compared with some known

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[24] Even though Dr. Saks was not a handwriting practitioner or researcher all parties agreed he was an expert in the empirical proficiency testing. Thus, he would have been qualified to testify about the need to employ empirical testing in various fields.

> criterion . . . [¶] **These kinds of empirical evaluations enable us to separate the more effective from the less effective techniques and the valid from the invalid theories . . . There is no other way to determine which is which.** [Emphasis added.] (Risinger et al, 735-37.)

E. Because Harris's Claimed Proficiency Was Never "Put To The Test Of Empirical Reality" His Conclusions Should Have Been Excluded

As set forth above, the prosecution had the burden of establishing that Harris's conclusions were reliable. (See § C, pp. 65-66, above; see also *People v. Prince*, *supra,* 40 Cal.4th at 1225, fn. 8.) In other words, the prosecution should have been required to demonstrate that Harris's alleged ability to accurately identify small quantities of block handprinting had been "put to the test of empirical reality." (Risinger et al, 735-37.) Because the prosecution failed to meet this burden – e.g., by out-of-court or in-court proficiency testing of Harris – Harris's conclusions about the authorship of the Love Insurance note should have been excluded.

In sum, Judge Hammes erroneously failed to perform her "gatekeeping responsibility" to assess the reliability of Harris's testimony. Instead of requiring the prosecution to prove that Harris's opinion testimony was sufficiently reliable to warrant admission into evidence, the judge erroneously required the defense to show that the testimony was not reliable. Accordingly, Harris's testimony was improperly admitted.

F. Admission Of Harris's Conclusion That Appellant Authored The Love Insurance Note Was Prejudicial

Respondent contends that even if Harris's opinion had been excluded, it is not reasonably probable that the verdict would have been more favorable

to appellant. (RB 184.)[25] However, this contention is unpersuasive because respondent fails to recognize the crucial role Harris played in eliminating any reasonable doubt the jurors may have had as to the authorship of the note. (See pp. 61-62, above.)

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[25] Appellant does not concede the applicability of the state standard of prejudice. Instead appellant continues to contend, as he did in his opening brief, that the error violated the federal constitution and that the *Chapman* standard should apply.

XXI.

RESPONDENT FAILS TO EXPLAIN WHY USE OF A PHOTOGRAPH OF THE ORIGINAL NOTE WAS RELIABLE [AOB Argument 2.5.7; RB Argument XXI]

Appellant's Opening Brief contended that the use of photographs for expert handprinting comparison was unreliable. (AOB 438-443.) Respondent asserts that a photographic copy of the original Love Insurance note was an adequate source for handprinting comparison. (RB 185-86.) Respondent further asserts that appellant has forfeited such a challenge to the expert handwriting comparison. (RB 185.)

A. The Authenticity Of The Note Was In Dispute

Respondent first eschews the seminal case of *Spottiswood v. Weir* (1885) 66 Cal. 525 as of no assistance to appellant because the expert in the present case did not rely on a "press copy" as in *Spottiswood*. (RB 186.) However, the reasoning employed by the Court in *Spottiswood* is not restricted to press copies. The basic concept that genuineness of the original must be established applies with equal force to a photograph of a handprinted note.

Respondent also claims that "there was no dispute as to the genuineness of the Love Insurance note or what it contained; the defense simply asserted the photographs did not adequately depict all of the minute detail which might have appeared on the note." (RB 186.)

Respondent is incorrect. There was indeed a dispute as to the authenticity of the photographs and the fairness in admitting them in lieu of the original. (See AOB 363-64.) Signaling a dispute as to genuineness, the defense moved to exclude the note for failure to authenticate under Evidence Code §§ 1400 and 1401 and under § 352. Furthermore, specific differences between the content of the photos and that of the original note were raised at

trial: missing from the photos were content in the folds of the note and the impression marks from the handprinting. (RTH 8219; 8221; 8223; 13891; 24625; 8616; RTK 598.) Such differences undermined the fairness and reliability of the expert opinion testimony especially in light of the small amount of handprinting available on the note for comparison, the detailed nature of such a comparison, and the importance of the note in allegedly linking appellant to the Jacobs scene.

B. The Claim Was Not Forfeited

Despite respondent's assertions otherwise, appellant was not required to cite *Spottiswood* specifically in order to preserve the issue of authenticity for appeal. Appellant's reliance on *Spottiswood* to argue unreliability in the handprinting comparison is predicated on the lack of showing of authenticity of the original note. As respondent acknowledges, appellant made repeated pre-trial and trial objections to the admission of photographs of the Love Insurance note based on the lack of authenticity of that evidence. (RB 157, citing 51 CT 11217-11228; 5 TRT 655.) Furthermore, appellant did object under Evidence Code §§ 1400 and 1401. (CT 11217-28.) These objections to the photographs were specific enough to apprise the trial court and the prosecution of the issue and to give the trial court an opportunity to address it.

XXII.

THE HANDPRINTING CLAIMS WERE NOT WAIVED AS TO TRIAL

Appellant's Opening Brief contended that Judge Hammes prejudicially erred by precluding the defense from presenting Dr. Saks and Dr. Denbeaux, the CTS proficiency studies and in court testing of the prosecution handprinting expert (Harris) to challenge his conclusion that, to a reasonable certainty, appellant authored the Love Insurance note.

Respondent asserts that appellant waived these claims because:

(1) Appellant did not "fairly call upon the trial court to make a ruling on the admissibility of his evidence at trial." (RB 188.)

(2) The judge's finding that the handprinting comparison field was "unassailable" did not "purport to be a ruling on the admissibility of defense evidence to impeach the prosecution expert" (RB 188.)

(3) "[T]he trial court plainly indicated that its rulings were premised on an insufficient foundation or showing which could be cured." (RB 189.)

(4) The judge did not "foreclose" admission of the proficiency studies should appellant demonstrate their relevance. (RB 189.)

(5) Appellant never made an offer of proof as to the foundational requirements for a proper experiment to test Harris's proficiency. (RB 190.)

Respondent's assertions are unpersuasive.

The judge made it clear that she did not consider the defense witnesses to be qualified experts. (RTH 17584 ["I find [Dr. Saks] not to be an expert]; 17625 [Denbeaux]; see also 17518-20; 25439-40.) Hence, any request to admit their testimony at trial would obviously have been futile. Under these circumstances any failure of defense counsel to make such a request did not waive the claim. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v.*

Chavez (1980) 26 Cal.3d 334, 350 fn 5; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn 4; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-13.)

Similarly, in light of the judge's erroneous ruling that only a practitioner or researcher in the field of handwriting would have been qualified to testify about the field's proficiency database, it would have been futile for counsel to attempt to provide any additional foundational testimony than that already provided by the defense experts. Dr. Saks, who was an acknowledged expert in proficiency research, testified that he researched all available materials in the field and found only the CTS proficiency research. Hence, there were no researchers other than those who conducted the CTS studies who could have so testified. (See RTH 17500-03; see also 13924-25 [the prosecution's expert witness, Harris who purportedly was an experienced practitioner in the field, acknowledged that he knew of no proficiency database in the field].) And, the judge had already ruled that the CTS studies were irrelevant because Harris did not participate in them. Hence, by unduly limiting the defense to the testimony of practitioner's or researchers – in violation of Evidence Code § 801(b) – the judge effectively precluded the defense from making any foundational showing that she would have accepted. (See RTH 17633 ["I don't think you're going to be able [to make an adequate showing] no matter what you present. . ."].)

Judge Hammes's ruling as the CTS studies also made it clear that any attempt to make an additional foundational showing would be futile. The judge did suggest that the foundation for the CTS studies could be established by specific testimony about how the studies were conducted. (RTH 17569-70.) And, the defense responded by informing the judge that they would be contacting CTS "to obtain a witness in order to lay the foundation for the admission of [CTS studies]." (RTH 17624.) However, the judge then further

restricted the scope of her ruling by finding that the CTS studies would be irrelevant because Harris did not participate in them. (RTH 17625.) Hence, even if the defense had called a person from CTS the judge would still have found them to be irrelevant to Harris's reliability.

Finally, the defense was precluded from making an additional offer of proof regarding testing because that offer would have to have been based on the testimony of Dr. Denbeaux. Because the judge had already ruled that Dr. Denbeaux was not an expert it would have been futile to call him to lay the foundation for additional testing.

In sum, the claims were not waived.

XXIII.

CLARK'S LAY OPINION THAT APPELLANT AUTHORED THE LOVE INSURANCE NOTE SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE [AOB Argument 2.6.3; RB Argument XXIII]

Appellant's Opening Brief contended that Frank Clark was erroneously permitted to testify at trial that, in his opinion, appellant authored the Love Insurance note. (AOB 452-65.) Respondent contends that Clark's opinion was properly allowed. (RB 191-96.) Respondent's argument should be rejected.

The prosecution failed to demonstrate that the small amount of block printing on the Love Insurance note was sufficiently unique to render a reliable lay opinion as to its authorship. (AOB 455-58.) Respondent asserts that appellant's argument is simply a restatement of his global *Kelly* challenge to handprinting comparison opinion testimony. (RB 192.) However, even if *Kelly* did not require exclusion of the evidence, the prosecution – as the proponent of the evidence – was still obligated to establish that Clark's testimony was reliable. (See Argument XI, pp. 29-30, below; see also AOB 455-56.)[26]

Moreover, even if the uniqueness of the writing had been sufficiently shown, the prosecution also failed to establish the reliability of Clark's opinion. (See *United States v. Prime* (W.D. Wa. 2002) 220 F.Supp. 1203, 1213 [38% error rate by lay witnesses who claimed to identify handwriting samples]; cf., *People v. Craig* (1978) 86 Cal.App.3d 905 [reliability of dog

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[26] See *United States v. Saelee* (D.C. Ala. 2001) 162 F.Supp.2d 1097, 1105 ["[W]e do not know how many valid similarities are necessary to rule out the possibility that two people have essentially the same manner of writing the words in question."].)

tracking evidence must be established].)

Respondent also asserts that any foundational requirements were not subject to the instructional mandate of Evidence Code § 403(c)(1). This assertion is contrary to the express language of the statute which requires instruction – upon request – as to foundational facts upon which "[t]he relevance of the proffered evidence depends. . . ." (Evidence Code § 403(i).) Because the relevance of Clark's opinion depended on the foundational reliability of his opinion, the judge erroneously refused the defense instruction.

XXIV.

THE TRIAL COURT ERRED IN EXCLUDING THE STATEMENT BY ROCHELLE COLEMAN THAT IDENTIFIED DAVID WOODS AS THE AUTHOR OF THE LOVE INSURANCE NOTE [AOB Argument 2.6.4; RB Argument XXIV]

Appellant's Opening Brief contended that Rochelle Coleman's statement regarding David Woods as the author of the Love Insurance note was admissible. (AOB 466-67.) Respondent argues that no error was committed because the testimony was hearsay. (RB 197-98.) Respondent's argument should be rejected.

A. Admissible Hearsay As Spontaneous Utterance

Coleman's identification of the writing as Woods's was admissible as hearsay under the spontaneous statement exception. Evidence Code § 1240 provides that a statement is not inadmissible as hearsay if it: "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Respondent contends that Coleman's statement was not a spontaneous utterance because Coleman's demeanor was calm during the interview with law enforcement officials. However, that Coleman was calm making the statement does not preclude it from being a spontaneous utterance.

"Though the declarations were made in a calm manner, this does not necessarily indicate a lack of spontaneity." (*People v. Francis* (1982) 129 Cal.App.3d 241, 254.) "Calmness . . . does not necessarily defeat admissibility of a spontaneous statement." (*People v. Jones* (1984) 155 Cal.App.3d 653, 662.) Therefore, it was error to exclude from evidence Coleman's statement identifying the writing on the Love Insurance note as being the printing of

David Woods simply because she was calm.

Further, courts do not focus on the palpable manifestations of stress. Instead, the focus is on the statement itself: "The utterance must have been before there has been time to contrive and misrepresent." (*Showalter v. Western P. R. Co.* (1940) 16 Cal.2d 460, 468.) "[T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting." (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

In other words, what matters is that the statement not be the product of deliberation and not be made after time has elapsed for the declarant to formulate and be deceitful. Thus, the jurors could reasonably have concluded that Rochelle Coleman responded spontaneously in light of her "nervous excitement" and the stress of being interviewed by the police regarding their suspicion that her boyfriend may have committed a murder. Such issues of credibility are properly submitted to the fact finder as a matter of weight, not admissibility. (See e.g., CALJIC 2.20 [jurors are "sole judges of the believability of a witness and the weight to be given the testimony of each witness"]; CALJIC 2.81 [You are not required to accept an [lay witness] opinion but should give it the weight, if any, to which you find it entitled"].)

Moreover, Coleman made the identification without hesitation and offered to substantiate her identification with other evidence of Woods's printing, notes written by him which were in the sheriff's custody. Therefore, the reliability inherent in a spontaneous utterance adheres to Coleman's statement regarding the writing on the Love Insurance note.

B. Nonhearsay

Coleman's statement was also admissible for a nonhearsay purpose. "An out-of-court statement is properly admitted if a nonhearsay purpose for

admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute." (*People v. Turner* (1994) 8 Cal.4th 137, 189.)

The issue in dispute was the author of the note. The admission of both the lay opinion testimony of Frank Clark and the opinion testimony of the prosecution handwriting expert stemmed from the premise that no two persons print alike. (See AOB 477-81; Argument XXV, pp. 83-84, below.) However, Rochelle Coleman examined the same note, and under police questioning indicated that the writing looked like printing by Woods. Thus Coleman's testimony was relevant to negate the foundational premise upon which the testimony by Clark and the handwriting expert were admitted: Coleman's statement served the nonhearsay purpose of discrediting the prosecution's assumption of uniqueness by providing evidence to the contrary. (See generally *People v. Whittaker* (1974) 41 Cal.App.3d 303, 309.)

C. Coleman's Statement Was Admissible Notwithstanding Domestic Rules of Evidence

Coleman's statement regarding the Love Insurance note undermined the reliability of the prosecutor's handwriting experts by challenging the assumption of uniqueness and by providing evidence that someone other than appellant may have written it. Contrary to respondent's assertion, exclusion of this evidence did violate the federal constitution.

Excluding Coleman's statement gave the prosecution's authorship evidence a false semblance of reliability. Verdict reliability is required by the Due Process Clause of the 14th Amendment. (See *People v. Ramos* (1982) 30 Cal.3d 553, 600-601; *People v. Lewis* (2001) 25 Cal.4th 610, 642; *People v. Mayfield* (1997) 14 Cal.4th 668, 740.)

Further, as Due Process forbids prosecutors from suppressing potentially exculpatory evidence, the trial judge should not exclude such

potentially exculpatory evidence merely because it fails to satisfy a traditional hearsay exception, especially when its exclusion undercuts the reliability of the verdict. (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)

Refusal to admit the statement as evidence also violated appellant's federal constitutional rights to Due Process and a Fair Trial by Jury (6th and 14th Amendments) because the jury was precluded from assessing the credibility of the prosecution's expert witnesses. The Supreme Court has consistently held that juries are the ultimate arbiters of witness credibility. "On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.)

In appellant's trial, the jury was never allowed to play its constitutional role in weighing a crucial piece of evidence. Therefore, excluding Coleman's statement prejudicially violated appellant's federal constitutional rights.

XXV.

RESPONDENT UNPERSUASIVELY ARGUES THAT UNIQUENESS OF HANDPRINTING IS NOT A NECESSARY PREREQUISITE TO RELIABLE HANDPRINTING COMPARISONS [AOB Argument 2.6.5; RB Argument XXV]

Appellant's Opening Brief argued that the judge erred in denying the defense request to require the jury to make a preliminary finding of uniqueness before using handprinting comparison for purposes of identification. (AOB 477-81.) Respondent erroneously argues that the "uniqueness of handwriting is not a preliminary fact" necessary to establish the relevance of handprinting comparison testimony. (RB 202-03.)

The underlying premise of testimony which identifies handwriting as belonging to one individual is that the handwriting of that individual is so unique that it can be distinguished from all other writing. "Handwriting analysis proposes a theory that each person's handwriting is unique, and involves a method by which a trained expert can identify each writing's author." (*United States v. Lewis* (S.D. W. Va. 2002) 220 F.Supp.2d 548, 553; see also *United States v. Hidalgo* (D.C. Ariz. 2002) 229 F.Supp.2d 961, 967.) Absent empirical proof of such uniqueness, any opinion – whether expert or lay – is not sufficiently reliable to be admissible. Hence, even if an expert may point out similarities or differences between the writings, any opinion as to the ultimate issue of who wrote the questioned document should be excluded. "The role of the handwriting expert is primarily to draw the jury's attention to similarities between a known exemplar and a contested sample." (*United States v. Crisp* (4th Cir. 2003) 324 F.3d 261, slip opn. at 26; see also *United*

v. States v. Hines (D. Mass. 1999) 55 F.Supp.2d 62.)[27]

Accordingly – because Evidence Code § 403 requires the judge to give requested instructions as to preliminary facts upon which "[t]he relevance of the proffered evidence depends . . . " – the judge erroneously refused the preliminary fact question.

[27] A number of cases which have addressed the issue "distinguish between a questioned document examiner's testimony comparing the [document] with the exemplars and identifying similarities and differences, and testimony concerning the document examiner's inferences of authorship based on those similarities." (Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (West 2002), § 28-1.4.3, p. 423; see e.g., *United States v. Crisp, supra*; *United States v. Hines, supra*.)

XXVI.

THE FAILURE TO PROPERLY PRESERVE THE HAIR FOUND IN SUZANNE JACOBS' HAND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

[In response to RB Argument XXVI, appellant relies upon AOB Argument 2.7.1.]

XXVII.

DENIAL OF FAIR OPPORTUNITY TO CONFRONT JOHNNY MASSINGALE [AOB Argument 2.8.1; RB Argument XXVII]

In his opening brief, appellant contended that the defense was erroneously precluded from cross-examining Johnny Massingale regarding his lawsuit against the county. (AOB 485-507.) Respondent claims that the defense had no right to inform the jury about the $3,000,000 civil suit against the county because there "was no direct financial benefit to Massingale from appellant's conviction; at most, the defense speculated that Massingale might benefit in settlement negotiations, but he already had a judicial declaration of innocence." (RB 207-21.) Respondent's argument should be rejected.

It is self-evident that conviction of appellant would have added significant value to Massingale's lawsuit. The declaration of factual innocence by a single judge in an uncontested proceeding would not carry the same weight as a verdict by twelve jurors finding beyond a reasonable doubt that appellant, not Massingale, was the killer. Moreover, the judicial declaration of innocence would not have been admissible in Massingale's civil trial. (See Penal Code § 851.8(i) ["Any finding that an arrestee is factually innocent . . . shall not be admissible as evidence in any action."].)

In sum, the civil suit was not "marginal" or cumulative evidence.

XXVIII.

RESPONDENT FAILS TO EXPLAIN WHY IT IS PROPER TO REFUSE CALJIC 2.03 WHEN REQUESTED BY THE DEFENSE ALTHOUGH THE VERY SAME INSTRUCTION IS CONSISTENTLY GIVEN – AND APPROVED BY THIS COURT – WHEN REQUESTED BY THE PROSECUTION [AOB Argument 2.8.2; RB Argument XXVIII]

In his opening brief, appellant argued that it was error to refuse a consciousness of guilt instruction (CALJIC 2.03) as to Massingale. (AOB 508-13.) Respondent unpersuasively asserts that the consciousness of guilt instruction requested by the defense was properly refused even though the very same instruction has been consistently approved by this Court when requested by the prosecution, and even though, as is undisputed by respondent, Massingale did make false statements from which the jury could reasonably have inferred a consciousness of guilt. (RB 222-25.)

First, respondent erroneously maintains that Johnny Massingale's consciousness of guilt was "inapplicable, and did not involve a defense theory of the case." (RB 222.) To the contrary, the consciousness of guilt concepts articulated in CALJIC 2.03 were at the heart of the defense theory that Massingale committed the Jacobs murders.

Second, respondent asserts that CALJIC 2.03 is argumentative. This position is disingenuous at best in light of this Court's consistent rejection of defense claims that CALJIC 2.03 is argumentative. (See e.g., *People v. Kelly* (1992) 1 Cal.4th 495, 531-32; *People v. Medina* (1995) 11 Cal.4th 694, 762.)

Third, this Court's discussion of the cautionary language in CALJIC 2.03 (see e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 438) does not support respondent's position. That very same cautionary language was also included in the instruction requested by the defense. (CT 508.) If the existence of such cautionary language precludes the instruction from improperly endorsing the

prosecution's theory, then it follows that the defense requested instruction – which included the very same cautionary language – "did not improperly endorse the [defense] theory. . . ." (*Ibid.*)

Fourth, respondent erroneously asserts that the trial court justifiably denied the instruction because it was "irrelevant" and could have relieved the jury of its duty to make necessary findings. (RB 224.) Respondent fails to explain how Massingale's consciousness of guilt – which was directly relevant to the defense theory of third party guilt – could possibly be irrelevant, and which findings the jury would have been relieved from making. (See generally *Holmes v. South Carolina* (2006) 547 U.S. 319 [evidence of third party guilt is relevant].)

In sum, respondent – without even mentioning the constitutional principle of reciprocity relied on by appellant (see AOB 511-12) – fails to provide any persuasive basis upon which to conclude that CALJIC 2.03, if supported by the record, should be allowed when requested by the prosecution yet disallowed when requested by the defense.

XXIX.

RESPONDENT FAILS TO DISCUSS HOW LAY JURORS WOULD HAVE INTERPRETED THE INSTRUCTIONAL REQUIREMENT THAT APPELLANT MUST "RAISE A REASONABLE DOUBT" [AOB Arguments 2.8.3, 4.8.12, 5.2.3.1; RB Argument XXIX]

Appellant's Opening Brief contended that the judge failed to fully and correctly instruct on the defense theory of third party guilt by requiring the third party guilt evidence to "raise a reasonable doubt" as to appellant's guilt. (AOB 514-24; 1223-25; 1310-13.) Respondent contends that the jurors would have relied on the instructions as a whole to cure any shifting of the burden of proof in the third party guilt instruction. (RB 225-28.) However, this contention is contrary to a common sense interpretation of the instructional language which required the evidence to "raise" a reasonable doubt. (See generally *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [instruction interpreted in light of its "most natural and common sense reading"]; see also *People v. Catlin* (2001) 26 Cal.4th 81, 154 [instructions "[r]ead together in a common sense fashion"].)

Moreover, the Judicial Council's Blue Ribbon Jury Instruction Committee has consistently avoided using the "raise a reasonable doubt" terminology in its well-researched and vetted jury instructions on defense theories, thus further supporting the view that such language is misleading.[28]

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[28] See e.g., CALCRIM 1863, final paragraph ["If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <*insert specific theft crime*>."]; CALCRIM 3400, paragraph 2 ["If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty."]; CALCRIM 3402, paragraph 4 ["The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not (continued...)

Finally, this Court has recognized that jurors may misinterpret specific deviations from the standard presumption of innocence instructions. For example, in *People v. Hill* (1998) 17 Cal.4th 800, 831-32 the prosecutor's argument explained the concept of reasonable doubt stating: "it must be reasonable . . . There has to be some evidence on which to base a doubt. There must be some evidence from which there is a reason for a doubt." This Court concluded that "it is reasonably likely [the] comments, taken in context, were understood by the jury to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt." (*Id.* at 832.) Similarly, it is reasonably likely that appellant's jury understood the language of the third party guilt instruction to mean that appellant had the burden of producing evidence to show that it was Massingale, and not appellant, who committed the Jacobs murders.

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[28](...continued)
guilty of _____ <*insert crime[s]*>"]; CALCRIM 3404; CALCRIM 3405, paragraph 2; CALCRIM 3406, paragraph 4 ["If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes)."]; CALCRIM 3425, paragraph 3 ["The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty."]

XXX.

RESPONDENT'S CLAIM THAT THE PROSECUTOR DID NOT HAVE A CONFLICT OF INTEREST SHOULD BE REJECTED [AOB Argument 2.8.4; RB Argument XXX]

Appellant's Opening Brief contended that the trial court's denial of appellant's motion to recuse the district attorney violated due process. (AOB 525-28.) Respondent argues that there was no conflict of interest created by the prosecution of Massingale for the Jacobs murders and the defense of detectives in the civil suit filed by Massingale. (RB 228-231.) However, respondent's argument is not persuasive.

A. A Clear Conflict Of Interest Existed

According to respondent, the DA's position in the Massingale and the Lucas cases were not at odds because "the issue in appellant's case was not the voluntariness of Massingale's confession, but its veracity." (RB 230.) However, the "veracity" of Massingale's confession was at issue because it was allegedly involuntarily given. (See *Jackson v. Denno* (1964) 378 U.S. 368, 386 [coerced confessions forbidden in part because unreliable].) Thus, the issues were inextricably bound. The truth of Massingale's confession to committing the Jacobs murders was necessarily undermined by the argument – advanced by the prosecution in appellant's trial – that Massingale was coerced into making that confession.

Therefore, it was a glaring conflict of interest for the county prosecutor to make crucial but opposing arguments so that prosecutors could convict appellant while simultaneously the county was defending itself and the detectives against Massingale's civil suit. The goal was not justice, it was victory.

Apart from the opposing positions of the DA on the voluntariness of the

confession, there were other circumstances demonstrating a conflict. For example, Detective Green's dual role as coercive interrogator of Massingale and later as an investigator of appellant for the same crime was a sign of a disabling conflict. (See AOB 527.) Similarly, the prosecutor again played both ends against the middle during the preliminary hearings by opposing testimony about Massingale's confessions in the Santiago, Strang/Fisher and Swanke preliminary hearing. (See AOB 526-27 n. 475.)

In sum, the DA had a clear conflict of interest and, therefore, the recusal motion should have been granted.[29]

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[29] Respondent asserts in a footnote that because the defense did not raise the prosecutor's inconsistent positions at appellant's two preliminary hearings in his recusal motion, that claim is waived. (RB 231, fn 138.) However, as stated by this Court, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) Moreover, reviewing courts "retain discretion to excuse the lack of an objection and elect to exercise that discretion in defendant's favor because of the shocking nature of the error which rendered the trial unfair." (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 644-645.)

Because the failure to recuse the San Diego District Attorney violated appellant's state and federal right to due process and caused structural error rendering the trial unfair, the lack of specific objection at trial regarding the prosecutor's inconsistent positions does not foreclose appellant from raising the recusal claim on appeal.

XXXI.

A SERIES OF PROBLEMS DENIED APPELLANT A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE THAT SANTIAGO'S IDENTIFICATIONS OF APPELLANT AND OF APPELLANT'S HOUSE WERE UNRELIABLE AND WERE THE INADMISSIBLE PRODUCT OF SUGGESTIVE PRETRIAL PROCEDURES

[In response to RB Argument XXXI, appellant relies upon AOB Argument 3.3.2.]

XXXII.

RESPONDENT FAILS TO DEMONSTRATE THAT THE PHOTOGRAPHIC LINEUP WAS FAIR AND RELIABLE [AOB Argument 3.3.3; RB Argument XXXII]

Appellant's Opening Brief contended that Santiago's identification of appellant was unreliable, and, therefore, the judge erroneously denied appellant's motion to suppress it. (AOB 863-82.) Respondent erroneously asserts that the photographic lineup was fair and reliable under the totality of the circumstances. (RB 236-243.)

A. The Photographic Lineup Caused Appellant To Stand Out From The Others Because He Was The Only One Who Matched Santiago's Description

Respondent characterizes the differences between the photos in the lineup as insignificant. However, the photograph of appellant was the only one which matched Santiago's description of her attacker in every way. It was the only photograph of a suspect with "bulging" eyes, a neatly groomed mustache not extending past the lip, feathered hair that was "falling away at the middle" and clothing that matched Santiago's description. (See AOB 873-874.)

What stood out "first and foremost" in Santiago's mind was that her attacker had "bulging" eyes. (RTH 5660.) Even Judge Hammes described appellant's eyes as "very, very distinctive." (RTH 24587.) Not only does such a facial feature itself draw attention, it was a feature specifically identified by Santiago. (Compare *People v. Gonzalez* (2006) 38 Cal. 4th 932, 943 ["...none of the witnesses described the gunman as having a distinctive eye, so any distinctiveness in the photograph would not suggest the witness should select that photograph].) Hence, the fact that only the photograph of appellant had

bulging eyes made the photo lineup patently suggestive.[30]

In addition, Santiago's amnesia, head injury and PTSD, her emotional need to have her attacker caught, and her participation in two composite drawings before the identification[31] all contributed to the impact of the unduly suggestive lineup. These factors made Santiago particularly susceptible to the improper lineup. (See AOB 3.3.2.)

Because the photograph of appellant was the only one that could fit Santiago's description – a situation exacerbated because Santiago may have been particularly susceptible to influence – the lineup was unduly suggestive. (*People v. Carpenter* (1997)15 Cal.4th 312, 367 ["The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him."]; see also *People v. Gonzalez*, *supra*,

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[30] Furthermore, none of the others in the lineup were "neat in [their] dress" as Santiago described her assailant. (RTH 5656.) Only appellant wore a collared, buttoned shirt in light blue. The others' clothing – ranging from T-shirts to a flowery shirt – simply did not match Santiago's description. Moreover, the men bore other features in direct contradiction to the description given by Santiago. For instance, the man in position 6 of the lineup was the exact opposite of "neat" – filthy and dirty, dressed in a T-shirt. Similarly, the man in position 3 was also the exact opposite of Santiago's description. He appeared to be a tanned body builder with a huge neck. Santiago told police that her assailant was not a "muscle-building" person (RTH 4648) and didn't "look like he laid out in the sun all the time. . . ." (In Limine Exhibit NN, p. 011748.)

[31] Respondent asserts that the suggestive role of the composite drawings in tainting the subsequent identification was not established by appellant as a fact, merely a possibility. (RB 239.) However, law enforcement failed to record the 2 ½ to 3 hour session between Santiago and Agent Gillis when the composite was made. (RTH 4623-28; In Limine Exhibit V.) Therefore, the only evidence available of what transpired was testimony, given months afterwards, by Gillis and Santiago about their necessarily sketchy recollections. (See AOB 852.)

38 Cal.4th at 943.)

B. The Totality Of The Circumstances Demonstrate The Unreliability Of Identification

Respondent further claims that the identification was reliable because (1) Santiago had "ample" opportunity to see her assailant's face; (2) "nothing" about her physical descriptions were shown to be inaccurate and (3) the natural loss of memory over the six months between the attack and Santiago's identification of appellant was mitigated by the times she was able to describe her assailant. However, respondent's analysis is incomplete.

Santiago's attention was divided during much of the time she was with her assailant. For example, while in the car Santiago was also looking out the window trying to remember the streets. She was seated between the two front seats with her attacker's arm clamped around her neck. Her observations of his face were in the rearview mirror. Once at the house, she was led down the hallway, her hands were tied behind her back, and she was later pushed face down on the bed before losing consciousness. Thus, her ability to focus on the culprit's face at the time of the offense was limited.

Other circumstances further suggest Santiago's identification was ultimately unreliable.

First, her physical description was inaccurate and changing. Santiago described her assailant as approximately 6'2" on June 21, 1984, then as 6' on June 26 and then as 5'10" to 5'11" on December 4. She made no mention of a mustache until June 21, then elaborated on the type of mustache on December 4. Furthermore, Santiago didn't mention the distinctive "bugged out" eyes until December 4 – over four months and five interviews after the attack. (See AOB 877.)

Second, the six months between the attack and Santiago's identification

was a significant lapse of time. (See *Neil v. Biggers* (1972) 409 U.S. 188, 201 [lapse of seven months would be considered "a seriously negative factor in most cases"].) Respondent urges – but provides no authority for – the proposition that Santiago's "natural loss of memory" was "mitigated" because of the multiple times she was asked to describe her assailant. However, it is more plausible that Santiago filled the blanks in her memory with suggested details each time she was asked to describe her assailant. (See e.g., Loftus and Doyle, *Eyewitness Testimony: Civil and Criminal* (LEXIS 1997), § 3.3-3.11.)

Third, there are contradictions in the record regarding how long it took Santiago to identify appellant from the photo lineup. Santiago testified that it took her two minutes (RTH 4658) while the detective's notations claim Santiago identified appellant "immediately." (In Limine Exhibit 63; see also AOB 885-86, fn. 747.) Thus, the certainty with which she identified appellant was unclear.

In sum, the totality of the circumstances demonstrates that Santiago's identification was anything but reliable. Accordingly, it should have been excluded.

C. Failure To Exclude The Identification Was Prejudicial

Absent Santiago's identification, the evidence in that case was plainly insufficient, calling for reversal of the conviction. Moreover, the cross-admissibility of the offenses was relied on heavily by the prosecution. Since Santiago provided the only eyewitness identification of appellant, the Swanke and Jacobs convictions should be reversed as well.

XXXIII.

THE CONSTITUTIONAL REQUIREMENT THAT FULL AND FAIR INSTRUCTIONS BE GIVEN PRIOR TO VIEWING A PHOTO LINEUP IS A PURE QUESTION OF LAW WHICH IS REVIEWABLE BY THIS COURT [AOB Argument 3.3.4; RB Argument XXXIII]

Appellant's Opening Brief contended that the pre-lineup admonishment given to Santiago was suggestive and unfair. (AOB 883-90.) Respondent incorrectly argues that appellant's challenge to the pre-lineup admonishment was forfeited and lacks merit. (RB 243-246.)

A. Violation Of The Federal Constitution By An Inadequate And Unfair Pre-lineup Instruction Is A Question Of Law And, Therefore, The Claim Was Not Forfeited

Respondent agrees that pure questions of law are subject to review on appeal even if the issue was not raised by trial counsel. Indeed, this is clearly the law. (See *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) In an effort to get around the rule, respondent claims that the question was not one of pure law because appellant supplied a factual background. This does not transform a legal question into a factual one.

Regardless of the factual background given, the question to be answered remains one of pure law: do the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution require a pre-lineup instruction to do more than inform the victim/witness that, "You should not infer anything from the fact that the photographs are being shown to you, or that we have a suspect in custody at this time. Please look through the photographs and see if you can identify any of the individual pictures." (Pertinent part of admonishment given to Santiago, In Limine Exhibit 63.)

Because this is a pure question of law which can be answered by

referencing undisputed facts from the record, it was not forfeited.

B. The Claim Of Error Is Meritorious

The answer to the pure question of law raised above is a resounding "yes." In order to fully and fairly instruct the eyewitness whose testimony contributes to a death verdict, the federal constitution requires that the witness be informed: (1) that the suspect may or may not be in the photographs presented; (2) of the importance of clearing the innocent as well as identifying the guilty; and (3) that the appearance of the individuals in the photographs may be different due to changes in head or facial hair. These factors are necessary in order to reduce the risks of false identification and to increase the level of reliability in capital cases. (See AOB 887-888.)

Respondent relies on *People v. Cunningham* (2001) 25 Cal.4th 926, in arguing that the state has no duty to neutralize a witness's natural expectations as long as it does not use an unnecessarily suggestive identification procedure. However, absent instructions informing the witness of the factors above, the state is being unnecessarily suggestive by omission. Given that witnesses are prone to the unreliable influences of such expectations, the state's failure to instruct them otherwise is effectively suggestive. (See U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999) www.ojp.usdoj.gov/nij/pubs-sum/178240.htm.)[32]

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[32] At pp. 31-32 of the Guide the Department of Justice admonishes:

B. Instructing the Witness Prior to Viewing a Lineup

Principle: Instructions given to the witness prior to viewing a lineup can facilitate an identification or nonidentification based on his/her own memory.

(continued...)

Ironically, the pre-identification instruction in *Cunningham*, respondent's own authority, informed the witness of the very factors appellant advances as necessary here. In *Cunningham*:

> Prior to examining the photographs, Cebreros was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone. Without equivocation, Cebreros identified defendant as the man who had shot him. Defendant has not met his burden of establishing unreliability in the totality of the circumstances under federal constitutional standards. (*People v. Cunningham,*

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[32](...continued)

> Policy: Prior to presenting a lineup, the investigator shall provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator.
>
> Procedure: Photo Lineup: Prior to presenting a photo lineup, the investigator should:
>
> 1. Instruct the witness that he/she will be asked to view a set of photographs.
>
> 2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
>
> 3. Instruct the witness that individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
>
> 4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.
>
> 5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
>
> 6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.

supra, 25 Cal.4th 926, 990.)

Santiago, on the other hand, was not informed of any of these factors – but she was told that the suspect was in the photo lineup. (See RTH 4490; 4647.) Thus, Santiago's identification of appellant as her attacker was unreliable and violated the federal constitution.

In light of this, the Santiago convictions should be reversed because they were primarily based on Santiago's unreliable identification of appellant as her attacker. It follows that the Swanke and Jacobs charges should also be reversed since the jury could have relied on the Santiago case to convict appellant of those other charges.

XXXIV.

WHETHER THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION DEMAND A DOUBLE-BLIND SEQUENTIAL PHOTO LINEUP IS A PURE QUESTION OF LAW WHICH IS MERITORIOUS AND REVIEWABLE BY THIS COURT [AOB Argument 3.3.5; RB Argument XXXIV]

Appellant's Opening Brief contended that the photo lineup violated the federal constitution because it was not a double-blind sequential lineup. (AOB 891-95.) Respondent argues that the claim lacks merit and was forfeited. (RB 246-8.)

A. The Claim Was Not Forfeited

Appellant's claim of error is that Santiago's identification from a photo lineup was unreliable in violation of the federal constitution because it was not double-blind and sequential. As discussed above in Argument XXXIII(A), trial counsel's failure to raise this issue did not waive the issue because it is a pure question of law. (See *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *Hale v. Morgan* (1979) 22 Cal.3d 388, 394.)

Respondent asserts that appellant forfeited his right to challenge the constitutionality of the photo lineup procedure simply because he failed to raise the issue at trial. Respondent concedes, by failing to argue otherwise, that appellant's claim raises a pure question of law.

Accordingly, the claim was not forfeited.

B. The Photo Lineup Method Was Not Reliable And Therefore It Violated The Federal Constitution

Scientific studies "show that factors which may be suggestive in a simultaneous lineup have less of an effect on the viewer during a sequential lineup." (*In re Thomas* (N.Y. Misc. 2001) 733 N.Y.S.2d 591, 593.) Courts have similarly recognized "the apparent unanimity of expert opinion as to the

benefits and superiority of double-blind testing." (See *People v. Wilson* (N.Y. Misc. 2002) 191 Misc. 2d 224, 228.)

Respondent attempts to characterize the increased reliability of identifications from the use of double-blind sequential lineups as only going to the accuracy of the witness's identification – thereby only going to the weight of that evidence, not its admissibility. However, it is the state that administers the photo lineup. The state currently decides which pictures to include, whether the lineup is sequential or simultaneous, and whether it is double-blind or not. Moreover, "[i]n unusual or threatening situations, people are prone to judge the appropriateness of their behavior by relying on others in a position of trust - such as the officer administering the lineup. 'Conformity [to authority] is at its peak when pressure is high and when judgments are made without anonymity.' (Citation.)." (Darehshori, et al, *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness* (2006) 4 Cardozo Pub. L. Pol'y & Ethics J. 85, 105-106 (hereafter *Empire State Injustice*).)

As discussed in Appellant's Opening Brief, those state-controlled variables can foster unnecessarily suggestive identification procedures which lead to unreliable identifications. (See AOB 892-894.) For instance, "[i]n double-blind testing, not only the subject, but the person conducting the test also does not know which response is being sought. This prevents the tester from skewing, even unintentionally, the test result." (*People v. Wilson, supra,* 191 Misc. 2d at 228.) "The recommendation for double-blind lineups would have particular importance in capital cases . . . This procedure helps eliminate the problem of unintentional verbal and body cues given by the lineup administrator that encourage the witness to choose the person the

administrator has in mind as the likely perpetrator." (*Empire State Injustice* at page 105.)

Furthermore, "[s]ince the viewer believes that the alleged perpetrator is in the lineup, the viewer will in all likelihood select a person from the lineup based upon the person who most closely depicts the perpetrator rather than from a recollection that the person is in fact the perpetrator."[33] (*In re Thomas, supra*, 733 N.Y.S.2d at 593.) Since appellant was the only one the state placed in the lineup with distinctive "bugged out" eyes as well as the other characteristics matching Santiago's description, it is highly likely that Santiago identified him because he most closely depicted her assailant, not because she remembered him.

In sum, by telling the witness that the suspect is in the lineup (as Santiago was told), and showing the witness a simultaneous lineup of six photographs by a person who knows which one is the suspect, the state makes the lineup unnecessarily suggestive. The heightened reliability requirement

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[33] "In fact, studies show the misidentification rate for blank lineups (containing only subjects known to be innocent) to be extremely high, ranging anywhere from 81-93%. [Citation.] The basis for this type of misidentification may lie in the fact that witnesses view lineups as problems to be solved [citation] and believe that they must choose at least one from the lineup. [Citation.] A sequential lineup would help to alleviate this problem in that it would prevent the witness from making comparative judgements. [Citation.]" (Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 Hastings L.J. 681, 688 (2002); see also generally David L. Feige, *I'll Never Forget that Face: The Science and Law of the Double-Blind-Blind Sequential Lineup*, CHAMPION, Jan./Feb. 2002 at 28. (Jan./Feb., 2002) (advocating use of sequentially presented rather than simultaneously presented photo arrays); Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. Rev. L. & Soc. Change 507 (2001-02).

imposed by the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution in a capital case is not met if the reliability of the identification is tainted by failure to conduct a double-blind sequential lineup.

Accordingly, the Santiago convictions should be reversed because they were primarily based on Santiago's unreliable identification of appellant as her attacker. It follows that the Swanke and Jacobs charges should also be reversed since the jury could have relied on the Santiago case to convict appellant of those other charges.

XXXV.

SUGGESTIVE IDENTIFICATION PROCEDURES AS TO INANIMATE OBJECTS VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS [AOB Argument 3.4.2; RB Argument XXXV]

Appellant's Opening Brief argued that Judge Hammes prejudicially erred by refusing to suppress – under due process principles – Santiago's identification of appellant's house and sheepskin seat covers. (AOB 902-15.) The attorney general asserts that due process should not apply to the identification of physical evidence. (RB 202-03.) Respondent's assertion should be rejected.

"Suggestive identification procedures potentially violate due process because they increase the likelihood of misidentification. Identification evidence is excluded when there is 'a very substantial likelihood of irreparable misidentification.'" (*State v. Johnson* (Wash.App. 2006) 132 P.3d 767, 769 quoting *Neil v. Biggers* (1972) 409 U.S. 188, 198.)

In the present case, the due process concerns at issue in eyewitness identification of persons were also present during the identification of the house and sheepskin seat covers. Santiago stated she was "certain" she would recognize appellant's house if she saw it again. (RTH 6109.) Yet after the photo lineup she was driven by the house twice and said nothing and made no identification. Hence, her inability to identify the house conflicted with her claim of certainty about recognizing it.

Furthermore, the next day Santiago was with the detectives when they prepared a warrant which specifically referred to the address of the house, thereby predisposing anyone seeing the warrant to conclude that the house at that address must be appellant's house. Subsequently the detectives drove Santiago and slowed down in front of appellant's house and asked Santiago:

"What about this house?" (Respondent acknowledges that Detective Fullmer heard someone in the car say "What about that house" or "Something about that house" just prior to Santiago identifying appellant's house. (See RB 250.) Thus, only with the detectives' prodding was Santiago able to make an identification.

Therefore, Santiago's identification was the product of a degree of suggestiveness sufficient to implicate appellant's due process rights.

XXXVI.

THE TRIAL COURT ERRED BY EXCLUDING THE TESTIMONY OF DEFENSE EYEWITNESS IDENTIFICATION EXPERTS [AOB Argument 3.5.1; RB Argument XXXVI]

In his opening brief, appellant contended that Judge Hammes erroneously excluded his eyewitness identification experts: Dr. Loftus and Dr. Buckhout. (AOB 916-33.) Respondent claims that the trial court did not abuse its discretion or violate appellant's constitutional rights by excluding the eyewitness identification experts' testimony. (RB 251-261.)

A. The Record Does Not Support The Trial Court's Finding That The Evidence Corroborating The Identification Was "Substantial"

As concluded in *People v. McDonald* (1984) 37 Cal.3d 351, 377: "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." More recently, in *People v. Jones* (2003) 30 Cal.4th 1034, 1112, this Court specifically noted that the holding in *McDonald* was not to be limited to instances in which "apart from the eyewitness identification, there is no other evidence whatever linking defendant to the crime."

Respondent asserts that Judge Hammes found "an enormous load of corroboration" for Santiago's identification of appellant. (RB 255.) However, the record does not support such a finding. The judge based her decision upon Santiago's own general description of her assailant's car and house plus limited evidence of the four other incidents (Swanke, Jacobs, Strang/Fisher and Garcia). However, of those four "corroborating" incidents, the jury only

found appellant guilty of the Jacobs and Swanke offenses. Thus while the judge may have characterized the corroborating evidence as being "an enormous load," the jury was obviously not as convinced.

Respondent likens the evidence in this case to the corroboration deemed sufficient in *People v. Jones, supra,* 30 Cal.4th 1034. However, *Jones* is distinguishable. In that case, unlike this one, the prosecutor principally relied on the defendant's admissions and not the eyewitness identification to prove its case. (*Id.* at p. 1111.) The corroborating evidence, therefore, included those admissions as well as corroborating testimony from two accomplices, one potential accomplice, a jailhouse informant and an acquaintance of the defendant. (*Id.* at p. 1112.)

In the present case, by contrast, Santiago's identification was the essential evidence in the prosecution's case. Santiago was the only eyewitness and her identification is what bolstered the limited evidence supporting the other charges. Therefore, the "corroborating" evidence relied on by the trial court was not substantial and independently reliable as required by *McDonald.* It did not include, for example, admissions from appellant or testimony from others identifying him as the perpetrator. Rather, the other evidence was weak and sparse.[34]

B. Expert Testimony Regarding Flaws In Eyewitness Identifications Was Necessary In This Case

As discussed above, Santiago's identification of appellant as her assailant was the key prosecution evidence. Thus, expert testimony on the issue was crucial to an adequate defense. Had they not been excluded, defense experts would have exposed the problems with the photo lineup, described the

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[34] Moreover, the suggestive identification procedures employed by the police (see AOB 863-82) also increased the need for the expert testimony.

impact of the post-event factors on the reliability of Santiago's identification (see AOB 924-927), and dispelled common misconceptions regarding the accuracy and reliability of eyewitness identifications – misconceptions that the jury may have relied upon in evaluating Santiago's testimony.

In essence, respondent argues that the invalidity of the commonly misconceived factors is simply common sense and, therefore, the experts were properly excluded. However, as this Court stated in *People v. McDonald, supra,* 37 Cal.3d 369, ". . . psychological factors have been examined in the literature and appear to contradict the expectations of the average juror." The assertion that "weapons focus," "suggestibility from misleading information" and the "effects of time on memory" are all "common sense," is unpersuasive. (RTT 9359.) The experts demonstrated that witness confidence in the identification does not correlate with reliability – a factor expressly recognized by this Court in *McDonald* to beyond the common sense ken of the average juror. (*People v. McDonald, supra,* 37 Cal.3d 351, 369.) Drs. Buckhout and Loftus further opined, inter alia, that (1) while a witness may be able to describe particular details of a culprit's face, that does not equate to increased reliability, and (2) construction of composite drawings decreases reliability due to the collaborative assistance of the artist. (AOB pp. 836-838; 842-843.) These were not intuitive, common sense conclusions a jury would likely draw. In fact, they were actually "counter-intuitive" to what most lay persons would believe. Therefore, they were the proper subject of expert testimony, and, as a factual matter, important to the jury's evaluation of the crucial eyewitness testimony in this case.

C. Judge Hammes Erroneously Concluded That Drs. Loftus And Buckhout Were Not Experts In Their Field

Respondent concedes that the proffered expert testimony was not

limited to common sense matters but asserts that the testimony was nonetheless properly excluded because the defense experts were not experts. (RB 259.) However, in *McDonald*, this Court described Drs. Buckhout and Loftus as "nationally recognized expert[s]." (*People v. McDonald, supra,* 37 Cal.3d at 365 fn.10.) Therefore, Judge Hammes's failure to accept those same experts in this case suggests that she abused her discretion. Respondent relies on *People v. Wright* (1988) 45 Cal.3d 1126, 1142, fn. 13 in urging that "scientific studies on the psychological factors affecting eyewitness identifications are sufficiently experimental and open to debate." (RB 260.) However, *Wright* did not overrule *McDonald*. *Wright* concerned incorporation of a particular expert's opinion into a jury instruction:

> Unlike a jury instruction, expert testimony is not binding on the jury. In *McDonald*, we observed, "the jury remains free to reject [the expert testimony] entirely after considering the expert's opinion, reasons, qualifications, and credibility . . . [¶] In contrast, an instruction incorporating a particular expert's opinion would deprive the jury of its independence in judging the weight to be given to such expert opinion.

(*People v. Wright, supra*, 45 Cal. 3d 1126, 1143.)

Here, the jury was never given the opportunity to consider the qualifications, credibility and opinions of Dr. Buckhout and Dr. Loftus on the key contested issue of Santiago's identification because Judge Hammes excluded their testimony. (RTT 9365.) This was error because the prosecution relied on the identification to prove its case, and the evidence "corroborating" that identification was not substantial enough to provide independent reliability.

D. Judge Hammes's Ruling Violated The Federal Constitution By Arbitrarily Applying A Rule Of Evidence To Abridge Appellant's Right To Present A Defense

The U.S. Supreme Court's recent decision in *Holmes v. South Carolina* (2006) 547 U.S. 319 holds that the constitutional guarantee of "a meaningful opportunity to present a complete defense . . . is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (547 U.S. at 324.) Applying a rule that says "no eyewitness expert testimony where there is corroborating evidence" to a case where the corroborating evidence is itself being challenged is such a rule. The evidentiary rule condemned in *Holmes* was a rule triggered solely by looking to the strength of the prosecution evidence, particularly the prosecution forensic evidence and ignoring the defense challenges to it. The state rule condemned in *Holmes* provided that:

> "'where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded." (547 U.S. at 329.)

Thus, *Holmes* is directly applicable to the present case where crucial defense evidence was excluded based solely on the existence of corroborating prosecution evidence which the defense contested. For this reason, as well as those already articulated in the briefing, exclusion of appellant's eyewitness experts was error.

E. The Error Was Prejudicial

Admission of Santiago's identification testimony absent the counterbalancing expert testimony regarding factors casting doubt on the reliability of Santiago's identification of appellant and/or correcting common misconceptions that could have lent a false aura of reliability to that

identification improperly skewed the verdict in favor of conviction.

Furthermore, because Santiago's identification was crucial to that conviction and was likely relied upon by the jurors to convict in the Jacobs and Swanke cases, those convictions should also be reversed.

Finally, the guilt trial error was substantial and prejudicial as to the penalty. A primary focus of the defense in the closely balanced penalty trial was lingering doubt. Jurors could have used the Santiago conviction to negate that defense theory and as an independent aggravator under factor (a). Assuming, *arguendo*, that the prejudice is insufficient to reverse the guilt verdicts, it was prejudicial as to penalty and calls for reversal of the death verdict.

Exclusion of the expert witnesses on identification in this closely balanced case was substantial error and, therefore, the Santiago conviction should be reversed. (See AOB 906-12 [discussion of multiple reasons indicating how Santiago case was closely balanced]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

XXXVII.

RESPONDENT FAILS TO EXPLAIN WHY SANTIAGO'S IMPRESSION OF THE LINEUP WAS NOT RELEVANT [AOB Argument 3.5.2; RB Argument XXXVII]

The Appellant's Opening Brief contended that the trial court erred by excluding Santiago's subjective impression of the photos in the lineup. (AOB 934-37.) Respondent asserts that the trial court was correct in excluding Santiago's testimony about whether the photographs in the lineup matched her descriptions. (RB 261-63) Respondent further asserts that appellant was not prejudiced by its exclusion. (RB 263.) Respondent's assertions should be rejected.

The reliability of Santiago's identification was a major issue at trial. Santiago's subjective impressions about the degree to which the other men in the lineup matched her description were key to the reliability issue. After all, she was the only eyewitness to identify appellant – a crucial factor upon which the prosecution relied in proving its case. If Santiago picked appellant simply because some or all of the other photos didn't match her description, it suggests that her identification was unreliable (i.e. that she picked him because he was the closest match and not because she remembered him). However, absent Santiago's specific testimony about whether she believed the others in the lineup matched, the jurors were left to assume that Santiago viewed the lineup in the very same way the court and the prosecution did – that it was a "good one" – therefore her identification must be reliable.

It follows that Santiago's subjective beliefs would have provided jurors with helpful information otherwise not available to them. Thus, it was a proper basis for lay opinion testimony and should have been allowed. (See *People v. Mixon* (1982) 129 Cal.App.3d 118, 127 ["Identity is a proper subject

of nonexpert opinion . . ."]; Cal. Evid. Code, § 800.)

In sum, the trial court erred by precluding the defense from exploring the basis for Santiago's identification on this contested issue. The error not only violated the state evidentiary rules, it violated the federal constitution by denying appellant his rights to due process, confrontation, compulsory process and trial by jury. (See *Chambers v. Mississippi* (1973) 410 U.S. 284.) It also undermined the reliability of the resulting conviction and death sentence. Omission of testimony regarding the reliability of Santiago's identification was substantial error in this closely balanced case. As such, it was prejudicial and warrants reversal of the Santiago judgment as well as the Jacobs and Swanke cases. Or, at the very least, reversal of the death verdict because the exclusion of this testimony undermined the mitigating theory of lingering doubt.

XXXVIII.

JUDGE HAMMES'S RULING EFFECTIVELY PRECLUDED THE DEFENSE FROM CONDUCTING PSYCHOLOGICAL TESTING OF SANTIAGO [AOB Argument 3.6.1; RB Argument XXXVIII]

Appellant's Opening Brief contended that Judge Hammes failed to permit neuropsychological and psychological testing agreed to by Santiago. (AOB 938-50.) Respondent contends that there was no error because (1) "the trial court never precluded the defense from contacting Santiago and either clarifying her position or arranging the testing" and (2) the trial court correctly concluded that – despite her statement to the contrary – Santiago had not agreed to the testing. (RB 264-69.)

A. The Judge's Rulings Effectively Precluded The Defense From Contacting Santiago On Their Own

Respondent's first contention is contrary to the law and the record. The judge made it clear on the record that (1) "It's the court's decision whether she's to be psychiatrically examined" (RTH 11611:19-11612:16) and (2) any psychiatric examinations "would not be done willingly by her. . . ." (RTH 24587:9-15; see also RTH 16939:2-16940:8 [". . . it's not something she, in essence, voluntarily would do"]; see also *Ballard v. Superior Court* (1966) 64 Cal.2d 159 [involuntary psychiatric examination of rape victim permissible by court order].)

Respondent's argument that – despite the judge's findings and this Court's decision in *Ballard* – defense counsel should have contacted Santiago and arranged for testing is ludicrous. Judge Hammes made it clear that she would be the one to decide whether Santiago should be examined. Judge Hammes stated, "I believe it's the court's decision whether she's to be psychiatrically examined." (RTH 11612.)

Moreover, the judge also expressly determined that Santiago had not

voluntarily agreed to be examined. The judge ruled that the testing was "not something [Santiago], in essence, voluntarily would do. It's something she would acquiesce, if required to do so for court purposes, and I'm not about, at this point, to order that." (RTH 16939:2-16940:8; see also RTH 11612-13; 24587.)

Accordingly, respondent's assertion that the defense was obligated to contact Santiago, even in the absence of an order permitting them to do so, should be rejected. The defense was bound by Judge Hammes's conclusion that Santiago had not voluntarily agreed to testing and was barred from circumventing it. Where a court has made its ruling, counsel must not only submit thereto but has a duty to accept it, and is required not to pursue the issue. (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696; see also *People v. Antick* (1975) 15 Cal.3d 79, 95 [no need to renew objection to a line of questioning at each occurrence]; *People v. Brooks* (1979) 88 Cal.App.3d 180, 185-6 [same].)

B. In Denying The Defense Request The Judge Misconstrued Santiago's Statements

After initially opposing release of her medical records, Santiago subsequently waived her privilege because she had "nothing to hide." (See AOB 940.) Furthermore, when asked by defense counsel during her testimony "would you agree to voluntarily submit to a series of neuropsychological and psychological tests?" Santiago replied, "I don't see why not." (RTH 4637-38.)

Respondent concedes that Santiago's answer to the direct question posed by defense counsel "appears to indicate her willingness to consent to the proposed testing." (RB 268.) However, respondent asserts that Santiago might not have agreed to the testing if she knew it was requested solely by the defense. (RB 268.) Respondent erroneously relies on pure speculation by

urging a strained reading of a straightforward record.

The record does not show that Santiago was influenced by feelings of hostility toward the defense when she clearly agreed, on the record, to the defense testing. Santiago testified that she had "nothing to hide." She did not qualify or restrict her acquiescence to the testing in any way. She stated, "I don't see why not." Such a response indicates she had considered the various reasons why she would refuse, including the alleged continued hostility toward the defense, and discarded them.

Respondent further contends that Santiago was traumatized by having to testify in court. (RB 269.) However, that is irrelevant to her decision to agree to the testing. The testing would not involve either a court appearance or testimony. Moreover, Santiago did not mention any wish to avoid any such trauma when she agreed to the testing.

The common sense reading, therefore, is simply that Santiago had nothing to fear and nothing to hide from anyone – either the prosecution, the court or the defense – and thus she agreed to the defense-proposed testing. Accordingly, the judge erroneously refused the defense request to have Santiago examined pursuant to her consent.

C. The Failure to Permit the Testing Was Prejudicial Error

The trial court erred by preventing the defense from testing a willing witness and obtaining potentially exculpatory evidence. The proposed defense tests were to determine whether or not Santiago was competent to testify. Santiago was the single eyewitness: her testimony was crucial to the prosecution and devastating to appellant. (See AOB 293-99.) Therefore the error was prejudicial and calls for reversal.

XXXIX.

THE INABILITY OF THE DEFENSE TO OBTAIN PSYCHOLOGICAL TESTING OF SANTIAGO PRECLUDED THE DEFENSE EXPERT FROM TESTIFYING [AOB Argument 3.6.2; RB Argument XXXIX]

In his opening brief, appellant argued that the defense was erroneously precluded from presenting expert testimony on Santiago's ability to remember because the trial court disallowed defense testing of Santiago. (AOB 951-56.) Respondent asserts that because the defense never proffered any expert testimony specifically regarding Santiago's ability to remember the events, there was no preclusion, error or prejudice. (RB 270-273.) However, as Argument XXXVIII, pp. 116-18, above establishes, the defense was precluded from conducting neuropsychological and psychological testing of Santiago. Therefore, the defense was denied the opportunity to lay a foundation for its expert to testify specifically regarding the effects on Santiago's memory.

While the trial court may have allowed the defense to solicit general expert testimony regarding the effects of Post Traumatic Stress Syndrome on memory, such testimony was no substitute for expert opinion on Santiago herself. Whether Santiago remembered her attacker's face accurately was the central factual issue for the jury to resolve. Thus, expert testimony specifically on Santiago's memory was material and relevant. In balancing appellant's federal constitutional rights (including the presumption of innocence and trial by jury) against the domestic rules of evidence, admission was favored and its exclusion violated appellant's constitutional right to present a defense. (See AOB 951-955.) Because the Santiago case was closely balanced and this was a substantial error, any doubt should be resolved in favor of the appellant and the judgment should be reversed. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Furthermore, because the error violated appellant's federal constitutional rights, the judgment should be reversed under the federal harmless-error standard. (*Chapman v. California* (1967) 386 U.S. 18, 23-24.) The error was also prejudicial as to the Jacobs and Swanke cases and if not prejudicial as to guilt, it was as to penalty because it undermined the mitigating theory of lingering doubt.

XL.

THE DEFENSE WAS ERRONEOUSLY PRECLUDED FROM EXPLAINING TO THE JURY WHY ITS EXPERT DID NOT CONDUCT PSYCHOLOGICAL TESTING ON SANTIAGO [AOB Argument 3.6.3; RB Argument XL]

Appellant's Opening Brief contended that the trial court prejudicially erred by precluding the defense expert from explaining why he had not conducted any testing of Santiago. (AOB 957-59.) Respondent concedes that the trial court did preclude the defense from presenting evidence of available tests which were not used in Santiago's diagnosis, but claims that the defense never offered to explain to the jury why those tests were not conducted. (RB 273-75.) However, respondent ignores the practical ramifications of the judge's ruling.

By precluding threshold testimony about the available psychological tests in general, the judge effectively negated any basis for testimony as to why those tests were not completed by the defense expert. There would simply be no foundation for presenting such opinion evidence absent testimony first explaining which tests could have been run.

Thus, Judge Hammes's ruling made futile any defense attempts to gain admission of testimony as to why its expert did not conduct tests on Santiago. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Chavez* (1980) 26 Cal.3d 334, 350 fn 5; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn 4; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-13.) This error was only exacerbated by the judge's instruction that in deciding controversies between experts, the jury was to consider the reasons given by the experts in reaching their opinions. (CT 14303; 14305.) Indeed, the judge's ruling and her instruction undermined the credibility and probative value of a key defense expert. Jurors would not only speculate as to why the defense expert did not

test Santiago himself, they would also give his "baseless" opinion little weight as instructed.

Exclusion of this crucial evidence was prejudicial error.

XLI.

THE JUDGE ERRED IN EXCLUDING EVIDENCE THAT SANTIAGO LEFT A BAR WITH A STRANGER THE NIGHT BEFORE THE ATTACK [AOB Argument 3.6.4; RB Argument XLI]

A. The Error Violated Appellant's Constitutional Right To Present A Defense

In his opening brief, appellant contended that the judge erroneously excluded evidence that Jodie Santiago left a bar with a stranger the night before the attack. (AOB 960-66.) This argument was founded on the fact that the defense contended that Jodie Santiago's recollection of the events leading up to her attack was not reliable due to her admitted amnesia and memory gaps resulting from the trauma of the attack. In this connection, the defense sought to offer the theory that Santiago was not abducted but was attacked after leaving with a stranger from the bar she visited that night. This defense theory was predicated on the fact that the night before the attack, Santiago spent the night with a stranger, Neil Reynolds, whom she met at another bar.

Respondent contends that this evidence was inadmissible because it did not impeach Santiago's testimony and was properly excluded under Evidence Code § 352. (RB 275-79.) However, the excluded evidence did impeach Santiago's testimony because it showed a character trait – the willingness to leave a bar with a strange man – which was circumstantially inconsistent with involuntary abduction. Here, the defense theory was that Santiago was not abducted by appellant but was attacked after leaving with a stranger from the bar. The basis for that theory was evidence that Santiago had done that very thing with Neil Reynolds the previous night. Such evidence, therefore, was admissible to impeach the credibility of Santiago's recollection that she left the bar alone the night of the attack. The probative value of this evidence clearly

outweighed any potential prejudice that the jury might be "distracted" by the fact that Santiago spent the previous night with Neil Reynolds. Thus, it was error to exclude it.

Moreover, because this evidence was the basis of a defense theory, it should not have been excluded under a domestic rule of evidence – Evidence Code § 352. (See *Green v. Georgia* (1979) 442 U.S. 95; see also *Holmes v. South Carolina* (2006) 547 U.S. 319 [defendant was denied constitutional right to a "meaningful opportunity to present a complete defense"].)

B. The Error Was Prejudicial

The trial court's erroneous exclusion of evidence in support of the defense theory was prejudicial. The Santiago case was closely balanced and the error substantial, therefore, the judgment should be reversed. Moreover, the error was prejudicial as to the Jacobs and Swanke convictions. Assuming, *arguendo*, that the prejudice is not great enough to overturn the guilt convictions, it still calls for reversal of the penalty because a primary defense theory at that phase was lingering doubt.

XLII.

EVIDENCE THAT THE SANTIAGO DETECTIVES COMMITTED PERJURY WAS RELEVANT AND SHOULD NOT HAVE BEEN EXCLUDED [AOB Argument 3.7.1; RB Argument XLII]

Appellant's Opening Brief argued that exclusion of evidence that the Santiago homicide detectives gave false and/or misleading testimony and violated *Miranda* rights was prejudicial error. (AOB 967-93.) Respondent claims there was no abuse of discretion in excluding impeachment evidence that the detectives were dishonest and engaged in misconduct. (RB 967-93.) In so doing, respondent asserts that the trial court correctly found the evidence was ambiguous and only involved two tangential witnesses whose testimony was corroborated by others or was otherwise uncontested. (RB 280-288.)

A. The Impeaching Evidence Was Not Ambiguous

As laid out in detail in Appellant's Opening Brief, there was ample evidence that the detectives not only engaged in deceitful investigation practices in a past murder case (*People v. Cavanaugh*) but also subsequently gave false and/or misleading testimony about that investigation. (AOB 968-84.) This past egregious misconduct was not a bare, unsupported accusation as suggested by respondent.

The misconduct was proved by undisputed physical and tape recorded evidence. It led to an Internal Affairs investigation in which Detective Fullmer attempted to assert the Fifth Amendment. It was also the basis for the trial judge in *Cavanaugh* to suppress both the defendant's confession and a tape recording of the slaying.

Specifically, a master tape recorded the entire *Cavanaugh* interrogation conducted by Detective Henderson and exposed the *Miranda* violation Henderson later sought to cover up. Because Henderson didn't know about

the master tape system, he was caught off guard by its introduction at the preliminary hearing. The tape revealed that Henderson's prior testimony about the content of the interrogation was grossly misleading.[35]

There was also evidence that Fullmer gave false statements at the *Cavanaugh* preliminary hearing. Fullmer testified that the purse at the murder scene was positioned so that he could see a tape recorder inside. Scene photographs contradicted any such possibility and Fullmer subsequently changed his story – twice – to match the physical evidence.

In sum, the evidence of the detectives' dishonesty and blatant disregard for a suspect's constitutional rights was certainly not ambiguous. It was supported by substantial evidence. Judge Hammes abused her discretion by finding otherwise.

B. The Investigating Detectives Who Shepherded Santiago Through The Multiple Identification Procedures Were Not Tangential Witnesses

The detectives were not tangential witnesses. They handled all aspects of Santiago's identification of appellant (including the completion of two composite sketches) and Santiago's identification of his house. The prosecution in turn relied on the Santiago eyewitness evidence – marshaled and testified to by these detectives – to prove its case. Not surprisingly, the reliability of Santiago's identification of appellant was a heavily contested issue at trial. Thus, the credibility of the detectives was necessarily an issue on that key matter. Had the detectives' dishonesty and misconduct in the *Cavanaugh* case been revealed on cross-examination, it would have painted a materially different picture of the detectives' credibility to the jury. (See

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[35] Judge Orfield ruled that appellant's *Miranda* rights were also violated by Henderson and Fullmer when he was interrogated by the detectives. (RTO 2897.)

People v. Mickle (1991) 54 Cal.3d 140, 168-169.) The jury might well have decided that such conduct demonstrated a clear intent and willingness to mislead the fact finder in an effort to obtain a conviction.

C. The Defense Challenged The Credibility Of The Investigating Team Including Detectives Henderson And Fullmer

Respondent asserts that the defense did not dispute the credibility of the Santiago investigating team including Detectives Henderson and Fullmer. To the contrary, the defense vigorously challenged the propriety of the investigation and the reliability of Santiago's identification of appellant and his residence. And, the defense relied on numerous evidentiary disputes throughout the investigation in advancing the defense theory that Santiago's identifications were inaccurate. (See AOB 792-806 [in limine]; 777-785 [trial].)[36]

However, even if there had not been any other factual disputes concerning Santiago's identifications, evidence that the investigating officers falsified evidence in another investigation can only be described as crucial evidence which the jury should have heard. That evidence alone would have provided the jurors with a rational basis for inferring that the detectives also falsified their testimony regarding the Santiago investigation and that her identification of appellant and his residence was unreliable.

By excluding the Cavanaugh evidence the judge deprived the defense of an important component of the defense theory of suggestive identification.

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[36] It should also be noted that respondent inaccurately asserts that the evidence "strongly supported" the inference that appellant's car had louvers (RB 286) despite the testimony of several defense witnesses to the contrary. (AOB 798-801.) Similarly, respondent speculates that the "computer voice" in appellant's car was "not working at the time" despite a defense witness who remembered hearing it. (AOB 799.)

Moreover, respondent inaccurately concludes that: "The jury was . . . free to evaluate the suggestiveness of the lineup based on an objective evaluation of the lineup." (RB 286.) Clearly, the jurors' evaluation of the lineup could not truly be "objective" without knowing that the detectives who conducted that lineup were willing to falsify evidence and testimony in order to obtain a conviction. The fairness of a photo lineup depends not only on the physical array of photographs, but also upon the behavior of the officers presenting the array to the witness. Any evidence which – as acknowledged by the judge would have caused the jurors to "raise an eyebrow" (RTH 24497) – is evidence which could also have raised a reasonable doubt and, therefore, its exclusion was reversible error.

D. The Trial Court's Time Estimate Was A Gross Overestimation

Respondent cites the volume of material and the list of witnesses requested and obtained by the defense during the initial discovery process as a basis for claiming undue consumption of time. (RB 287.) While the defense would have been foolish not to obtain and review all the *Cavanaugh* case materials, that does not mean it would have been obligated to present and/or challenge all that information. Furthermore, even the original *Cavanaugh* case did not take weeks.

Respondent goes on to speculate that the defense would not have limited its presentation to the issues specific to the detectives' misconduct. However, Judge Hammes could have exercised her discretion in allowing the *Cavanaugh* evidence, but limited the parties' presentations to accommodate the rules of evidence, appellant's constitutional rights and judicial economy. Contrary to respondent's characterization, it was simply not an all or nothing proposition.

Therefore, Judge Hammes's time assessment was erroneous.

E. The Error Was Prejudicial And Requires Reversal

In light of the foregoing, it was substantial error to exclude probative evidence upon which the jury could discredit important prosecution witnesses. It was prejudicial to the Santiago case as well as the Jacobs and Swanke convictions and calls for reversal. At the very least, the matter should be remanded for a full and fair in limine hearing regarding the admissibility of Santiago's identification.

XLIII.

RESPONDENT FAILS TO EXPLAIN WHY IT WAS PROPER TO EXCLUDE EVIDENCE THAT THE DETECTIVES INTENTIONALLY ASSEMBLED A SUGGESTIVE PHOTO LINEUP [AOB Argument 3.7.2, RB Argument XLIII]

Appellant's Opening Brief contends that exclusion of evidence that the detectives intentionally assembled a suggestive lineup was error because it supported the defense theory that Santiago was "led" to appellant through the entire identification process. (AOB 994-97.) Respondent asserts that the trial court did not abuse its discretion under Evidence Code § 352 by excluding evidence that the detectives had other less suggestive photographs of appellant available but did not use them in the lineup. Respondent further claims that this issue is waived because it is a "new theory" presented on appeal. (RB 288-292.)

A. The Evidence Had Significant Probative Value

The defense challenged the entire Santiago identification process conducted by the detectives as intentionally suggestive and unreliable. The process included the photo lineup itself as well as the other pre-trial interactions detectives had with Santiago including the making of the composite sketches, identification of appellant's house and the viewing of the sheepskin seat covers. Because there was no record of what transpired during these pre-trial interactions, any inferences drawn about their suggestiveness and reliability was a critical factual issue for the jury. Thus, the contrived use of a photograph of appellant that highlighted his distinct "bulging eyes" was relevant to the defense theory of intentional suggestion.

Accordingly, exclusion of that evidence was error. (See *Holmes v. South Carolina*, *supra*, 547 U.S. 319 [defendant was denied constitutional

right to a "meaningful opportunity to present a complete defense"].)

B. The Claim Was Not Waived

Respondent contends that the defense did not seek admission of the photograph evidence based on this theory. However, because suggestive police procedures were clearly relevant to the accuracy and reliability of Santiago's identification, the defense theory was sufficiently presented to the judge. Furthermore, as in the previous argument, respondent's claim that there was no evidence of suggestiveness begs the question because suggestiveness is the very issue upon which the photographs were relevant.

Moreover, the trial court responded to the defense theory of intentional suggestion when it ruled this evidence was irrelevant and inadmissible. As respondent acknowledged, "the trial court also found that raising the issue of other photographs and the detective's good or bad job of selecting the photograph for the lineup was a 'different trial' (54 TRT 10126) which would send the jury 'off again in the daisy fields.' (54 TRT 10129.)" (RB 291.)

Therefore, this claim was not waived. It was addressed in the trial court when the evidence was excluded and may be considered upon review.

XLIV.

THE PROSECUTION DID NOT MEET ITS BURDEN OF SATISFYING BOTH THE FIRST AND THIRD *KELLY*[37] PRONGS AS TO THE BLOOD ANALYSIS [AOB Argument 4.3, RB Argument XLIV]

Appellant's Opening Brief argued that admission of the blood analysis evidence was error because the prosecution failed to meet its burden to demonstrate admissibility under Prong One and Prong Three of *Kelly*. (AOB 1124-25.) Respondent contends that appellant's Prong One challenge lacks merit and appellant's complaints regarding admission of the blood analysis evidence under *Kelly* Prong Three raise issues involving weight, not admissibility. (RB 292-307.) Respondent is incorrect on both counts.

A. Prong One Analysis

Respondent contends that appellant's Prong One challenge to the general acceptance of agglutination inhibition testing of Gm and Km is without merit because published appellate opinions have since determined the procedure was generally accepted by the scientific community. However, because these decisions post-dated appellant's trial, they do not support respondent's Prong One argument in the present case.

In *People v. Riel* (2000) 22 Cal.4th 1153 this Court found the agglutination inhibition technique to be generally accepted based on two Court of Appeal cases that were also decided well after appellant's trial: *People v. Yorba* (1989) 209 Cal.App.3d 1017 and *People v. Morganti* (1996) 43 Cal.App.4th 643. However, as stated in *Riel*, "if a published appellate decision in a prior case has already upheld the admission of evidence based on such a showing, that decision becomes precedent for subsequent trials in the absence of evidence that the prevailing scientific opinion has materially changed.

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[37] *People v. Kelly* (1976) 17 Cal.3d 24.

[Citation.]" (*People v. Riel, supra,* 22 Cal.4th 1153, 1192 [underlining added].) Thus, because general acceptance of agglutination inhibition testing was not recognized until five years after appellant's trial, such precedent cannot support Judge Hammes's finding that Prong One was satisfied. According to the prosecution's Gm/Km expert (Dr. Moses Schanfield), SERI's methodology was not used by the vast majority of labs. (See AOB 1140-41.) Therefore, it could not have been generally accepted by the scientific community and thus the trial court erred by admitting the evidence.

B. Prong Three Analysis

"When, as in DNA testing, the reliability of the technique employed is not readily apparent to lay observation or experience, *Kelly-Frye* requires determination whether a laboratory has adopted correct, scientifically accepted procedures for conducting the test. Consideration and affirmative resolution of these questions constitutes a prerequisite to admissibility under the third prong of *Kelly*." (*People v. Roybal* (1998) 19 Cal.4th 481, 505 [internal citations and quotation marks omitted].) Thus, the trial court looks to how the tests were conducted and whether scientifically accepted procedures were followed in reaching the reported results.

1. ABO Testing

Respondent asserts that the challenges made by appellant to the ABO testing procedures revealed mere shortcomings in the testing process that go to weight, not admissibility of the evidence. However, as this Court has explained, shortcomings that may be deemed to go only to weight and not admissibility are those resulting from "careless" testing, not those resulting from the application of incorrect and unaccepted scientific procedures:

> The *Kelly* test's third prong does not, of course, cover all derelictions in following the prescribed scientific procedures. Shortcomings such as mislabeling, mixing the wrong

> ingredients, or failing to follow routine precautions against contamination may well be amenable to evaluation by jurors without the assistance of expert testimony. Such readily apparent missteps involve "the degree of professionalism" with which otherwise scientifically accepted methodologies are applied in a given case, and so amount only to '[c]areless testing affect[ing] the weight of the evidence and not its admissibility.' [Citations.] (*People v. Venegas* (1998) 18 Cal.4th 47, 81.)

In the present case, the defense challenges went far beyond readily apparent "missteps" revealing "careless" testing. The defense articulated deficiencies in the scientific acceptance of the procedures used to conduct the ABO testing including: (1) the San Diego Sheriff Office's failure to document which protocols, if any, were used for the ABO testing; (2) SERI's failure to confirm its ABO test results with a Lattes test; and (3) SERI's use of a mixed standard to conduct the testing. (See AOB 1124-45.)

Those were all legitimate considerations under the third prong of *Kelly*. The lack of reporting on the testing protocol followed by the San Diego Sheriff Offices prohibited the court from assessing whether the lab followed scientifically correct procedures – the very purpose of Prong Three. (See *People v. Barney* (1992) 8 Cal.App.4th 798, 824 ["If it is not established that correct scientific procedures were used in the particular case, it cannot be known whether the test actually conducted was the one that has achieved general scientific acceptance."].)

As for SERI's single test procedure, several experts testified that a confirming test, such as the Lattes test, was required. There was no substantial evidence of consensus in favor of SERI's procedure – therefore, the prosecution did not demonstrate that it was a scientifically accepted procedure as required under Prong Three.

Finally, SERI's use of mixed standards was criticized by numerous

experts because such standards may produce "false positives." Thus, appellant challenged the very method employed, not a mere laboratory mishap.

In sum, the challenges to the ABO testing exposed the use of incorrect and unaccepted scientific procedures by both the Sheriff's Office and SERI. Therefore, it was an abuse of discretion for the trial court to admit the ABO test results.

2. Electrophoretic Testing

Respondent argues that the "match criteria" used in the electrophoretic testing is not part of the scientific procedure and should not be evaluated under Prong Three of *Kelly*. Accordingly, respondent concludes that the subjective nature of electrophoretic gel plate "calls" goes to the weight of the evidence, not its admissibility.

Respondent is wrong on both counts. The reading of the gel plates and the methods by which the "calls" are made is part of the scientific procedure subject to Prong Three analysis. And, because it was never shown by the prosecution that SERI adopted correct, scientifically accepted procedures for conducting matches, the evidence was inadmissible under Prong Three of *Kelly*.

a. The Match Criteria Was Part Of The Scientific Procedure Subject To Prong Three Analysis

In *Venegas*, this Court found that, "DNA evidence is different. Unlike fingerprint, shoe track, bite mark, or ballistic comparisons, which jurors essentially can see for themselves, questions concerning whether a laboratory has adopted correct, scientifically accepted procedures for generating autorads or determining a match depend almost entirely on the technical interpretations of experts. [Citation.] Consideration and affirmative resolution of those questions constitutes a prerequisite to admissibility under the third prong of

Kelly." (*People v. Venegas, supra*, 18 Cal.4th 47, 80-81 [underlining added].)

Moreover, "[w]hether specific steps in the FBI's RFLP analysis, including the match criteria which that laboratory applied, were in compliance with that long-standing and accepted methodology, presents questions of correct scientific procedures properly considered under the third prong of the *Kelly* rule." (*Id.* at p. 79 [underlining added].)

Thus, according to *Venegas*, "match criteria" is subject to Prong Three analysis if the match determination depends on the technical interpretations of experts. Respondent concedes that: "In electrophoretic testing, the interpretation of the test results – i.e., reading and calling the gel plate – is a matter of experience of the reader. (116 PRT 8902; 119 PRT 9342.)" (RB 299-300.) Therefore, because here the reading of the gel plates was dependent on the technical interpretation of the experts, it was subject to Prong Three analysis.

Respondent cites no authority for its alternate assertion that the use of SERI's match criteria is merely part of "quality assurance" and not part of the actual procedure itself. In fact, the authority supports the opposite conclusion.[38] As noted above, in *Venegas* the match criteria applied was specifically addressed as part of the scientific procedure subject to Prong Three analysis.

Accordingly, the trial court was obligated to analyze the scientific

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[38] See *People v. Pizarro* (2003) 110 Cal.App.4th 530, 616, fn71 ["On rehearing, the People argue that procedure and interpretation are "coextensive" in the case of DNA evidence, and that general acceptance of the procedure as a whole includes general acceptance of the interpretation necessary to give the procedure meaning. But, as our previous discussion points out (see pt. V.C.3.c., ante), *Venegas* and other courts have addressed the general acceptance of each basic step of RFLP, not the entire procedure as a whole."].

acceptance of the matching procedure under the third prong of *Kelly*.

b. The Match Criteria Was Not In Compliance With Correct Scientific Procedures; Therefore the Electrophoretic Test Results Were Inadmissible Under The Third Prong

The match criteria applied by SERI was not a correct and scientifically accepted procedure as required under Prong Three. Testimony revealed that there were different methods used to make a "call." The subjective match criteria used to determine the phenotype of the donor allowed examiner discretion and lacked quantifiable criteria by which to determine the correctness of a "call." (See AOB 1139-40.) Indeed, the "calls" on phenotypes varied from reader to reader and from expert to expert. SERI's method in particular was of dubious reliability because it did not require both readers to agree. That diverged from the majority of experts who testified that without agreement between two independent readers, the results should not be reported. Such an independent read procedure was adopted by the scientific community to limit reader bias. SERI's failure to use the same or comparable method to limit such bias strongly suggests its procedure was incorrect and not scientifically acceptable. (See AOB 1132-33.)

Furthermore, SERI's deviation from its own electrophoretic test protocols was not shown to be acceptable scientific procedure and should have been yet another factor weighing against admission of the unreliable results. Finally, SERI's inadequate double-read method was not cured by photographing the results. This was not a valid substitute because the prosecution failed to establish that the photographs were reliable and in compliance with accepted scientific requirements.

In sum, the match criteria used for determining the electrophoretic test results was subject to third prong analysis. Hence, the results should have

been excluded as unreliable because the match criteria adopted by SERI was not shown to be a scientifically accepted procedure.

3. Gm/Km Testing

Similarly, SERI's Gm/Km methodology failed Prong Three of *Kelly*. SERI's procedure did not include the use of unstained controls when testing the fingernails. (RTH 14227-28.) The prosecution had the burden of proving that the method used by SERI was a correct, scientifically accepted procedure. It failed to do so in light of the use of this uncontrolled testing technique. Furthermore, SERI's failure to take photos of the test results was improper procedure. The prosecution's expert, Dr. Moses Schanfield, testified that it was his standard procedure to photograph the results. (RTH 25571.)

These procedural failures suggest SERI's Gm/Km methodology was not in keeping with scientifically accepted procedure and the test results should have been excluded under Prong Three of *Kelly*.

C. The *Kelly* Errors Violated Appellant's Constitutional Rights

Appellant's federal constitutional rights to a reliable verdict under the Sixth, Eighth and Fourteenth Amendments were violated by the erroneous admission of subjective expert opinion. Furthermore, the requirement of heightened reliability in the determination of guilt, death eligibility and sentence in a capital case was not met either, thereby violating the Cruel and Unusual Punishment and Due Process Clauses of the United States Constitution. Appellant's state-created rights under the California Evidence Code and the state constitution were also arbitrarily denied by the erroneous admission of the expert opinion testimony under *Kelly*. Specifically, he was denied his right to due process under the Fourteenth Amendment.

Appellant has not forfeited any of these constitutional challenges even if they were not raised in the trial court. As stated by this Court:

> Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (See *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of former jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [5 Cal. Rptr. 871, 353 P.2d 583] [constitutional right to jury trial]; cf. *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023 [nonconstitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].)" (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

D. The Error Was Prejudicial

The erroneous admission of the serology evidence was prejudicial because, as discussed in AOB 1144-45, it likely had substantial impact on the jury. The scientific serology test results were clothed in an "aura of infallibility." Those apparently reliable results connected appellant to the crimes and provided the jury a way of dismissing the other expert forensic testimony that was inconsistent with appellant's guilt – specifically, the pubic hairs found on Swanke that did not match appellant.

Accordingly, the Swanke judgment should be reversed. The Santiago and Jacobs cases should also be reversed since the error was prejudicial to those counts as well. Absent the unreliable but impactful serology evidence, conviction in those cases would have been less likely. Even assuming, *arguendo*, that the prejudice was insufficient to reverse the convictions, its impact on the mitigating theory of lingering doubt was more than sufficient to require reversal of the penalty.

XLV.

THE *KELLY* ERRORS VIOLATED THE FEDERAL CONSTITUTION
[AOB Argument 4.4, RB Argument XLV]

Appellant's Opening Brief contended that the *Kelly* errors violated the federal constitution. (AOB 1146-52.) Respondent contends that the *Kelly* Prong One claim was forfeited because it was not raised at trial. (RB 307-09.) However, because the claim is purely a question of law it should be cognizable on appeal. (See *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Brown* (1996) 42 Cal.App.4th 461, 471.)

As to the substantive claim respondent concedes that "the Prong One standard evaluates the reliability of the new scientific technique." Thus even though it is the judge who makes the Prong One assessment, the fact remains that the judge is not permitted to independently evaluate the reliability of a technique that has been generally accepted.

In sum, evidentiary reliability is improperly undermined by *Kelly* Prong One in violation of the constitutional principles set forth in appellant's Opening Brief.

XLVI.

BECAUSE APPELLANT'S SUBSTANTIAL RIGHTS COULD HAVE BEEN AFFECTED DURING THE ELECTROPHORETIC TESTING IT WAS A CRITICAL STAGE OF THE PROCEEDINGS [AOB Argument 4.5, RB Argument XLVI]

Appellant's Opening Brief contended that conducting electrophoretic testing without notification of defense counsel violated appellant's constitutional rights. (AOB 1153-59.) Respondent contends that the scientific testing of blood samples was not a critical stage of the proceedings. (RB 309-14.) However, even though the procedures were documented, counsel's presence was necessary to ensure that such documentation was accurate and complete. Under established United States Supreme Court precedent, a critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; *Bell v. Cone* (2002) 535 U.S. 685, 696 [defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused"]; see also *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 902.)

Accordingly, because appellant's substantial rights may have been affected, the absence of counsel was error.

XLVII.

THE TRIAL COURT ERRONEOUSLY EXCLUDED THIRD PARTY GUILT EVIDENCE IN THE SWANKE CASE [AOB Argument 4.6.1, RB Argument XLVII]

In his opening brief appellant contended that the judge erroneously excluded third party guilt evidence as to the Swanke charges. (AOB 1160-64.) Respondent contends that there was no evidence connecting Swanke's former boyfriend to the crimes, and, therefore, the trial court's exclusion of third party culpability evidence was not an abuse of discretion. (RB 314-319.)

A. The Defense Offered Substantial Evidence Of Third Party Guilt

Respondent asserts that there was no evidence of motive or opportunity for Swanke's ex-boyfriend, Jimmy Capasso, to commit the crimes. (RB 319.) Respondent is incorrect. There was evidence of both motive and opportunity. Thus Capasso qualified as a third party suspect.

The offer of proof found insufficient in *People v. Yeoman* (2003) 31 Cal.4th 93 showed only motive. It did not demonstrate opportunity because there was no evidence that the third party was seen in the vicinity of the victim at or about the time of the killing. (*Id.* at pp. 140-141.)

Here, Capasso's presence at Swanke's house, both in the morning and evening on the day Swanke disappeared was evidence of opportunity. Evidence of motive was Capasso's apparent unhappiness with the break up. Swanke expressed fear of Capasso after they broke up (RT 4436) and even respondent admits the evidence shows Capasso was still "pining for Swanke after three years." (RB 319.) Furthermore, Capasso's fidgety, nervous and shifty behavior following Swanke's disappearance was very unusual. It was this suspicious and "off-kilter" behavior coinciding with Swanke's death that directly supported the defense's third party guilt theory.

Therefore, the defense made a sufficient offer of proof of Capasso's motive and opportunity to raise a reasonable doubt of appellant's guilt. Because this evidence was highly relevant to the defense theory of third party guilt based on the unexplained presence of pubic hairs which did not match appellant, Swanke, or her current boyfriend, it should not have been excluded. (See *Holmes v. South Carolina* (2006) 547 U.S. 319 [defendant barred from presenting third party guilt evidence was denied constitutional right to a "meaningful opportunity to present a complete defense"].)

B. The Court Abused Its Discretion Thereby Prejudicing Appellant

"The trial court ruled that the evidence did not make Capasso a third party suspect and was, thus, irrelevant, misleading and confusing." (RB 316.) This was an abuse of discretion.

In *People v. Hall* (1986) 41 Cal.3d 826, 834, this Court cautioned:

> We recognize that an inquiry into the admissibility of [third party culpability] evidence and the balancing required under section 352 will always turn on the facts of the case. Yet courts must weigh those facts carefully. They should avoid a hasty conclusion such as the trial court's finding in the present case that evidence of Foust's guilt was 'incredible.' Such a determination is properly the province of the jury.
>
> Furthermore, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed, "if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt. [Citation.]" (*Id.* at p. 834 [underlining added].)[39]

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[39] The United States Supreme Court reiterated the defendant's right to present a complete defense in the context of third party guilt evidence. In (continued...)

Because the trial judge erroneously concluded that the evidence did not even qualify Capasso as a third party suspect, she did not adequately weigh the probative value of this third party culpability evidence against its prejudicial effect. This was particularly inadequate because the Capasso evidence went to the defense theory of third party guilt in the Swanke case. It was not a collateral issue of little import. Rather, appellant's strong interest in its admission outweighed any conceivable risk of consuming undue court time or causing confusion. (See *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 878-79 [abuse of discretion under § 352 to exclude "testimony of [defense psychologist which] proved integral – vital even – to Alcala's case. His testimony would have provided a formidable defense tool"].) Thus, it was a prejudicial abuse of discretion to exclude the third party guilt evidence. (See AOB 1163-64.)

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[39](...continued)
Holmes v. South Carolina, supra, 547 U.S. 319 [126 S.Ct. 1727, 1734], the court struck down a rule allowing for exclusion of third party guilt evidence simply because the evidence of the defendant's guilt was overwhelming. In deciding the rule was arbitrary and thus unconstitutional, the Court restated the following guiding principles: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" [citations]. This right is abridged by evidence rules that "infringe upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" [Citations.]." (*Id.* at pp. 1731.)

XLVIII.

SHANNON LUCAS's STATEMENT ABOUT THE DOG CHAIN WAS NOT ADMISSIBLE LAY OPINION [AOB Argument 4.6.2, RB Argument XLVIII]

Appellant's Opening Brief contends that the trial court erred by admitting Shannon Lucas's statement identifying a dog chain as the one used for their dog. (AOB 1165-78.) Respondent erroneously contends that the trial court properly admitted Shannon Lucas's statement as a spontaneous declaration which did not violate appellant's right to confrontation or marital privilege. Respondent further asserts that if there was any error, it was harmless. (RB 320-329.)

A. The Statement Was Not Admissible as a Spontaneous Statement Because it Was Shannon's Inadmissible Opinion

As stated in *People v. Miron* (1989) 210 Cal.App.3d 580, 584, "the spontaneous statement exception to the hearsay rule cannot be used to bootstrap admissibility. The opinion rule excludes admission of a spontaneous statement of inadmissible opinion [citation], and such opinions or conclusions should be excluded even where the statement as a whole meets the requirements of Evidence Code § 1240 [spontaneous statement exception]."

Respondent seeks to avoid the opinion rule applied in *Miron* by arguing that Shannon's statement regarding the ownership of the dog collar was admissible lay opinion.[40] However, Shannon's opinion that the dog chain was

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[40] Respondent cites 1 Witkin, California Evidence (4th ed. 2000) *Opinion Evidence*, § 15 as sole support for the admissibility of lay opinion regarding ownership. (RB 324.) Respondent misquotes Witkin, omitting a key word, "usually." Witkin actually states: "Ownership is usually regarded as a matter of permissible opinion on which a lay witness may testify." [Underlining added.]

Duke's was a conclusion based on speculation and conjecture. (See *Reimel v. Alcoholic Beverage Control Appeals Board* (1967) 255 Cal.App.2d 40, 48 [Witness opinions that are speculative and conjectural excluded because such speculation is not substantial evidence].)

The speculative nature of Shannon's opinion was apparent from her confusion about which dog wore the chain (she wondered if it was actually "Amber's" and then stated she was positive it was "Amber's"), and her acknowledgment that she had seen the same type of chains "in stores." (Court's Exhibit 6, pp. 19, 29.) Her conjecture was also fueled by the detectives' suggestive questioning. They elicited Shannon's reaction after intensive inquiry into her relationship with David and their family pets. In fact, Detective Henderson pulled the dog chain from a bag and held it just as Shannon was answering a question about her dogs' collars. (RB 321.) It is far more likely, especially considering her vacillation about which dog's chain she thought it was, that Shannon's "opinion" was a product of this suggestion and not a rational belief that the collar was really Duke's. Moreover, the prosecution presented no foundational facts to show that the chain was even unique enough for Shannon to identify.

Therefore, because Shannon's opinion was based on pure speculation and conjecture, it was not substantial evidence and should have been excluded even if the statement was deemed spontaneous.

B. Pursuant To *Crawford v. Washington*, Admission Of Shannon's Testimonial Statement Violated The Confrontation Clause

In *Crawford v. Washington* (2004)541 U.S. 36, 59, the United States Supreme Court held that testimonial statements of witnesses absent from trial are only admissible where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Therefore, because

Shannon's statement was testimonial and she was not cross-examined by the defense, admission of her statement violated appellant's right to confrontation.

1. The Statement Was Testimonial In Nature

Respondent concedes that Shannon was unavailable at trial and that "all of what [she] said to the police in response to their questioning was testimonial." (RB 327.) However, respondent attempts to parse one statement from the entire interrogation and claim it was non-testimonial simply because it was "spontaneous" and not made in response to a direct verbal question by the detectives.

Respondent overreaches. As observed in *Crawford*, "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." (*Crawford v. Washington* (2004) 541 U.S. 36, 56.)

Crawford specifically considered "interrogations by law enforcement officers" finding them to "fall squarely" within the class of testimonial statements. (*Crawford v. Washington, supra,* 541 U.S. at p. 53.) The Court found that Sylvia Crawford's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition" of interrogation. (*Ibid.*, fn. 4) Thus, once established that it was a formal interrogation by police officers, the protections of the Sixth Amendment were implicated and the high court was not expressly concerned with the exact manner of interrogation (e.g., whether police employed dramatic, non-verbal measures to elicit verbal reactions from the subject). The fact that "government officers were involved in the production of testimony

with an eye toward trial" was sufficient to make the statement testimonial.

Accordingly, even if Shannon's statement regarding the dog collar was spontaneous, the fact remains that it was still the direct result of police interrogation tactics and presented the potential for prosecutorial abuse recognized in *Crawford*. As such, it was as testimonial as the rest of her statement to the detectives during the interrogation.

2. Appellant Did Not Waive His Right To Confrontation By Not Calling And Confronting Shannon At The Preliminary Hearing

Respondent's final contention is that appellant had a prior statutory right to cross-examine Shannon at his preliminary hearing, which he failed to exercise, rendering *Crawford* inapplicable. (RB 327-328.) However, such an interpretation presents appellant with an unreasonable choice at a very early stage of the proceedings between two rights: calling and confronting his wife on the stand at the preliminary hearing about her statement to the detectives or forever waiving his right to confrontation on that issue.[41]

That decision takes on added dimension in light of the fact that "there is a substantial difference in the nature and purposes of preliminary and trial proceedings." (*People v. Green* (1969) 70 Cal.2d 654, 663.) As explained by

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[41] In *Crawford*, the Court offered no opinion on the topic although it recognized the argument. It proceeded as if there had been no prior opportunity for cross-examination, stating: "The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that 'forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice.' 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters." (*Crawford v. Washington, supra*, 541 U.S. 36, 42, fn. 1.)

this Court in *Green*, "the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial." (*Ibid.*) Moreover, "neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 UCLA L.Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination." (*Ibid.*)

As a practical matter, appellant had no reason to call Shannon at the preliminary hearing stage. As noted in *Green*, the preliminary hearing is merely for establishing probable cause. Shannon's testimony for appellant would have opened the door for the prosecution to cross-examine her as a hostile witness but undoubtedly done little if anything towards negating probable cause.[42]

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[42] It is unclear whether appellant could have compelled Shannon to testify, since Shannon, if she wanted to avoid subjecting herself to prosecution cross-examination, would have had a right to invoke the marital privilege and refrain from testifying. As this Court explained in *People v. (Larry) Lucas* (1995) 12 Cal.4th 415, 490-91, in the course of upholding a trial court's decision to permit the defendant's wife to invoke the marital privilege when called to testify by her spouse:

> Under Evidence Code section 973, subdivision (a), if a married person chooses to testify in a proceeding in which his or her spouse is a party, the person waives the privilege and must answer potentially damaging questions on cross-examination. "[A] married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege

(continued...)

In sum, appellant's Sixth Amendment right to confrontation was violated under *Crawford* because Shannon was an unavailable witness at trial whose testimonial statements were admitted absent prior cross-examination.

C. Marital Privilege

Respondent cites *First National Bank v. De Moulin* (1922) 56 Cal.App. 313, 323 and asserts that "the [marital] privilege does not, by its terms, apply to hearsay statement[s] by a married person." (RB 326.) Assuming respondent's reading of *De Moulin* is correct, because Shannon's statement violated appellant's confrontation rights pursuant to *Crawford*, the statement was inadmissible regardless of whether or not the marital privilege applies. As the high court stated, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford v. Washington, supra*, 541 U.S. 36, 68-69.) Thus, even if Shannon's statement fell under a firmly rooted exception to the hearsay rule and was not subject to the marital privilege, it was still inadmissible as a violation of appellant's right to confrontation.

D. The Statement Should Have Been Excluded As Unduly Prejudicial Under Evidence Code § 352

Even if Shannon's statement was otherwise admissible, it should have been excluded as unduly prejudicial in violation of Evidence Code § 352. As

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[42](...continued)
provided in Section 970 to keep from testifying on cross-examination to unfavorable matters. . . ." (Citations.) The trial court may have concluded defendant's wife was invoking the privilege to avoid such an eventuality, even if her testimony on direct examination would have been favorable to defendant, for the record indicates she may have been a percipient witness on the night of the crime.

addressed above in section (A), Shannon's opinion was based on pure speculation and conjecture. It was not reliable evidence and, therefore, lacked probative value. (See Argument IV, pp. 14-15, above [evidence must be reliable to have probative value]; see also AOB 284-91.) On the other hand, the prejudicial impact of Shannon's identification of the dog collar was great. The jury might well have accepted her unsubstantiated identification of the generic collar at face value and used it to link appellant to Swanke's murder. The risk of undue prejudice was far greater than any probative value Shannon's identification might have provided.

E. The Error Was Not Harmless

Admission of Shannon's statement was prejudicial. The identity of the attacker was a central issue in the Swanke case. However, evidence connecting appellant to the Swanke murder was circumstantial and inconclusive. It required the jury to balance conflicting evidence such as the presence of unidentified pubic hairs on Swanke's body – which tended to exclude appellant as the assailant – and Leyva's testimony that the two cars he saw on the side of the road were approximately the same size.[43]

Accordingly, admission of the statement was not harmless beyond a reasonable doubt and calls for reversal of the Swanke charge. Shannon's statement that the dog chain belonged to the Lucas family dog went to the heart of the key issue of identity linking appellant to the crime. And, because that charge was used to convict in the Santiago and Jacobs cases, those convictions should also be reversed along with the death judgment.

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[43] Appellant's truck was substantially larger than Swanke's car. (See AOB 1114.)

XLIX.

THE PRELIMINARY INSTRUCTIONS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

[In response to RB Argument XLIX, appellant relies upon AOB Argument 2.9.1, 3.9.1, 4.8.1, 5.2.7.1.]

L.

BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF "THE PEOPLE" THE TRIAL JUDGE VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

[In response to RB Argument L, appellant relies upon AOB Argument 2.9.2, 3.9.2, 4.8.2, 5.2.7.2.]

LI.

BECAUSE THERE WAS EVIDENCE UPON WHICH EITHER APPELLANT OR JOHNNY MASSINGALE COULD HAVE BEEN HELD LIABLE FOR JACOBS, A CAUTIONARY ACCOMPLICE INSTRUCTION SHOULD HAVE BEEN GIVEN

[In response to RB Argument LI, appellant relies upon AOB Argument 2.9.3.]

LII.

BECAUSE CALJIC 2.20 DID NOT INSTRUCT THE JURORS TO CONSIDER A GRANT OF IMMUNITY AS A BASIS FOR WITNESS BIAS, IT WAS ERROR TO REFUSE THE DEFENSE REQUESTED INSTRUCTION [AOB Argument 2.9.4, RB Argument LII]

CALJIC 2.20 instructs the jury in a general way about assessing a witness's credibility including the presence of bias and self-interest. Therefore, Appellant's Opening Brief contended that CALJIC 2.20 did not adequately instruct the jury on a grant of immunity as a basis for witness bias. (AOB 558-62.) Respondent asserts CALJIC 2.20 was sufficient to inform the jury of the possibility that a grant of immunity to prosecution witness Frank Clark might engender bias. (RB 345-49.) Therefore, according to respondent, the trial court did not err by rejecting the defense requested instruction that specifically informed jurors they may consider the grant of immunity in assessing the believability of the witness and that such an agreement may constitute a motive for bias. (RB 345-349.)

Respondent cites *People v. Harrison* (2005) 35 Cal.4th 208 for the proposition that CALJIC 2.20 "adequately informed the jury to consider the witness's immunity." (RB 347.) However, in *Harrison* "the jury received instructions on the credibility of witnesses in general (CALJIC No. 2.20) and on the credibility of a witness who has been convicted of a felony (CALJIC No. 2.23). Together, these instructions adequately informed the jury that the 'existence or nonexistence of a bias, interest, or other motive' and a witness's prior conviction of a felony were factors it could consider in determining the believability of a witness." (*Id.* at pp. 253-254 [underlining added].)

Respondent also relies on *People v. Hunter* (1989) 49 Cal.3d 957, 976-977 and *People v. Echevarria* (1992)11 Cal.App. 4th 444, 450. In those cases, however, the trial court refused the defense requested instruction but properly

gave a modified version of the requested instruction that amplified CALJIC 2.20 by specifically identifying a grant of immunity as a potential source of bias.

In contrast, here, only CALJIC 2.20 was given and the trial court made no modification or amplification of the defense requested instructions to identify a grant of immunity as applicable under CALJIC 2.20. Thus the jury's ability to fairly and reliably evaluate the credibility of the prosecution's witness was hindered and appellant's constitutional rights were violated as a result.

Respondent claims that any error was harmless because counsel's argument to the jury incorporated the necessary information. However, respondent cites no authority for the proposition that argument can be used as a substitute for instructions that should have been given. (See *People v. Miller* (1996) 46 Cal.App.4th 412, 423 fn. 4 ["While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority which permits us to use argument as a substitute for instructions that should have been given. Logically, this is so, because the jury is informed that there are three components to the trial – evidence presented by both sides, arguments by the attorneys and instructions on the law given by the judge."]; see also *Kelly v. South Carolina* (2002) 534 U.S. 246 [argument of counsel was insufficient to cure ambiguity as to meaning of life imprisonment].) Furthermore, the error was prejudicial as to the Jacobs case, which was closely balanced. (See AOB 209-11.) Clark opined that the handwriting in the Love Insurance note was appellant's. It was largely that note which connected appellant to the Jacobs charges. The fact that Clark was testifying for the prosecution pursuant to an immunity agreement might well have influenced the jury's assessment of Clark's credibility and potential bias. Accordingly, the

error was not harmless and the judgment should be reversed. And, even if not prejudicial as to guilt, the error was as to penalty because it undermined the mitigating theory of lingering doubt.

LIII.

THE JUDGE'S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED APPELLANT'S DUE PROCESS RIGHTS

[In response to RB Argument LIII, appellant relies upon AOB Argument 2.9.5, 3.9.3, 4.8.3, and 5.2.7.3.]

LIV.

THE TERM "EXPERT WITNESS" SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS

[In response to RB Argument LIV, appellant relies upon AOB Argument 2.9.6, 3.9.4, 4.8.4 and 5.2.7.4.]

LV.

THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM "INFERENCE" IN THE JURY INSTRUCTIONS

[In response to RB Argument LV, appellant relies upon AOB Argument 2.9.7, 3.9.5, 4.8.5 and 5.2.7.5.]

LVI.

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE

[In response to RB Argument LVI, appellant relies upon AOB Argument 2.9.8, 3.9.6, 4.8.6 and 5.2.7.6.]

LVII.

A LAY JUROR WOULD NOT HAVE UNDERSTOOD THAT EXPERT OPINION TESTIMONY IS CIRCUMSTANTIAL EVIDENCE [AOB Arguments 2.9.9, 4.8.7; RB Argument LVII]

Appellant's Opening Brief contended that the judge erroneously denied the defense request to specify which opinion testimony was circumstantial evidence. (AOB 585-89; 1215.) Respondent's Brief (RB 361-63) speculates that the jurors would have understood the subtle difference between direct and circumstantial expert testimony as follows:

> "John Harris opined that based on his comparison, the person who wrote the due course handwriting also wrote the Love Insurance note. (13 TRT 2309.) While the jury could reasonably infer from Harris's opinion that appellant wrote the Love Insurance note, the reasoning process is plainly one of inference-drawing, not direct evidence."
>
> Similarly, Brian Wraxall testified that the blood stain on the sheepskin seat cover could have come from Swanke (31 TRT 5728) and the blood under Swanke's nails could have come from appellant (31 TRT 5742). In each instance, Wraxall indicated the population frequency attributable to the blood characteristics. (31 TRT 5735-36, 5743.) Once again, the jury's reasoning process was plainly one of inference-drawing, not direct proof. (RB 362-63.)"

However, there is nothing about either of these matters that would have allowed a lay juror to understand whether expert opinion testimony is direct or circumstantial evidence. (See generally *People v. Proctor* (1992) 4 Cal.4th 499, 567 ["What is dispositive is not what jurists on appellate court may announce, but what laypersons on juries may understand."].) To the contrary, because the expert's testimony appeared to "directly prove" the fact to which their opinion related, it is far more likely that the jurors concluded that the evidence was direct and hence failed to apply to that testimony the instructions

governing the use of, and premising conclusions upon, circumstantial evidence – instructions essential to protecting a defendant's due process right not to be convicted except upon proof beyond a reasonable doubt.

LVIII.

RESPONDENT FAILS TO EXPLAIN WHY THE JURORS WOULD NOT HAVE BEEN MISLED BY THE INSTRUCTION TITLES [AOB Arguments 2.9.10, 3.9.7, 4.8.8; RB Argument LVIII]

Appellant's Opening Brief argued that the judge should have deleted the instruction titles from the written instructions or cautioned the jury regarding use of the titles. (AOB 590-99; 1034-35; 1216-17; 1352-53.) Respondent contends that it was not error to include the descriptive titles of the instructions over defense objection. (RB 363-64.) However, because instructional titles may emphasize or de-emphasize isolated parts of the instructions, they may convey an inaccurate or imbalanced and misleading message if left on the written instructions which are given to the jurors.[44]

Moreover, as recognized by the Blue Ribbon CALCRIM committee: "The title is not part of the instruction." (CALCRIM "Guide To Using" (Fall 2006 Edition, printed by West), p. x.)

In fact, a number of jurisdictions specifically recommend that instructional titles should not be included on the written instructions given to the jury. For example, in Hawaii the jury instruction committee has specifically stated that "titles are not part of the instructions and are not intended to be read to the jury. . . ." (*Hawaii Pattern Jury Instructions - Criminal, HAWJIC*

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[44] This Court has held that the written instructions are the ones upon which it must be assumed the jurors relied. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 673 ["We reiterate our recommendation that in capital cases trial courts provide juries with written instructions "to cure the inadvertent errors that may occur when the instructions are read aloud."]; see also *People v. Davis* (1995) 10 Cal.4th 463, 542 [when the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2.)

Introduction (West, 1998); see also *5th Circuit Pattern Jury Instructions - Criminal* 1.17 [Expert Witness] note (2001) ["When the judge gives written instructions to the jury, the judge may wish to delete the title 'expert witness'"]; *Alaska Pattern Criminal Jury Instructions* General use notes (Alaska Bar Association, 1987) [titles of instructions are not intended to come to the attention of the jury]; *Idaho Criminal Jury Instructions, ICJI Introduction and General Directions for Use* (Idaho Law Foundation, Inc., 1995) [subject and title "must be omitted"]; *Wisconsin Jury Instructions - Criminal, WIS-JI-Criminal* 926 [Contributory Negligence] comment p. 2 (University of Wisconsin Law School, 1999) ["The term 'contributory negligence' is used only in the title of the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term"].)

This Court briefly addressed the issue of instructional titles in *People v. Bloyd* (1987) 43 Cal.3d 333, 355 and held that no error is committed when descriptive titles – even if erroneous – are on the written instructions submitted to the jury. (But see *People v. Staten* (2000) 24 Cal.4th 434, 459, fn. 7 [suggesting that failure to strike inapplicable wording from instruction title would be error if the defendant was prejudiced].) However, if titles are included, it should be presumed that the jurors read and relied on those titles. "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-25,

fn 9.)[45] Hence, because the titles were in some cases inaccurate or misleading (see AOB 594-596), inclusion of the titles was prejudicial error.

[45] The reality that the jurors will rely on the titles is also reflected by the numerous jury instruction committees, cited above, who have directly addressed the question.

LIX-LXX.

[In response to RB Argument LIX-LXX, appellant relies upon AOB Argument(s) LIX (2.9.11, 3.9.8, 4.8.9, 5.2.7.8), LX (2.9.12, 3.9.9, 4.8.10, 5.2.7.9), LXI (2.9.13, 3.9.10, 4.8.11, 5.2.7.10), LXII (2.10.2, 3.10, 4.9, 5.2.8), LXIII (2.10.1, 3.10, 4.9, 5.2.8), LXIV (2.10.3, 3.10, 4.9, 5.2.8), LXV (2.10.4, 3.10, 4.9, 5.2.8), LXVI (2.10.5, 3.10., 4.9, 5.2.8), LXVII (2.10.6, 3.10., 4.9, 5.2.8), LXVIII (2.10.7, 3.10., 4.9, 5.2.8), LXIX (2.10.8, 3.10, 4.9, 5.2.8), and LXX (2.10.9, 3.10, and 4.9).

LXXI.

THE JURORS SHOULD NOT HAVE BEEN PERMITTED TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM DURING DELIBERATIONS IN THE ABSENCE OF APPELLANT'S COUNSEL

[AOB Arguments 2.11.1, 3.11.1, 4.10.1, 5.2.9.1, 7.7.8; RB Argument LXXI]

A. Overview

In his opening brief appellant argues that the absence of counsel from the readback proceedings violated his constitutional rights. (AOB 698-730; 1048-51; 1232-35; 1365-67.) Respondent contends that the reading of testimony to the jurors during deliberation is not a "critical stage" of the trial. (RB 402-06.) However, even assuming *arguendo* that the re-reading proceeding was not a critical stage of the trial for purposes of appellant's right to personal presence, it was for purposes of his right to counsel.

Thus, respondent asserts that allowing the jurors to read the trial transcripts in the absence of appellant's counsel did not violate appellant's Sixth Amendment right to counsel. (RB 404.) This contention is based on a fundamental misreading of this Court's decisions.

B. This Court Has Never Expressly Considered Whether– *For Purposes Of The Right To Counsel* – A Re-Reading Of Testimony Is A Critical Stage Of The Trial

In *People v. Horton* (1995) 11 Cal.4th 1068, 1120-112 this Court addressed the question of whether a re-reading of testimony is a proceeding at which the defendant has a constitutional right to personal presence. The *Horton* opinion concluded that for purposes of personal presence a re-reading proceeding is not a "critical stage of the trial" because "defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his

case or denied him a fair and impartial trial. [Citations.]"

However, even assuming *arguendo* that *Horton* is correct as to personal presence, there are important additional considerations that apply to the "critical stage" analysis in the context of the right to counsel including counsel's special duties and training which are not applicable to the defendant. (See pp. 170-74, § C, below.)

Nevertheless, since *Horton* this Court's decisions have failed to recognize these important differences between the role of counsel versus that of the defendant at a re-reading proceeding. All three decisions of this Court which have purported to address the question of whether a re-reading proceeding is "a critical stage of the trial" for purposes of the right to counsel have simply cited to *Horton* without further discussion of the important differences between the right to personal presence and the right to counsel.[46] Hence, because these decisions did not fully consider the issue raised by appellant, they are not authority in support of respondent's assertion that the right to counsel does not apply to a re-reading proceeding. (See *People v. Dillon* (1983) 34 Cal.3d 441 [opinions are not authority for propositions not considered].)

C. In Light Of The Special Duties And Training Of Defense Counsel, The Constitutional Right To Counsel Should Apply To A Re-Reading Of Testimony

Even assuming *arguendo* that absence of the defendant at a re-reading

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[46] These decisions and their perfunctory consideration of the questions are as follows: *People v. Ayala* (2000) 23 Cal.4th 225, 288 ["The rereading of testimony is not a critical stage of the proceedings . . ."]; *People v. Box* (2000) 23 Cal.4th 1153, 1213 [same]; *People v. Cox* (2003) 30 Cal.4th 916, 963 ["We have repeatedly stated that the rereading of testimony is not a critical stage of the proceedings."]

proceeding is not constitutional error,[47] the absence of counsel is a different matter.

First, it is counsel who is charged with the duty to identify and state objections to trial error. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202 [trial counsel has the duty to protect the record when their client's trial interests are at stake]; *In re Horton* (1991) 54 Cal.3d 82, 95 ["'it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.'"]; *People v. Hinton* (2006) 37 Cal.4th 839, 874 [same].) Thus, counsel's presence at a readback proceeding is necessary to assure that any error which occurred during the readback was properly objected to and either corrected below or preserved for appeal. (*People v. Sumstine* (1984) 36 Cal.3d 909, 917-918 [courts rely on counsel to "perform his duty as an advocate and an officer of the court to inform the accused of and take steps to protect the other rights afforded by the law . . ."].)

Second, as a person who is professionally trained to follow the testimony at trial, identify the important portions of that testimony and remember that testimony or adequately memorialize it, counsel is in a much

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[47] The better view was expressed in *State v. Brown* (N.J. 2003) 827 A.2d 346, 350-352 which held that although a readback " introduces no new matter into the trial" it "is obviously critical to the jurors' deliberations" and, therefore, should be considered a "critical stage" of the proceedings at which the defendant should be present. Other courts have determined that any time the jury is required to be present the defendant has the right to be present. (See *Bales v. State* (Ind. 1981) 418 N.E.2d 215, 218; *Cape v. State* (Ind. 1980) 400 N.E.2d 161, 162-63; *People v. Harris* (N.Y. 1990) 76 N.Y.2d 810, 559 N.Y.S.2d 966, 559 N.E.2d 660, 662; *Hill v. State* (N.D. 2000) 615 N.W.2d 135, 139.)

better able to identify errors in the court reporter's reading of the testimony than is the defendant.

Moreover, any assumption that no error occurred while the jurors were reading the transcripts would be unreliable and fundamentally unfair to appellant.[48] The fact that a person may make errors in reading aloud from a written transcript is well illustrated by the number of times this court has had to rely on the written instructions to cure errors by the judge in reading aloud from the written instructions. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 673 [We reiterate our recommendation that in capital cases trial courts provide juries with written instructions "to cure the inadvertent errors that may occur when the instructions are read aloud."]; see also *People v. Davis* (1995) 10 Cal.4th 463, 542 [when the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2.)

Furthermore, even court reporters, who are trained to be precise and accurate, can and do make mistakes. (See e.g., *People v. Huggins* (2006) 38 Cal 4th 175, 191 ["Because the court clearly was reading a standard instruction, it is far more likely that the punctuation supplied by the court reporter failed to accurately reflect the meaning conveyed by the court's oral instructions. . ."]; see also 2 SCT 425-433 [listing of stipulated court reporter errors identified during record correction].) Accordingly, it should not be assumed that the transcripts which the jurors received were correct. Thus, the presence of the judge, counsel and defendant was necessary to help identify

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[48] Therefore, reliance on such an assumption to affirm the guilt and/or penalty verdicts would violate the Eighth Amendment of the federal constitution. (See generally *Beck v. Alabama* (1980) 447 U.S. 625.)

such errors and correct them for the jurors.

Even when the evidence requested by the jury is a tape recording which can be mechanically replayed, the proceeding is still considered an important part of the trial "because it involves the crucial jury function of reviewing the evidence." (*U.S. v. Ku Pau* (9th Cir. 1986) 781 F.2d 740, 743.)[49]

Finally, it cannot be assumed that any error which did occur would have been innocuous. When the jurors request a readback of testimony it is fair to say that such testimony is important to them. A deliberating jury's request for readback or transcripts of certain testimony may reflect the jurors' "intent to emphasize a specific portion of the trial. . . ." (*U.S. v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1408-09; see also *U.S. v. Rodgers* (6th Cir. 1997) 109 F.3d 1138, 1145 [recognizing "the natural tendency of a deliberating jury to focus on the testimony it has requested"].) Moreover, the need for a cautionary instruction was particularly critical as to the testimony of Dr. Marks and the Atascadero stipulation because those items were given to the jurors after their announced deadlock as to penalty. (See *Rodgers,* 109 F.3d at 1143-44 [citing and quoting *U.S. v. Padin* (6th Cir. 1986) 787 F.2d 1071, 1076-77 [danger of undue emphasis is especially high when the jurors' readback request is made "after the jury has reported its inability to reach a verdict."].) Hence, how the jurors read the transcript testimony was no less important then how the testimony was presented in the first place:

> . . . [A] mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which

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[49] Even though *Ku Pau* analyzed the issue under Fed. Rule of Criminal Proc. 43, the reasoning also applies to the constitutional bases for the right to presence.

might readily occur, would result in irremediable prejudice to defendant. (*Little v. U.S.* (10th Cir. 1934) 73 F.2d 861, 864.)

A critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; *Bell v. Cone* (2002) 535 U.S. 685, 696 [defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused"]; see also *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 902.) In light of defense counsel's special duties and training discussed above, appellant's substantial rights may have been affected by allowing the jurors to read the trial transcripts in the absence of counsel.

Hence, the absence of counsel violated appellant's right to counsel at a critical stage of the proceedings and the judgement should be reversed. (See AOB 717-18.)

D. Even If There Was No Independent Right To Counsel, Under The Circumstances Of The Present Case The Procedure Violated Fundamental Fairness And Reliability Requirements Of The Federal Constitution

There can be no doubt that the re-reading proceeding in the present case was crucial to the jurors's deliberations since they asked to re-hear the testimony of nearly 30 witnesses.[50]

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[50] During the guilt deliberations the jury requested a readback of the testimony of several witnesses. (CT 5555 [Request for transcript of David Oleksow and John Harris testimony]; CT 5559 [Request for transcript of Michele Tortorelli, John Simms and James Bailey testimony]; CT 5560 [Request for transcript of Margaret Harris, Frederick Edwards, Edward Fairhurst, David Daywood, Leigh Emmerson, Pat Stewart, John Torres, Fran VanHerreweghe testimony]; CT 5561 [Corrected copy of transcript of Frederick Edwards testimony]; CT 5562 [Request for transcripts of Walter Hartman, Donald Lucas, Steven Katzenmaier, Pat Katzenmaier, Susan Herrin, Catherine McEvoy, Mark McEvoy, David Katsuyama, Charles Geiberger, (continued...)

However, the proceeding in the present case failed to utilize minimal safeguards to assure fundamental fairness and reliability. First, the transcripts were simply given to the jurors with no instructions as to how they should be used. (See AOB 1751-55.) Second, the readback proceeding was conducted in the absence of the defendant as well as his counsel and the judge who were charged with the duty of assuring procedural fairness and reliability.[51] Third, the actual transcripts which were given to the jurors are not available to verify that they were properly redacted.[52]

Hence, apart from any independent right to personal presence or representation of counsel, the unfairness and unreliability of proceeding in the present case violated the federal constitution.

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[50](...continued)
Howard Robin, Robert Bucklin, Craig Henderson, Thomas Streed, and Cyril Wecht testimony].)

[51] The absence of the trial judge from such a critical stage of the trial violated appellant's constitutional rights notwithstanding the conclusion of *People v. Rhoades* (2001) 93 Cal.App. 4th 1122, 1127 to the contrary.

[52] The jurors' requests were answered by having the reporter prepare a transcript of the requested testimony, excluding in limine portions, which were sent into the jury room. (RTT 1226-31; RTT 12232-36.) Because these transcripts were actually in the jury room during deliberations, and were apparently different than the full transcripts on appeal, they should have been part of the record on appeal so that it could be determined which portions of the transcripts were actually before the jury. However, this Court denied appellant's request for the "sanitized" transcripts sent into the jury in response to request for specific testimony of witnesses. (See order issued by this Court on September 19, 2001.)

LXXII.

THE TRIAL COURT ERRED BY FAILING TO PROVIDE CAUTIONARY INSTRUCTIONS TO THE JURY BEFORE PROVIDING THEM WITH TRANSCRIPTS DURING DELIBERATIONS [AOB Arguments 2.11.3, 3.11.3, 4.10.3, 5.2.9.3, 7.7.10; RB Argument LXXII]

Appellant's Opening Brief argued that the judge erroneously failed to caution or otherwise instruct the jurors when the transcripts were sent into the deliberation room. (AOB 731-35; 1052-53; 1236-37; 1369-70; 1757-60.) Nevertheless, respondent cites the preliminary and final instructions and erroneously asserts that those admonitions sufficed to inform the jury how to properly use the transcripts during deliberations. (RB 406-9.) However, as the following cases illustrate, an additional cautionary instruction specific to the use of transcripts was necessary.

In *United States v. Rodgers* (6th Cir. 1997)109 F.3d 1138, the Sixth Circuit Court recognized that, "Authority does exist in other circuits standing for the proposition that if a district court allows a jury to review trial transcript during its deliberations, the court must give the jury additional, cautionary instructions." (*Id.* at p. 1144 [underlining added].) The court went on to hold "that if a district court chooses to give a deliberating jury transcribed testimony, or chooses to re-read testimony to a deliberating jury, the district court must give an instruction cautioning the jury on the proper use of that testimony. This holding makes explicit a rule we have consistently applied in the past." (*Id.* at p. 1145.)

For example, it is crucial to admonish the jurors against giving the requested testimony undue emphasis. A deliberating jury's request for readback or transcripts of certain testimony may reflect the jurors' "intent to emphasize a specific portion of the trial. . . ." (*U.S. v. Hernandez* (9th Cir.

1994) 27 F.3d 1403, 1408-09.) Hence, to avoid undue emphasis the judge is well within his or her discretion to deny a requested readback for that reason. (See *U.S. v. Nolan* (9th Cir. 1983) 700 F.2d 479, 486; *U.S. v. Escotto* (2nd Cir. 1997) 121 F.3d 81, 84 [noting view that "unsupervised access to written transcripts poses and enhanced danger that jurors may unduly emphasize discrete sections of the trial testimony . . ."]; *U.S. v. Rodgers, supra,* 109 F.3d at 1145 [recognizing "the natural tendency of a deliberating jury to focus on the testimony it has requested"].) Accordingly, when the jurors' request to rehear testimony is granted a cautionary instruction addressing the issue of undue emphasis may be appropriate. (See e.g., *U.S. v. Gengo* (2nd Cir. 1986) 808 F.2d 1, 4 [jury instructed that legal sufficiency of the charges "must be assessed on the whole record"].) In fact, courts have held that such an instruction "represents the minimum amount of protection a [trial court] should provide if it grants a deliberating jury's request for testimony." (*Rodgers*, 109 F.3d at 1145; see also *U.S. v. Lujan* (9th Cir. 1991) 936 F.2d 406, 411-12 [district court must, *inter alia*, "admonish the jury to weigh all of the evidence and not to focus on any portion of the trial"].)

Moreover, the danger of undue emphasis is especially high when – as in the present case at the penalty phase[53] – the jurors' readback request is made

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[53] The jurors reported their inability to reach a verdict in a note dated July 18, 1989. (CT 24250.) However, the judge required the jurors to deliberate longer. (RTT 13346-47.)

Thereafter, the jurors continued to deliberate through July 31, 1989 when at 1:34 p.m., they requested transcripts of the testimony of Dr. Marks, Pat Katzenmaier, and the stipulation which was read into the record concerning the Atascadero diagnosis of appellant by Dr. Schumann. The transcripts and stipulation were transmitted to the jury by the bailiff.

At 10:34 a.m. on the next day of deliberations, August 2, 1989, the jury returned a verdict of death. (CT 5590-5600; RTT 14861.)

(continued...)

"after the jury has reported its inability to reach a verdict." (*Rodgers*, 109 F.3d at 1143-44 [citing and quoting *U.S. v. Padin* (6th Cir. 1986) 787 F.2d 1071, 1076-77.)

In *United States v. Lujan, supra,* 936 F.2d 406 a specific instruction to the jury regarding the use of a transcript was deemed adequate. "The instruction cautioned the jury that the transcript would not serve as a substitute for their memory or assessment of witness credibility. The jury was admonished to weigh all the evidence and not to use the transcript to focus on any portion of the trial. Finally, the trial court instructed the jury the transcript was not authoritative and the juror's memory should prevail." (*Id.* at pp. 411-412.)

Similarly, in *United States v. Montgomery* (9th Cir. 1998) 150 F.3d 983, a specific supplemental instruction was found adequate. It provided: "I want you to bear in mind that the testimony at trial is the evidence, not the transcripts. The transcript is not authoritative. If you remember something different from what appears in the transcripts, your collective recollection is controlling. In other words, the transcripts may not serve as a substitute for the collective memories of the jury or take the place of the assessment of the credibility of witnesses subject to the usual rules . . . . Finally, as the court has previously instructed you, you must weigh all of the evidence in the case and not focus on any one portion of the trial." (*Id.* at pp. 999-1000.)

Here, the preliminary and final instructions referenced by respondent did not specifically caution the jury on the proper use of transcripts during

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[53](...continued)

Accordingly, it appears likely that the transcripts which were sent into the jury room shortly before the death verdict had a decisive influence on the jurors.

deliberations. For example, the pre-deliberation instructions focused on the jurors' use of their notes from trial, not on the use of transcripts. (RB 407.) Unlike in *Lujan* and *Montgomery*, the jurors were not instructed that the transcripts were not to function as a substitute for the jurors' own recollection, told that the transcripts were not authoritative, or even generally reminded not to give undue emphasis to the transcripts

Respondent next claims the trial court's admonishments that neither direct nor circumstantial evidence is entitled to any greater weight than the other, and that jurors are the sole judges of the believability of a witness and the weight to be given to the testimony of each witness, made it clear to the jury that they were not to overemphasize testimony or take it out of context. (RB 408.) Again, these instructions do not suffice to adequately inform the jury regarding the use of transcripts specifically. Thus a specific, instruction was required to ensure the jury did not unduly emphasize the requested transcripts or consider it out of context.

Moreover, the jurors should also have received an instruction cautioning them about the dangers of unintended distortion if the transcripts are read aloud, and that the reader of the transcripts – if they are read aloud – must be careful to read accurately and completely, and to avoid inserting bias or casting aspersions on testimony by means of intonation – and that the listener must be careful to avoid being improperly influenced by such bias. The instructions also should have included a recommendation that if the transcripts are to be read aloud a second person should read along silently as the transcript is read aloud. And another instruction should have cautioned that if each juror is going to read the transcript individually (1) the juror should be careful to read both direct and cross to ensure a fair and accurate understanding and appraisal of the testimony, and (2) the other jurors should

refrain from deliberations while a juror is reading a transcript so that all 12 jurors get to participate in all deliberations.

The absence of such instruction prejudicially abridged appellant's constitutional rights to due process and a fair trial by jury.

LXXIII.

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

[In response to RB Argument LXXIII, appellant relies upon AOB Argument(s) 2.11.4, 3.11.4, 4.10.4, and 5.2.9.4.]

LXXIV.

GUILT PHASE CUMULATIVE ERROR

[In response to RB Argument LXXIV, appellant relies upon AOB Argument(s) 2.12, 3.12, 4.11.]

LXXV.

RESPONDENT EFFECTIVELY CONCEDES REVERSIBLE ERROR AS TO THE *CASH* CLAIM [AOB Argument 6.3.1, RB Argument LXXV]

A. Overview

Appellant's Opening Brief contended that the judge committed reversible error by sustaining the prosecutor's objection to defense questioning of prospective jurors regarding appellant's 1973 rape conviction. (AOB 1432-39.) Respondent does not deny "[the 1973 rape] was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances. . . ." (*People v. Cash* (2002) 28 Cal.4th 703, 721.)[54] Nor does respondent deny that the 1973 rape conviction was "a fact likely to be of great significance to prospective jurors. . . ." (*Cash*, *supra*, 28 Cal.4th at p. 721.) Indeed, to take such a position would require respondent to contradict the district attorney's candid admission that "90 percent" of the potential jurors would say "Yes [to the gas chamber]" if asked about the 1973 rape. (RTH 27651-52; see also RTH 27651:1-7 [judge acknowledges that some jurors would not be "open" after hearing that appellant committed a rape before "this murder..."].)

Hence, respondent implicitly concedes that it would have been reversible error under *Cash* to "foreclose all questioning regarding appellant's alleged rape." (RB 421.)

Nevertheless, respondent asserts that the judgement need not be

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[54] Cf., *People v. Roldan* (2005) 35 Cal.4th 646, 694 [suggesting that a "sensational sex offense" is an aggravating fact likely to be of great significance to prospective jurors].

reversed, because the judge's ruling did not actually preclude the defense from asking the prospective jurors about the 1973 rape conviction. (RB 421.) However, in so asserting respondent grossly mischaracterizes the record. From start to finish the discussion among counsel and the judge made it clear that the essential issue to be resolved was whether defense counsel could ask the prospective jurors about appellant's 1973 rape conviction. (See RTH 27665 [DA describes issue as whether "the court [would] allow [] questions about the '73 rape. . . ."].) And, the record is clear that the judge answered this question in the negative and expressly barred the defense from asking about appellant's 1973 rape conviction and whether it would preclude otherwise qualified prospective jurors from considering evidence of mitigation.

B. Argument And Rulings

1. Ruling # 1: DA Objection Sustained To Defense Question About The 1973 Rape Conviction And Sentence

The first time defense counsel attempted to ask a prospective juror about the 1973 rape conviction the judge immediately sustained the DA's objection and denied the defense request to be "heard on that. . . ." (RT 27389.)

2. Ruling # 2: Reference Permitted As To General Statutory Factors But Not As To Specific Aggravating Facts

Shortly after the initial ruling, defense counsel asked the judge to explain her ruling in light of the potential link between the prior rape conviction and juror bias as to the death penalty. (RTH 27394-95.) The judge stated that a question about the impact of specific aggravating evidence would be "asking [the jurors] to prejudge the evidence." (RTH 27395.) Thus, the judge ruled that inquiry could be made regarding the statutory aggravating and mitigating factors without reference to "specifics" – "[I]t has to be a

generalized thing. We can't get into those specifics that are actually going to be applied in the mitigating and aggravating factors in this case." (RTH 27401; 15-18.)

3. Ruling # 3 (Reversing Ruling # 2): Asking About The 1973 Rape Conviction "Is A Permissible Question"

Sometime after ruling that counsel could not "get into" the "specifics" of the aggravating and mitigating circumstances, the judge entertained a lengthy discussion about the issue in which both defense counsel and the prosecutor sought an explicit ruling as to whether or not prospective jurors could be asked about the 1973 rape conviction. Defense counsel began by again asking the judge about the prior rape:

> DEFENSE COUNSEL: . . . If we put the jury questions about the circumstances of the crime . . . which the jury is directed to consider, and ask them the generalized question "merely because you may find Mr. Lucas guilty of all these murders by throat slashings, are you automatically going to vote for death?" [¶] I assume that's an acceptable question . . . because that does constitute a circumstance in aggravation. But I am back to attempting to press the issue of bringing out in certain circumstances the existence of the prior rape. And although I recognize that at the time I initially put the question, I think the court had an objection. The call of the question was for prejudging.
>
> I wish to again stress to your honor that that is a question sanctioned by 884.1 sub (B), "The presence or absence of criminal activity by the defendant which involve the use or attempted use of force or violence, or the express or implied threat to use force or violence." (RTH 27646:7-16.)

The judge responded by "reversing" her previous ruling: "Yes. And I am going to reverse my position on that. I think that is a permissible question." (RTH 27646:17-18.)

The prosecutor then pressed the judge for an explicit expression of

which questions defense counsel could ask and the judge eventually stated that a "properly put question" would be along the following lines:

> Now, these are some pretty strong [guilt phase] facts and I am going to add to all the facts that you have here [the] extra fact [of the prior rape conviction]. At that point can you still keep an open mind toward the mitigating circumstances, or do you believe your feeling would be so strong for the death penalty at that point, hearing this thing, that you could not keep an open mind? [RTH 27649:15-21.]

The prosecutor responded:

> That's where we part ways. We don't think that's proper. ¶ Now, he can refer to the statute or the jury instruction and say that all these things are listed. "You may hear these aggravating factors and one of which is a potential incident of a prior conviction for violence. Now, how are you going to react to that," or something. That's fine. But to say beyond that, "He was convicted of rape in 1973 with the use of a knife. Now, Mr. Smith – " that's . . . impermissible – (RTH 27649:27-27650:6.)

The prosecutor's objection to the judge's new ruling triggered additional argument on both sides. In particular, the prosecutor argued that allowing specific questions on the prior would be asking jurors to prejudge the case. (RTH 27651-52.)

After hearing this additional argument the judge stated "I am going to jump the opposite" way signaling that she was again having second thoughts about allowing specific reference to the prior rape conviction. (RTH 27653:2-3.)

The defense responded that they were not asking for prejudgment and would be willing to ask the question in a "hypothetical sense." (RTH 27656-57.) Defense counsel went on to explain:

> [O]ur duty as [appellant's] counsel is to explore those areas which we perceive might ultimately result in a death

judgment in a juror who's unequivocally closed to any further evidence, and that's really all we're seeking to identify. (RTH 27657:9-12.)

The prosecutor responded that asking the jurors to consider the prior rape "now" [during voir dire] would be improper prejudgment:

"Consider it now, Mr. Smith: Rape. Consider it. Now, tell me, how are you going to feel about that? What is your position going to be? Are you going to be able to consider anything else?" Well, well, come on. That's prejudgment. (RTH 27657:26-27658:2.)

Defense counsel responded:

Your honor, the question is "How do you feel today about it?" And if the juror fairly says, "You know, I am a citizen. I want to do my duty. Your honor has told me to be fair and open. I am just telling you honestly I am such a person. In my life I went to school. I don't know. I have got religious background and training. I believed all my life that rape was a horrible crime, and there is nothing you can tell me. Somebody commits rape, I think they ought to die. It doesn't matter whether you save it to present that evidence to me in penalty or whether you give it to me at guilt. That's my belief." (RTH 27658:3-13.)

The prosecutor responded that defense counsel "wants a commitment [from the jurors] now and he's not entitled to that." (RTH 27659:13-14.)

Defense counsel then summarized the defense position as follows:

Your honor, unfortunately, the whole reason why we are doing this is in a capital case the law prescribes that you are able to question jurors about their attitude on the death penalty. That's the only reason we're doing that. So if you specifically recognize, and the law does, that there should be a separate questioning of the jurors on their attitudes on the death penalty, then it sanctions, in effect, an inquiry as to their attitudes about the death penalty and certainly with respect to the death penalty in this particular case.

The only way we can do that properly is to find out whether they have foreclosed or whether they are substantially

locked in their mind that the death penalty would be imposed in this case or would not be imposed in this case based on a pre-existing viewpoint. If they take into this case a pre-existing viewpoint on rape or drugs or any other factors, then they are not fair and impartial jurors going into the case, and it is specifically sanctioned that we question them about their attitudes on the death penalty.

And so it is appropriate that we make that inquiry. And how can we then make a justifiable challenge, how can we exercise our challenges in a knowing way without inquiring as to whether or not they hold such beliefs that they are biased going into the case in a particular way? The whole purpose of voir dire is to ascertain whether or not there is a bias. And in this particular case, being a capital case, we are faced with that inquiry being sanctioned.

In addition, the Eighth Amendment which prohibits cruel and unusual punishment has to be read into the idea that these jurors must consider or shall consider, as the instructions says [sic], all of these factors.

So, again, it is a proper inquiry that if they go into a penalty phase with a locked-in perspective, then they are not able to consider, and that's all we are asking is would they be able to consider all of the factors. (RTH 27659:17-27660:23.)

The judge responded by deferring a final ruling on the matter:

I am not going to make the decision now, and I am going to take this under submission and give it some thought. I think both sides have some excellent points here. I am inclined to think that there is a dividing line between what you can ask in conjunction with the guilt phase as opposed to what you can ask in terms of facts about the penalty phase, but I want to give [it] some more thought. And I will tell you tomorrow what my ruling is going to be on how far you can go into the facts on aggravation and mitigation. (RTH 27662:13-21.)

4. The Final Ruling: Reference To 1973 Rape Not Permitted

In her final ruling the judge "reversed [her] position" from the previous day that reference to the specific penalty phase evidence was permissible

(RTH 27675:24-25) and reaffirmed her original ruling that questioning about the guilt phase could include specifics but questioning about the penalty phase could not:

> And so I am going to draw the line there [between the guilt and penalty phases]. I think that that is the line that is to be drawn. You can't ask specific factors in mitigation and aggravation and how they would feel about those factors presented to them. That's beyond the proper scope of the *Hovey* voir dire, and so I will limit that. (RTH 27672:15-20.)

In response to continued defense argument on the issue the judge reiterated her ruling not permitting the very question she had said would be permitted the day before:

> . . . you want to go beyond [the guilt trial specifics]. You want to go to the next step and say, "Not only do you have all of these circumstances of the case which are terrible in themselves, but I am going to give you an additional factor that there is a 1973 rape prior. Okay. And now I want to ask you whether or not if you go into the penalty phase and you have all of this evidence before you, are you going to vote for the death penalty."
>
> Well, first of all, that's a direct question to the juror, in direct fashion as you can, saying, "How are you going to vote given A, B, and C facts?" which is not permitted.
>
> But it also begins to invade the province of the jury, once you get into the penalty phase, because the jury is open and allowed to weigh any one factor so heavily in their mind, they are permitted to do that. (RTH 27674:26-27675:13; see also RTH 27678:4-16 [". . . you can't ask the kind of question you're asking."]; RTH 27684:5-7 [". . . you can't hypothesize them into the penalty phase and give them specifics of aggravating and mitigating factors and ask how they feel."].)[55]

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[55] The judge did allow general questions about rape:

> You can certainly explore how strongly they feel about

(continued...)

5. Reaffirmation Of The Final Ruling

A week after the judge's final ruling the defense cited additional cases[56] which counsel argued supported their request to voir dire the jurors regarding the 1973 rape (RTH 27901-906):

> . . . [I]t's the defense position that a controversial subject matter in [the] penalty phase in the case would be whether or not a juror pre-existing has a belief that anyone who has previously committed a rape automatically deserves to die, independent of any evidence.
>
> The cases I have cited to your honor this morning, that we have cited to your honor this morning, squarely say . . . that merely because a juror says he or she can follow the law, the courts must become more sophisticated and that that simply is inadequate. That's an insufficient answer for purposes of fairly and fully exploring the true feelings of the juror.
>
> Our questions are designed specifically not to cause prejudging, nor to educate the jurors, but in fact are designed to determine whether or not the juror has in fact prejudged his verdict on penalty, i.e., whether or not his feeling is so strong that he or she cannot impartially determine neutrally, as the cases we cited last week to your honor, the punishment." (RTH 27902:27-27903:17.)

The judge agreed to read the new cases but stated ". . . as of now I am

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[55](...continued)
> rape and whether that's ever touched their lives and whether they would be very, very, very prejudiced against somebody who did such a thing. That will give you an indication that that's the person who will take that one aggravating factor and vote death and that's it, and I think that's a peremptory challenge. (RTH 27684:12-18.)

[56] The cases cited were: *People v. Fuentes* (1985) 40 Cal.3d 629, *People v. Balderas* (1985) 41 Cal.3d 144, *People v. Murtishaw* (1981) 29 Cal.3d 733, *People v. Turner* (1984) 37 Cal.3d 302, *People v. Armendariz* (1984) 37 Cal.3d 573 and *People v. Fields* (1983) 35 Cal.3d 329.

not going to change my opinion. I still think we're talking about prejudgement. 'What is your vote if you have the aggravating circumstance of the crime and you additionally have the aggravating circumstance of a prior rape?'" (RTH 27904:6-11.)

After reading the cases the judge reaffirmed her ruling that asking about the 1973 rape was "a prohibited area." (RTH 27953.)[57] She saw nothing in those cases establishing "a legal right or duty on the part of the court to ask the [requested] question about the 1973 rape. . . ." (RTH 28098:5-9.)

6. Final Ruling Utilized By Prosecutor To Preclude Defense Questioning Of A Prospective Juror On The Prior Rape

Subsequent to the judge's final ruling the prosecutor relied on that ruling to successfully object to defense questioning of a prospective juror:

> Q. [Defense Counsel] Mr. Wier, you used the term you would expect very substantial mitigating evidence in order to convince you that life without possibility of parole would be a consideration in the type of fact situation that we were discussing, context of the four women and two children. Can you tell us what you meant by "very substantial?"
>
> A. Well, previous, shall I say, good behavior. I don't know how to express this, but no past evidence of this type of behavior that the person would be charged with now. I think some kind of community involvement, the type of acquaintances and friends that the person travels with; that sort of thing.
>
> Q. So if you heard evidence that the person had, for instance, a prior conviction for, say, rape, would that affect you?

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[57] As before, the ruling did not prohibit general questions about rape:

> "But what may be appropriate is to ask something along the lines of, you know, 'How do you feel about the crime of rape? And is the crime of rape something in your mind that in and of itself would be deserving of the death penalty, regardless of any other circumstances that you may know about, just simply rape? That alone, would that do it?'" (RTH 27953:15-20.)

Mr. Williams: Objection; calls for prejudgement, Your Honor.

The Court: Sustained.

Q. If you heard that the person had a prior conviction for rape, how would that impact your ability to consider mitigating circumstances?

[Prosecutor]: Same objection.

The Court: Sustained. (RTH 30400:9-30401:6.)

7. Second Reaffirmation Of Final Ruling

During a discussion of peremptory challenges defense counsel yet again requested to ask about the 1973 rape. Counsel stressed the devastating impact the prior rape could have:

> The prior rape . . . is something that runs the risk of poisoning the entire panel. (RTH 32855:13-14.)
>
> . . .[W]e have a right to know whether or not, if a prospective juror who indicates maybe on the questionnaire that rape is a crime for which he or she believes the death penalty appropriate, and even if they don't, frankly, that we have a right to find out from them whether, all of the – all other things being equal or not being equal, if they hear evidence of a rape, that's going to do it for them, period, because rape is – in society is such an inflammatory, outrageous act in the days of heightened consciousness, and that's really what my sense of it is in terms of the political reality, that we have a right to know whether a juror would blow it so out of proportion that they couldn't, wouldn't, no matter what, consider other evidence.
>
> And, in our view, that's just not prejudgement. (RTH 32856:10-24.)

However, the judge again denied the defense request:

> . . .[T]he way you proposed the question . . . was something like this: 'If you were to find someone guilty of first degree murder with multiple murders and then go into a penalty phase and now you heard evidence of a rape, would that do it for you?'
>
> That's prejudgement. Without question in my mind, that is asking for a prejudgement on the issues, and that would be

unacceptable. (RTH 32856-57.)[58]

8. Third Re-Affirmation Of The Final Ruling

Much later in the process, defense counsel broached the scope of voir dire questioning one more time by referring the judge to this Court's statement in *People v. Rich* (1988) 45 Cal.3d 1036, 1105 that jurors may properly be asked about specific facts relating to the charged murders. (RTH 32915-17.) The judge responded by reaffirming her ruling that counsel could ask about specific facts related to the charged offenses but not to specific penalty phase evidence:

> I would have no problem with a question like [the one approved in *Rich*] as long as the context indicates that we are talking about the guilt phase and the end of the guilt phase and what the question is calling for is an indication of whether the juror is closed to the mitigating factors. And if, in the context, it's clear to the juror that that's what's being asked, then I would have no problem with that question.
>
> If it somehow is – through the context would appear that they are being asked to place themselves into a penalty phase and give a judgment based on apparent factors that may or may not be in the penalty phase for mitigation, then I don't think it's a proper question. (RTH 32915:26-32916:9.)

Thus, the judge again emphasized that to "stay away from prejudgment" only general "open-ended" questions about rape were permissible:

> . . . I think both sides have the right to inquire into

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[58] The judge again indicated that general questions about rape could be asked:

> If you want to ask here, as I have indicated, previously or later, if you want to ask their feelings on rape, how strongly they feel about it, we have worded some questions previously. I put some questions to one of the jurors about it and she said, 'Yes,' finally that she couldn't see straight with respect to rape. Fine. No problem. (RTH 32856:26-32857:15.)

people's feelings about drugs and rape.

Keeping away from the prejudgment is the important thing, and drawing that line is what I am trying to do.

So you can't ask for a prejudgment on those areas, but what you can do is ask them about their feeling in those areas. Open-ended question may be the best way to approach that . . . "How do you feel about it Mrs. Jones? What do you think about people who use alcohol?". . . I think that's okay, because then they are kind of out of the context of this case and what they might judge one way or the other and they are just talking about their feelings on it. Maybe that will reveal more, sort of exploring that: "What do you think about rape?" (RTH 32916-17.)

C. The Judge Clearly And Unequivocally Precluded Questioning About The Prior Rape Conviction

Respondent insists that the judge "did not foreclose all questioning regarding appellant's prior rape." (RB 421.) However, in so doing, respondent fundamentally mischaracterizes the record. While the judge did rule at one point that the defense could refer to the 1973 rape conviction, she subsequently reversed that ruling by drawing a bright line distinction between specific facts from the guilt phase as opposed to those from the penalty phase.[59] Her final ruling – which she subsequently reaffirmed three times – unequivocally prohibited any questions about any specific penalty phase facts, including the 1973 rape conviction.

Furthermore, the judge differentiated between questions about rape in general versus questions about appellant's 1973 rape conviction. (RTH

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[59] The *Cash* opinion itself makes clear that the trial court's guilt phase versus penalty phase evidence distinction was erroneous. In *Cash* the anticipated evidence as to which voir dire was improperly barred related to prior murders committed by the defendant as a juvenile – evidence which would come before the jury solely at the penalty phase of trial. (*People v. Cash*, *supra*, 28 Cal.4th at 717.).

32916-17.) While the judge's final ruling allowed "open-ended" questions about rape in general (e.g., "what do you think about rape?"), it disallowed any questions about whether appellant's 1973 rape conviction would undermine the jurors' ability to keep an open mind at the penalty trial.

And, finally, respondent also inaccurately asserts that appellant's trial counsel did not understand the judge's ruling to preclude questions about the prior rape conviction. (RB 422.) The fact that the judge unequivocally denied the defense request to ask about the prior rape and twice sustained prosecutorial objections to such questions left no doubt that counsel understood that they were not to ask about the 1973 rape during voir dire. Moreover, the prosecutor's characterization of the issue as whether "the court [will] allow [] questions about the '73 rape . . ." (RTH 27665) corroborates the fact that both parties and the judge considered this to be the question which the judge unequivocally answered in the negative.

D. The Judgment Should Be Reversed

Respondent does not dispute that prohibiting voir dire questioning on the prior rape conviction would have constituted reversible error in this case. Nor could respondent plausibly make such an argument. Both the trial court and the parties expressly recognized the prior rape's potentially determinative impact for prospective jurors. (See p. 182, 186-87, above.) The prior rape, within the meaning of the standard articulated in *People v. Cash*, *supra*, 28 Cal.4th at 721, "was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." Given the inherently inflammatory nature of violent sexual offenses, a prior rape will generally be a circumstance that could lead otherwise qualified jurors to

invariably vote for death.[60]

This reality is reinforced by this Court's recent decision in *People v. Zambrano* (2007) 41 Cal.4th 1082, in which the Court found no *Cash* error in a trial court's refusal to permit voir dire concerning the fact of the victim's post-mortem dismemberment. The Court explained as follows:

> The sole fact as to which the defense unsuccessfully sought additional inquiry – the condition of the adult murder victim's body when found – was not one that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury – invariably to vote for death, regardless of the strength of the mitigating evidence. No child victim, prior murder, or sexual implications were involved.

(41 Cal.4th at 112; emphasis added.) In the present case, of course, the topic on which voir dire was barred clearly involved more than sexual "implications" – it was a prior rape.

Moreover, the impact of a prior rape was especially weighty in the present case because the guilt phase charges included the murder or attempted murder of five women and two children, but no charges of any sexual offense. Hence, the prior rape, an especially heinous form of violent abuse against women (see footnote 61, above), could have led otherwise qualified jurors to close off consideration of any form of mitigating evidence.[61] (See p. 182, 186-

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[60] See e.g., *Coker v. Georgia* (1977) 433 U.S. 584, 615, Chief Justice Burger, with whom Mr. Justice Rehnquist joins, dissenting [". . .as the plurality admits, the crime of rape is second perhaps only to murder in its gravity."]; *Rizzuto v. Nexxus Products Co.* (D.N.Y. 1986) 641 F. Supp. 473, 478 [rape is "a particularly heinous crime"].)

[61] That the trial judge permitted general questions about rape did not ameliorate the problem or permit proper determination of prospective jurors' fitness to serve at appellant's penalty trial. As discussed in Appellant's (continued...)

87, above.)

Since a gross mischaracterization of the record as to whether the requested voir dire was barred is all that respondent has mustered in opposition to appellant's claim of reversible error under *Cash*, respondent has effectively conceded that the judgment should be reversed.

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[61](...continued)
Opening Brief (p. 1439, fn. 1212), general questions about rape could not satisfy *Cash*.

Given the universally reprehensible nature of rape (see p. 196, fn. 61, above) it is likely that most, if not all, prospective jurors would have expressed the belief that rape is a heinous crime. Such general responses would have provided little if any guidance in identifying which jurors would have automatically voted for death as a result of the 1973 prior. The fact that a juror generally believed that rape is a serious crime – as most people would have – would not necessarily mean that in a case in which a defendant is found guilty of one or more murders, the juror would invariably vote for death upon learning of a prior rape conviction. The only reliable way to find out was to directly ask the prospective juror. Under *Cash* and *Zambrano* appellant was entitled to do so as part of the death-qualification voir dire. The proposed inquiry went directly to the prospective jurors' fitness to serve – and potential challenges for cause.

LXXVI.

THE JUDGE'S BIAS IN FAVOR OF ADMITTING THE 1973 RAPE WAS NOT MERELY PROCEDURAL [AOB Argument 6.4.4, RB Argument LXXVI]

Appellant's Opening Brief contended that appellant's right to due process was violated by the trial judge's bias regarding the challenges to admissibility of the 1973 prior rape conviction. (AOB 1483-88.) Respondent asserts that appellant's claim is without merit because the trial court's statements did not exhibit prejudgment of the issue, but "merely reflected its view on the existence of a prima facie case should the motion be presented as a habeas corpus petition." (RB 431-433.) Furthermore, respondent urges that appellant's failure to seek writ relief after denial of the disqualification motion forfeited any claim of error. (RB 430.)

A. The Trial Judge Prejudged The Issue Of Whether The 1973 Rape Was Admissible

After the defense moved to strike the 1973 rape conviction, it was not the prosecution, but the trial judge herself who, on her own motion, ruled that such a challenge could not be made. (RTH 20280-93.) Before hearing any evidence or argument on the motion, Judge Hammes stated, "I don't want to entrap you into thinking that if you file it back here, that I haven't made up my mind on those issues . . . it is my opinion that none of the issues raised showed incompetency either of Mr. Gilham or of Mr. Arm, so I will say that right out." (RTH 20361; 20364.)

Respondent asserts that Judge Hammes's conclusion that the motion to strike was insufficient was based purely on the procedural context, i.e., the pleadings and supporting documents were only insufficient on their face to support a habeas petition. (RB 431.) This is a red herring. It certainly was not

the conclusion urged by the prosecution at the time. After the Court of Appeal ruled that the trial judge could hear the motion to strike the prosecution assumed the judge's earlier "ruling" that the motion was without merit still held. (RTH 27665.) Therefore, even after the "procedural context" had been resolved, the prosecution understood the trial judge to have already ruled on the issue.

Thus, Judge Hammes's own unambiguous statements and the prosecution's interpretation of those statements demonstrate that she prejudged the issue of the incompetency of counsel. The judge's failure to recuse herself after engaging in prejudgment violated appellant's rights to a fair and impartial judge and to due process under the Sixth Amendment of the federal constitution. These violations constituted structural error that was reversible per se.

B. Appellant's Due Process Claim of Judicial Bias Is Not Barred

Appellant's motion to disqualify Judge Hammes included a nonstatutory due process claim. (CT 13443.) As this Court has stated, "section 170.3(d) does not apply to, and hence does not bar, review (on appeal from a final judgment) of nonstatutory claims that a final judgment is constitutionally invalid because of judicial bias. (*People v. Brown* (1993) 6 Cal.4th 322, 335.)

Appellant's claim of judicial bias was raised in the trial court and depicts an unambiguous instance of prejudgment of an issue involving highly inflammatory evidence in aggravation. The jury likely relied on the 1973 prior in reaching its verdict of death. (See AOB 1442-44.) Under these circumstances, the violation of appellant's right to an impartial judge should be cognizable on appeal.

LXXVII.

BOTH PRONGS OF *STRICKLAND* WERE MET DEMONSTRATING INEFFECTIVENESS OF TRIAL COUNSEL, THEREFORE, THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE THE 1973 PRIOR [AOB Argument 6.4.5, RB Argument LXXVII]

Appellant's Opening Brief alleged ineffective assistance of counsel on the part of appellant's trial counsel at the 1973 rape trial. (AOB 1489-97.) Respondent erroneously asserts that the defense failed to prove either of the two prongs of his ineffective assistance of trial counsel claim regarding the 1973 prior conviction. (RB 433-89.)

A. Failure To Interview Casas Until After A Motion For New Trial On The 1973 Prior Had Been Denied Was Objectively Unreasonable

Casas, the victim's friend, was at the Cook residence the afternoon and evening of the alleged rape. Defense counsel knew, or should have known this, as it was clearly indicated in police reports. Nonetheless, the defense never interviewed Casas. (See In Limine Exhibit 759B.) Defense counsel gave no reason for not interviewing Casas and the trial judge failed to identify one.

Respondent relies on *Riley v. Payne* (9th Cir. 2003) 352 F.3d 1313, in claiming that counsel need not interview every possible witness. (RB 441.) However, *Riley* provides more support for appellant than for respondent. In *Riley*, defense counsel's "performance fell below an 'objective standard of reasonableness' because he failed to interview Pettis." (*Id.* at p. 1318.) Pettis was a key witness because he had been present when the incident occurred – a fact of which the defense counsel was aware.

The *Riley* court concluded that because defense counsel had never interviewed Pettis, he "could not have fully assessed Pettis's version of the events, Pettis's credibility and demeanor, or any other aspect of his

involvement that might have reinforced Riley's defense." (*Ibid.*) Nor could he "have determined what Pettis would have said about the shooting, whether Pettis would have been a credible defense witness, and whether Pettis should have been called to testify to aid the defense. The record shows that counsel did not make a reasonable professional judgment to ignore an important corroborating witness." (*Id.* at p. 1319.)

Similarly, here, by failing to interview Casas, defense counsel was unable to assess Casas's credibility, demeanor or her version of events. Respondent claims that there was no contested issue as to Casas's presence at the house and, therefore, she was never presented as a witness by the prosecution. (RB 442.) However, the defense would invariably have different questions to ask of Casas, questions that may well have revealed a version of events that included the alleged rape victim's phone call to Casas and at the very least indicated that she, the alleged victim, was hiding something. Moreover, the prosecution's failure to call Casas as a witness may also have indicated that she would not testify favorably for the prosecution. Thus, by failing to interview Casas, defense counsel was not reasonably diligent.[62]

B. Failure to Interview Casas Prejudiced Appellant

Respondent claims that the evidence as to the time of the alleged rape "was rife with incredulity and inconsistency" and that the victim's time estimates were "extremely uncertain and speculative." (RB 444-43.) This does not undermine appellant's argument that the phone call from the victim to Casas would have discredited the victim and established a reference point from which the jury could have rejected the prosecution's theory. The

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[62] Respondent contends that the defense had no reason to contact Casas. However, as a person who was present during the events leading up to the rape, Casas was clearly someone the defense should have contacted.

prosecution's theory throughout was that the rape occurred between 9:30 and 10:30 p.m. The phone call (in which the victim made no mention to Casas of being raped) occurred between 10:00 and 10:05 p.m. Even if the rape had lasted less than 45 minutes, the call was made right in the middle of the time frame advanced by the prosecution.

The jury deliberations were closely balanced in the 1973 case. (See AOB 1496.) Thus, a solid reference point in a critical timeline that undermined the prosecution's theory, as well as the credibility of the alleged victim, made it reasonably probable that appellant would not have been convicted if this evidence had been presented.

C. The Error Was Not Harmless

Respondent unpersuasively argues that the error was harmless "[i]n light of appellant's horrific crimes . . ." (RB 449.) First, such a conclusion ignores the different nature of the crime of rape. As noted in appellant's Opening Brief, fourteen potential jurors believed that the death penalty "should always be imposed" for rape. (AOB 1440.) Moreover, the defense was not allowed to question jurors during voir dire to assess the influence a rape conviction would have on their ability to fairly consider penalty. (AOB 1432-39.) And, the prosecutor made repeated references to the rape conviction during his opening statement and closing argument to the jury. (RTT 12594; 13268-70; 13273-74.)

Furthermore, the rape conviction was the only aggravating evidence presented at the penalty trial. Thus, it was this evidence alone that allowed the jury to conclude that appellant would be a future danger because he continued to commit violent crimes after the rape conviction. The prior conviction also gave the jury a means of negating the lingering doubt theory relied upon by the defense.

The nature and existence of this aggravating evidence added a sexual deviance dimension to the jury's impression of appellant. Absent this inflammatory information, there is a reasonable probability that the jurors, who at one point deemed themselves hopelessly deadlocked and deliberated for over six days before reaching a penalty verdict, would not have imposed the death sentence. Therefore, the error was not harmless.

LXXVIII.

THE PRIOR RAPE CONVICTION WAS UNCONSTITUTIONAL BECAUSE APPELLANT'S APPELLATE ATTORNEY HAD A CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED HIS REPRESENTATION [AOB Argument 6.4.6, RB Argument LXXVIII]

In his opening brief appellant contended that his appellate counsel in the 1973 rape proceedings was burdened by a conflict of interest which adversely affected his performance. (AOB 1498-1530.) Respondent erroneously claims that no conflicts of interest adversely affecting appellant's representation existed and that even if they did, any resulting error was harmless. (RB 450-54.)

A. Respondent's Speculation That Appellant Would Have Abided By His Mother's Decisions Regardless Of Whether She Paid The Retainer Does Not Negate The Conflict Of Interest

"Conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [Citations.]'" (*People v. Hardy* (1992) 2 Cal.4th 86, 135.) In other words, "a conflict may exist 'whenever counsel is so situated that the caliber of his services may be substantially diluted.'(citation)." (*Id.* at p. 136 [citation omitted].) "Clients should expect their lawyer to 'use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf.'" (*United States v. Elliot* (9th Cir. 2006) 444 F.3d 1187, 1194 [citation omitted, underlining added].)

Legal authorities recognize the inherent risk of conflict raised by third party payment. (See *Wood v. Georgia* (1981) 450 U.S. 261, 271.) Specific safeguards are in place to counteract the implicit risks of conflict from such

arrangements. (See American Bar Association Code of Professional Responsibility, Disciplinary Rule 5-107; ABA Standards Relating to the Prosecution Function and the Defense Function, Defense Function Standard 3.5(c); Rule 5-102(B) of the Rules of Professional Conduct of the California State Bar [requiring written consent from the client if conflicting interests].)

Respondent premises its "absence of conflict" argument on the assumption that appellant's mother did not have any interests adverse to appellant and that appellant would have done whatever his mother decided anyway. (RB 453.) However, appellant's mother quite clearly embraced an interest (i.e., avoiding injury to trial counsel) that conflicted with appellant's interest in having his conviction set aside, and it is mere speculation to suggest that appellant shared this interest or would have chosen to pursue it when it conflicted with his own interest in seeking a reversal. Appellate Attorney Arm, pursuing his own interest in the fee being paid by appellant's mother, elected to pursue her interest in avoiding injury to trial counsel at the expense of appellant's interest in having his rape conviction set aside. The conflict and its adverse impact are clear.

Furthermore, respondent cites no authority for the proposition that appellant's alleged willingness to defer to his mother could serve to negate the presence of a conflict absent written consent and/or a knowing and voluntary waiver.[63] Indeed, there was no written consent and respondent does not point to evidence on the face of the record that appellant knowingly and intelligently waived his fundamental right to conflict-free representation. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465.) In fact, the trial judge expressly found

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[63] To the contrary, appellant's purported lack of sophistication, his immaturity and his susceptibility to his mother's influence suggest he required the guiding hand of a loyal advocate more, not less.

that Arm had not obtained a waiver of the ineffectiveness of trial counsel claim from appellant. (RTH 35176.)

Regardless of appellant's alleged deference to his mother's decisions, Arm retained a separate and distinct duty of loyalty to appellant alone. Believing as Arm did, for example, that the ineffective assistance of counsel argument should have been raised in the opening brief, he was obligated to apprise appellant of the legally disastrous decision his mother made to exclude it, and to at least inform appellant that his interest was not served by forgoing the ineffective assistance claim. Arm did neither. (See AOB 1509.) His failure to do so revealed an actual conflict of interest because Arm went against appellant's best interests in order to satisfy the third party who was paying his fee. Even if Mrs. Lucas had her son's best interests at heart, she made the wrong decision from a legal standpoint. Arm was obligated to exercise his independent professional judgment and communicate that to his client.

Arm was also obligated to avoid financial conflicts. He did not. Mrs. Lucas wouldn't pay for further investigation, court transcripts, a Petition for Rehearing and/or a Petition for Hearing, so Arm did not provide those services. According to respondent, "Appellant agreed to his mother making the decisions on appeal. Thus, his interests were expressed in her decisions." (RB 453.) Again, such an "agreement" by appellant was not in writing – or knowing and intelligent – and is therefore invalid. Furthermore, Arm's personal financial stake is not addressed by that argument. The record suggests that Arm's decisions about what to do or not do were driven by whether or not Mrs. Lucas would pay for them, not whether they were necessary for appellant's representation. This created an obvious conflict between Arm's financial interests and appellant's liberty interests.

B. The Conflict Adversely Affected Arm's Performance

As fully described in the Appellant's Opening Brief, both Arm's loyalty to Mrs. Lucas and his financial conflict adversely affected his representation of appellant in numerous and critical ways. (See AOB 1510-1522.)

Respondent urges that the asserted conflict did not adversely affect Arm's performance because appellant would have followed his mother's advice regardless of whether or not she was paying Arm's retainer. (RB 454.) Thus, in respondent's view, "Arm would be left with the same client-decisions which he followed when he withdrew the ineffective assistance claim from the opening brief." (*Ibid.*)

Respondent's argument requires speculation as to what appellant's decisions would have been had he been adequately informed, or informed at all, of the legal ramifications of Mrs. Lucas's orders and payment decisions.

Moreover, respondent erroneously suggests that appellant must show that a different course of action would necessarily have been taken by counsel. This is not the correct standard of review. "To show a violation. . .under our state Constitution, a defendant need only demonstrate a potential conflict, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance. [Citations.]" (*People v. Zambrano* (2007) 41 Cal. 4th 1082, 1191.) Additionally, under the federal standard there is no obligation to prove that counsel would necessarily have followed an alternative strategy:

> To prove adverse effect, a [defendant] must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [defendant] need not show that the defense would necessarily have been successful if [the alternative strategy or

> tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

(*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1011; *accord, e.g., United States v. Ramirez-Benitez* (1st Cir. 2002) 292 F.3d 22, 30; *Perillo v. Johnson* (2000) 205 F.3d 775, 807-808.)

This standard does not attempt to measure prejudice, because it *presumes* prejudice from an attorney conflict that affects a case. If the record shows that there is a "plausible alternative defense strategy" which was not taken and which was germane to the conflict, and the action omitted or taken "possessed sufficient substance to be a viable alternative," then prejudice is presumed, no further showing or showing of prejudice need be made, and the conflict is reversible error.

In the present case all three elements of the federal standard have been met. First, there was a plausible alternative strategy to pursue: i.e., raise potentially meritorious claims even if they might "hurt" trial counsel; ask the court to pay for the services Mrs. Lucas did not want to pay for; advise Lucas to seek appointment of counsel from the Court of Appeal. Second, these alternative strategies were clearly reasonable under the facts. For example, appellate counsel himself thought that it was stupid not to challenge trial counsel's effectiveness. Third, there is a direct link between the foregone strategy and the conflict since it was Arm's loyalty to Mrs. Lucas that caused his deferral to her wish not to "hurt" attorney Gilham and not to pay for certain services.

Hence, the prior conviction should have been stricken under the federal

standard.

C. The Error Was Not Harmless

As stated above in Argument LXXVII, and in Appellant's Opening Brief, pp. 1525-1530, the prior rape conviction was devastating to appellant at penalty where deliberations were closely balanced. Therefore, since respondent has not shown that failure to strike the prior was harmless beyond a reasonable doubt, the penalty judgment should be reversed.[64]

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[64] Respondent asserts (RB 454, n. 258) that the only IAC claim that Arm had in mind (and hence, by inference, the only punch pulled as a result of the conflict), was the one he prepared as part of his draft opening brief: the failure to seek a psychiatric examination of the victim under *Ballard*. This is not relevant for purposes of conflict analysis, since one punch pulled is all that is needed. Moreover, just because he only drafted one IAC claim does not mean that this was the only one he would have briefed had he not been told to include no IAC claim.

LXXIX.

APPELLATE COUNSEL ARM'S FAILURE TO CONTINUE REPRESENTING APPELLANT AFTER THE PRIOR RAPE CONVICTION WAS AFFIRMED WAS GROUNDS FOR STRIKING THE PRIOR [AOB Argument 6.4.7, RB Argument LXXIX]

Appellant's Opening Brief contended that appellant's appellate counsel was ineffective because he failed to challenge an error in the appellate opinion via a petition for rehearing. (AOB 1531-41.) Respondent's Brief (RB 455-57) asserts that "the decision not to seek rehearing was made by appellant's mother with appellant's assent and appellant was not prejudiced by the failure to seek rehearing." (RB 455.)

A. The Failure To Seek Rehearing Was The Product Of Arm's Conflict Of Interest

Arm's abandonment of appellant before filing a Petition for Rehearing was predicated on a conflict of interest – on Arm abiding by a third party's decisions absent written consent and/or knowing and voluntary waiver by appellant. Thus, Arm was not merely following appellant's decision as argued by respondent.

B. Appellant Was Denied Representation Of Counsel At A Crucial Stage Of The Proceedings

"[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected" (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Denial of counsel at a critical stage of the criminal proceedings raises a presumption of prejudice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1137; see also *Penson v. Ohio* (1988) 488 U.S. 75, 88, recognizing fundamental importance of assistance of counsel extends to appellate stage.)

Arm abandoned representation of appellant during the post-affirmance

phase of the appellate process. As explained in Appellant's Opening Brief (pp. 1531-32), the post-affirmance petition process for rehearing in the appellate court and review in this Court is a "crucial stage of the proceedings." Moreover, the petition must be filed within a 15-day time frame which further heightens the crucial nature of and fundamental need for counsel during this process. Appellant would have been hard-pressed to find a replacement for Arm who could be brought up to speed and file a petition within 15 days.

C. Respondent Has Not Rebutted The Prejudice Suffered Due To The Failure To File The Meritorious Petition For Rehearing

A Petition for Rehearing was meritorious because the reviewing court misconstrued the appellate claim and the record. (See AOB 1535-1540.) Respondent blames the confusion solely on inconsistencies in appellant's arguments claiming that the appellate court relied on the argument headings that referenced substantial evidence. However, the relief sought by appellant in the body of the argument was "reversal of the order denying the defendant's motion for new trial." (In Limine Exhibit 757, p. 12:9-12; see also pp.11; 12:25.) As appellant and respondent agree, new trial is not the remedy for insufficient evidence. (RB 457.) Therefore, even though the appellate court was sufficiently alerted to the abuse of discretion argument, the court misconstrued it to be a sufficiency of the evidence claim. Moreover, "[a] reviewing court is empowered to decide a case on any proper points or theories, whether urged by counsel or not [citations], and will exercise that authority under fair procedure in an appropriate case. [Citations.]" (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.) Thus, even if the brief had not argued abuse of discretion, the appellate court was nonetheless empowered to decide the issue under that standard.

Because a Petition for Rehearing was meritorious and should have been

granted if filed, Arm's failure to file it was prejudicial to appellant. Respondent has not rebutted the presumption of prejudice, therefore, the 1973 prior conviction should have been stricken and the death judgment should be reversed.

LXXX.

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT CASAS'S TESTIMONY [AOB Argument 6.4.8, RB Argument LXXX]

Appellant's Opening Brief contended that appellant's appellate counsel was ineffective for not alleging that trial counsel for the 1973 rape charge failed to discover and present crucial testimony at trial. (AOB 1542.) Respondent argues that appellant's appellate counsel need not have raised trial counsel's failure to present Casas's testimony because it was not a meritorious claim. (RB 458-459.) However, "the obligations of appellate counsel, includ[e] the duty to prepare a legal brief containing citations to the transcript and appropriate authority, and setting forth all arguable issues, and the further duty not to argue the case against his client." (*People v. Lang* (1974) 11 Cal.3d 134, 139 [underlining added].) Arm violated that duty.

It is clear from the record that Arm himself believed the ineffectiveness of trial counsel issue was meritorious. (See AOB1505-06.) In fact, he described it as "the strongest issue in the appeal" and thought it was "stupid" not to challenge trial counsel's ineffectiveness. (RTH 35062; 35061-62.) The entire ineffectiveness of counsel argument was deleted, however, in order to abide by Mrs. Lucas's wishes not to "hurt" trial counsel. Therefore, by Arm's own admission, the issue was arguable and should have been briefed; he had no tactical reason for not raising it. Failure to do so was clearly deficient performance by appellate counsel, and the deficient performance was prejudicial in that, as shown above in Argument LXXIX, pp. 210-12, above), the omitted claim had substantial merit and was reasonably likely to have resulted in a more favorable result on appeal. Accordingly Judge Hammes should have granted the Motion to Strike.

Furthermore, respondent's argument that Arm was acting with appellant's approval when he excluded "the strongest issue on appeal" from the brief was refuted above in Argument LXXVIII and provides no basis for escaping the ineffectiveness of counsel claims raised by appellant herein.

For the reasons stated in the Appellant's Opening Brief, pp. 1525-1530, failure to strike the prior rape conviction was prejudicial error. Therefore, since respondent cannot show that failure to strike the prior was harmless beyond a reasonable doubt, the penalty judgment should be reversed.

LXXXI.

EXCLUSION OF APPELLANT'S SUCCESSFUL POLYGRAPH TEST AS TO CRUCIAL AGGRAVATING EVIDENCE VIOLATED THE FEDERAL CONSTITUTION

[In response to RB Argument LXXXI, appellant relies upon AOB Argument(s) 6.5.1.]

LXXXII.

RESPONDENT UNPERSUASIVELY ARGUES THAT APPELLANT WAS PROPERLY PRECLUDED FROM ATTACKING THE RELIABILITY OF THE 1973 RAPE CONVICTION [AOB Argument 6.5.2, RB Argument LXXXII]

Appellant's Opening Brief contended that the judge erroneously precluded the defense from informing the jurors regarding the fact that Casas's testimony was not presented at the trial on the 1973 rape charge. (AOB 1551-58.) Respondent asserts that any claim regarding exclusion of Casas's testimony was waived. (RB 465-70.) However, it was obvious from the judge's ruling that any evidence seeking to "relitigate" the prior conviction would not be allowed. Thus, it would have been futile to specifically offer Casas's testimony and, therefore, the issue is cognizable on appeal. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Chavez* (1980) 26 Cal.3d 334, 350 fn. 5.)

Moreover, respondent also erroneously contends that the judge correctly precluded the defense from challenging the reliability of the guilt verdict on the 1973 prior. (RB 470 [". . . proper respect for finality precluded relitigation of appellant's prior rape conviction"].) Respondent concedes that when a prior conviction is admitted under both factor (b) and factor (c) "it is the underlying conduct which is at issue." (RB 469.) However, without citation to any authority and without discussing the constitutional principles discussed in Appellant's Opening Brief, respondent simply asserts that appellant was not "entitled to relitigate that conduct." (RB 469.) Respondent's assertion makes little sense and is inconsistent with the basic principles of fairness and the capital sentencing reliability required by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. If the state is offering a prior

conviction as evidence of criminal conduct and urging both the conduct and the conviction as reasons for imposing a death sentence, then the defendant must be permitted to offer evidence to show the unreliability of the conviction and that he in fact did not engage in that conduct. Appellant attempted to do just that by offering to have his 1973 trial lawyer testify as to his own inept performance at that 1973 trial and his post-verdict discovery of new evidence casting doubt on the credibility of the prosecutor's principal witness.

Accordingly, respondent has not persuasively countered appellant's claim that the penalty jury should have heard the proffered testimony of his 1973 attorney and the newly discovered evidence which undermined the reliability of the 1973 rape conviction. Although it is true that the 1973 jury convicted appellant, they did so without considering testimony that undermined both the prosecution's theory of the case and the credibility of the prosecuting witness. (See AOB 1494-96 above, incorporated herein.) Such testimony was critically important to the reliability of the conviction; yet the jury which sentenced appellant to death was never aware of it. Hence, Judge Hammes unconstitutionally denied appellant an opportunity to deny and explain aggravating evidence which undoubtedly weighed heavily with the sentencing jury.

LXXXIII.

THE JUDGE IMPROPERLY PERMITTED THE JURORS TO RELY ON THE CURRENT GUILT PHASE CONVICTIONS IN DECIDING WHETHER APPELLANT'S GUILT OF THE 1973 RAPE WAS PROVEN BEYOND A REASONABLE DOUBT

[In response to RB Argument LXXXIII, appellant relies upon AOB Argument 6.6.1.]

LXXXIV.

THE FACTOR (B) INSTRUCTION FAILED TO REQUIRE THE JURORS TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE 1973 RAPE

[In response to RB Argument LXXXIV, appellant relies upon AOB Argument 6.6.2.]

LXXXV.

RESPONDENT FAILS TO ADDRESS THE QUESTION OF WHETHER THE JUDGE "HID THE BALL" FROM APPELLANT TO PREVENT HIM FROM EXERCISING HIS LEGAL RIGHTS [AOB Argument 7.3.1, RB Argument LXXXV]

A. The Judge's Desire To Exclude Appellant From The Discussions Of His Attorneys' Mistake Exhibited An Intent To Prevent Him From Understanding And Exercising His Legal Rights

The opening brief argued that the judge erroneously asked appellant to waive his presence at a hearing about defense counsels' ineffectiveness. (AOB 1567-77.) Respondent fails to effectively address the most unique and significant aspect of this claim: that it was the trial judge herself who initiated appellant's exclusion from the hearing regarding his attorneys' mistakes. (RB 475-83.)

Respondent argues that there was no harm in excluding appellant because he had agreed to be absent from other proceedings during the trial. However, appellant's absence from the ineffective counsel hearing was qualitatively different from the other proceedings because there was a deliberate intent on the part of the trial judge to prevent appellant from hearing what was to be said during the hearing.[65] Such an intent on the part of the trial judge is anathema to the judge's constitutional duty to safeguard the rights of the defendant.[66]

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[65] This deliberate intent was explicitly stated: "I would like to talk with counsel in chambers alone on the record without Mr. Lucas's presence." (RTT 13003 (Judge Hammes).) It was further evidenced by the fact that the judge denied appellant's request that his unconflicted Motion and Writ counsel Mr. Stuetz be present during the in chambers discussion. (See RTT 13003.)

[66] It is well settled that trial courts have an affirmative duty to safeguard (continued...)

The judge did not expressly state her reason for wanting appellant excluded from the hearing, but the only reasonable inference from the record as a whole is that she did not want defense counsels' mistakes to "screw up the case." (RTT 13007.)[67] And, presumably the judge was afraid that having appellant present during the discussion of counsels' mistakes might prompt appellant to "screw up the case" by requesting inquiry into his counsels' ineffectiveness, asking for substitution of counsel or seeking a mistrial. Indeed, there is no other explanation for the judge's exclusion of appellant except that she intentionally kept appellant in the dark about his counsels' potential ineffectiveness to prevent appellant from exercising his legal rights. Thus, the judge effectively subordinated appellant's rights to her goal of avoiding the need for further inquiry, substitution of counsel or even mistrial.

Nor is there any question that the hearing was a critical stage of the trial and the information the judge sought to keep from appellant was information which (1) he had a right to hear and (2) was relevant and material to his legal rights.[68]

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[66](...continued)
the rights of criminal defendants. (See *People v. McKenzie* (1983) 34 Cal.3d 616, 626–627; *People v. Carlucci* (1979) 23 Cal.3d 249, 255; *People v. Mendez* (1924) 193 Cal. 39, 46; *People v. Garcia* (1986) 183 Cal. App. 3d 335, 345; *People v. Blackburn* (1982) 139 Cal.App.3d 761, 764 *People v. Polite* (1965) 236 Cal.App.2d 85, 91–92; *Pedrow v. Federoff* (1926) 77 Cal.App.164, 175; *Shoemake v. State* (Ga. Ct. App. 1994) 213 Ga. App. 528, 530.)

[67] During the conference the judge explained her view that although Landon and Feldman had never before "fouled up" during this trial, as to Dr. Marks they made a "mistake" which could raise "an incompetence question later." (RTT 13006-07.)

[68] For purposes of his right to presence claim the hearing was critical (continued...)

In sum, appellant was effectively deprived of his state (art. I, sections 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process, fair trial by jury, right to effective representation, and to a fair and impartial judge. Such a deprivation was structural error which undermined the fairness and reliability of the trial and, therefore, the judgment should be reversed. (See *Tumey v. Ohio* (1927) 273 U.S. 510; see also *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119.)

B. Appellant Did Not Effectively Waive His Presence Because The Judge Did Not Tell Him That The Discussion Would Be About His Attorneys' Potential Ineffectiveness

Respondent does not contest the fundamental principle that a defendant's purported waiver of personal presence requires that the defendant be made aware of "the nature of the proceeding, not the abstract existence of the right itself." (*Cohen v. Senkowski* (2nd Cir. 2002) 290 F.3d 485, 493; *Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 996 ["A valid waiver of conflict of interest must be voluntary, knowing, and intelligent, such that the defendant is sufficiently informed of the consequences of his choice. [Citation.] We are required to 'ascertain with certainty' that a defendant knowingly and intelligently waived that right by 'focusing on what the defendant understood.' [Citation]"]; see also *State v. Sam* (Conn. App. Ct. 2006) 907 A.2d 99, 109-

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[68](...continued)
because appellant's presence "would [have] contributed to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1356-57.)

However, as discussed herein, this is not merely a right to presence claim. It is also a judicial misconduct or bias claim in light of Judge Hammes's clear intent to keep relevant and material information from appellant.

110, 98 Conn.App. 13, 27.)[69]

However, respondent claims that the discussion prior to the in camera meeting adequately informed appellant about the nature of the proceeding. This claim is unpersuasive. There was pre-meeting discussion of the underlying issue – i.e., Marks's possession of the chronology, etc. – but the judge never informed appellant of her concern that his attorneys may have violated his right to effective assistance of counsel. Without such a disclosure appellant had no basis for knowing or understanding that he had a vested interest in attending the conference. Nor did the judge explain to appellant that the potential ineffectiveness of his attorneys created a conflict for them which could preclude them from acting entirely in his best interests at the conference and throughout the remainder of the trial.[70]

Accordingly, appellant's purported waiver of presence should have no binding effect.

C. Appellant's Counsel Had A Conflict Of Interest

Respondent asserts that appellant's counsel had no conflict of interest by virtue of their "mistakes" because they were "concerned with preventing appellant from being harmed by the prosecution's potential cross-examination with . . . documents" they did not know Marks had reviewed. (RB 481-82.) Furthermore, respondent concludes that there was no "adverse effect on

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[69] See also AOB 714, 1573-74.

[70]Counsels' conflict of interest and likely embarrassment over their inadequate preparation vis-a-vis Dr. Marks's testimony also undercuts any suggestion (see RB 479) that counsels' conferring with appellant prior to his purported "waiver" of his personal presence can be deemed to have rendered that purported waiver knowing and intelligent. Indeed, appellant should have been provided with conflict-free counsel before waiving his presence at the hearing. (See *Lewis v. Mayle, supra*, 391 F.3d at 996.)

counsel's performance" because the trial court precluded the prosecutor from obtaining the documents Dr. Marks reviewed. (RB 482.) However, the record by no means establishes that the judge's ruling regarding the social history cured counsel's deficient performance with respect to Dr. Marks.

First, the fact that counsel did not know what materials their own expert had reviewed reasonably justified inquiry into whether counsels' out of court preparation had been deficient. (See *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1115-16 [failure to properly prepare expert was ineffective; *People v. Bean* (9th Cir. 1998) 163 F.3d 1073, 1078-79 [same].)

Second, the judge's ruling did not prevent prejudicial cross-examination of Marks because the prosecution had already been given the Atascadero records which contained the devastating Schumann diagnosis of appellant. (See RTT 13009.) Thus, the record suggests that counsels' mistake was more fundamental than simply not knowing which materials their expert had reviewed. Instead, they had fundamentally erred in assuming that the prosecution could not obtain and present the Atascadero records – including Dr. Schumann's diagnosis – if Dr. Marks didn't review such records. As respondent notes (RB 480), once defense counsel called Dr. Marks and placed appellant's mental status in issue as a factor in mitigation, the prosecution was entitled to rebut that evidence with any contrary diagnosis in the Atascadero records – regardless of whether Dr. Marks had reviewed those records.

Accordingly, as defense counsel impliedly acknowledged, their faulty assumption that the Atascadero records would not be admissible fundamentally impacted the defense strategy by changing the strategic calculus regarding whether to call Dr. Marks in the first place. (RTT 13002 ["We were not in a position to make a knowing judgment as to whether to call Marks . . ."].)

The prospect that counsel had made such a crucial error – which

ultimately required the defense to stipulate to Dr. Schumann's diagnosis – required counsel to make a Hobson's choice between their own professional and financial interests and the best interests of appellant. If counsel had in fact strategically blundered in failing to adequately prepare for Dr. Marks's testimony and/or in assuming that Dr. Marks's testimony would not open the door for the Atascadero diagnosis, then there may well have been a basis for appellant to ask for substitution of counsel, a mistrial and/or a new trial based on ineffective assistance of counsel. Moreover, because such requests could have adversely impacted counsels' professional and/or financial interests, counsel had a fundamental conflict of interest in deciding whether to make such a request. As recognized by the prosecutor, any attorney who is accused of ineffectiveness has "an obvious motive" to try to protect their own interests. (RTH 35040-41.)[71] Thus, "[w]hen counsel is called upon to argue his own ineffectiveness, a conflict of interest arises." (*People v. Ramirez* (Ill. App. Ct. 1993) 242 Ill. App. 3d 954, 959; *People v. Fields* (Ill. App. Ct. 1980) 88 Ill. App. 3d 821, 823-824 ["An attorney is under a duty to withdraw as counsel when the issue [of his own inadequacy] arises."]; *State v. Kirchner* (Iowa Ct. App. 1999) 600 N.W.2d 330, 335 ["Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned."]; *Johns v.*

[71] A successful ineffective assistance of counsel claim may result in serious professional and financial consequence for the attorney. "[I]f incompetent representation results in the modification or reversal of a judgment, counsel must be reported to the State Bar." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 689; see also Bus. & Prof. Code, § 6086.7, subd. (a)(2).) Such a referral could impact the attorney by damaging his or her reputation as well as the pecuniary value of his or her law practice. And, worse yet, the very ability of the attorney to make a living could be jeopardized if the State Bar referral resulted in suspension or disbarment per Business and Professions Code § 6103 or State Bar Rule 6-101(A)(2).

Perini (6th Cir. 1972) 462 F.2d 1308, 1313 ["Defense counsel, who was understandably defensive of his professional reputation in light of the claim of ineffective assistance of counsel"].)

In light of this conflict the judge's exclusion of appellant from the ineffective assistance of counsel hearing was error. (See *State v. Lopez* (Conn. 2004) 859 A.2d 898 [absence of defendant from hearing on counsel's conflict of interest was structural error]; cf., *People v. Perry* (2006) 38 Cal.4th 302, 314 ["We do not dispute that a defendant may be entitled to be present at a conference called to remove his counsel for conflict of interest . . ."].)

D. Deliberate Exclusion Of A Criminal Defendant From A Hearing Regarding His Attorneys' Potential Ineffectiveness Should Be Reversible Error Per Se

Although the United States Supreme Court has noted that most constitutional errors are subject to a harmless error analysis, it has drawn a distinction between a limited class of cases with "structural defects" in the trial mechanism that defy analysis by harmless error standards and the broader category of cases involving "trial errors" that occur during the presentation of the case to the jury, which accordingly may be quantitatively assessed in the context of other evidence presented. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309.) In applying this distinction, the Supreme Court has recognized further that, when the consequences of the deprivation of the defendant's constitutional rights are "necessarily unquantifiable and indeterminate, [the deprivation of that right] unquestionably qualifies as 'structural error.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-82.)

A structural error creates a defect in the trial mechanism such that, while it is virtually impossible to pinpoint the exact harm, it remains abundantly clear that the trial process was flawed significantly. For this reason, "errors of this magnitude are per se prejudicial and require that the underlying

conviction be vacated." (Emphasis in original.) (*Lainfiesta v. Artuz* (2d Cir. 2001) 253 F.3d 151, 157, cert. denied sub nom. *Lainfiesta v. Greiner* (2002) 535 U.S. 1019, 122 S. Ct. 1611, 152 L. Ed. 2d 625, citing *Neder v. United States* (1999) 527 U.S. 1, 8-9; see also *Sullivan v. Louisiana*, *supra*, 508 U.S. 280-81 [harm resulting from erroneous jury instruction on definition of reasonable doubt impossible to quantify because court can only speculate what properly charged jury might have done]; *Vasquez v. Hillery* (1986) 474 U.S. 154, 263-65 [harm resulting from racial discrimination in grand jury cannot be quantified because impossible to know whether decision to indict would have been assessed same way by properly constituted grand jury]; *Waller v. Georgia* (1984) 467 U.S. 39, 49 n. 9 [harm resulting from denial of right to public trial unquantifiable because benefits of public trial are intangible, virtually impossible to prove]; *State v. Murray* (2000) 254 Conn. 472, 497-99, 757 A.2d 578 [harm resulting from improper substitution of alternate juror for excused juror after deliberations had begun impossible to quantify because court cannot ascertain whether jurors would be capable of disregarding prior deliberations and receiving potentially nonconforming views of alternate juror].)

In the present case the impact of the judge's errors – (1) deliberately keeping appellant in the dark about the potential ineffectiveness of his counsel and (2) failing to fully inquire into counsels' ineffectiveness and the resultant conflict of interest it created – cannot be quantified. Had appellant been present when the judge expressed her view that his counsel had been ineffective, appellant could have asked for (1) further inquiry, (2) substitution of counsel and/or (3) a mistrial. However, because such inquiry was never made and such motions were never litigated, it is impossible to evaluate the

impact of the errors.[72]

Accordingly, the denial of the defendant's constitutional right to be present during the in-chambers inquiry constituted a structural defect warranting the automatic reversal of the penalty phase verdict. (*State v. Lopez* (Conn. 2004) 859 A.2d 898, 901-907; see also *Peck v. United States* (2d Cir. 1997) 106 F.3d 450, 454 ["If a reviewing court determines that the error is of the structural variety, the court's task is at an end."].)

Moreover, the errors were also prejudicial under harmless error analysis. (See AOB 1576-77.)

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[72] The trial court's error and its impact on the state of the record is thus very analogous to *Marsden* error. (*People v. Marsden* (1970) 2 Cal.3d 118.) In the usual *Marsden* error setting the trial court erroneously fails to conduct a hearing as to complaints about counsel's performance. The error is reversible per se because the record permits no evaluation of what might have been revealed had the hearing been held. (See *People v. Lewis* (1978) 20 Cal.3d 498, 499; *People v. Cruz* (1978) 83 Cal.App. 308, 318.) Here the trial court held a cursory hearing on its own motion, but excluded from the hearing a crucial player – the person whose interests were most at stake, the capital defendant – and there is no way to know what his responses might have been or what further information might have been elicited in response to his questions or requests.

LXXXVI.

THE TRIAL JUDGE ERRED BY NOT SPECIFICALLY IDENTIFYING FOR JURORS THE FACT TO WHICH THE PARTIES STIPULATED

[AOB Argument 7.3.2, RB Argument LXXXVI]

Appellant's Opening Brief contended that Judge Hammes erroneously failed to instruct the jurors regarding what specific facts were included in the Atascadero State Hospital stipulation agreed to by the parties. Respondent claims that no reasonable jury would have misunderstood either the stipulation or the trial court's instruction. (RB 483-85.) Respondent further asserts that this claim was forfeited or harmless in any event. (RB 483-84.)

A. The Court's Generalized Admonishment Erroneously Allowed The Jury To Treat Dr. Schumann's Diagnosis As A Proven Fact Instead Of A Contested Issue

The stipulation read to the jury contained more than one piece of information: It included (1) the fact that Dr. Schumann had made a diagnosis and (2) the diagnosis itself. (RTT 13025-26.) Thus, it is reasonably likely that the jury would conclude the fact to which the parties stipulated was the diagnosis, not merely the person who made it. Nonetheless, the judge's admonishment failed to disabuse the jury of this obvious and potential misinterpretation. Judge Hammes's instruction simply referred to the entire content of the stipulation generally, as a "matter" which the jury did not have to decide because it was given to the jurors "as a fact." (RTT 13026.)

Respondent asserts that the jury would have realized that the stipulation was not to appellant's mental condition because before and after the stipulation, Dr. Marks provided testimony disputing Dr. Schumann's diagnosis. (RB 484.) Respondent's theory requires the jury to apply instructions by drawing conclusions from who is testifying and in what order. It is unreasonable to assume that a jury could and should divine what fact was

being stipulated to based on implications from later testimony instead of the court's own instructions.

Moreover, even if other instructions regarding stipulations were correct statements of the law as respondent argues, they are meaningless if it was unclear to which fact the parties were stipulating. (RB 484.) If applied by jurors to the wrong fact, as here, even the "correct" instructions would erroneously remove a disputed issue from the jury. These other instructions simply could not cure the error.

B. The Claim of Error Was Not Waived

Respondent argues that appellant forfeited his right to challenge the judge's instruction because defense counsel did not request clarification at trial. (RB 484.) "However, there is an exception to the general rule the defendant's failure to make an appropriate objection in the trial court precludes appellate review of an alleged error. [Penal Code] [s]ection 1259 provides an appellate court may review any instructions given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (Citations.) Thus, an objection is not always required in order to preserve an issue of instructional error for appeal. (Cf. *People v. Hannon* (1977) 19 Cal.3d 588, 600.)" (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074.)

Here, Appellant's substantial rights were affected by the instruction which incorrectly communicated to the jury that Dr. Schumann's diagnosis was "not a matter that [jurors] had to decide" but rather was "a fact." (RTT 13026.) The truthfulness and accuracy of the diagnosis itself was actually a disputed issue for the jury to decide. Taking this decision out of the jury's hands and instructing them to accept the prosecution psychiatrist's diagnosis that appellant had a "severe antisocial personality disorder with sexual

deviation, aggressive sexuality" and a "very guarded prognosis" was highly prejudicial. It violated appellant's substantial rights to due process, trial by jury, confrontation and counsel. (See generally *Davis v. Alaska* (1974) 415 U.S. 308; *Francis v. Franklin* (1985) 471 U.S. 307; *Carella v. California* (1989) 491 U.S. 263; *In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986) 41 Cal.3d 714.)

Therefore, an objection was not required in order to preserve this claim of instructional error for appeal.

C. The Error Was Not Harmless

Respondent claims any error was harmless because "it was simply not incumbent upon the defense, or the prosecution for that matter, or necessary to show which of the two diagnoses were correct." (RB 485.) The effect of the error is not as simple and discrete as respondent would have this Court believe. If the jury understood that it had to accept Dr. Schumann's diagnosis as a proven fact, it necessarily had to discredit Dr. Marks, who gave conflicting testimony. This entirely undermined Dr. Marks's credibility, not just his diagnosis of appellant. Therefore, Dr. Marks's mitigating testimony regarding matters such as appellant's positive qualities and his ability to perform well in prison were improperly diminished.

Furthermore, the fact that the court had impliedly admonished the jury to accept one doctor's diagnosis over another would also have unduly emphasized and corroborated the favored doctor's conclusion that "the prognosis was very guarded." This went to evidence in aggravation (i.e., future dangerousness) and was bound to impact the jury's penalty phase deliberations.

The fact that the jury asked for and received the stipulation and admonishment during penalty phase deliberations suggests they believed it

important to their decision. Indeed, they returned a death verdict the next morning. (CT 5598-5600; see also AOB 1579.) This further supports the conclusion that the error was not harmless.

This was a closely balanced case and respondent has failed to show that this substantial error was harmless beyond a reasonable doubt. (See AOB 1582.) Therefore, the penalty judgment should be reversed.

LXXXVII.

DURING PENALTY PHASE ARGUMENT, THE PROSECUTOR IMPROPERLY INVOKED BIBLICAL LAW AND ENCOURAGED THE JURY TO MAKE THEIR DETERMINATION BASED ON "GOOD VERSUS EVIL" [AOB Argument 7.4.1, RB Argument LXXXVII]

Appellant's Opening Brief contended that the prosecutor committed prejudicial misconduct during his penalty phase argument. (AOB 1584-93.) Respondent asserts that the prosecutor's arguments were legally proper and that appellant waived any claim of error. (RB 485-493.)

A. The Prosecutor's Biblical Theme Was Improper Argument Because It Undermined The Jury's Role In The Sentencing Process

Respondent erroneously contends that since the prosecutor's good-versus-evil argument "did not reference the Bible," the prosecutor did not improperly invoke religious law in support of the death penalty. (RB 490-1.)

In *People v. Sandoval* (1992) 4 Cal.4th 155,193, "the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty." In holding such an implied biblical reference improper, this court stated:

> Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." [Citation.] He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. [Citations.] The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination. (*Ibid.*)

As noted in Appellant's Opening Brief, the juxtaposition of good and evil occurs throughout the Bible. (See AOB 1589, fn. 1349.) Furthermore, the prosecutor opened and closed his argument by quoting a phrase from Proverbs

24:20: "The candle of the wicked shall be put out."[73] (RTT 13266, 13278.) He also told the jury that: "mercy is not an earthly gift. It is a divine gift, and only God can grant mercy" (RTT 13273); "God will consider whether mercy is appropriate" (RTT 13273)[74]; and "[c]apital punishment has been with us for thousands of years, as Moses laid it down, as the punishment for premeditated murder, and we have had it ever since because it is a just penalty when someone commits the ultimate act of evil." (RT 13277-78.)

Clearly the prosecutor was making religious references throughout his argument. In this context, the biblical application of "good versus evil" and "candle of the wicked" would have been readily recognizable by persons familiar with the Christian religion. Notwithstanding respondent's argument to the contrary, express reference to the Bible is not required to render such statements improper. (See *People v. Roldan* (2005) 35 Cal.4th 646, 743 [It is "patent misconduct" for prosecutors to " invoke religious rhetoric..."].)

In sum, the prosecutor quoted religious authority such as "[t]he candle of the wicked shall be put out" and then labeled appellant as "a wicked person." (RTT 13266.) This was improper because it invited the jury to rely on a higher law in imposing the death penalty.

B. Even A Non-Biblical Application Of The "Good Versus Evil" Argument Is Improper

Use of the good-versus-evil paradigm to determine penalty is improper because "the balance is not between good and bad but between life and death."

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[73] Respondent is disingenuous in suggesting that jurors would not have understood this phrase as echoing Biblical authority. The prosecutor was clearly referring to the Bible, not to a pop song. (See RB 490-491.)

[74] The trial court sustained defense objection to this and issued a curative instruction that the law specifically provides the jury may consider mercy for the defendant. (RTT 13273, 13283.)

(*People v. Brown* (1985) 40 Cal.3d 512, 541, n. 13.)

The prosecutor characterized the penalty determination as "entering the battle between good and evil." This "battle" was referenced at least nine times in the prosecutor's argument and encouraged jurors to vote for death unless they found appellant's crimes were not evil. (RT 13277-78.) However, as stated in *Brown*, "It would be rare indeed to find mitigating evidence which could redeem [appellant] or excuse his conduct in the abstract." (*People v. Brown, supra,* 40 Cal.3d 512, 541, n. 13.) Thus, appellant was sure to lose the "battle" improperly characterized by the prosecutor as between good and evil.

C. Appellant Has Not Waived This Claim

Respondent claims that appellant has waived this claim of misconduct because he waited until the end of argument to object. (RB 488.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion–and on the same ground–the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Appellant has not waived the claim here under the general rule and, in any event, the exception to that rule would allow him to raise the misconduct issue on appeal.

While appellant did not object during the prosecutor's argument, he did so before the jury retired to deliberate. Thus, it was still timely as the court could have issued a curative instruction addressing this matter. (See *People v. Green, supra*, 27 Cal.3d 1, 27.)

Moreover, even if appellant had not objected at all, since an objection

would have been futile, the claim is not waived. Objection would have been futile for at least three reasons.

First, the defense had previously requested a penalty phase instruction informing the jury that they must not view the penalty deliberations as a balance of good versus bad. This instruction was denied by Judge Hammes. (CT 14463.)

Second, the defense did not interrupt the prosecutor's argument to object based on counsels' understanding that as a matter of policy Judge Hammes wanted such objections to be made at a recess. (RTT 13279) And, even though the judge denied that she had ever told counsel "not to interrupt argument"(RTT 13279), her on-the-record statements certainly left the impression that she disfavored such interruptions. (See e.g., RTT 11701 ["And . . . I want to reemphasize I do not like people interrupting other people's closing arguments."]; RTT 11702 [". . . I think most things, again, can be cured after the argument . . ."]; RTT 11790 ["And, again, I would ask that we show restraint. If at all possible, [do] not interrupt [a]n argument until there is a break because we will be having frequent breaks every hour."]; RTT 10996 ["And just so that it's kind of clear what my policy will be on closing argument . . . I am extremely reticent to stop any counsel during argument . . . My feeling is that closing arguments are sacrosanct, and they should be the – the attorney should be free to talk."].) Moreover, this approach has been recognized by the United States Supreme Court as appropriate. (*United States v. Young* (1985) 470 U.S. 1, 13-14 ["[I]nterruptions of arguments . . . are matters to be approached cautiously. At the very least, a bench conference might have been convened out of the hearing of the jury once defense counsel closed, and an appropriate instruction given."].) Hence, it would be unfair to hold that appellant waived these claims based on counsels' reasonable

conclusion that the judge wanted such objections to be made at recess. At a minimum, the judge's policy against contemporaneous objection chilled appellant's right to preserve his appellate claim by forcing him to risk judicial backlash by violating her stated policy in order to do so. (See generally *Simmons v. U.S.* (1968) 390 U.S. 377, 394 ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"]; see also *In re Ali* (1966) 230 Cal.App.2d 585, 591 [petitioner "placed in the unenviable position of having to waive either or both of two constitutional rights: his right to counsel or his right to trial by jury as guaranteed by the California Constitution]; *U.S. v. Davis* (9th Cir. 1973) 482 F2d 893, 913.)[75]

Third, when the defense did object at the close of the prosecutor's argument to the good-versus-evil argument and "appeals to religious passion" (RTT 13278-80), the court refused to restrict the application of those influences. (RTT 13281.) Even when the defense objected to the prosecutor's "only God could grant mercy" assertion, the judge merely admonished the jury that they could consider mercy as part of their determination. (RTT 13283.) Of course, this did not cure the improper application of religious law, it only conveyed to the jurors that they, as well as God, could grant mercy.

Accordingly, the claim of misconduct was not waived.

D. The Error Was Not Harmless

Respondent claims that any error was harmless, in part because of the magnitude of the penalty phase evidence. (RB 492-3.)

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[75] The element of coerced choice described by *Simmons* is also present where the defendant is required to choose between a statutory right and a constitutional right. (See *Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 582 [improper to require defendant to choose between waiver of statutory right to speedy trial and constitutional rights implicated by lack of adequate time to prepare for trial].)

Despite this alleged "magnitude" of evidence, the record demonstrates that the penalty deliberations were closely balanced. (See AOB 1619-22 [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].)

Therefore, the prosecutor's substantial errors during argument cannot be viewed as harmless beyond a reasonable doubt.

LXXXVIII.

IN ARGUING FOR WAIVER RESPONDENT FAILS TO ACKNOWLEDGE THE JUDGE'S POLICY AGAINST INTERRUPTING COUNSEL'S ARGUMENTS [AOB Argument 7.4.2, RB Argument LXXXVIII]

Appellant's Opening Brief contended that the prosecutor minimized the jurors' role in determining the punishment; urged that the jurors were duty bound to return a death sentence and encouraged the jurors to disregard or discount the mitigating evidence by informing the jurors that:"If Mr. Lucas does not deserve the death penalty in this case, we should abolish it as a measure of punishment in the state of California." (AOB 1594-96.) Except for the *Caldwell* error, respondent contends that the claims were waive because defense counsel did not contemporaneously object to the improper argument. (RB 494.) This contention should be rejected because, as a matter of policy, Judge Hammes required such objections to be made at the end of the argument.

Respondent concedes that the defense did object to the prosecutor's statement at the first recess after it was made. (RB 494, citing RTT 13279-80.) The defense did not interrupt the prosecutor's argument to object based on counsels' understanding that, as a matter of policy, Judge Hammes wanted such objections to be made during a recess. (RTT 13279) And, even though the judge denied that she had ever told counsel "not to interrupt argument"(RTT 13279), her on the record statements certainly left the impression that she disfavored such interruptions. (See e.g., RTT 11701 ["And . . . I want to reemphasize I do not like people interrupting other people's closing arguments."]; RTT 11702 [". . . I think most things, again, can be cured after the argument . . ."]; RTT 11790 ["And, again, I would ask that we show

restraint. If at all possible, [do] not interrupt [a]n argument until there is a break because we will be having frequent breaks every hour."]; RTT 10996 ["And just so that it's kind of clear what my policy will be on closing argument . . . I am extremely reticent to stop any counsel during argument . . . My feeling is that closing arguments are sacrosanct, and they should be the – the attorney should be free to talk."].)

Moreover, this approach has been recognized by the United States Supreme Court as appropriate. (*United States v. Young* (1985) 470 U.S. 1, 13-14 ["[I]nterruptions of arguments . . . are matters to be approached cautiously. At the very least, a bench conference might have been convened out of the hearing of the jury once defense counsel closed, and an appropriate instruction given."].)

Further, the trial judge herself did not treat defense objections made during the recess immediately following the prosecutor's closing argument as untimely. While she did not agree on the merits as to most of the defense objections, as to one of the challenged remarks (i.e., the prosecutor's suggestion that "only God can show mercy") she offered to provide and did provide an immediate corrective instruction. (RTT 13281, 13283.) Had she agreed on the merits with the objection at issue in this section of appellant's briefing, she could have remedied this additional improper facet of the prosecutor's argument at the same time.

In sum, it would be unfair and totally inappropriate to hold that appellant waived these claims based on counsels' reasonable conclusion that the judge wanted such objections to be made at recess. The trial court did not treat objections made during the recess as waived, and there's no reason for this Court to do so either.

LXXXIX.

THE PROSECUTOR'S PENALTY PHASE ARGUMENT ERRONEOUSLY NEGATED MITIGATING TESTIMONY ON APPELLANT'S BEHALF [AOB Argument 7.4.3, RB Argument LXXXIX]

Respondent does not address appellant's argument (AOB 1597-1600) that any "barrier" to consideration of mitigation evidence is constitutionally impermissible (*Mills v. Maryland* (1988) 486 U.S. 367, 374-375) but maintains that the prosecutor's reference to Ted Bundy was not misconduct. Respondent further asserts that any claim of error was not only forfeited, it was harmless. (RB 499-500.)

A. The Prosecutor's Argument Relied On An Uncommon "Fact" Not In Evidence And Expressly Negated The Mitigating Testimony

Respondent errs in claiming that the prosecutor's statement – "Ted Bundy was a good guy when he wasn't murdering people" – was a fact of which the jury could take judicial notice.[76] While Ted Bundy's criminal acts may be notorious, whether he was a "good guy" when he wasn't murdering people is not a matter of common knowledge. Nonetheless, the prosecutor erroneously urged jurors to rely on that unsupported assumption in disregarding mitigating testimony regarding appellant's positive qualitites.

In asserting that appellant was not prejudiced by the prosecutor's statements, respondent relies on *People v. Jones* (1997) 15 Cal.4th 119, in which the prosecutor argued "that every murderer on death row 'really probably grew up as a kid, nice kid.'" (*Id.* at p. 185.) This Court concluded,

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[76] "Since judicial notice by a jury is more limited than judicial notice by the trial court (McCormick, *Evidence*, p. 691), facts are deemed within the common knowledge of the jury only if they are matters of common human experience or well known laws of natural science." (*People v. Love* (1961) 56 Cal.2d 720, 732, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631.)

"[a]s we held regarding a similar argument in *People v. Sims* (1993) 5 Cal.4th 405, 464, this argument was proper because the prosecutor 'did not imply that the jury should disregard the evidence of defendant's background, but rather that, in relation to the nature of the crimes committed, it had no mitigating effect.'" (*Ibid.*)

In contrast, here, after the improper Ted Bundy reference, the prosecutor expressly stated that Appellant's mitigating evidence should be disregarded. The prosecutor told the jury:

> What is the just punishment? What is just for Mr. Lucas? You must base your decision upon what Mr. Lucas did, not who he is or what family he comes from or any sympathy for his family. The question is what did he do. (RTT 13273.)

Consideration only of what appellant did (i.e., the crimes he committed) necessarily negated any consideration of the mitigating evidence offered during the penalty phase such as good character evidence, the potential effects of a harsh and abusive childhood and appellant's inherent human worth as reflected in testimony from the many people who cared for him.

Because the prosecutor's argument urged the jury to completely disregard the mitigating evidence, it was clearly erroneous.

B. The Claim Of Error Was Not Forfeited

Respondent asserts that this claim of error was forfeited because appellant did not object "until the recess and sought a mistrial, not an admonition." (RB 499.)

Respondent is incorrect. While appellant did not object during the prosecutor's argument, he did so at the recess and before the jury retired to deliberate. Thus, it was still timely as the court could have corrected the error by issuing a curative instruction, if not granting a mistrial. (See *People v. Green, supra*, 27 Cal.3d 1, 27.)

C. The Error Was Not Harmless

Referencing its earlier argument (RB 492-93), respondent claims that any error was harmless, in part because of the magnitude of the penalty phase aggravating evidence. (RB 500.)

Despite this alleged "magnitude" of aggravating evidence, the record demonstrates that the penalty deliberations were closely balanced. (See AOB 1619-22 [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].)

Therefore, the prosecutor's substantial errors during argument cannot be viewed as harmless beyond a reasonable doubt.

XC-CII.

[In response to RB Arguments XC-CII, appellant relies upon AOB Argument(s) 7.4.3-7.7.1.]

CIII.

JUDGE HAMMES IMPROPERLY COERCED THE JURORS AFTER THEY INFORMED HER THAT A UNANIMOUS DECISION AS TO PENALTY "WAS NOT POSSIBLE" [AOB Argument 7.7.1, RB Argument CIII]

Appellant's Opening Brief contended that the judge improperly coerced the jury into returning a verdict after they stated they were deadlocked. (AOB 1669-77.) Respondent erroneously asserts that Judge Hammes did not coerce the jury. (RB 541-50.) As the following demonstrates, the judge's actions did exert undue pressure on the jurors after they informed her that "a unanimous decision was not possible." (CT 24250, RTT 13341.)

A. Failure To Inquire As To Numerical Division Of Jury Was Improper

Respondent claims that the trial judge did not err by failing to inquire after the jury announced it was deadlocked. However, as this Court stated in *People v. Carter* (1968) 68 Cal.2d 810, "The court also may, and indeed it should, question individual jurors as to the probability of agreement. [Citations.] Then, if the court determines that a reasonable probability of agreement does exist, it may, generally speaking, undertake certain measures calculated to encourage agreement." (*Id.* at p. 815; disapproved on other grounds in *People v. Gainer* (1977) 19 Cal.3d 835.)

According to respondent, Judge Hammes did not inquire because she "reasonably determined" that the jury had not deliberated long enough to reach a "true deadlock." (RB 546.) As noted in *Carter*, however, inquiry is appropriate before the court decides a reasonable probability of agreement exists. The defense requested that Judge Hammes conduct that threshold inquiry of the jurors. (TRT 13345.) She refused to do so, preferring instead to

presumptively instruct the jury to attempt to reach an agreement. Thus, the judge erroneously forced continued deliberations without evaluating whether or not an uncoerced agreement was reasonably probable.

B. Reference To The Length And Complexity Of The Case Was Improper

Judge Hammes also informed the jury that due to the "length and complexity of the case," the jurors should continue to deliberate regardless of any deadlock. (RTT 13346-47.) This was improper. (See *People v. Gainer* (1977) 19 Cal.3d 835, 851, n.16 ["reference to the expense and inconvenience of a retrial . . . impermissible."].)

Respondent speculates that the jury would not have understood the trial judge's reference to mean they should reach a verdict to avoid the expense and inconvenience of retrial. (RB 547.) However, the natural inference from judge's comments was that because the trial was lengthy and complex, retrial was something the court sought to avoid. (See *People v. Barraza* (1979) 23 Cal.3d 675, 685 ["That the reference here did not link the notion of expense to a prospective retrial is immaterial, for the link is obvious and will naturally be inferred by the jurors once the subject is introduced."] This improperly revealed a judicial preference for a verdict and invited consideration of an improper factor as a reason for a juror to abandon his or her conscientious opinion – i.e., the desirability of avoiding the expense and inconvenience a retrial would involve.

Moreover, as respondent concedes, the penalty phase was much shorter than the guilt phase (RB 546) and included consideration of evidence already thoroughly reviewed by the jury during the eight-day guilt trial deliberations. (RTT 13481.) The additional evidence presented during the penalty phase was undoubtedly more emotional than it was complex. Thus, reliance on length

and complexity as a reason for continued deliberation lacked validity.

C. Informing The Jury That Deadlock Would Result In A New Penalty Trial Was Improper

The jury's second and third notes to the judge asked what would happen if the jurors were deadlocked. In her response, Judge Hammes told the jury that in the event of a deadlock, "the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be." (CT 24253.)

Respondent erroneously concludes that there was no error because "the trial court did not tell the jury that the case must be decided at some time and there was nothing inaccurate in the trial court's answer." (RB 548.) Respondent ignores the plain meaning of the law. It is error for the trial court to give an instruction that "states or implies that if the jury fails to agree the case will necessarily be retried." (*People v. Gainer, supra,* 19 Cal.3d 835, 852.) The judge unambiguously informed the jurors that if they remained deadlocked, a new jury would be impaneled to reach a decision. In other words, the penalty phase will be retried. Respondent provides no other reasonable interpretation of the instruction.

Not only did the judge err by informing the jury that the case would be retried if the deadlock was not broken, she went on to instruct the jury to disregard that information. (CT 24253.) Respondent appears to claim that this "admonishment" negated any error. (RB 548.) Obviously, however, the error could have been completely avoided had the judge not informed the jury of the consequences of a deadlock in the first place. Giving the jury information only to immediately admonish them to disregard it is utterly counter-productive and bound to increase juror confusion and prejudice, not negate it. The likelihood is nil that the jury, having been expressly told that their deadlock would result

in a retrial, could then ignore this fact.

D. Refusing To Instruct Each Juror To Follow His Or Her Own Conscience Was Improper

Judge Hammes urged jurors to evaluate their opinions in light of those of the other jurors but failed to admonish them to exercise their own independent judgment.

Absence of an admonishment for each juror to follow his or her own conscience has served as a basis for reversal in the Ninth Circuit Court of Appeals. (See *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981, fn. 5 ["When a trial court gives an *Allen* charge, it 'is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.'"].) Moreover, use of this admonishment is approved by California courts. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 958-959; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1121.) In *People v. Hinton* (2004) 121 Cal.App.4th 655, 659-660, the Court of Appeal found that even though the admonishment was given, it was still not enough to negate the damage done by an instruction encouraging the minority to go with the majority.

While Judge Hammes did not expressly direct jurors in the minority to abide by the majority opinion, the thrust of her instruction was that the jurors should examine their opinions in view of other jurors' opinions in order to reach a verdict. (RTT 13346-7.) The trial court's emphasis on a resolution of opinions, therefore, demanded the counterbalancing admonishment for the jury members to ultimately maintain their independent judgment in deciding the penalty. Under the circumstances, failure to give this admonishment further contributed to the coercive environment.

E. Further Instruction Based On Speculation After Surreptitious Inspection Of The Jury Deliberation Room Was Improper

As addressed in more detail immediately below in Argument CIV (pp. 251-57), the trial judge's inspections of the jury deliberation room and subsequent additional instruction to the jury based on what the judge discovered about the jurors' deliberations were improper. Respondent asserts that there was no coercion because the jurors were unaware of the jury room inspections. (RB 550.) Respondent is off the mark. While the improper observations of the jury room were not coercive in and of themselves, it was these improper observations and the inferences the judge drew from them which led her to give an unwarranted supplemental instruction advising the jury for the second time that the guilt phase exhibits could be considered during penalty deliberations. (CT 14403) In light of the fact that the supplemental instruction essentially repeated what the trial judge had stated the previous day, the instruction would inevitably have been understood as conveying the judge's view that the jurors should devote time to re-examining and reconsidering guilt phase exhibits (which included multiple gory crime scene photos), and thereby, at least implicitly, would also have conveyed the trial court's view as to the appropriate sentence. The trial court thus communicated her own bias, put unwarranted pressure on jurors favoring a sentence of life, and "inject[ed] extraneous and improper considerations into the jury's debates." (*People v. Gainer, supra,* 19 Cal.3d 835, 852.)

In sum, the individual and combined effect of the judge's coercive responses to the deadlocked jury likely caused prejudice. As this Court stated in *Gainer*, "when the erroneous admonition to minority jurors is given or repeated to a criminal jury which have indicated that they are divided, it is difficult if not impossible to ascertain if in fact prejudice occurred; yet it is

very likely that it did." (*People v. Gainer, supra,* 19 Cal.3d 835, 855.) Because respondent has not and cannot show the absence of prejudice, reversal is required.

CIV.

JUDGE HAMMES IMPROPERLY INVADED THE SECRECY OF THE JURY'S DELIBERATIONS [AOB Argument 7.7.2, RB Argument CIV]

Appellant's Opening Brief contended that Judge Hammes violated the general rule, embraced by this Court, that "no one – including the judge presiding at a trial – has a right to know how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." (*People v. Cleveland* (2001) 25 Cal.4th 466, 481-482 [internal citations and quote marks omitted].) (AOB 1678-90.)

Respondent concedes that the judge used observations of the jury room to "understand the degree of the jury's misunderstanding" and to "fashion" a supplemental instruction in response. (RB 550-51.) However, respondent erroneously claims this did not invade the secrecy of deliberations and that the supplemental instruction did not emphasize the inflammatory guilt phase exhibits.

A. The Invasion Of The Secrecy Of Jury Deliberations Was Prompted By The Judge's Personal Belief That The Jurors Were Not Looking At Physical Exhibits From The Guilt Phase

Respondent asserts that the presence of the bailiff in the jury room absent the jurors is not an invasion of jury secrecy. (RB 553-54.) This is not the issue raised by appellant. Appellant alleges error in the use of the trial judge's and the bailiff's observations of the jury room to: (1) speculate as to the jurors' subjective mental processes and (2) provide a supplemental instruction to the jurors in light of these speculations as to the jurors' mental processes – an instruction that was both biased and prejudicial to appellant.

According to respondent, the bailiff's observations in this case

"revealed nothing of the jurors' thought processes and, thus, did not implicate the concerns which imposed secrecy on the deliberations." (RB 554.) However, the judge's explicit purpose in directing the bailiff to report on the condition of the jury room was to gather intelligence about the jurors' thought processes. (RTT 13455.) The judge not only believed the observations revealed something about the jurors' thoughts, she acted on that belief. Although the jurors had already been told that guilt phase evidence could be considered in penalty deliberations,[77] the judge speculated that because physical exhibits were not spread out in the jury room, the jury was excluding guilt phase evidence from their thought processes. In response to the bailiff's observations and her speculative inferences, the judge gave the jury the additional, unrequested instruction on her own motion.

Respondent, in an attempt to justify the giving of the supplemental instruction, asserts that "when [the trial court] learned that the jury had not included the guilt phase exhibits in their deliberations even after obtaining the trial court['s] initial answer, the trial court recognized that its answer was not full and complete, and a further answer was appropriate." (RB 554-555.) Ignoring the impropriety of the trial court's invasion of the privacy of the jury's deliberative process, respondent is still wrong as a purely factual matter. Before the supplemental instruction was given, the bailiff had reported to the court that "looking a little more deeply" he had noticed that one exhibit had been moved. (RTT 13476.) This certainly undercut any reason for believing that the jurors thought they couldn't look at the exhibits. Further, the jurors

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[77] The court had so advised the jury in response to a specific question from the jury. (CT 24253; see also AOB 1680.) Thus, the subsequent supplemental instruction based on jury room observations was repetitive and especially likely to unduly influence the jurors. (See AOB 1679-81.)

had presumably spent considerable time reviewing the guilt phase exhibits during eight days of guilt phase deliberations, and the fact that they did not pull them out again during penalty deliberations did not mean in any way that they were not considering that evidence in their penalty deliberations. And, the trial court's "initial answer" was a very clear response to a specific question: "Evidence of the circumstances of the crime . . . may be considered in the penalty phase just as if it had been presented in the penalty phase." (CT 24253-24254.) There is no reason to suspect that the jurors did not understand this. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 139.) The only purpose and likely effect of the supplemental instruction was to convey that the trial judge thought the jurors should devote more time to looking at the guilt phase exhibits – something a trial judge should not be conveying to deliberating penalty phase jurors who had announced their inability to reach a verdict.

Additionally, respondent's reliance on *People v. Mincey* (1992) 2 Cal.4th 408 is misplaced because juror misconduct is not alleged in the present case. In *Mincey*, the bailiff observed a juror with a Bible in the jury room. He notified the court which in turn questioned each juror. The issue in that case was the use and presence of material extraneous to the record during deliberations. Thus, the bailiff in *Mincey* was reporting objective signs of juror misconduct.

In the present case, however, there was no evidence that jurors were referring to material outside the record or engaging in any other alleged

misconduct.[78] Indeed, the materials at issue were evidentiary exhibits, and Judge Hammes believed that the jurors were not looking at them. Even if this were true (but see p. 252, above), failure to look at exhibits is not juror misconduct. The jurors deliberated over that guilt phase evidence for more than eight days during the guilt trial and had just been re-instructed that they could consider such evidence. (RTT 13481; CT 24253.) They had the option to look at the physical exhibits again but were by no means required to do so.

B. The Giving Of The Supplemental Instruction Was Not A Neutral Judicial Act, And It Prejudicially Emphasized Inflammatory Exhibits From The Guilt Phase

In arguing that the supplemental instruction was neutral and did not emphasize the court's concerns, respondent myopically focuses on the content of the instruction. Standing alone, the content may appear superficially neutral. However, the context in which the instruction was given reveals its prejudicial role. (See *People v. Melton* (1988) 44 Cal.3d 713, 735 ["The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made."].)

First, the very fact the court gave the additional instruction at all necessarily emphasized it.[79] Because the supplemental instruction was not

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[78] "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

[79] There is a particular danger of undue emphasis with supplemental instructions. "Supplemental instructions should be carefully framed and tendered to counsel. [Citation.] The last words a jury hears may be those which are best remembered." (O'Malley, Grenig & Lee, *Federal Practice and*

(continued...)

given in direct response to further questions from the jury, it would have appeared very significant to the jurors. (*Ibid.*)

Second, the instruction reiterated information already supplied to the jury in response to their previous question. This repetition unduly emphasized the court's concern that the jury "understand" that it had "access to" the physical exhibits, instructions and notes. (See *People v. Hill, supra,* 76 Cal.App.2d 330, 343 ["continual repetition tends to give undue emphasis to the particular point to which they may relate and operates to confuse the jury in their consideration of the evidence.'"].)

Third, "[a]n instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue. [Citations]." (*People v. Wright, supra*, 45 Cal.3d 1126, 1135.) The supplemental instruction here listed the exhibits, among other specific items, as something to which the jurors could refer. (CT 14403) References to the guilt and penalty phase exhibits and jury instructions were separately enumerated while access to unspecified "testimony" appeared on the last line. Specifically focusing the jury on the evidentiary exhibits, many of which were graphic, inflammatory and prejudicial to the defense,[80] operated as improper judicial comment on particular items of evidence. (*Ibid.*)

Moreover, as this Court stated in *People v. Klor* (1948)32 Cal.2d 658,

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[79](...continued)
Instructions 9:03 [Communication Between Court And Jury] pp. 597-98 (West, 5th ed. 2000); see also *People v. Thompkins* (1987) 195 Cal.App.3d 244, 255; *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 158, fn 3.)

[80] For example, the exhibits included close up photos of the wounds suffered by each victim. (See RTT 4467-68 [People's Ex. 30: photo board depicting wounds for comparison purposes].) (The defense made an on-going objection to these photos.) (RTT 992-93.)

662:

> "It is true that in a criminal case a jury should be given instructions on the general principles of law applicable to the case and even if not requested by the parties such instruction should be given by the court of its own motion. But this is not the rule as to specific points developed at the trial. Unless instructions thereon are requested by the parties desiring them it is not incumbent on the court to give them of its own motion where the jury is otherwise fully and fairly instructed on the general principles of law involved in the case." (*Id.* at p. 662.)

In the present case, the "clarifying" instruction was given on the court's own motion even though the defense objected and the court had already provided additional instructions on the matter in direct response to the jury's question. This determination on the judge's part to make sure the jury reviewed the largely graphic and inflammatory exhibits contributed to the biased context in which the supplemental instruction was given.

In sum, the invasion of the secrecy of jury deliberations and the subsequent issuance of a repetitive and specific instruction on the court's own motion was improper.

C. The Error Was Not Harmless

Respondent does not directly challenge appellant's claim of structural error but asserts that any error was harmless because "the supplemental instruction was a broad instruction calling the jury's attention to a wide variety of items available for their consideration." (RB 557.) Therefore, according to respondent, there is no reasonable probability the jury could have understood the instruction as anything but a clarification of the answer they had already been given. (*Ibid.*) This is a mischaracterization of the supplemental instruction and does not prove the error harmless beyond a reasonable doubt because there is no record of how the jury responded to the receipt of the supplemental instruction. (See AOB 1688-90.)

The first answer given in direct response to the jury's question about whether it could consider guilt phase evidence during its penalty phase deliberations was general. (CT 24253.) It was the court's supplemental instruction that listed specific items from both the guilt and the penalty phase in which the judge directed the jury that: "it should understand it has access" to those items. (CT 14403.) The exhibits were the only items of evidence referenced that were specifically enumerated as to both the guilt and penalty phases. The instruction only generally referenced "transcripts of testimony."

In light of the fact that the jury had no question that it could consider the penalty phase evidence, and had already been broadly instructed that it could consider the guilt phase evidence, the court's specific reference to the guilt phase exhibits would have impressed upon the jury that the trial court believed consideration of those particular exhibits would help resolve the deadlock. This was not a harmless emphasis because the guilt phase exhibits contained graphic and inflammatory photographs of all seven victims' throat slashing wounds. Furthermore, Judge Hammes recognized her authoritative influence over the jury, noting that it was really "tuned in" to her. (See RTT 8401.) Thus, the jury would have deferred to her instructions.

Therefore, respondent has failed to prove that the error was harmless beyond a reasonable doubt and the judgment must be reversed.

CV and CVI

[In response to RB Arguments CV and CVI, appellant relies upon AOB Argument(s) 7.7.3 and 7.7.4.]

CVII.

WHEN A DELIBERATING JUROR REPORTS THAT A FAMILY MEMBER HAS DIED THE JUDGE HAS "DISCRETION TO DECIDE WHAT SPECIAL PROCEDURES TO EMPLOY" – BUT DOING NOTHING IS NOT AN ACCEPTABLE OPTION [AOB Argument 7.7.5, RB Argument CVII]

In his opening brief Appellant contended that the judge abused her discretion by doing nothing in response to a juror's note disclosing the recent death of her father. (AOB 1702-09.) Respondent disagrees, asserting that inaction under these circumstances was an acceptable option: "As the juror's note indicated no hesitancy, much less inability, to carry out her duties and only asked to be excused to attend the funeral, there was nothing for the trial court to determine." (RB 561-64.) In other words, respondent contends that because the juror only requested to be excused to attend the funeral – and did not "ask to be discharged" or otherwise express emotion – the judge had no obligation to do anything at all. (RB 563-64.) This argument should be rejected.

Nothing in this Court's decisions authorizes the trial judge to make no inquiry whatsoever as to the continued fitness to serve of a juror whose family member has died during deliberations. For example, in *People v. Beeler* (1995) 9 Cal.4th 953, although there was no formal hearing or detailed inquiry, the judge did meet personally with the juror. This personal meeting between the judge and the juror satisfied the judge's discretionary duty because "the judge was in the best position to evaluate the juror's demeanor." (*Id.* at 989; cf. *People v. Stewart* (2004) 33 Cal.4th 425, 451-52 [judge's decision to excuse jurors for cause based solely on written juror questionnaire not entitled to deference on appeal because there is no face-to-face contact during which

the judge may evaluate the juror's demeanor] .)

Furthermore, this Court has consistently held that the death of a family member – especially a parent – is a very significant event. For example, in *In re Mendes* (1979) 23 Cal.3d 847, 852, the death of a juror's brother justified the summary ex parte discharge of the juror even in the absence of any on-the-record request by the juror to be discharged.[81] (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029 ["The death of a juror's parent constitutes good cause to discharge the juror *if* it affects the juror's ability to perform his or her duties"]; see also *People v. Asthmus* (1991) 54 Cal.3d 932, 987 [the death of one's mother is "obviously . . . a tragic and disturbing event"]; cf., *People v. Ramirez* (2006) 39 Cal.4th 398, 462 ["Although the murder of a fellow juror is shocking, defendant's attempt to equate that event with the death of a family member, especially a parent, is unavailing"].)

In sum, when the judge receives notice that a juror's parent has died during deliberations the judge should be obliged to, at a minimum, personally meet with the juror to assess their demeanor and ability to continue deliberating without being affected by grief or emotion caused by the death. (See e.g., *People v. Cunningham*, *supra*, 25 Cal.4th at 1020 [court has "duty to make reasonable inquiry" into juror's distress over her dying father].) Respondent correctly observes that "people do not act or react uniformly to every situation" (RB 564), but on this record there is no assurance that the juror was unaffected by the death of her father. A strong emotional response precluding calm and careful deliberation and distracting other jurors will be a

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[81] This Court "reasonably infer[red]" from the otherwise silent record that the juror asked to be excused from jury duty. (*In re Mendes, supra*, 23 Cal.3d at 852.)

very common response to receiving word of the death of one's father.[82] Without some inquiry there is no reasonable basis for assuming that a juror under such circumstances would remain fit to continue deliberating. Because the judge in the present case failed to do anything at all in response to the juror's note, the judgment should be reversed.

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[82]See *People v. Beeler, supra*, 9 Cal.4th at 1013 (Kennard, J., dissenting):

> As the concurring and dissenting opinion by Justice Baxter aptly observes, courts have long recognized the human reality that the death of an immediate family member can have a profound effect on jurors and can disrupt the calm, dispassionate, and focused deliberation they must bring to bear on their sworn task of deciding guilt or, as here, whether a defendant should be put to death. Accordingly, in this case there was a great risk that the emotional trauma of the death of his father would cloud Juror C[]'s deliberations, as well as a risk that it would also distract the other jurors.

See also *People v. Beeler, supra,* 9 Cal.4th at 1019 (Baxter, J., concurring and dissenting).

CVIII.

THIS COURT SHOULD NOT DEVIATE FROM THE CLEAR LANGUAGE OF THE CLERK'S MINUTES WHEN INTERPRETING THE APPELLATE RECORD [AOB Argument 7.7.6, RB Argument CVIII]

Appellant's Opening Brief contended that the judge erroneously failed to notify defense counsel of the note from Juror P.W. advising that her father had died and requesting to be excused for the funeral. (AOB 1710-16.) The issue raised by this claim is whether or not the Clerk's Minutes[83] demonstrate that defense counsel were notified about Juror P.W.'s note.

Respondent asks this Court to reject a straightforward reading of the minutes because "the clerk's minutes are not literal in sequence and may also not be literal in substance." (RB 565.) This Court should decline respondent's invitation.

Respondent's position is based on asserted discrepancies between the times written on the notes themselves and the times recorded in the Clerk's Minutes. However, there are no such discrepancies.

As to the first note – in which Juror P.W. informed the judge about the death of her father – respondent asserts no discrepancy. The Attorney General thus concedes that the Clerk's Minutes are correct in stating that counsel were not informed about the note at that time. As to the next two notes the Clerk's Minutes contain the following notation:

> EX PARTE: . . . Two notes are received from the jury, now incorporated as part of Exhibit 32, re: scheduling and counsel are notified of the notes and agree the jury need not deliberate on Friday of this week, if needed . . . (CT 5595.)

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[83] Because there were no oral proceedings the only record of the matter is the Clerk's Minutes.

Respondent contends that use of the term "the notes" in the second part of the sentence not only refers to the "two notes" mentioned in the first part of the sentence but also refers back to Juror P.W.'s notes from the previous afternoon about the death of her father. Respondent claims that such an interpretation is reasonable because the times on the two notes received that morning – and a third note received later that morning – did not correspond with the time the Clerk's Minutes indicate the notes were received. (RB 565.) However, as to the first two notes from that morning it is perfectly reasonable that they would have been written before they were actually given to the clerk – especially since they involved scheduling matters relating to events later in the week. Thus, the fact that the notes were written at 9:30 and 10:00 a.m. and received by the clerk during a break at 10:39 a.m. is simply not a discrepancy and does not in any way undermine the accuracy of the Clerk's Minutes.

Nor is the alleged discrepancy as to the third note from that morning significant. The fact that there is a one minute difference between the time on the note and the time it was received is of no significance whatsoever and suggests nothing more than someone's watch being slightly fast or slow.

In sum, respondent has failed to impeach the accuracy of the Clerk's Minutes and this Court should decline respondent's invitation to rewrite the record.

Respondent also erroneously asserts that Juror P.W.'s note about the death of her father was not a critical stage in the proceedings because substitution of a juror is not a critical stage. (RB 566.) However, respondent's assumption that the two situations are equivalent is fatally flawed. When a juror is replaced by an alternate any ongoing concerns about the replaced juror's ability to deliberate are no longer relevant. On the other hand, in a situation such as the present one – where the juror is continuing to deliberate

– any potential impairment of the juror's ability to deliberate can obviously affect the substantial rights of the defendant. (See *People v. Cunningham* (2001) 25 Cal.4th 926,1029.) Accordingly, receipt of Juror P.W.'s note was a critical stage of the proceedings and the absence of counsel was reversible error. (*People v. Horton* (1995) 11 Cal.4th 1068, 1137.)

CIX - CXVII

[In response to RB Arguments CIX - CXVII , appellant relies upon AOB Argument(s) 7.7.7-7.9.]

CONCLUSION

For all of the foregoing reasons and the reasons stated in Appellant's Opening Brief, it is respectfully requested that appellant's convictions for first degree murder and the special circumstance finding be reversed, and that appellant's death sentence be set aside.

Dated: May ____, 2008

THOMAS LUNDY
Attorney for Defendant and Appellant
DAVID ALLEN LUCAS

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California.

I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue #179, Santa Rosa, California 95405. On May 13, 2008, I served the within: **APPELLANT'S REPLY BRIEF** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and executed on May 13, 2008, at Santa Rosa, California.

Tom Lundy