SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff / Respondent, vs. LA TWON WEAVER, Defendant/Appellant.	California Supreme Court Case No. S033149 Superior Court Case No. CRN22688

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

Honorable J. Morgan Lester

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

CALIFORNIA STATUTES

OTHER AUTHORITIES

I. THE TRIAL COURT'S FAILURE TO ADVISE MR. WEAVER THAT HE WAS SURRENDERING HIS CONSTITUTIONAL RIGHTS INVALIDATED THE JURY WAIVER

Mr. Weaver did not knowingly, intelligently, or voluntarily waive his right to a jury trial because he was never advised that he was surrendering his right to appeal the denial of pretrial motions, and he was never advised of his right to participate in jury selection. (Appellant's Opening Brief (hereinafter AOB) 24-36.) The trial court's failure to inform him that he was giving up these two fundamental constitutional rights violated the United States and California Constitutions and invalidated the jury waiver. (*Ibid.*)

Respondent contends that the jury waiver was valid because: 1) the trial court advised Mr. Weaver of his right to an automatic appeal, and Mr. Weaver understood that he was waiving his right to appeal the pretrial motions; and 2) the trial court was not obligated to personally advise Mr. Weaver of his right to participate in jury selection. (Respondent's Brief (hereinafter RB) 18, 20-27, 28-33.)

As discussed below, the record refutes Respondent's argument and shows that the jury waiver colloquy was constitutionally deficient. In Section A, Mr. Weaver argues that he was neither advised nor understood that he was surrendering his right to appeal the pretrial motions as a condition of his jury waiver. In Section B, Mr. Weaver argues that he was not informed of his right to participate in jury selection. In Section C, Mr.

Weaver argues that these errors require reversal. Because the trial court failed to advise Mr. Weaver of the constitutional rights he surrendered or of the consequences of waiving his right to a jury trial, the waiver was not knowing, intelligent, or voluntary, and thus his rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and article I of the California Constitution.

A. Mr. Weaver Was Not Advised That A Consequence Of Waiving His Right To Jury Trial Would Be The Surrendering Of A Significant Portion Of His Appellate Rights

Trial courts are required to advise defendants of the constitutional rights they surrender when waiving a jury trial. (See AOB 26-27; *People v. Collins* (2001) 26 Cal.4th 297, 305; *Colorado v. Spring* (1987) 479 U.S. 564, 573.) In order for a jury waiver to be considered knowing, intelligent, and voluntary, courts must inform defendants of any constitutional rights surrendered and the consequences of waiving those rights. (AOB 26-27.) Here, the record demonstrates that the trial court failed to inform Mr. Weaver that he was giving up a significant part of his constitutionally protected right to appeal. (AOB 27-31.) As discussed below, the trial court never asked Mr. Weaver whether he understood that he was surrendering his constitutional right to appeal pretrial motions as a condition of his jury waiver.

1. Because the right to appeal is constitutionally protected, the trial court's failure to advise Mr. Weaver that he was giving up a portion of the right invalidates the jury waiver

Respondent argues that the right to appeal is not a constitutional right and that the States are not required to provide appellate review. (RB 29.) Respondent, however, fails to address Mr. Weaver's argument that the U.S. and California Constitutions protect the right to automatic appeal in capital cases and that appellate review is a bedrock requirement for a constitutional death penalty. (AOB 27-31, and cases cited therein.) In fact, Respondent completely ignores the last 30 years of Supreme Court jurisprudence mandating appellate review as a necessary condition for a constitutional death penalty statutory scheme. (*Ibid.*) Additionally, in characterizing the right to appellate review as neither a constitutional nor a fundamental right, Respondent disregards the liberty interest created by the State of California in establishing the right to an automatic appeal of a death sentence, which is protected by the Due Process Clause. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 400-401 [due process protections attach to state created right to criminal appeals].)

The U.S. and California Constitutions safeguard the right to an automatic, non-waivable appeal with meaningful review of all legal issues relating to a capital defendant's conviction and sentencing. (AOB 27-31.) As detailed in Mr. Weaver's Opening Brief, since reinstating the death

penalty in 1976, the Supreme Court has held that the availability of automatic appellate review is necessary to a constitutional death penalty scheme. (*Ibid.*) Indeed, the Supreme Court has repeatedly emphasized the fundamental importance of mandatory appellate review as a safeguard to help ensure that the death penalty is not arbitrarily imposed. (*Parker v. Dugger* (1991) 498 U.S. 308, 321; *Pulley v. Harris* (1984) 465 U.S. 37, 44; *Zant v. Stephens* (1983) 462 U.S. 862, 890; *Gregg v. Georgia* (1976) 428 U.S. 153, 204-207; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Jurek v. Texas* (1976) 428 U.S. 276; *Proffitt v. Florida* (1976) 428 U.S. 242, 258-259.)

Even if the past 30 years of the Supreme Court's capital jurisprudence did not specifically mandate appellate review as a constitutional right, Respondent's argument would still fail. A state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections, and "that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The California Penal Code provides for the automatic appeal of death sentences. (Pen. Code, § 1239, subd. (b).) Because the Due Process Clause protects against liberty interests that are created by state law, (see, e.g., *Evitts v. Lucey*, *supra*, 469 U.S. at pp. 399-400), Mr. Weaver's right to appeal implicates a constitutional right.

Because the right to appeal in a capital case is itself a constitutional right, and because Mr. Weaver's jury waiver was conditioned upon surrendering part of his automatic appeal – the right to appeal pretrial motions – the trial court had a duty to inform Mr. Weaver that he was giving up this right. (AOB 27-31.) Its failure to do so rendered the jury trial waiver invalid.

2. Mr. Weaver was never advised that he was giving up his constitutional right to appeal

The trial court failed to advise Mr. Weaver that he was surrendering a significant portion of his right to appeal and of the consequences of waiving that right as a condition of his jury waiver.

Notably, Respondent does not dispute that the trial court was required to advise Mr. Weaver that he was waiving part of his right to appeal. Instead, Respondent first argues that the jury waiver was knowing, intelligent, and voluntary because the trial court's colloquy was "detailed and exhaustive," and Mr. Weaver "repeatedly stated that he understood the trial court's advisements." (RB 20.) However, absent from the trial court's waiver colloquy was an express admonition informing Mr. Weaver of his right to appeal. Although he may have indicated that he understood the court's various advisements on other issues, Mr. Weaver was never informed of his right to an automatic appeal or of the consequences of waiving that right.

Next, Respondent contends that the trial court "advised the parties in open court, with Weaver present" of his right to an automatic appeal. (RB 20.) To support this argument, Respondent cites three instances during the waiver colloquy when the trial judge mentioned the right to appeal. (RB 20-21; 14 RPT 6-7, 25, 47.)

In the first two references, the trial judge, in what were exchanges with counsel and not Mr. Weaver, merely explained the right to an automatic appeal generally; he did not "specifically advise" Mr. Weaver. (14 RPT 6-7, 25.) Respondent concedes that it was the prosecutor whom the trial judge advised that a defendant could not waive the right to an automatic appeal. (RB 23; 14 RPT 6-7.) In the third reference, although the trial judge mentioned to Mr. Weaver that, procedurally, "the case goes up to an automatic appeal to the California Supreme Court," he did so in the context of informing Mr. Weaver that there would be no independent review of a jury verdict if Mr. Weaver waived jury. (14 RPT 47.) In any event, at no time did the trial judge ever ask Mr. Weaver anything with respect to his right to appeal, let alone secure his assent to the waiver of his right to appeal the denial of the pretrial motions. (AOB 26-27.)

Respondent also argues that Mr. Weaver "was aware he was waiving his right to appeal the pre-trial motions," and that Mr. Weaver did so for "tactical reasons." (RB 28-29.) Respondent provides no record evidence to support this argument, but points out that defense counsel agreed to give up

Mr. Weaver's right to appeal certain pretrial motions as a condition of the jury waiver. (*Ibid.*) The mere fact that defense counsel agreed to the prosecutor's condition does not establish that Mr. Weaver understood he was waiving his right to appeal, when Mr. Weaver was never advised of that right nor was he asked about it on the record.[1]

Respondent suggests that the trial court did not need to explain all "conceivable ramifications" to Mr. Weaver, and that the jury trial waiver was acceptable even if Mr. Weaver "did not know the specific detailed consequences of invoking it." (RB 19-20.) It is true, as Respondent states, that a waiver need not be rendered inadequate "simply because all conceivable ramifications are not explained." (RB 19-20, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 374, superseded by statute on another ground in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) But *Carpenter* arose out of a situation in which counsel had a conflict of interest, and the issue was whether the defendant had been sufficiently advised about the potential consequences of proceeding with conflicted counsel. (*Ibid.*) *Carpenter* and cases like it stand merely for the

[1] Citing 14 RPT 14, Respondent claims that "[i]t was only after the trial court accepted Weaver's waiver on the pretrial motions that it accepted the prosecution's jury waiver." (RB 28.) Respondent's statement implies that the trial court specifically discussed the appellate waiver with Mr. Weaver and received his explicit assent. In fact, no such thing occurred. It was only defense counsel who was asked about, and discussed on the record, the waiver of Mr. Weaver's right to appeal the denial of the pretrial motions. (14 RPT 14.)

proposition that a proper colloquy need not include a warning of every imaginable consequence of a particular waiver decision. (See, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 140.) Here, the waiver of a significant portion of Mr. Weaver's appeal rights was not a hypothetical possibility; it was a specific, binding condition of the jury waiver, perhaps known to all counsel, but never explained to Mr. Weaver.

Though Respondent suggests that Mr. Weaver "chose to waive" his right to appeal the pretrial motions, Respondent also argues, in the alternative, that Mr. Weaver's counsel had the authority to waive this right on his behalf. (RB 28-29.) Respondent's contention is premised on the incorrect assumption that a fundamental right was not at issue here. (RB 29.) As discussed above and in the Opening Brief (AOB 27-31), the right to appeal in a capital case is a fundamental, constitutional right: "We have repeatedly emphasized the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger*, *supra*, 498 U.S. at p. 321.) Moreover, Respondent's argument misses the mark. The question here is whether the trial court's failure to inform Mr. Weaver of his appellate rights and secure his on-the-record understanding that he was giving up a portion of those constitutional rights as a condition of the jury waiver rendered the jury waiver invalid. As this Court has explained in the guilty-plea context, in a case that Respondent cites, "before taking the plea, the trial court must admonish the

defendant of the constitutional rights that are being waived, as well as the direct consequences of the plea." (*People v. Panizzon* (1996) 13 Cal.4th 68, 80; RB 20, 29.) A defendant waiving any portion of his appeal as a condition of a jury waiver thus must be personally admonished with respect to the surrender of his appellate rights. The trial court failed to do so in this case.

Finally, Respondent asserts that Mr. Weaver's claim is "meritless" because Mr. Weaver is currently exercising his right to an automatic appeal before this Court. (RB 27.) Respondent misses the point. Mr. Weaver's argument is that his jury waiver was not knowing, intelligent, and voluntary because the trial court failed to advise him that he was giving up a significant portion of his appeal, namely the appeal from the denial of some 19 pretrial motions. (AOB 24.) The fact that Mr. Weaver is currently appealing other aspects of his conviction and death sentence is of no moment. The relevant point is that the trial court failed to perform a constitutionally adequate inquiry to ensure that Mr. Weaver understood he was giving up a portion of his appellate rights as a condition of the jury waiver. Under those circumstances, the jury waiver cannot be considered knowing, intelligent, or voluntary, and must be vacated.

B. Mr. Weaver Was Not Advised Of His Constitutional Right To Participate In Jury Selection

Mr. Weaver's jury waiver was also invalid because the trial court failed to advise Mr. Weaver of his right to participate in jury selection. (AOB 31-36.) The right to a jury trial cannot be waived "with full awareness of the right being abandoned" unless a defendant is advised of his right to participate in the selection of his jury. (AOB 33.) As Mr. Weaver argued in his Opening Brief, this Court should make clear that trial judges must inform defendants of the right to participate in jury selection as a constitutionally mandated part of the jury waiver colloquy. (*Ibid.*)

Respondent contends that informing a defendant of his right to participate in jury selection is "too stringent for any situation," and that courts should not be forced to explain every single ramification of the choice to waive a jury. (RB 32.) First, advising a defendant of his right to participate in jury selection as part of the jury waiver colloquy is hardly a rigorous obligation for trial judges. Second, although this Court has not yet addressed whether a trial judge must specifically inform a defendant who seeks to waive his jury trial about his right to participate in jury selection, the U.S. Courts of Appeal for the Second, Sixth, Seventh, Ninth, and Tenth Circuits have recognized the right to participate in jury selection as a key component of the right to a jury trial. (AOB 32-33, and cases cited therein.) Mr. Weaver acknowledges that those courts did not ground their

decisions in the U.S. Constitution and did not impose an absolute rule. However, he argues that "the manifest importance of the jury trial right," recognized by these federal courts of appeal supports the imposition of a constitutional rule, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I of the California Constitution, requiring judges to inform defendants who wish to waive jury of their right to participate in selecting the jury. (See, e.g., *United States v. Martin* (6th Cir. 1983) 704 F.2d 267, 274.)

Respondent also argues that "the record supports the inference that Weaver knew he had the right to participate" in jury selection based on the fact that Mr. Weaver filed pretrial motions relating to jury matters. (RB 32.) Defense counsel in California capital cases regularly file pretrial motions relating to jury selection. Nothing in the record supports the inference that Mr. Weaver understood these motions, let alone the inference that he was aware of his right to participate in jury selection or had a "full awareness . . . of the nature of the right being abandoned." (*People v. Collins*, *supra*, 26 Cal.4th at p. 305.) Moreover, given the constitutional right at stake, this Court should not uphold a waiver based upon an "inference" that a defendant understands he has the right to participate in the selection of his jury. The trial court's failure to advise Mr. Weaver of his constitutional right to participate in jury selection rendered the jury waiver invalid. Mr. Weaver's conviction and sentence must be set aside.

C. The Trial Court's Failure To Advise Mr. Weaver Of His Right To Appeal And To Participate In Jury Selection Was Reversible Error, Invalidating The Jury Waiver

As argued above, Mr. Weaver's jury waiver was not knowing, intelligent, and voluntary because the trial court failed to advise Mr. Weaver of his constitutional right to appeal and participate in jury selection. The court's errors invalidated the jury waiver and, therefore, Mr. Weaver was improperly denied the right to a jury trial. The improper denial of the right to a jury trial is structural error, requiring that Mr. Weaver's conviction and sentence be set aside. (AOB 36; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; *People v. Collins*, *supra*, 26 Cal.4th at p. 313.)

Respondent fails to address this point and offers no compelling justification for why a structural error analysis should not apply. Instead, Respondent argues that any trial court error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 821. (RB 29-30, 33.) Respondent's conclusion that *Watson* applies to Mr. Weaver's waiver of right to appeal pretrial motions is erroneously premised on the notion that the right to appeal in a capital case is a statutory, rather than constitutional, right. (RB 30, fn. 13.) Respondent offers no rebuttal to Mr. Weaver's argument that the U.S. Constitution has protected the right to meaningful appellate review in capital cases since *Furman v. Georgia* was decided in 1976. (AOB 27-

31.) Neither does Respondent provide any justification for its conclusion that *Watson* applies to Mr. Weaver's right to participate in jury selection.

However, if this Court finds that harmless error analysis is appropriate, the *Chapman* standard of prejudice should apply in this case because the trial court's failure to advise Mr. Weaver of his right to appeal and participate in jury selection was federal constitutional error. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Under *Chapman*, a constitutional violation requires reversal unless the state shows that the error was harmless beyond a reasonable doubt. (*Ibid.*) Respondent does not and cannot show that the improper denial of the right to a jury trial was harmless beyond a reasonable doubt. As discussed above, the trial court's errors invalidated the jury waiver and led to an improper denial of Mr. Weaver's right to a jury trial. This constitutional error cannot be considered harmless beyond a reasonable doubt under *Chapman*.

Moreover, even if this Court finds that *Watson* applies, Respondent fails to show that the trial court's errors were harmless. The *Watson* standard requires reversal if it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*People v. Watson*, *supra,* 46 Cal.2d at p. 836.) In support of its view that the trial court's failure to advise Mr. Weaver of his right to appeal was harmless, Respondent tries to advance several arguments. (RB 30-33.)

Respondent argues that any trial court error did not prejudice Mr. Weaver because he is currently exercising his right to appeal. (RB 30.) As noted above, this argument is not responsive to the question before the Court. Mr. Weaver has never claimed that he was denied the right to appeal from any aspect of his conviction and death sentence. At issue here is Mr. Weaver's right to appeal the denial of some 19 pretrial motions. The fact that Mr. Weaver is currently exercising that part of his right to appeal that he did not waive is irrelevant to a harmlessness analysis.

Respondent argues that most of the issues raised by the pretrial motions are moot on appeal because primarily the motions involved matters pertaining to a jury trial. (RB 30.) While it is true that some of the pretrial motions involved jury trial issues, a number of the motions did not, so the question of prejudice is not moot. (14 RPT 11-13 [pretrial motions also included defense motions to strike aggravating factors as unconstitutional; to require disclosure of the district attorney's legal theories; to obtain a fair trial; and to strike the prosecution's notice of intention to introduce evidence in aggravation].)

Respondent argues that Mr. Weaver was not prejudiced because Mr. Weaver knew that he was waiving his right to appeal the pretrial motions. (RB 30.) Respondent's only support for this argument is that Mr. Weaver was present for the hearings on the jury waiver and thus cannot assert that he was "unaware that he was waiving his right to appeal." (RB 30.)

Nothing in this Court's precedent supports the proposition that Mr. Weaver's presence at the hearings, alone, is enough to support Respondent's conclusion that Mr. Weaver was aware of his right to appeal. To the contrary, this Court has explained that, "[t]o protect against inappropriate incursions on a defendant's exercise or waiver of a fundamental constitutional right, such as that to jury trial, the federal Constitution long has been construed as requiring procedural safeguards, such as the requirement that a waiver of the right in question be made by the defendant personally and expressly." (*People v. Collins*, *supra*, 26 Cal.4th at pp. 307-308.) As detailed above, the record shows that the trial court never advised Mr. Weaver of his right to appeal or that he was surrendering a significant part of that right, and Mr. Waiver never expressly waived any such right. (14 RPT 5-14, 25-29.)

Respondent argues that Mr. Weaver was not prejudiced because he failed to claim that, absent the error, he would not have waived jury. (RB 30.) This argument is mere speculation and does not support a finding of harmlessness. As argued above, the proper way for a trial court to determine whether a defendant intends to waive a significant part of his right to appeal is to place the waiver on the record. The error is not rendered harmless by speculating whether Mr. Weaver would have waived his right to a jury trial absent the error. (Cf. *People v. Mancheno* (1982) 32 Cal.3d 855, 865 [harmless error analysis inappropriate when "a court can

only speculate why a defendant would negotiate for a particular term of a bargain," and therefore, "implementation should not be contingent on others' assessment of the value of the term to defendant"].)

Respondent argues that any error was harmless because Mr. Weaver did not specify which pretrial motions he wished to, but was precluded from, challenging on appeal. (RB 30-31.) Again, Respondent's contention misses the point of Mr. Weaver's argument and does not support a finding of harmlessness. Mr. Weaver was prejudiced by the trial court's error – not simply because he was precluded from challenging the denial of the pretrial motions on appeal – but because it resulted in an unconstitutional waiver proceeding and the improper denial of his right to a jury trial. (AOB 36.)

Finally, Respondent argues that Mr. Weaver failed to demonstrate prejudice under *Watson* as a result of the trial court's failure to advise Mr. Weaver of his right to participate in jury selection. (RB 33.) Respondent offers no support for this argument and offers no justification for why *Watson* should apply to the trial court's error. (*Ibid.*) Furthermore, as discussed in Argument V, the trial judge stated that, were it not for the victim impact evidence presented by the prosecution, he would not have imposed a death sentence. (12 RT 1371 ["It is this change in the law that would have caused this court to make a different decision if it were not the law"].) The trial court's statement, which demonstrates how close his penalty determination was, suggests that it was reasonably probable that a

denial of Mr. Weaver's constitutional rights would have resulted in a more favorable outcome for him.

The trial court's errors prejudiced Mr. Weaver and were not harmless under any standard. Respondent does not show otherwise. Given that the trial court improperly denied Mr. Weaver the right to a jury trial by conducting an unconstitutional waiver proceeding, reversal of Mr. Weaver's conviction and sentence is required.

II. THE TRIAL COURT ERRED BY FAILING TO OBTAIN A SEPARATE, PERSONAL JURY WAIVER ON THE ALLEGED SPECIAL CIRCUMSTANCES

In his Opening Brief, Mr. Weaver argued that the special circumstance findings and death sentence must be vacated because he did not waive his right to a jury trial on the special circumstance allegations. (AOB 37-62.) Specifically, Mr. Weaver argued that California statutory law and the California and U.S. Constitutions require a separate jury waiver on the special circumstances, and that the trial court failed to obtain such a waiver. (*Ibid.*)

Respondent contends that "the record demonstrates Weaver understood that his jury waiver applied to 'all aspects of his special circumstances cases [*sic*], from beginning to end.'" (RB 36, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 565.)

The record belies Respondent's contentions. Not only did the trial court fail to secure a separate waiver, but Judge Lester acknowledged that

the guilt phase and special circumstance waivers had been "lumped together." (7 RT 725.) Because the trial court did not obtain a separate, personal waiver of Mr. Weaver's right to a jury trial on the alleged special circumstances, Mr. Weaver's special circumstance findings and death sentence must be vacated pursuant to the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I of the California Constitution.

A. California And Federal Law Require A Separate, Personal Jury Waiver On The Alleged Special Circumstances

As detailed in Mr. Weaver's Opening Brief, both California statutory law and the state and federal Constitutions guarantee the right to have a jury decide whether the special circumstance allegations in a capital case have been proved beyond a reasonable doubt. (AOB 42-50.) Penal Code section 190.4, subdivision (a), mandates the right to a jury trial on the special circumstances, even if the defendant waives jury trial on the determination of culpability: "If the defendant was convicted by the court sitting without a jury, the trier of fact [for the special circumstance allegations] shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court." (Pen. Code, § 190.4, subd. (a).) The California Constitution also guarantees this right through its requirement that a defendant's waiver of his right to a jury trial be personal and express. (AOB 49-50; *People v. Collins*, *supra*, 26 Cal.4th

at pp. 307-308.) Following *Ring v. Arizona* (2002) 536 U.S. 584, 609, the U.S. Constitution further guarantees a capital defendant the right to a jury trial on any "aggravating circumstance necessary for the imposition of the death penalty." (AOB 48-50.)[2]

Penal Code section 190.4, subdivision (a), requires that "an accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial" on the special circumstances. (*People v. Memro* (1985) 38 Cal.3d 658, 704, disapproved on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Two subsequent opinions, *People v. Diaz* and *People v. Wrest*, maintain this Court's requirement that the trial court secure a separate and distinct waiver on the special circumstances. (*People v. Diaz*, *supra*, 3 Cal.4th at p. 565; *People v. Wrest* (1992) 3 Cal.4th 1088, 1103.) In the instant case, the trial court failed to do so.[3]

Respondent does not dispute that the denial of a jury trial on the special circumstances is structural error, reversible per se. (AOB 56; RB

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[2] As noted in Mr. Weaver's Opening Brief, he also asserts that the right to a jury trial on the special circumstance allegations is grounded in the Eighth Amendment. (AOB 37.)

[3] As Mr. Weaver argued in his Opening Brief, the trial court's failure to obtain a separate, personal waiver is an independent ground for relief. (AOB 51-52.) In addition, as a separate ground for relief, this Court must reverse the special circumstance findings and death sentence because Mr. Weaver did not knowingly, intelligently, and voluntarily waive his right to a jury trial on the special circumstances. (*Ibid.*)

33-38.)[4] Because the trial court failed to obtain a separate waiver and denied Mr. Weaver his right to a jury trial on the special circumstances, the judge's findings on the special circumstances must be reversed as structural error and set aside, and Mr. Weaver's death sentence must be set aside. (AOB 56.)

B. Mr. Weaver Was Not Advised Of His Right To A Jury Trial On The Special Circumstances And He Did Not Separately Waive That Right

The record establishes that the trial court failed to obtain a separate jury waiver on the special circumstance allegations. Contrary to Respondent's argument that the trial court's admonition "far surpass[ed] the requirement articulated in *Diaz,*" (RB 35), Mr. Weaver's jury waiver on the special circumstances fell far short of what Penal Code section 190.4, subdivision (a), *Memro*, *Wrest*, and *Diaz* demand.

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[4] Shortly after Respondent filed its brief, this Court decided *People v. French* (2008) 43 Cal.4th 36. In *French*, the Court acknowledged its previous holding in *People v. Ernst* (1994) 8 Cal.4th 441, 449, that the denial of a defendant's constitutional right to a jury trial on a charged offense constitutes structural error. (*People v. French*, *supra*, 43 Cal.4th at p. 53, fn. 8, citations omitted.) The Court also pointed out that, in *Washington v. Recuenco* (2006) 548 U.S. 212, the United States Supreme Court held that the denial of a Sixth Amendment right to a jury trial on sentencing factors is subject to harmless error analysis. While *Recuenco* dealt with the failure to submit a sentencing factor to the jury, Mr. Weaver's case, like *Ernst*, deals with the waiver of the right to a jury trial. (*Washington v. Recuenco*, *supra*, 548 U.S at pp. 214-216; *People v. Ernst*, *supra*, 8 Cal.4th at p. 444.) At the time Respondent filed its brief in this case, the U.S. Supreme Court had already decided *Recuenco*, and Respondent does not contend that *Recuenco* changed the standard of review on the waiver issue.

First, neither the trial court's colloquy nor the signed waiver forms "actually cover[ed]" the right to a jury trial on the special circumstances; they focused exclusively on the guilt and penalty phase waivers.[5] (*People v. Wrest, supra*, 3 Cal.4th at p. 1105; see also *People v. Memro, supra*, 38 Cal.3d at p. 704.) Second, in contrast to *Diaz*, here the record does not show that Mr. Weaver understood he had a separate right to a jury trial on the special circumstances allegations. (*People v. Diaz, supra*, 3 Cal.4th at p. 565 ["[T]he record must show that the defendant is aware that the waiver applies to each of these aspects of trial"].) Finally, the trial judge admitted, after the fact, that he had "lumped together" the special circumstance and guilt phase jury waivers, which the law expressly prohibits. (7 RT 725.) For these reasons, the special circumstance findings and death sentence must be reversed.

1. The jury waiver did not "actually cover" the right to a jury trial on the special circumstance allegations

Neither the trial court's colloquy prior to the commencement of the guilt phase nor the jury waiver forms "actually cover[ed]" the right to a jury trial on the special circumstances. (*People v. Wrest, supra*, 3 Cal.4th at p. 1105.) In *Wrest*, at the judge's request, the prosecutor specifically advised the defendant that he had the right to have a jury decide "the special allegations, or any other special allegations that are charged in this

[5] The waiver forms are attached to the AOB. (See AOB, Attachments, A, B and C.)

particular case" (*id.* at p. 1103, italics omitted); told him that 12 jurors "would have to agree [on] . . . the special circumstances"; and asked him whether he wanted "a jury trial on the issue of guilt *or the special circumstances* or the enhancements." (*Id.* at p. 1104, emphasis added.) Additionally, the trial judge specifically asked the defendant whether, by initialing the jury waiver box on the jury waiver form, he was waiving and giving up his right to a jury trial on "any enhancements and special allegations that we've already talked about." (*Id.* at p. 1104, italics omitted.) Under those circumstances, this Court found a separate, and therefore valid, waiver. (*Id.* at pp. 1103-1104.) It held that, because the prosecutor specifically asked the defendant whether he wanted to waive his right to a jury on the special circumstances, the waiver was appropriately "separate" even though the prosecutor asked the defendant about the guilt phase waiver in the same question. (*Id.* at p. 1105.) The Court noted that a jury waiver on the special circumstances does not have to be taken in accordance with a particular procedure, so long as the waiver "actually cover[s]" the special circumstances as a distinct right. (*Ibid.*)

Unlike *Wrest*, here, the trial court never explicitly informed Mr. Weaver that he had a separate right to a jury trial on the special circumstances, nor did it ask him if he wanted a jury trial on the special circumstances or whether he intended to give up this right. To the extent that the trial court mentioned special circumstances, it was only in the

context of bifurcating the jury's duties between the guilt and penalty phases. (14 RPT 16-17, 42, 53-54.)

Beyond the trial court's cursory references to special circumstances being defined as part of the guilt phase, Respondent fails to offer any citations to the record that show that Mr. Weaver was informed the waiver covered the special circumstances. (RB 33-38.) The court's colloquy only covered the guilt and penalty phase waivers. The trial judge never informed Mr. Weaver that he actually had the right to a jury trial on the special circumstances. (14 RPT 16-17, 42, 53-54; AOB 39-42.)

Respondent discusses the only instance in which the trial court referenced special circumstances; this occurred in the context of the trial court defining the guilt phase. (RB 35; 14 RPT 16-17.) After stating that the waiver applied to "all triable issues" during the guilt and penalty phase, the judge went on to describe the guilt phase: "[The guilt phase] incorporates, of course, the court determining whether or not the People prove their case beyond a reasonable doubt during which the defendant has the presumption of innocence, a first degree murder charge along with the proof of a special circumstance, along with the other charges that the people have pled . . . ." (14 RPT 16-17.) This admonition only informed Mr. Weaver about the structure of a capital trial, and did not explain the right to a separate trial on the special circumstances. Unlike in *Diaz*, where the trial court's question "explained to [the] defendant that the waiver of his right to

trial by jury applies to all aspects of his special circumstances case," here, the trial court's admonition actually suggested that the special circumstance findings were a subset of the guilt phase trial and did not implicate a separate right. (See *People v. Diaz*, *supra*, 3 Cal.4th at p. 565, italics omitted.)

Contrary to Respondent's assertion, the first set of jury waiver documents failed to advise Mr. Weaver of his right to a jury trial on the special circumstances. (RB 36.) Neither of the pretrial jury waiver documents mentioned the right to a jury trial on the special circumstance allegations.[6] (*Ibid.*) While the court later produced a third waiver form prior to the penalty phase that includes a separate jury waiver on the special circumstances (4 CT 690; RT 723; AOB, Attachment C), it was not presented to Mr. Weaver until after the court had made findings on the special circumstance allegations. At most, it was a belated waiver of a right long since lost.

The trial court's colloquy is precisely the type of vague approach rejected by this Court in *Memro*. (*People v. Memro*, *supra*, 38 Cal.3d at p.

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[6] The first document, entitled "Jury Waiver," provides that Mr. Weaver desires to give up his right to a jury and have the court "determine whether he is guilty or not guilty of the offense(s) for which he is charged." (4 CT 672; AOB, Attachment B.) The second document, entitled "Jury Waiver (Penalty Phase)," states that "[i]f, at the guilt phase, [Mr. Weaver] is found guilty of first degree murder and a special circumstance is found true," Mr. Weaver desires to waive his right to a jury trial and have the court decide "whether he will be sentenced to life without the possibility of parole or death." (4 CT 671; AOB, Attachment A.)

704.) Should the Court hold that the waiver in this case satisfies *Memro*, it would necessarily follow that every guilt phase jury waiver would be valid so long as the judge utters the phrase "special circumstances." Such an approach would be contrary to the intent of Penal Code section 190.4, subdivision (a), eviscerate this Court's holding in *Memro,* and conflict with the Supreme Court's holding in *Ring*.

2. The record does not show that Mr. Weaver understood he had a right to a jury trial on the special circumstances

a. Mr. Weaver was not advised of his right to a jury trial on the special circumstances

In *Diaz*, this Court followed and defined *Memro*: "The waiver must be made by the defendant personally, and must be 'separate' – that is, if the defendant is to be deemed to have waived the right to a jury trial on both guilt and special circumstances, the record must show that the defendant is aware that the waiver applies to each of these aspects of trial." (*People v. Diaz*, *supra*, 3 Cal.4th at p. 565.) Instead of establishing that Mr. Weaver separately waived his right to a jury on the special circumstances, Respondent makes the general assertion that Mr. Weaver "understood that his jury waiver applied to 'all aspects of his special circumstances cases, from beginning to end.'" (RB 36, quoting *People v. Diaz*, *supra*, 3 Cal.4th at p. 565.) In support of this argument, Respondent compares the instant case to *Diaz* and notes that the trial court explained to Mr. Weaver that his

jury waiver applied to "all triable issues" before the court, defined the guilt phase to include "proof of a special circumstance," and informed Mr. Weaver that a jury waiver meant the court would determine "all legal findings" in the guilt phase. (RB 35.) These vague and isolated record excerpts do not satisfy the requirement in *Diaz* that "the record must show that the defendant is aware that the waiver applies to each . . . aspect[] of trial." (*People v. Diaz*, *supra*, 3 Cal.4th at p. 565.)

In contrast to this case, the trial court in *Diaz* specifically asked the defendant "if he understood that the waiver applied to 'both phases . . . of the special circumstances case.'" (*People v. Diaz, supra,* 3 Cal.4th at p. 564.)[7] The defendant in *Diaz* expressly agreed. (*Ibid.*) This Court thus held that the waiver was sufficient to inform the defendant that his waiver applied to "*all* aspects of his special circumstances case, from beginning to end." (*Id.* at p. 565, italics in original.) The record in this case differs from *Diaz* in this critical respect: unlike in *Diaz*, the trial court here never informed Mr. Weaver that that the jury trial waiver applied to the special circumstances case. Prior to the trial judge's attempt to cure his error, the

[7] Although it is not immediately clear what the trial court in *Diaz* meant by "both phases" of the special circumstances case, this Court interpreted that portion of the colloquy as explaining to the defendant that the waiver of his jury trial right applied to "all aspects" of the People's burden in this special circumstances case. (*People v. Diaz, supra,* 3 Cal.4th at p. 565.)

record offers no basis for the conclusion that Mr. Weaver understood that his waiver applied to his right to a jury trial on the special circumstances.

Respondent also argues that, like the defendant in *Diaz*, defense counsel had "spoken with" Mr. Weaver about the jury waiver "at great length." (RB 35.) However, unlike the defendant in *Diaz*, who informed the court that he had "quite thoroughly" discussed the meaning of the jury waiver with his attorneys after being informed that his waiver applied to all aspects of his case, the record in this case does not show that Mr. Weaver was even aware of his right to a jury trial on the special circumstances. (*People v. Diaz*, *supra*, 3 Cal.4th at pp. 564-565; 14 RPT 48-50.)[8] Furthermore, whether Mr. Weaver discussed the jury waiver in general with his attorneys is a separate question from the constitutional issue before this Court: whether Mr. Weaver was aware of, understood, and expressly relinquished his separate right to a jury trial on the special circumstances. According to *Diaz*, a waiver is deficient under California law unless the record shows that "the defendant is aware that the waiver applies to each . . . aspect[] of the trial." (*People v. Diaz*, *supra*, 3 Cal.4th at p. 565; see also *People v. Wrest*, *supra*, 3 Cal.4th at p. 1105; Penal Code § 190.4, subd.(a).)

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[8] Respondent misstates Mr. Weaver's argument on appeal when it declares that Mr. Weaver "does not assert that he was unaware that he was waiving his right to a jury trial on the special circumstance allegation." (RB 36, fn. 16.) Rather, in his Opening Brief, Mr. Weaver argued that "[t]he record does not show that Mr. Weaver was even aware of his right to a jury trial on the special circumstances." (AOB 47.)

Consequently, a defendant's understanding of his separate rights must appear on the record and cannot be gleaned from allusions to privileged discussions with counsel. Here, the record is devoid of any reference to Mr. Weaver's understanding that he had a separate right to a jury trial on the special circumstances.

b. Respondent's interpretation of *Diaz* contradicts *Memro* and Penal Code Section 190.4, subdivision (a)

If this Court accepts Respondent's interpretation of *Diaz*, it will eradicate the rule established by Penal Code section 190.4, subdivision (a) and *Memro*. Respondent concedes that *Diaz* requires that a waiver on the special circumstances "must made separate, [*sic*] and by the defendant personally," and correctly states that a valid waiver can be demonstrated by the record in a particular case. (RB 34.) Respondent then tries to argue for a sweeping reading of *Diaz*, whereby all that is required for a valid special circumstance waiver is for the court to define the guilt phase as including "proof of a special circumstance." (RB 35.) Respondent's interpretation of *Diaz* circumvents the separate waiver requirement established by *Memro* and upheld by this Court in *Diaz*. To the extent that Respondent is relying on *Diaz* for a holding narrower than what *Memro* requires, this Court should reject Respondent's argument.

Even if this Court were inclined to adopt Respondent's sweeping interpretation of *Diaz,* which would be an abrogation of the rule in *Memro*,

it must resist doing so because U.S. Supreme Court precedent now precludes such a result. (AOB 48-50.) *Diaz* and *Wrest* were decided at a time when California courts interpreted the right to a jury trial on the special circumstance allegations to be a statutory right rooted in Penal Code section 190.4, subdivision (a), rather than a constitutional right guaranteed under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and parallel provisions of the California Constitution. (See, e.g., *People v. Odle* (1988) 45 Cal.3d 386, 411.) After the Supreme Court's decision in *Ring*, the right to a jury trial on the special circumstance allegations can no longer be considered merely statutory. (*Ring v. Arizona, supra,* 536 U.S. at p. 609; *United States v. Booker* (2005) 543 U.S. 220; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *People v. Preito* (2003) 30 Cal.4th 226, 256 [observing that *Ring* overruled that aspect of *People v. Odle, supra*, 45 Cal.3d at p. 411, which held there was no constitutional right to a jury determination of special circumstances].) Following *Ring, Apprendi* and *Booker*, this Court cannot overrule *Memro* or interpret *Diaz* as relaxing the procedures that *Memro* held were demanded by Penal Code section 190.4, subdivision (a), because doing so would compromise a right that is now clearly required as a matter of federal and state constitutional law.

3. The trial judge admitted that he "lumped together" the guilt and special circumstances jury waivers and then tried to cure his mistake after the fact

Respondent does not address the trial judge's acknowledgement that he had earlier failed to obtain a separate waiver from Mr. Weaver on the special circumstances and "lumped together" the guilt phase and special circumstance waivers. (AOB 53; 7 RT 725.) The judge noted the reason that he included three separate waivers was "to show that in a capital case jury waiver that there is a waiver as to guilt, there is a waiver as to special circumstances, a waiver as to penalty." (7 RT 724-725.) He went on to explain why he was now, for the first time, including three waivers: "[W]hen the court took the waiver before I lumped together in the guilt phase the issue of guilty or not guilty findings and special circumstances and kept that separate phase, penalty phase." (7 RT 725.) Not only does this statement contradict Respondent's argument that the "trial court's initial advisement was proper," (RB 36), but the judge's statement that he "lumped [the waivers] together," (7 RT 725), is an admission that he had failed to obtain a "separate and personal" waiver of the right to a jury trial on the special circumstance allegations. The trial court's attempt to "reaffirm" Mr. Weaver's pretrial waiver underscores an important point, namely that the judge would not have had to conduct a post-hoc "reaffirmation" if he had properly secured a special circumstances waiver in the first instance.

Respondent offers a conclusory statement that the so-called "reaffirmation" does not "support finding any deficiency . . . because the trial court's initial advisement was proper." (RB 36.) In support of this argument, Respondent relies chiefly on a comment the trial judge made to the effect that he believed that the initial waiver colloquy was sufficient. (*Ibid.*) Respondent points to the judge's statement, during the reaffirmation proceeding, that the colloquy transcript showed Mr. Weaver understood the waiver was for "all purposes and all findings in front of the court." (RB 36-37.)

Respondent's reliance on the trial judge's comments is misplaced. The comments are hardly a barometer of the validity of the waiver, when it was the judge who initiated the "reaffirmation" and admitted that he had "lumped together" the guilt and special circumstance waivers. (7 RT 725.) The judge's statement that the first waiver was sufficient is irrelevant, not to mention inconsistent with his admission that he had conflated the guilt phase and special circumstances waivers. If he believed that the first waiver was adequate, as Respondent suggests, there would have been no need to conduct a post-hoc "reaffirmation." In any event, Respondent's argument is contradicted by the trial judge's acknowledgment on the record that he "lumped" the waivers together. (*Ibid.*)

Respondent argues in a footnote that Mr. Weaver's affirmative answer, when asked during the reaffirmation "if at the time he originally

waived jury, it had been his intention to waive on the special circumstances," is evidence that the initial advisement was proper. (RB 36, fn. 16.) Respondent, however, neglects to mention that Mr. Weaver had already been convicted, that the special circumstances had been found true, and that he made this statement before a judge who alone would decide life or death. As Mr. Weaver argued in his Opening Brief, no post-trial "reaffirmation" can occur where the right had already been lost. (AOB 53.) Under these circumstances, no "reaffirmation" waiver can be considered voluntary, and this Court should conclude that Mr. Weaver's waiver was the product of the coercive circumstances under which it was obtained. (AOB 52-56.)[9]

Respondent's other suggestions are misplaced to the extent they imply that the jury waiver was adequate because Mr. Weaver's counsel declined a further recitation of jury trial rights and viewed the waiver as

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[9] Respondent argues that Mr. Weaver improperly relies on *United States v. Reyes* (9th Cir. 1979) 603 F.2d 69, because (1) Mr. Weaver's case does not involve a federal rule and *Reyes* is not binding authority, and (2) unlike *Reyes*, the trial court in Mr. Weaver's case did obtain a waiver on the special circumstances prior to trial. (RB 37-38.) First, Mr. Weaver did not cite *Reyes* as binding authority or for the federal rule. Rather, Mr. Weaver cited *Reyes* because it involved an analogous situation in which the Ninth Circuit recognized the impossibility of questioning a defendant about his relinquishment of rights after he had been convicted without the benefit of those rights. (AOB 54-55 [arguing that *Reyes* "demonstrates that a post-hoc attempt to resurrect an unconstitutional waiver cannot stand"].) Second, for the reasons discussed above, Respondent's attempt to distinguish *Reyes* by arguing that a constitutionally valid waiver was obtained is not supported by the record. (RB 38.)

being "rather specific." (RB 37.) The constitutional issue here is whether the trial court advised Mr. Weaver – not his counsel – and whether Mr. Weaver understood both that he had a right to a jury trial on the special circumstances and that he was giving up this right. Mr. Weaver's counsel's views on the specificity of the waiver or the trial court's description of jury trial rights are therefore irrelevant. Since the record does not reflect that Mr. Weaver even knew he had a right to a jury trial on the special circumstances, it is improper for Respondent to imply that he should have asked for a recitation of his jury trial rights. Rather, the inadequacy of the post-hoc "re-affirmation," coupled with Respondent's reliance on the purported adequacy of the initial waiver, compels the conclusion that if this Court finds the initial waiver to be improper, it must find that Mr. Weaver did not waive his right to a jury trial on the special circumstance allegations.

The trial court had an obligation under Penal Code section 190.4, subdivision (a), *Memro*, *Wrest*, *Diaz*, and *Ring* to inform Mr. Weaver of his right to a jury trial on the special circumstances prior to trial, not as a last-ditch attempt to correct the record after the truth of the special circumstances had been decided. The trial court had every opportunity to do so. Instead, the judge did not advise Mr. Weaver of his right to a jury on the special circumstances until after the right was lost. The trial court's initial failure to secure a separate jury waiver on the special circumstances

cannot be cured by a post-hoc "reaffirmation," and therefore, this Court must set aside the special circumstance findings and Mr. Weaver's death sentence.

C. The Trial Court Acted In Excess of Its Jurisdiction By Rendering Findings On The Special Circumstance Allegations In The Absence Of A Valid Waiver

Respondent fails to address Mr. Weaver's argument that the trial court erred by making findings on the special circumstance allegations and proceeding to the penalty phase in the absence of a valid waiver. (AOB 57-62.) A court acts in excess of its jurisdiction when it acts beyond the scope permitted by statute or contrary to the authority conferred. (See, e.g., *People v. Am. Contractors Indem.* (2004) 33 Cal.4th 653, 663; *People v. Tindall* (2000) 24 Cal.4th 767, 776.) Because the trial court rendered findings on the special circumstances when Mr. Weaver had not separately waived his right to a jury trial on those findings as required by Penal Code section 190.4, subdivision (a), the special circumstance findings must be vacated, and this case must be remanded for a new trial on the special circumstance allegations and the penalty phase.

III. THE PROSECUTION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO MR. WEAVER

Mr. Weaver argued in his Opening Brief that the prosecutor's guilt phase closing argument improperly shifted the burden of proof to the defense by asserting that he was required to present affirmative evidence of

his innocence. (AOB 63-71.) The prosecutor's improper burden shifting violated Mr. Weaver's rights under the U.S. and California Constitutions. (AOB 63.)

Respondent claims that the prosecutor's arguments were proper comment on Mr. Weaver's failure to produce logical evidence, and did not suggest that Mr. Weaver had a burden of proof. (RB 38.) Respondent further contends that any prosecutorial misconduct was harmless error. (RB 43-44.) The Court should reject Respondent's arguments.

The prosecutor crossed the line of permissible advocacy by arguing that Mr. Weaver had the burden of producing evidence that "some other third person" committed the murder. (AOB 65.) The prosecutor's misconduct was not limited to one comment. Rather, it was a persistent theme throughout his rebuttal closing argument. Specifically, the prosecutor began his rebuttal argument with a question: "I kept waiting for the answer that I think the court was probably waiting for from the defense, and that was, well, if it wasn't [La Twon] Weaver, just who the heck was it? Who was it?" (5 RT 684.) Toward the end of his rebuttal, the prosecutor returned to this theme, stating, "I kept waiting for [defense counsel] to offer this court some alternative, some — I suppose we just have this some other third person who committed this crime. The court has been offered absolutely no alternative, nor could they offer — . . . ." (5 RT 701.) The trial court overruled defense counsel's objection that the prosecution

was "attempting to shift the burden of proof." (*Ibid.*) The prosecutor continued, reiterating that "[a]t no point in time was [defense counsel] able to offer this court an alternative, an explanation of just who this other third person was." (*Ibid.*) He concluded, "No alternative was offered to this Court, and for good reason, because there is one and only one person who is responsible for the murder of Michael Broome . . . ." (5 RT 702.)

Respondent cannot show that the prosecutor's misconduct was harmless beyond a reasonable doubt. Because the prosecutor improperly shifted the burden of proof to the defense in violation of Mr. Weaver's rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I of the California Constitution, reversal of Mr. Weaver's convictions, the special circumstance findings and his death sentence is required.

A. Mr. Weaver Did Not Introduce Third Party Culpability Evidence Or Raise An Affirmative Defense

Respondent contends that the prosecutor's arguments were permissible because trial counsel insinuated that "Summersville was the murderer," but did not produce Mr. Summersville or anyone else as a logical witness. (RB 42.) According to Respondent, "Byron Summersville loomed large in this trial during pretrial motions, the presentation of evidence, as well as during defense counsel's closing argument." (*Ibid.*)

The record belies Respondent's argument. Not only was it the prosecutor who initially raised the issue of Mr. Summersville in an in limine motion, but on direct examination, the prosecutor systematically showed witnesses a photograph of Mr. Summersville in order to rule him out as the person responsible for the shooting. (1 RT 51, 134, 154; 2 RT 217-218.) Consistent with their theory that the prosecution could not prove identity beyond a reasonable doubt (1 RT 15-17; 5 RT 666-667, 683), on cross-examination, trial counsel then challenged the reliability of the witnesses' identifications. (See, e.g., 1 RT 89-90, 189-191, 204.) Mr. Weaver did not present evidence at the guilt phase that Summersville had committed the charged offenses, and Respondent provides nothing in the record showing otherwise. (5 RT 626-630.)

Respondent correctly notes that the parties stipulated to evidence regarding Summersville. (RB 39, 42.) None of the stipulations pertained to the identity of the individual who had committed the charged crimes. Given the prosecution's motion to exclude a third party culpability defense, it defies reason that the prosecutor would then enter into these stipulations had he believed they would have assisted Mr. Weaver in presenting evidence to support such a defense.

Moreover, it is disingenuous for Respondent to suggest from this record that trial counsel used the stipulations for this purpose. (RB 39-42.) Trial counsel, Jeffrey Martin, began his closing argument by stating that

"the issue for this court to decide is whether the prosecutor's evidence proves beyond a reasonable doubt that Mr. Weaver is the offender in this case." (5 RT 666.) Mr. Martin reviewed the testimony of the "multiple witnesses" who identified Mr. Weaver as "the one," arguing the weaknesses in each identification. (5 RT 666-677.) He then asked the court to consider the lack of corroboration for the identifications. (5 RT 677.) It was in this context that Mr. Martin discussed the evidence pertaining to some of the stipulations regarding Mr. Summerville, such as the fact that Byron Summersville owned the blue Oldsmobile and leased the apartment where Mr. Weaver was living. (5 RT 678-680.) Trial counsel argued that various items of evidence seized from the car and apartment, e.g., jewelry, hair, ammunition, and clothing with apparent gunshot residue, did not necessarily corroborate the identifications. (5 RT 678-681.) In the course of this discussion, Mr. Martin responded to the prosecution's argument that Mr. Summersville did not resemble Mr. Weaver by criticizing the prosecution's lineup procedures. (5 RT 680.) Mr. Martin concluded with the absence of other corroborating evidence such as fingerprints, a firearm or a confession. (5 RT 682-683.)

Therefore, to the extent that trial counsel challenged the eyewitness identifications, this took place in the context of their defense that the prosecution had not met its burden of proof. (AOB 64-65.) Mr. Weaver did not assume any burden to produce Summersville or anyone else as a

witness by pointing out weaknesses in the prosecution's case or stipulating to certain evidence. If that were so, the defense would have a burden of producing evidence in nearly every trial, a result that is inconsistent with a defendant's constitutional right to have the prosecution prove each element of an offense beyond a reasonable doubt. (*People v. Gonzalez* (1991) 51 Cal.3d 1179, 1214-1215, superseded by statute on another ground as explained in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Finally, Mr. Summersville did not "loom large" in Mr. Weaver's guilt phase closing argument. (RB 42.) Respondent claims that, during closing arguments, trial counsel challenged eyewitness identifications, suggested that Mr. Weaver was innocent, and insinuated that Mr. Summersville was the murderer. (RB 42.) However, it was the prosecution who emphasized Mr. Summersville during closing arguments. (5 RT 645, 649, 650-651, 655, 660-661, 684-685, 694, 697-699.) Trial counsel's references to Mr. Summersville were brief, responsive to the prosecution's argument, and made in the context of raising a doubt about the strength of the prosecution's case. (5 RT 678-680.) In contrast, the prosecution referred to Summersville repeatedly and at great length, mentioning him by name thirty-four times during its guilt phase closing and rebuttal arguments. (5 RT 645, 649, 650-651, 655, 660-661, 684-685, 694, 697-699.)

To the extent that trial counsel referred to Mr. Summersville during the guilt phase, it was only to put the prosecution to its proof by pointing out the weaknesses in the prosecution's case. (AOB 68; CALJIC No. 2.61 (1990 rev.) (5th ed. 1988) ["[T]he defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge"].) Therefore, as discussed below, it was prejudicial misconduct for the prosecutor to assert, during his guilt phase closing argument, that Mr. Weaver had a duty to produce evidence that "some other third person . . . committed this crime." (5 RT 701.)

B. The Prosecution Erroneously Argued That Mr. Weaver Was Required To Present Evidence Of Third Party Culpability And Prove His Innocence

Respondent contends that the "prosecutor's comments on the absence of logical evidence were permissible," and that "when the prosecutor pointed out the fact that the defense failed to present any evidence that someone other than Weaver was the murderer, he in no way suggested that Weaver had a formal burden of proof." (RB 42.) Respondent's conclusory statement is mistaken. As argued above, Mr. Weaver did not introduce evidence of third party culpability and did not raise an affirmative defense. Therefore, the prosecutor's comments were improper because they suggested that Mr. Weaver bore the burden of

producing evidence to support a theory of defense that trial counsel did not assert.

While a prosecutor may argue that a defendant has not produced evidence to corroborate an essential part of its defense theory, it is improper to argue that trial counsel has a burden to corroborate a defense they never presented. (See *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1214-1215; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Ford* (1988) 45 Cal.3d 431, 447 ["We recognize that a rule permitting comment on a defendant's failure to call witnesses is subject to criticism if applied when the reason for his failure to do so is ambiguous, or if the defendant is simply standing on his right to have the state prove his guilt"].) Moreover, there is a distinction between the permissible comment that a defendant has not produced evidence and the improper statement that a defendant has a duty or burden to produce evidence or prove his or her innocence. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

In this case, the prosecutor's arguments were not merely a comment on the state of the evidence or an argument that Mr. Weaver had failed to produce a logical witness to corroborate his theory of the case. Instead, the prosecutor crossed the line of permissible argument by repeatedly telling the court that Mr. Weaver had an obligation to offer evidence and prove his innocence, in spite of the fact that Mr. Weaver did not raise an affirmative defense. (AOB 68.)

If Summersville's role was "an essential part of [the] defens[e] story," the prosecutor's comment may have been permissible. (See, e.g., *People v. Varona* (1983) 143 Cal.App.3d 566, 570.) But as this was not the case, Mr. Weaver should not "reasonably [have been] expected to produce such corroboration" and the prosecutor's arguments were therefore impermissible. (See *id.* at p. 570.)

Mr. Weaver did not testify, offered no affirmative defense, and stood on his right to have the prosecution carry its burden of proof beyond a reasonable doubt. The prosecution raised the issue of third party culpability and then rebuked Mr. Weaver for failing to produce evidence to support it. On this record, Respondent's argument that the prosecutor was simply commenting on the "absence of logical evidence" is unavailing. (RB 42.)

C. The Prosecution's Improper Burden Shifting Was Reversible Error

The prosecutor's prejudicial misconduct violated Mr. Weaver's rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I of the California Constitution. (AOB 63-71.) The error is one of federal constitutional magnitude and requires reversal unless the prosecution establishes that the error is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at pp. 24, 87.) Reversal is also required under state law because there is a reasonable probability that the judge would have returned a more favorable verdict

absent the prosecutor's misconduct. (*People v. Wagner* (1975) 13 Cal.3d 612, 620, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Respondent contends that if the prosecutor's argument did constitute error, it was harmless because judges are presumed to properly follow established law, and the evidence against Mr. Weaver was overwhelming. (RB 43.) Respondent also reasserts its argument that the prosecution retained the burden of proof. (*Ibid.*) Respondent fails to show that the error is harmless beyond a reasonable doubt. Respondent argues that "a judge [is] presumed to have properly followed established law," and that judges are trained in a manner that enables them to "discriminate" between permissible and impermissible evidence. (RB 43.) In support of this point, Respondent asserts that the trial judge was aware of the correct law and stated the correct law. (*Ibid.*)

As to the first point, the presumption that the trial court followed the law does not apply where, as here, the record is clear that the trial court did not do so. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1221.). As to the second point, Respondent relies upon *People v. Frye* (1998) 18 Cal.4th 894, 970[10] and *People v. Albertson* (1944) 23 Cal.2d 550, 577. (RB 43.) Both *Frye* and *Albertson* are inapposite because the record here demonstrates that the trial judge did in fact misunderstand the law.

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[10] *People v. Frye, supra,* was overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 380, 421, footnote 22.

When the judge overruled defense counsel's objection, he stated that the prosecutor's comments were "an argument of fact," (5 RT 701), rather than what they were – an attempt to shift the burden of proof to Mr. Weaver by arguing that Mr. Weaver was required to show that a third party had committed the crime. That the judge viewed the prosecutor's comments as a legitimate "factual" contention indicated that the judge felt that it was fair to require that Mr. Weaver produce the true perpetrator. If the judge believed that the prosecutor's explicit statement, "I kept waiting for [defense counsel] to offer this court some alternative" (5 RT 701), was a legitimate factual question, this Court must be concerned that the trial court too was waiting for defense counsel to offer some alternative to the prosecution's case. If the judge, like the prosecutor, was "waiting" for the defense to produce the true perpetrator and the defense did not, it undoubtedly impacted the judge's verdict of guilt. It thus cannot be shown beyond a reasonable doubt that the prosecutor's improper argument was harmless. Despite the judge's claim that he understood that the prosecution had the burden of proof, his approval of the prosecutor's question and comments belies that understanding.

For the reasons argued above, Respondent fails to show that the prosecutor's misconduct was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at pp. 25-26.) Moreover, under state law, absent the prosecutor's misconduct, there is a reasonable

probability that the judge would have returned a more favorable verdict. (*People v. Wagner*, *supra*, 13 Cal.3d at p. 620.) Therefore, this Court should reverse Mr. Weaver's convictions, the special circumstances findings and death sentence.

IV. THE CUMULATIVE EFFECT OF THE ERRORS AFFECTING THE GUILT VERDICT AND SPECIAL CIRCUMSTANCES FINDINGS REQUIRES REVERSAL OF MR. WEAVER'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCES FINDINGS

The cumulative effect of the errors affecting the guilty verdict and the special circumstances findings prejudiced Mr. Weaver and rendered his conviction and special circumstance findings unconstitutional. Respondent's only argument in response is that since there allegedly was no error, there was no prejudice. (RB 44.) Should this Court agree that there was error, Respondent has conceded its cumulative effect. Therefore, while this Court may find that no single non-structural error warrants reversal of Mr. Weaver's conviction and special circumstance findings, the cumulative effect of the errors here deprived Mr. Weaver of his rights to due process, to a fair trial, and to a reliable sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and article I of the California Constitution.

V. THE ADMISSION OF THE UNLIMITED, VOLUMINOUS AND HIGHLY EMOTIONAL VICTIM IMPACT EVIDENCE IN THIS CASE VIOLATED MR. WEAVER'S STATUTORY AND CONSTITUTIONAL RIGHTS

A. Mr. Weaver Properly Preserved His Objection To The Prosecution's Victim Impact Evidence

On appeal, Mr. Weaver challenges the victim impact testimony admitted during the penalty phase of his trial. (AOB 73-153.) Respondent contends that trial counsel preserved only Mr. Weaver's objection to victim impact evidence generally and that Mr. Weaver forfeited any claim of error with regard to specific testimony. (RB 51.) In fact, trial counsel objected to this testimony numerous times in limine. Furthermore, although not necessary to preserve the issue, counsel also objected to the introduction of the evidence at trial. Trial counsel's multiple objections to the prosecution's victim impact evidence, as set out below, preserved Mr. Weaver's claims for appellate review.

1. Trial counsel's in limine motions properly preserved Mr. Weaver's objection for appeal

Trial counsel moved in limine to exclude the specific victim impact evidence admitted in this case. (2 CT 296-304; 3 CT 365-370.) In doing so, trial counsel satisfied the requirements of California Evidence Code section 353, and preserved Mr. Weaver's right to challenge specific victim impact testimony on appeal.

Evidence Code section 353 precludes setting aside a verdict or reversing a judgment or finding that evidence was erroneously admitted

unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion." (Cal. Evid. Code, § 353, subd. (a); *People v. Morris* (1991) 53 Cal.3d 152, 187, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Section 353 does not require a particular form of objection. (*People v. Morris*, *supra*, 53 Cal.3d. at p. 188 [finding that section 353 "does not exalt form over substance . . ."].) The general rule is that even when an in limine motion has previously been filed, a party must object contemporaneously. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) In some circumstances, however, a motion in limine preserves for appeal a challenge to admitted evidence. (*People v. Morris*, *supra*, 53 Cal.3d at pp.188-189.)

In *Morris*, defense counsel had unsuccessfully moved in limine to exclude the testimony of two witnesses but did not additionally object at the time they testified. The Court found that the in limine motion had preserved the issue for appellate review. (*People v. Morris*, *supra*, 53 Cal.3d at p. 187.) It held that, "[u]nder appropriate circumstances, a motion in limine can serve the function of a 'motion to exclude' under Evidence Code section 353 by allowing the trial court to rule on a specific objection to particular evidence." (*Id.* at p. 188.) In order for that to occur, three requirements must be met: "(1) a specific legal ground for exclusion is

advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*Id.* at p. 190.) If a motion in limine satisfies each of these requirements, then the opponent to the evidence need not make a further objection in order to preserve the issue for appeal. (*Ibid.*) *Morris* held that the defendant's motion in limine satisfied the requirements of section 353, and considered the defendant's argument on the merits. (*Id.* at p. 191.) In this case, trial counsel's in limine objections to the victim impact evidence satisfy all three of the *Morris* factors.

a. The specific legal grounds for excluding victim impact evidence raised on appeal were advanced at trial

Trial counsel's motion in limine complied with section 353's first requirement by raising – and calling to the trial court's attention – specific legal grounds for excluding the victim impact testimony. (2 CT 296-304.) First, trial counsel argued that the U.S. Supreme Court's then-recent decision in *Payne v. Tennessee* (1991) 501 U.S. 808 did not mandate the admission of victim impact evidence. (2 CT 300.) Second, trial counsel argued that both U.S. and California Supreme Court decisions barred the victim impact evidence that the prosecution sought to introduce because of its highly emotional and prejudicial nature. (2 CT 301-303.) Third, trial

counsel highlighted the limited victim impact evidence, the exceedingly brutal nature of the crimes, and the witnesses' observation of the killings in the precedential cases. (2 CT 300-303.) Finally, trial counsel asserted that the prosecution's proposed opinion testimony about the crime and the defendant exceeded constitutional limitations under *Payne*. (2 CT 303.)

In their reply brief to the prosecution's motion to admit victim impact testimony, trial counsel continued to object in limine to the inflammatory nature of the prosecution's victim impact evidence. (3 CT 367.) They also argued that, if admitted, the prosecution's victim impact evidence should be limited to witnesses who were percipient to the crime, and specifically objected to the highly prejudicial nature of the victim impact testimony that the prosecution sought to admit: testimony of non-victim adults who did not witness the crime. (3 CT 367.)

In addition to filing in limine motions, both parties argued their respective positions over the course of three hearings, in which the trial court considered and explicated its understanding of the law regarding the admissibility of victim impact evidence. (7 RPT 31-54; 9 RPT 36-43; 10 RPT 28-35.) At these hearings, too, trial counsel objected to the prosecution's proposed victim impact evidence. In particular, trial counsel objected to non-percipient victim impact witnesses who would testify to the emotional effect the death of Michael Broome had on the witnesses, as well as on other family members. (7 RPT 42; 9 RPT 38-40; 10 RPT 30-31.)

Despite the trial court's denial of trial counsel's motion in limine, counsel continued to press their legal arguments against admitting the victim impact evidence in this case. On March 19, 1993, immediately prior to the testimony of the first victim impact witness, trial counsel renewed their motion to exclude the prosecution's proposed victim impact evidence. (7 RT 734-735.) Trial counsel again argued that the prosecution's proposed victim impact testimony, as described in its Amended Notice, violated federal and state constitutional protections and exceeded the scope permitted by *Payne v. Tennessee, supra* and *People v. Edwards* (1991) 54 Cal.3d 787. (7 RT 734-735, 742-743.) In sum, even though trial counsel did not have to orally reiterate the objections made in their motions, they did so.

Trial counsel's extensive litigation against the prosecution's proffered victim impact evidence alerted the trial court to the various, specific legal bases for excluding the evidence, complying with *Morris*' first requirement.

b. Trial counsel challenged a particular identifiable body of evidence

Trial counsel directed their motion in limine, and subsequent objections, at a particular, identifiable body of evidence — the prosecution's proposed testimony of the victim's family members — thus satisfying section 353's second requirement. (*People v. Morris*, *supra*, 53

Cal.3d at p. 190.) This Court has noted that the policy behind requiring objections to a defined body of evidence is to allow the trial judge "to consider excluding the evidence or limiting its admission to avoid possible prejudice." (*Id.* at pp. 187-188.) Furthermore, an objection to a "defined body of evidence" allows "the proponent of the evidence to lay additional foundation, modify the offer of proof, or take additional steps designed to minimize the prospect of reversal." (*Ibid.*)

Respondent does not argue that Mr. Weaver forfeited his right to challenge the victim impact evidence generally, but rather the specific victim impact testimony admitted in this case. (RB 51.) However, trial counsel's in limine motion and subsequent objections sought to exclude the proposed testimony – specified both by witness and subject matter – detailed in the prosecution's Amended Notice. (3 CT 495, 498, 499, 498-501, 500.) Because the testimony to which Mr. Weaver objects in his Opening Brief tracks the testimony detailed in the prosecution's amended notice, trial counsel preserved Mr. Weaver's challenges to this testimony on appeal.

The trial court and trial counsel knew the identities of the victim impact witnesses from the outset; as a result, trial counsel was able to, and in fact did, specifically object to the testimony of those witnesses. The prosecution's original notice of intent to introduce victim impact evidence listed nine witnesses who would testify "regarding the impact of the crime."

(2 CT 113-114.) Pursuant to the court's request for more detailed information regarding the scope of the victim impact testimony it planned to introduce, (7 RPT 27), the prosecution subsequently filed an Amended Notice that listed 13 potential witnesses. (3 CT 495-502.) The Amended Notice also described the relationship between the victim and each witness. (3 CT 496.) Prior to trial, the prosecution narrowed its list of witnesses, informing the court that the primary victim impact witnesses it intended to call would be the three female witnesses present at the crime, Annette Broome, Michael Broome's parents, and perhaps his brother. (10 RPT 33.) Trial counsel objected to allowing the victim's family members to testify because of the highly emotional and prejudicial nature of their testimony. (10 RPT 30-32.) Trial counsel's arguments were directed at specific victim impact witnesses, known to both parties and the trial court.

Moreover, the details of the intended victim impact testimony were equally evident to the court and trial counsel. In its Amended Notice, the prosecution described how the victim's family members would testify about their responses to the loss of Michael Broome in the months following his death. (3 CT 497-501.) The testimony would also recount important holidays shortly following Michael Broome's death, including his birthday, Mother's Day, Father's Day, Thanksgiving, Michael Jr.'s birthday, and Michael and Annette Broome's anniversary. (3 CT 500.) The notice even revealed that the prosecution intended to elicit testimony

about life in the Broome family before Michael Broome's death, his qualities as a businessman, and the family's decision to move from New Jersey to California. (3 CT 499-500.) The Amended Notice identified other highly emotional anecdotes, such as Annette Broome's playing music for her husband at his graveside, and Michael Jr.'s broken heart, his need for therapy, his excessive fear for his mother's life, and his belief that his poor behavior caused his father's death. (3 CT 498-499.)

Throughout the proceedings on the introduction of the victim impact testimony, the prosecution maintained that its notice of intended testimony was specific and detailed. The Amended Notice stated that its contents provided the "sum and substance of the testimony" of the victim impact witnesses it intended to present. (3 CT 497.) During the third hearing on the admissibility of victim impact evidence, the prosecution argued that the summary in its Amended Notice provided "a pretty good outline" of the victim impact testimony it planned to offer. (10 RPT 33.) In fact, the trial court described the prosecution's Amended Notice as "overly detailed in some senses." (9 RPT 33.) Trial counsel's objections to this detailed proffer thus covered the specific testimony of the victim impact witnesses.

For example, Annette Broome, Mary Broome, and Joseph Broome all testified to the impact that Michael Broome's death had on each of

them.[11] All three of the Broome family members recounted important holidays immediately following Michael Broome's death.[12] Annette Broome testified about the couple's decision to move their family from New Jersey to California.[13] All of the family members testified about attending the funeral,[14] and about the impact the death of Michael Broome had on his children.[15] All of this testimony was proffered in the prosecution's Amended Notice — and was the subject of trial counsel's specific in limine objection. (2 CT 200-303; 3 CT 367; 7 RPT 42; 9 RPT 38-40; 10 RPT 30-31.)

Trial counsel also objected to the prosecution's notice of its intent to introduce victim impact evidence that improperly characterized Mr. Weaver. (3 CT 498.) The prosecution noted that Annette Broome would testify about the heart-breaking moment of explaining the loss of Michael Broome to their young son: "A short time later, Michael Jr. was told that a bad man 'shot and killed daddy.'" (*Ibid.*) Annette Broome's testimony was consistent with the description given in prosecution's Amended Notice. Mrs. Broome testified that she had told her son, "[a] bad man shot daddy."

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[11] See 7 RT 769-773, 794-795, 805-806 [Annette Broome]; 7 RT 814-817, 819-820 [Mary Broome]; 7 RT 824 [Joseph Broome].

[12] See (7 RT 806-811 [Annette Broome]; 7 RT 818-819 [Mary Broome]; 7 RT 827-828 [Joseph Broome].

[13] See 7 RT 762-766.

[14] See 7 RT 797-798 [Annette Broome]; 7 RT 817-818 [Mary Broome]; 7 RT 825-827 [Joseph Broome].

[15] See 7 RT 777-794, 809-810 [Annette Broome]; 7 RT 818 [Mary Broome]; 7 RT 826-827 [Joseph Broome].

(7 RT 779.) As Mr. Weaver argued in his Opening Brief (AOB 127), Annette Broome's characterization of Mr. Weaver as a "bad man" is improper evidence that was inadmissible under *Booth v. Maryland* (1987) 482 U.S. 493. Trial counsel challenged the admission of this evidence from the outset, with the filing of the motion in limine. (2 CT 303.) Trial counsel also highlighted this specific objection in an oral argument, stating that *Booth*'s prohibition on "opinions of the victim's family about the crime, the Defendant, [and] the appropriate sentence" was left intact by *Payne*. (9 RPT 39.)[16]

The examples cited above establish that trial counsel challenged a body of evidence that was particular and identifiable, thus satisfying *Morris*' second requirement.

c. Trial counsel challenged the victim impact evidence at a time when the trial judge had the appropriate context to determine the evidentiary question

The parties extensively litigated the admission of the victim impact evidence before the trial began, and immediately prior to the testimony of the prosecution's first victim impact witness, giving the trial judge ample time and the appropriate context to determine the evidentiary questions. (*Morris*, *supra*, 53 Cal.3d at p. 190.) The trial court had the necessary

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[16] Trial counsel's arguments were made before the court at the second hearing, held on January 5, 1993. (10 RPT 28-35.) The prosecution filed its Amended Notice on December 15, 1992. (3 CT 476-501.)

background to make its rulings because the nature of the evidence was sufficiently detailed, trial counsel had argued specific legal bases for excluding the victim impact evidence, and the prosecution had responded with counterarguments. Over the course of three hearings, the court was informed of the anticipated content of the prosecution's victim impact evidence and the relevant law, and was able to decide the admissibility and scope of the evidence. (7 RPT 31-54; 9 RPT 36-43; 10 RPT 28-35.)

Despite trial counsel's objections at the final hearing, the trial court imposed no limitations on the prosecution's victim impact testimony. (10 RPT 34-35.)[17] Indeed, the trial court admitted all of the prosecution's victim impact evidence. Mr. Weaver now challenges admission of this evidence on appeal. (AOB 82-135.) Trial counsel more than satisfied the requirements of section 353, and preserved Mr. Weaver's challenges to the admission of the prosecution's victim impact evidence.

[17] Respondent claims that the trial court "limited" the victim impact evidence that it would consider. (RB 49.) In fact, the trial court did no such thing. The court simply confirmed what it understood to be mandatory under *Edwards, supra*. (10 RPT 34 [ruling that "certainly [testimony of] a spouse or a parent" falls within the framework articulated by *Edwards*].) Beyond that, the court stated that permissible victim impact evidence would be addressed on a "per witness" basis. (10 RPT 35.) At no point did the court limit the prosecution's presentation of victim impact evidence in any way.

2. Trial counsel's renewed and continuing objections to the prosecution's victim impact evidence exceeded the requirements necessary to preserve Mr. Weaver's right to appeal the admission of the evidence

Just moments before the first victim impact witness testified, trial counsel renewed their motion to exclude all of the prosecution's victim impact evidence. (7 RT 742.) After the trial court denied the renewed motion, trial counsel requested a continuing objection to the victim impact testimony that was about to commence. The trial court granted trial counsel's continuing objection. (7 RT 742.) Respondent contends that the trial court's agreement to a continuing objection was based only on victim impact evidence "generally," and not specifically. (RB 51.) But Respondent ignores the fact, discussed above, that trial counsel had already repeatedly and specifically objected to the detailed description of the testimony the prosecution sought to admit.

Contrary to Respondent's contention, the continuing objection colloquy between trial counsel and the trial court did nothing to undermine the preservation of Mr. Weaver's claims of error on appeal. Instead, trial counsel's renewal of their motion immediately prior to the testimony of the first victim impact witness provided additional safeguards against forfeiture of Mr. Weaver's right to appeal any adverse rulings that the court made regarding that evidence. In response to trial counsel's renewed motion to exclude, the trial court confirmed that it would allow evidence of the

specific harm caused to the victim's family. (7 RT 742-743.) The trial court stated that it intended to overrule any continuing objection unless it was "a specific objection if we enter into overindulgence." (7 RT 742.) The court's language suggested that he would only entertain specific objections to testimony *beyond* that to which trial counsel had already unsuccessfully objected on multiple occasions. Thus, it was reasonable for trial counsel to conclude that their continuing objection preserved Mr. Weaver's claims of error on appeal.

A "specific" objection during the victim impact testimony would have served no practical purpose because trial counsel had already made multiple objections to the evidence in its entirety and to specific aspects of the testimony. Any further objections would have been futile. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1126, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *People v. McDermott* (2002) 28 Cal.4th 946, 1001; *People v. Hill* (1998) 17 Cal.4th 800, 820.) Repeated objections during the victim impact testimony also would have undermined the purpose of requesting a continuing objection, i.e., to minimize interruptions during the sensitive and highly emotional testimony of each of the prosecution's five victim impact witnesses. (3 Crim. Prac. Manual, § 81:10 (West 2008) [discussing how a continuing objection is a solution to the problem that "the process of objection could be carried to absurd

lengths if it were necessary, for instance, to object after every single question during an entire line of questioning which is thought to be objectionable"]; see also Logan, *Confronting Evil: Victims Rights' in an Age of Terror* (2008) 96 Geo. L.J. 721, 752 [noting that "with the greater volume of victim impact witnesses and their extensive highly emotional accounts come correspondingly greater difficulties for defense counsel," such as objecting to victim impact testimony].) Repeated objections during the testimony would also have undermined the purpose of filing an in limine motion, i.e., to minimize disruptions during trial and allow for the uninterrupted flow of evidence. (See *People v. Morris*, *supra*, 53 Cal.3d at p. 188.)

Respondent's argument seeks to punish Mr. Weaver because trial counsel went beyond what is required under section 353. Respondent's argument is akin to saying that trial counsel's continuing objection somehow "un-preserved" the previous objection that was properly made under *Morris*. On the contrary, trial counsel's numerous efforts to exclude the prosecution's victim impact evidence, including their request for a continuing objection, demonstrate that trial counsel's actions not only met, but exceeded, section 353's requirements to preserve Mr. Weaver's right to appeal the erroneous admission of victim impact evidence.

Furthermore, the case law that Respondent references in support of its argument is unavailing. In *People v. Robinson* (2005) 37 Cal.4th 592,

for example, the defendant argued that the trial court should have excluded the prosecution's victim impact testimony at the retrial of the defendant's penalty phase. (*Id.* at p. 650.) This Court reasoned that, because this was a penalty retrial, defense counsel was aware that most of the same evidence had been admitted at the first trial and therefore should have moved in limine to exclude the victim impact evidence. (*Id.* at p. 652.) Because the defendant failed to do so "or to object when the testimony . . . [was] offered," the Court held that the defendant had waived the issue on appeal. (*Ibid.*)

Mr. Weaver, of course, had only one penalty phase trial. In addition, trial counsel did file a motion in limine to exclude the evidence, (2 CT 296-304), renewed the motion in limine before the penalty phase began, (7 RT 734-735), and requested a continuing objection as the first victim impact witness took the stand. (7 RT 742.) Thus, Respondent's reliance on *Robinson* for the proposition that trial counsel was required to specifically object as the witnesses testified is misplaced. In fact, *Robinson* supports this Court's consistent position that, had the defendant brought an in limine motion to restrict admission of the evidence *or* objected when the evidence was offered, the defendant would have preserved the issue on appeal. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652.)

The additional cases Respondent cites also fail to support its argument. (RB 51.) None of the decisions involve instances in which the

trial court ruled on a motion in limine to exclude victim impact evidence. Instead, the cases Respondent cites are examples of how this Court has held that important constitutional claims are forfeited when counsel fails to object.[18] Here, trial counsel satisfied the statutory requirements and this Court's precedents for preservation of the issue on appeal.

3. If the question of whether trial counsel preserved Mr. Weaver's ground for appeal is "close and difficult," this Court should exercise discretion in favor of review

For the reasons set forth above, Mr. Weaver asserts that his challenges to the victim impact evidence were properly preserved for appeal. However, should this Court find "close and difficult" the question of preservation, it should nonetheless consider the issue on the merits. In cases that present close and difficult determinations about whether a party properly preserved a ground for appeal, the Court exercises discretion in

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[18] (See *People v. Roldan* (2005) 35 Cal.4th 646, 732, overruled on other grounds as stated in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn.22 [holding that defendant's claim on appeal that victim impact evidence should have been excluded at trial as inflammatory was waived because defendant did not object on this ground at trial]; *People v. Benavides* (2005) 35 Cal.4th 69, 106 [holding that defendant who objected to admission of victim impact testimony in camera, after testimony was given, failed to preserve objections for appeal, because not only were objections untimely, but defendant failed to make motion to exclude or strike evidence or otherwise correct perceived error]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181-1182 [rejecting defendant's arguments that he was not required to timely object to prosecution's victim impact testimony because defendant would have appeared callous, thereby alienating jury]; *People v. Crew* (2003) 31 Cal.4th 822, 845 [holding that defendant failed to object to victim impact evidence at trial, and therefore waived claim of error on appeal].)

favor of review. (See *People v. Ayala* (2000) 23 Cal.4th 225, 273; *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5.)

B. The Admission Of Victim Impact Testimony In This Case Far Exceeded Both Constitutional And Statutory Limits

1. The victim impact testimony in this case violated constitutional limits imposed by the U.S. Supreme Court and this Court

This is not a case in which the Court has to speculate about the effect of the victim impact evidence on the fact-finder. Here, the fact-finder made it clear: "Any reviewing court should know," the trial judge explained as he announced his death verdict, "that absent the strength and force of the extremely high level and heavy weight of [the victim impact evidence], this court would have reached a different result." (12 RT 1373.) Moreover, the prosecution introduced no statutory aggravation other than evidence that the trial court deemed admissible under Penal Code section 190.3, subdivision (a), the circumstances of the crime. As to factor (a), the prosecution's presentation consisted solely of highly emotional victim impact evidence that spanned nearly 100 pages of testimony. Thus, the only question the Court need decide with respect to this issue is whether the testimony admitted over counsel's repeated objections, exceeded state and federal constitutional bounds. (AOB 73-153.)

As Mr. Weaver argued in his Opening Brief, this Court has cautioned against the admission of "irrelevant information or inflammatory

rhetoric" that "invites an irrational, purely subjective response" or "diverts the [sentencer] from its proper role" and therefore violates the Due Process Clause. (AOB 107 [citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 836].) The trial court failed to abide by these limits when it admitted the inflammatory testimony of the prosecution's victim impact witnesses – testimony that invited a response from the sentencer based on passion instead of reason.

In determining whether the introduction of victim impact evidence was unduly prejudicial, this Court typically examines one or more of three specific factors: the length of the victim impact testimony, the emotional tenor of the testimony, and the contested victim impact evidence in relation to the gravity of the crime and other aggravating evidence adduced at the penalty phase. (AOB 107-108.) Respondent does not dispute that these are the factors this Court considers when determining prejudice, but instead disputes whether Mr. Weaver prevails when the facts of his case are applied to each of the factors. (RB 51-53, 55-58.)

a. Respondent's focus on the number of witnesses who testified is misplaced

In determining whether the admission of victim impact evidence is unfairly prejudicial, this Court evaluates the evidence to determine whether it is "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*People v. Taylor* (2002) 26

Cal.4th 1155, 1172.) To assess what constitutes "voluminous" victim impact evidence, the Court often refers to the length of the testimony. For example, as noted in Mr. Weaver's Opening Brief, this Court recently described 37 pages of victim impact testimony as "extensive[]." (AOB 109, citing *People v. Robinson*, *supra*, 37 Cal.4th at p. 644.) Almost three times that amount was introduced here. (AOB 109.) Respondent does not address this argument.

Respondent does maintain that the victim impact testimony in Mr. Weaver's case was "not unduly lengthy, nor did it entail numerous witnesses." (RB 52.) However, Respondent fails to address Mr. Weaver's contention that the length of the victim impact testimony in this case far exceeds the "quick glimpse" authorized by *Payne v. Tennessee, supra*, 501 U.S. at page 822. Instead, Respondent dwells on the number of witnesses who testified, arguing that this Court has repeatedly allowed multiple victim impact witnesses to testify at the penalty phase of a capital trial. (RB 52.) Mr. Weaver's argument does not hinge on the number of victim impact witnesses that the trial court permitted to testify in this case, however. It concerns the length and content of the witnesses' testimony.

Respondent cites three cases for its proposition that the Court has repeatedly allowed multiple witnesses to testify. (RB 52-53, citing *People v. Huggins* (2006) 38 Cal.4th 175, 236-238; *People v. Panah* (2005) 35 Cal.4th 395, 416; *People v. Boyette* (2002) 29 Cal.4th 381, 440-441,

overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421.) While Respondent's cases do discuss the permissibility of multiple victim impact witnesses, they hold that length of the testimony is what matters, not the number of witnesses.

In two of these cases, this Court upheld the introduction of the victim impact testimony based on the relative brevity of the testimony. (*People v. Panah*, *supra*, 35 Cal.4th at p. 495 [discussing how even if it was error to admit the victim impact testimony, given the "brevity of the testimony," such error would be harmless]; *People v. Boyette*, *supra*, 29 Cal.4th at p. 445 [assuming arguendo that the trial court erred in admitting victim impact evidence, there was no prejudice because "the several family members who testified did so briefly and relatively dispassionately"].) In Respondent's third case, the Court looked to the substance of the testimony in determining prejudice, not to the number of witnesses who testified. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 238-239.) Thus, the cases Respondent cites in support of its argument actually confirm that the Court looks to the length and substance of the testimony, not the number of witnesses, when determining prejudice. Under Respondent's theory, a penalty phase in which fifteen victim impact witnesses provided brief, fact-based testimony would be more likely to be impermissible than a penalty phase in which five victim impact witnesses gave lengthy, highly emotional

and inflammatory testimony. Such a rule defies common sense, and is unsupported by any precedent in this or any other court.

Respondent also relies on an improper comparison between the number of victim impact witnesses who testified for the prosecution and the number of mitigation witnesses who testified on Mr. Weaver's behalf. (RB 53.) Specifically, Respondent argues that because the prosecution called only five victim impact witnesses, and Mr. Weaver presented the testimony of sixteen witnesses during the penalty phase, the victim impact testimony was not unduly lengthy. (*Ibid.*) Citing *Payne*, Respondent argues that the "prosecution has a legitimate interest in counteracting [the defense's] mitigating evidence with evidence in aggravation." (*Ibid.*) Although the majority of the Court in *Payne* was concerned that exclusion of victim impact evidence "unfairly weighted the scales in a capital trial," it sought to remedy this by allowing for only a "quick glimpse" into the victim's life and a demonstration of the loss to the victim's family and society. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822.) Nothing in the majority opinion suggests that the Court intended to sanction penalty phase trials in which the state and defendant went tit-for-tat- mitigation witness against victim impact witness.

Unlike victim impact evidence, mitigating evidence is not meant to present a "quick glimpse" of the defendant. Rather, its purpose is to provide the sentencer with any evidence that might be a basis for

sentencing the capital defendant to life, instead of death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605.) Because "death is qualitatively different" than other forms of punishment, the Eighth and Fourteenth Amendments require that a judge or jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 604.) The Court has repeatedly reaffirmed this expansive view of mitigating evidence, and did so in *Payne*: "We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne v. Tennessee, supra,* 501 U.S. at p. 822, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114. (See also *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285; *McCleskey v. Kemp* (1987) 481 U.S. 279, 304; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5.) Thus, the penalty phase is necessarily focused on the defendant. This follows from the principle that "punishment should be directly related to the personal culpability of the criminal defendant," because a defendant who commits crimes "attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such

excuse." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304, 321.)

Unlike mitigation, there is no corresponding constitutional requirement that a jury be allowed to consider and give effect to victim impact evidence. In fact, a court has the discretion not to permit any victim impact evidence at all. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.) ["We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of the evidence, 'the Eighth Amendment erects no *per se* bar'"].) The purpose of admitting victim impact evidence during the penalty phase of a capital trial is "to remind the jury that the person whose life was taken was a unique human being." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.).)

Respondent's arguments therefore do not refute the fact that the victim impact testimony in this case exceeded both the U.S. Supreme Court's and this Court's constitutionally permissible limits and unduly prejudiced Mr. Weaver.

b. The victim impact testimony was highly emotional and unduly prejudicial, and this Court cannot presume that the trial judge was impervious to deciding based on passion, not reason

As discussed in Mr. Weaver's Opening Brief, this Court also looks to the emotional tenor of victim impact testimony in determining prejudice. (AOB 110-111.) The Due Process Clause forbids the introduction of victim impact testimony that invites an "irrational, purely subjective response." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The victim impact testimony in Mr. Weaver's case was so inflammatory as to constitute the "extreme case" contemplated by this Court in *People v. Smith*. (AOB 111, citing *People v. Smith* (2005) 35 Cal.4th 334, 365.)

Respondent argues that the victim impact testimony in Mr. Weaver's case, particularly the testimony of the victim's mother, Mary Broome, was not so inflammatory that "emotion reigned over reason." (RB 55.) Respondent further contends that, even assuming that the trial court erred in admitting the testimony, Mr. Weaver was not prejudiced by its admission because the case was tried before a judge, not a jury. (RB 51-52.) Respondent is wrong on both points.

Respondent asserts that the victim impact evidence, specifically Mary Broome's testimony, was not unduly prejudicial because, while emotional, it was neither shocking nor inflammatory. (RB 55.) Respondent maintains that it was "instead, a tragically obvious and

predictable consequence of [Mr.] Weaver's crime." (*Ibid.*) On the contrary, as detailed in Mr. Weaver's Opening Brief, the testimony did more than demonstrate Mary Broome's profound grief; it aroused other emotions in the listener, including an overwhelming, immediate concern for her physical and psychological well-being. (AOB 111-114.) It also allowed Mrs. Broome to testify in a manner completely unrestrained by the rules of evidence. (AOB 112-113.)

Respondent cites *People v. Sanders* (1995), 11 Cal.4th 475, in support of its argument that Mary Broome's testimony was not prejudicial because it was a "predictable and obvious consequence" of Mr. Weaver's crime. (RB 55.) The facts in *Sanders* are easily distinguishable from Mr. Weaver's case, however. Unlike in Mr. Weaver's case, Sanders' challenge to the victim impact evidence arose in the context of a prosecutorial misconduct claim. (*People v. Sanders, supra,* 11 Cal.4th at pp. 548-549.) The defendant claimed on appeal that, during closing argument, the prosecutor's references to the impact of defendant's crime on the victim's family invited an irrational response from the jury. (*Id.* at p. 550.) This Court held that the prosecutor's remarks were not prejudicial because the prosecutor mainly referred to the absence of testimony from family members and friends of the victims, and because the "references to the suffering of the family members were generalized and consisted of obvious truisms to the effect that they were aggrieved." (*Ibid.*) By contrast, Mr.

Weaver's penalty phase trial consisted of the evocative, anguished, and, at times, angry testimony, which recounted numerous detailed examples of how the witnesses and other family members had been all but destroyed by Michael Broome's murder.

Respondent is also wrong in its contention that, even if the victim impact testimony was inflammatory, its admission did not prejudice Mr. Weaver because he was not tried by a jury. (RB 51-52.) Respondent argues that the law presumes a difference between judges and jurors, "recognizing that judges possess a trained and disciplined mind," which enables them to draw conclusions "entirely uninfluenced by the irrelevant prejudicial matters within their knowledge." (RB 51-52.) Respondent's argument fails for two reasons.

First, Judge Lester stated, on the record, that without the victim impact evidence in this case, he would not have sentenced Mr. Weaver to death. (12 RT 1373.) As Judge Lester announced his sentencing verdict, he stated that "[a]ny reviewing court should know that absent the strength and force of the extremely high level and heavy weight of [the victim impact] evidence, this court would have reached a different result." (*Ibid.*) Unlike penalty phase jury verdicts in California, which offer reviewing courts little, if any, insight into the significance that specific mitigating or aggravating evidence had on the outcome, Judge Lester's penalty phase verdict was explicit and directed toward this Court's inevitable

consideration. Although he provided some specific examples of the victim impact testimony he considered, his description of the evidence as of an "extremely high legal and heavy weight" leaves no doubt that it was the sum of the testimony that directly led him to sentence appellant to death.[19]

Second, Respondent's argument incorrectly presumes that judges are impervious to the highly emotional nature of victim impact testimony. On the contrary, judges are also susceptible to responding emotionally, even irrationally, to victim impact evidence. (See, e.g., Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials* (2000) 33 U. Mich. J. L. Reform 1, 27 [discussing how victim impact evidence has a "palpable emotional effect on jurors and even supposedly impartial trial judges"]; Gibeaut, *The Last Word: Jury is Still Out on Effects of Victim Impact Testimony* (1997) 83 A.B.A. J. 42, 43

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[19] Respondent cites another portion of Judge Lester's sentencing verdict in which he stated that he was following the law and that, although the victim impact evidence was emotional, it "did not cause this court to react with a rash or purely subjective response." (RB 52, citing 12 RT 1361.) Respondent's argument is misplaced for two reasons. First, any presumption that the trial court followed the law does not apply where, as here, the record is clear that the trial court did not do so. (See *People v. Scott*, *supra*, 15 Cal.4th at p. 1221.) Second, Judge Lester's opinion is irrelevant. It is for this Court to decide whether the victim impact evidence led to an improper result, and the last person whose opinion should control is the very person who Mr. Weaver argues was improperly swayed by the unduly emotional evidence. (See, e.g., Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, (2005) 153 U. Pa. L.Rev. 1251, 1251 [discussing research finding that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware"].)

[discussing how in the penalty phase of Timothy McVeigh's capital trial, the judge "wept as family members, rescue workers and others took the stand"].)

Finally, while this Court has never reversed a death sentence on the basis of a challenge to the admission of victim impact evidence, it has consistently affirmed that there are "limits on emotional evidence and argument." (*People v. Robinson*, *supra*, 37 Cal.4th at p. 651, quoting *People v. Edwards*, *supra*, 54 Cal.3d at p. 836]; cf. *People v. Dykes* (2009) 46 Cal.4th 731, 782 [commending trial court for its emphatic admonishment to counsel to prepare witnesses to avoid inflammatory emotional remarks].) If the voluminous, highly emotional victim impact evidence in this case is not the type of "inflammatory rhetoric" that "invites an irrational response," and "so infects the sentencing proceeding as to render it fundamentally unfair," then there are effectively no limits on the amount or extent of victim impact evidence that the prosecution can present in an effort to secure a death sentence. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.); *People v. Edwards*, *supra*, 54 Cal.3d at p. 836, internal citations omitted].) Because the trial court did not place any restrictions on this inflammatory evidence, "emotion reigned over reason" and the victim impact testimony unfairly prejudiced Mr. Weaver.

c. The circumstances of the crime stand in stark contrast to cases in which this Court has concluded that highly emotional victim impact testimony did not prejudice the defendant

This is a case in which the prosecution conceded that Mr. Weaver had committed no prior crimes of violence and had no prior felony convictions (11 RT 1265), and introduced only victim impact evidence in aggravation. As Mr. Weaver argued in his Opening Brief, these facts distinguish Mr. Weaver's case from those in which the Court concluded that highly emotional victim impact evidence did not prejudice the defendant. (AOB 115-118, and cases cited therein.) Respondent argues that, despite the absence of any other aggravating evidence, the circumstances of Mr. Weaver's crime were such that the presentation of victim impact evidence did not result in prejudice. (RB 56.)

Respondent characterizes the crime as "far more" than a single gunshot felony-murder and portrays Mr. Weaver as intentionally targeting Mr. Broome. (RB 57.) In doing so, Respondent selectively highlights the testimony of two of the prosecution's witnesses, and ignores the testimony of prosecution and defense witnesses that contradict Respondent's argument. (RB 57.) None of the evidence presented at trial indicated that Mr. Weaver planned to shoot Michael Broome when he entered Shadowridge Jewelers. In fact, the prosecutor conceded that he did not know "whether when he entered that store that day he intended to kill

Michael Broome." 11 RT 1261. Rather, the evidence at trial suggests that Mr. Weaver – a young man with no significant criminal record – was extremely nervous and heavily under the influence of alcohol, and that, to the extent there was any evidence of planning, it was limited to the robbery. (AOB 117-118.)

Respondent cites the trial court's statement that there was nothing in the evidence that suggested an accidental or "reaction-type impulse shooting." (RB 56, citing 12 RT 1359.) However, the testimony of various prosecution witnesses contradicts the trial court's erroneous conclusion. For example, Ricky Black, a prosecution witness who had been sitting in the shopping center parking lot before the shooting occurred and who observed Mr. Weaver outside the jewelry store before he entered it, testified that Mr. Weaver appeared "very nervous." (2 RT 229.) Lisa Stamm, a jewelry store employee present during the shooting, testified that when Mr. Weaver entered the store, he was "nervous" and that he was "really nervous" after the shooting. (4 RT 610, 613.) Ms. Stamm further testified that that Mr. Weaver got scared and shot Mr. Broome; it was her impression that Mr. Weaver did not enter the store intending to shoot anyone. (4 RT 613-614.) Lisa Maples, who was physically closest to Mr. Weaver during the robbery, testified that Mr. Weaver was nervous and that she could feel him shaking as his arm was around her. (7 RT 836.) Lastly, Dr. Charles Rabiner, a psychiatrist who testified for the defense, concluded

that Mr. Weaver is someone who is more likely to "fire a weapon . . . out of fear and impulsiveness than out of a clear thought-out plan." (9 RT 1142.) At the very least, the conflicting testimony at trial raises doubts as to whether the shooting was intentional.

Respondent tries to dismiss Mr. Weaver's claim that he was intoxicated by citing to the testimony of two witnesses, Detective Phelps and Mary Deighton, while ignoring the testimony of other key witnesses. (RB 57.) Both Ms. Deighton and Detective Phelps testified that Mr. Weaver did not appear to experience any difficulty with his speech, balance, or coordination. (10 RT 1233-1234 [Mary Deighton]; 10 RT 1240-1241 [Detective Phelps].) However, after Mr. Weaver's arrest, police conducted a blood alcohol test, and determined that Mr. Weaver's blood alcohol level was .05 percent. (8 RT 918.) Mary Buglio, a forensic alcohol supervisor at the San Diego County Sheriff's crime laboratory, estimated that at the time he was taken into custody (less than an hour after the shooting), Mr. Weaver had a blood alcohol level of about .17 percent, the equivalent of someone Mr. Weaver's size having consumed seven to eight drinks within one hour. (8 RT 924-925.) Therefore, the evidence shows that Mr. Weaver was under the influence of alcohol when he entered the jewelry store, committed the robbery, and shot Mr. Broome.

Ms. Buglio testified that alcohol first impairs judgment, information processing, and self-restraint, before it affects physical abilities. (8 RT

920.) According to the witness, although there is variance among individuals, studies show that, at a .08 blood alcohol level, an individual's awareness of his surrounding, peripheral vision, "abstract and logical thinking," "judgment," and control of inhibitions are impaired. (*Id.* at pp. 925-929.) She testified further that alcohol consumption also affects an individual's ability to be attentive to multiple events that are occurring simultaneously, and that the higher one's blood alcohol level, the less an individual is able to engage in that type of mental processing. (*Id.* at p. 920.)

By citing only the testimony of Detective Phelps and Mary Deighton, Respondent fails to acknowledge the conflicting testimony presented at trial regarding Mr. Weaver's mental and emotional state when the shooting occurred. These contradictions in the testimony undermine Respondent's argument that Mr. Weaver "targeted" Michael Broome for death, and that the circumstances of the crime were therefore particularly aggravating.[20]

[20] The only piece of evidence Respondent tries to rely on to establish that Mr. Weaver "targeted" Mr. Broome is Ms. Deighton's testimony that Mr. Weaver was hostile to, and displayed a different attitude toward, Mr. Broome. (RB 56-57.) Mr. Weaver addressed the lack of foundation for Ms. Deighton's opinion testimony and the trial court's error in admitting that evidence in his Opening Brief (AOB 172-180) and in Argument VII, *infra*. The evidence in this case, when considered in the aggregate, suggests that Mr. Weaver did not "target" Mr. Broome. (AOB 172-180.)

Respondent is also mistaken in arguing that the circumstances of Mr. Weaver's crime outweigh the prosecution's unduly prejudicial victim impact testimony because Mr. Weaver displayed "common sense in an effort to avoid detection" and "never displayed remorse." (RB 57.) The defense presented expert testimony at trial that refutes Respondent's argument. Dr. Rabiner, a psychiatrist, testified at trial that Mr. Weaver had lower than average intelligence, (9 RT 1127), and that he was not the type of individual who planned ahead, but rather "lived in the moment," (9 RT 1134-1135). Dr. Rabiner concluded that Mr. Weaver was a person who "frequently depended on others to make his mind up for him, would look to others for direction, had a low sense of self confidence, self esteem, and was not very good at initiating things on his own. . . ." (9 RT 1141.) In essence, Mr. Weaver was a "follower," not a leader. (*Ibid.*) Furthermore, Dr. Rabiner's conclusions were supported by two additional defense expert reports, one by another psychiatrist and one by a psychologist. (9 RT 1144, 9 RT 1145.)

Respondent completely misrepresents Dr. Rabiner's testimony, relying on it for the proposition that Mr. Weaver "never displayed remorse." (RB 57 [citing 9 RT 1140-1150, 1161-1162].) In fact, Dr. Rabiner testified at trial that Mr. Weaver appeared "genuinely remorseful" and that he "knew he had caused the family of the victim a great deal of pain." (9 RT 1140.) Summarizing his factual findings, Judge Lester

echoed Dr. Rabiner's conclusions: "The court finds clearly the defendant did and has shown at various times to various people remorse for what he has done. He has shown remorse toward the victim's plight and the victim's family. He has truly shown sorrow for his activity." (12 RT 1349.) To the extent that Respondent cites testimony discussing Mr. Weaver's initial denial of the crime as evidence of his lack of remorse, (RB 57, citing 9 RT 1140-1150, 1161-1162), Dr. Rabiner addressed this very point at trial, stating that Mr. Weaver most likely denied involvement in the crime initially because he was frightened and because he was suspicious of who was questioning him. (9 RT 1140.) Moreover, as this Court has recognized, the prosecution may argue the defendant's "overt remorselessness" only when the argument is supported by evidence of the defendant's unambiguous statements or actions that are contemporaneous with or occur after the offense, which is not the case here. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 448-449, disapproved on another ground in *People v. Prieto*, *supra*, 30 Cal.4th at p. 263, fn. 14.)

Finally, as discussed in the Opening Brief, the circumstances of Mr. Weaver's crime stand in stark contrast to those cases in which this Court has concluded that highly emotional victim impact evidence did not prejudice the defendant because of the nature of the crime. (AOB 115-116, and cases cited therein.) Here, the circumstances of Mr. Weaver's crime – a single gunshot during the course of a robbery – did nothing to dilute the

power of the victim impact testimony. Thus, this Court can have no confidence that "emotion [did not] reign over reason" during Mr. Weaver's penalty phase. (AOB 118, citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

When the three factors this Court considers are examined in the aggregate – the volume of the victim impact testimony, the charged tenor and substance of the testimony, and the victim impact evidence in relation to the gravity of the crime and lack of other aggravating evidence – the nearly 100 pages of inflammatory victim impact evidence admitted in Mr. Weaver's case rendered his penalty trial fundamentally unfair.

2. The trial court improperly admitted testimony that characterized both the crime and Mr. Weaver in violation of *Booth v. Maryland*

Victim impact evidence that characterizes the crime or the defendant "creates a constitutionally unacceptable risk" that the death sentence will be imposed in an arbitrary and capricious manner. (AOB 118-119; *Booth v. Maryland*, *supra*, 482 U.S. at pp. 502-503.) Respondent contends that the victim impact testimony in this case did not include such improper characterizations and opinions. In doing so, Respondent ignores several of Mr. Weaver's claims altogether, and cites irrelevant case law in response to others. In the end, Respondent cannot avoid the fact that the U.S. Supreme Court left in place the bar on the type of victim impact evidence admitted here. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.)

a. Improper characterizations of the crime

Annette Broome's victim impact testimony consisted of several impermissible statements in which she imagined her husband as he lay dying in the jewelry store. (AOB 122-124.) Respondent contends that Annette Broome's testimony was proper because it demonstrated the "understandable human reactions" that accompany learning of the violent death of a loved one. (RB 54.) Respondent, however, relies upon several cases that are irrelevant to determining whether testimony constitutes an impermissible characterization of a crime. In addition, Respondent ignores altogether Mary Broome's and Joseph Broome's equally impermissible testimony. (AOB 122-125). Finally, given that this Court has yet to speak directly to *Booth*'s limitation, it should look to Justice Moreno's concurring opinion in *Robinson*, as well as the decisions of federal circuit courts for guidance. (*People v. Robinson*, *supra*, 37 Cal.4th at pp. 656-658 (conc. opn. of Moreno, J.); AOB 120-121, 124-125, and cases cited therein.).

Respondent's reliance on *People v. Wilson* (2005) 36 Cal.4th 309, and *People v. Brown* (2004) 33 Cal.4th 382, is misplaced because neither case applies *Booth* to the victim impact evidence presented in that case. (RB 54.) In *Wilson*, the victim's sister testified that she could not understand why someone whom her brother had befriended and trusted would kill him. (*People v. Wilson, supra,* 36 Cal.4th at p. 357.) When detectives told her it was for money, she testified that her reaction was that

she "was angry someone would kill for that." (*Ibid.*) This Court held that "her statements permissibly concerned the 'immediate effects of the murder,' i.e., her 'understandable human reactions' on hearing someone had killed her brother for money." (*Ibid.*) *Wilson* did not discuss the witness's statement in the context of *Booth*'s prohibition on characterizations of the crime or the defendant. In fact, this Court did not even mention *Booth* during its analysis of the victim impact evidence in that case. (*Id.* at pp. 355-358). Moreover, in contrast to *Wilson*, where the victim's sister testified to her anger and lack of understanding of the motive for the killing, the testimony in this case crossed the line of permissible victim impact testimony by speculating about Michael Broome's thoughts during the last moments of his life. (AOB 122-124.) Respondent's reliance on *Wilson* is therefore non-responsive to the argument that the testimony of Annette Broome, Mary Broome, and Joseph Broome violated *Booth*'s prohibition on a victim impact witness's characterization of the crime.

Respondent is also wrong to rely on *Brown, supra.* (RB 54.) In that case, the victim's brother testified about his custom of saluting his brother's grave every time he drove past the cemetery, and the victim's father testified that he had not gone fishing since his son's death. (*People v. Brown, supra*, 33 Cal.4th at p. 398.) Upholding the introduction of this evidence, this Court found that the family members' responses as "understandable human reactions" were "simply manifestations of the

psychological impact experienced by the victims." (*Ibid.*) The Court, however, did not consider whether these statements were improper characterizations of the crime and thus inadmissible under *Booth*, nor did it discuss any victim impact evidence that might even remotely be construed as a characterization of the crime.[21] (*Ibid.*) Accordingly, to the extent that the facts of *Brown* are at all similar to those in this case, the Court's decision in *Brown* is not dispositive of Mr. Weaver's claim under *Booth*.

Respondent ignores entirely the improper characterizations made by Mary Broome and Joseph Broome, and instead addresses solely Annette Broome's testimony. (RB 44-58; AOB 122-125.) At trial, Mary Broome testified that she thinks of her son and "how he laid there dying for no reason at all," and that she thinks of him "laying there in a pool of blood." (7 RT 815, 819.) Joseph Broome testified that it would have been easier to accept his brother's death if it were due to cancer or a car accident, but that he could not accept his brother's death for "such a callous reason." (7 RT 828.) By failing to address the improper testimony of Mary Broome and Joseph Broome, Respondent addresses neither the individual nor cumulative impact of their testimony.

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[21] The only time that *Booth* is mentioned is in a citation, where this Court noted that the U.S. Supreme Court's decision in *Payne v. Tennessee* partially overruled its decision in *Booth v. Maryland*. (*People v. Brown*, *supra*, 33 Cal.4th at p. 395.) However, the Court did not discuss *Booth*'s bar to the introduction of certain types of victim impact evidence, including improper characterizations of the crime, which *Payne* left in place. (*Id.* at pp. 395-396.)

Finally, two Justices on this Court have previously discussed the improper characterizations of the crime. (*People v. Robinson*, *supra*, 37 Cal.4th at pp. 656-658 (conc. opn. of Moreno, J.); AOB 119-120.) In *Robinson*, Justice Moreno, joined by Justice Kennard, relied on *Booth* in his concurrence, stating that he "would hold as a general rule that testimony of victims' friends and family regarding their imagined reenactments of the crime be excluded." (*Id.* at pp. 656-657.) As detailed in the Opening Brief, other jurisdictions have addressed the issue and squarely rejected victim impact evidence that characterizes the crime or the defendant. (AOB 120-121, 124-125, and cases cited therein.) While Respondent is correct that this Court is not bound by decisions of federal circuit courts, (RB 54, fn. 18), in the absence of any case law on this particular issue, this Court often looks to persuasive authority in other jurisdictions for guidance. Considering that the Court has yet to adjudicate this issue on the merits, Mr. Weaver's case presents the Court with the opportunity to make it explicit that improper characterizations of the crime and the defendant are not permitted under any circumstance.[22]

[22] The Court recently decided *People v. Martinez* (2010) 47 Cal.4th 911, 960, in which the defendant claimed that testimony by family members improperly characterized the crime. The Court compared the facts of *Martinez* to that of another recent case, *People v. Pollock*, *supra*. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 961, citing *People v. Pollock*, *supra*, 32 Cal.4th at pp. 1166, 1182.) The Court, however, did not apply *Booth* to resolve the claim in either case. It has yet to consider how *Booth* affects the resolution of a claim where, as here, the victim's family

b. Improper characterizations of Mr. Weaver

Respondent argues that the victim impact evidence did not include improper characterizations of Mr. Weaver. Respondent does not respond at all to Mr. Weaver's arguments concerning Joseph Broome's improper characterizations of Mr. Weaver. (7 RT 824; 7 RT 826; AOB 127-128.) Further, while Respondent argues the propriety of Annette Broome's statement that the crime was "so cruel and cold" and that "[e]ven a dog stops what they're doing and comes over to lick your wounds if you're crying," it only does so in the context of a characterization of the *crime*. (7 RT 805; RB 54.) Respondent does not contest that this was an improper characterization of Mr. Weaver.

Respondent contends that Annette Broome's testimony labeling Mr. Weaver as a "bad man" was a "simple statement of fact," intended to explain the death of the victim to their young son. (RB 54.) Respondent

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members discussed their "imagined reenactments of the crime." (See *People v. Robinson*, *supra*, 37 Cal.4th at pp. 656-657 (conc. opn. of Moreno, J.).)

Martinez and *Pollock* are distinguishable from this case. The testimony in *Martinez* and *Pollock* referred generally to what the victims went through and the suffering they experienced. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 960; *People v. Pollock*, *supra*, 32 Cal.4th at pp. 1166, 1182.) Here, the testimony included witnesses' imagined descriptions of Michael Broome lying in a "pool of blood." (7 RT 819.) This testimony violated Mr. Weaver's constitutional rights and was improper because it was an "imagined reenactment[] of the crime." (See *People v. Robinson*, *supra*, 37 Cal.4th at pp. 656-657 (conc. opn. of Moreno, J.).)

further contends that Mrs. Broome's description of Mr. Weaver as "bad" was an "understatement" in light of Mr. Weaver's crime. (*Ibid.*)

It is certainly understandable that Annette Broome would feel grief and anger when trying to explain the loss of his father to their young son, and would have described Mr. Weaver to her son in this manner. It is also understandable that she considers Mr. Weaver to be a "bad man." But that characterization of Mr. Weaver is matter of opinion, not fact. Indeed, it is precisely the type of improper opinion that *Booth* prohibits, because it serves no evidentiary purpose and only injects passion into the decision to impose a death sentence. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 508-509.)

Respondent's argument that the trial court's awareness of the particulars of Mr. Weaver's crime minimizes the harm done by the admission of improper victim impact testimony is both incorrect and misleading. To support its contention, Respondent cites various parts of the sentencing verdict in which the trial court characterized Mr. Weaver and the crime "in far more harsh terms." (RB 54-55.) Any characterizations that the trial court made during its sentencing verdict are not evidence. They are the judge's opinions about the evidence, including victim impact testimony. In fact, *Booth* prohibits the improper characterizations that Annette Broome made because such statements improperly influence the

reasoned conclusions that the sentencer must draw. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 508-509.)

Respondent's reliance on *People v. Kelly* in support of its argument is misplaced because the victim impact testimony in *Kelly* did not consist of improper characterizations of the defendant. (RB 55, citing *People v. Kelly* (2007) 42 Cal.4th 763, 793.) In *Kelly*, the victim's mother narrated a videotape portraying the victim's life. (*People v. Kelly*, *supra*, 42 Cal.4th at pp. 793, 799.) The Court in *Kelly* rejected the defendant's contention that the testimony of the mother should have been limited because it was "'so unduly prejudicial' so as to render the trial 'fundamentally unfair.'" (*Ibid.*, internal citations omitted.) Whether or not the victim's mother had improperly characterized the defendant, and therefore violated *Booth*, was never an issue. (*Ibid.*) In fact, this Court does not cite *Booth* in its discussion of the victim impact evidence in this case. (*Id.* at pp. 793-799.)

Finally, Respondent argues that the law does not prohibit the comparison of the victim and the defendant.[23] (RB 55.) Respondent is wrong and fails to address the inherently prejudicial nature of human worth comparisons, in general. Annette Broome's testimony that she believed Mr. Weaver was a "bad man" did not establish Michael Broome's

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[23] Respondent's reliance on the absence of a prohibition of victim-to-defendant comparative worth judgments in *People v. Kelly* is also misplaced, because in that case the Court found that such a comparison was not made. (*People v. Kelly*, *supra*, 42 Cal.4th at p. 799.)

"uniqueness as an individual human being." (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.) By allowing her opinion into evidence, the trial court impermissibly sanctioned a death sentence for Mr. Weaver because his life is worth less than the life of Michael Broome. (AOB 127.)

In his dissenting opinion in *Payne*, Justice Marshall, joined by Justice Blackmun, urged that the majority had abandoned "the core principle of this Court's capital jurisprudence," namely "that the sentence of death must reflect an '*individualized* determination' of the defendant's 'personal responsibility and moral guilt [citations].'" (*Payne v. Tennessee, supra*, 501 U.S. at p. 845, italics in original (dis. opn. of Marshall, J.); see also *id.* at p. 864 (dis. opn. of Stevens, J.) ["[A]dmission of victim impact evidence is undesirable because it risks shifting the focus of the sentencing hearing away from the defendant and the circumstances of the crime and creating a 'mini-trial' on the victim's character [citation]]".) Justice Marshall explained that the "impermissible risk of sentencing arbitrariness" flows from the "inherent capacity" of victim impact evidence to "draw the [fact-finder's] attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community." (*Id.* at p. 845; see also *id.* at p. 866 [objecting to additional risk of arbitrariness likely to flow from differences in "character and reputation" among victims, resulting in introduction of evidence

"intended to identify some victims as more worthy of protection than others"].) In so doing, Justice Marshall captured the prejudicial impact of the victim impact testimony in this case.

In sum, when the trial court improperly admitted testimony that characterized Mr. Weaver and the crime, it created a "constitutionally unacceptable risk" that the death sentence would be imposed in an arbitrary and capricious manner, thus violating *Booth v. Maryland*, *supra*. Accordingly, Mr. Weaver's death sentence must be vacated, and a new sentencing trial ordered.

3. The admission of victim impact testimony that was not materially, morally, or logically related to the crime exceeded statutory limits

In addition to constitutional limits, this Court has also held that the admission of victim impact evidence is statutorily delineated. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Specifically, victim impact evidence that is admitted as a "circumstance of the crime," pursuant to Penal Code section 190.3, subdivision (a), must be related "materially, morally, or logically" to the specific harm caused by the defendant. (*Id.* at p. 833.) In so holding, the Court noted that section 190.3, subdivison (a) may not "necessarily include[] all forms of victim impact evidence and argument allowed by *Payne*." (*Id.* at pp. 835-836.)

In his Opening Brief, Mr. Weaver argued that the trial court admitted victim impact testimony concerning three events that violated this

Court's statutory restrictions: testimony regarding the reasons for the victim and his family's move from New Jersey to California; testimony about the New Jersey business community's response to the shooting; and testimony that the prosecution elicited from the victim's wife about the trauma she experienced as a result of a bomb scare that occurred during, but was unrelated to, Mr. Weaver's trial. (AOB 128-135.)

Respondent argues that the victim impact testimony concerning all three subjects was proper. Respondent is wrong. All three subjects were too attenuated from any act by Mr. Weaver to be relevant to his moral culpability or to the specific harm he caused to Michael Broome and his family.

a. Testimony about the Broome family's move from New Jersey to California

The trial court improperly admitted testimony regarding the Broome family's move to California. Respondent argues that this testimony was "proper evidence of Michael Broome's hopes and fears." (RB 56.) However, Respondent's reliance on *People v. Raley* as a justification for the admission of this particular victim impact testimony is inapposite because the facts are distinguishable. (*Ibid.*, citing *People v. Raley* (1992) 2 Cal.4th 870, 917.)

In *Raley*, the defendant argued that the prosecutor committed misconduct during closing argument when he discussed the false hope that

the victim had experienced upon being rescued, after the crime occurred and moments before her death. (*People v. Raley*, *supra*, 2 Cal.4th at p. 916.) In that case, the victim was conscious when rescued and was taken to the hospital. (*Id.* at p. 917.) A witness testified at trial that the victim "smiled as if to say 'thank God . . . I'm finally getting out of here." (*Ibid.*) The prosecutor argued that perhaps "the cruelest thing of all was the false hope that [the victim] had just before she died." (*Id.* at p. 916.) This Court held that "the victim's hopes and fears near the time of her death were [not] irrelevant to the penalty determination." (*Ibid.*) In Mr. Weaver's case, the statements in question consisted of victim impact testimony describing the victim's decision to move from New Jersey to California, which was made nearly a year before the shooting. (AOB 130-131.) The mindset of the Broome family members before the crime is not only irrelevant to the circumstances of the crime and Mr. Weaver's moral culpability; the testimony is far removed in time from the crime itself, and therefore inadmissible. To the extent that *Raley* suggests otherwise, the case was wrongly decided as a matter of federal constitutional law, the requirements of the Eighth Amendment, and the Supreme Court's precedents, including *Booth*, *supra*, and *Payne*, *supra*, and should therefore be overruled.

Mary Broome's testimony linking the shooting of Michael Broome to the Los Angeles riots of 1992 also crossed the line.[24] (AOB 132.) Respondent argues that Mary Broome's testimony, which expressed her concern for her son during the Los Angeles riots, was permissible because it did not raise the "specter of racial discrimination," nor did it suggest the court should impose the death penalty for racial reasons. (RB 55.) Respondent mischaracterizes Mr. Weaver's argument. Mr. Weaver is not arguing that Mary Broome's testimony "raised the specter of racial discrimination," but instead argues that admission of this particular aspect of her testimony violated this Court's statutory boundaries on permissible victim impact evidence. (AOB 132.) Implicit in Mary Broome's testimony was the notion that Michael Broome's death was related to the racially-charged climate that existed in Los Angeles at that time.

The shooting of Michael Broome, on May 6, 1992, occurred one week following the riots in Los Angeles, which were precipitated by the beating of an African-American man, Rodney King. During her testimony, Mary Broome described how she had telephoned her son the preceding week and expressed concern for his safety during the riots. (7 RT 818-

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[24] Pursuant to Evidence Code section 452 (h), Mr. Weaver requests that the Court take judicial notice of the fact that, in response to the verdicts in the trial of Los Angeles police officers who had been accused of crimes involving the 1991 beating of Rodney King, riots broke out in Los Angeles on April 29, 1992, and continued for several days. (See, e.g., Staff of the Los Angeles Times, Understanding the Riots: Los Angeles Before and After the Rodney King Case (1996).)

819.) Mary Broome then stated, "A week later, he was gone, dead. I couldn't believe it." (7 RT 819.) Mary Broome's testimony about the Los Angeles riots had nothing to do with Mr. Weaver's moral culpability for the death of Michael Broome, nor was it in any way related to the circumstances of the crime itself. Instead, Mary Broome's testimony was a result of her concern for her son, who had recently moved to a place that had erupted into racial violence. Mary Broome's testimony served no other purpose than to invite the sentencer to consider victim impact evidence that was not "materially, morally, or logically" related to the crime; thus her testimony was improper. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.)[25]

b. Testimony about the New Jersey business community's reaction to the shooting

The trial court also improperly admitted evidence regarding the effects of Mr. Broome's death on the New Jersey business community. Respondent argues that this testimony was proper evidence of the effect of the loss on his family, friends, and the "'community as a whole.'" (RB 56, citing *People v. Marks* (2003) 31 Cal.4th 197, 236.) Mr. Weaver does not dispute that current case law permits the presentation of some evidence about the effect of a victim's death on his community. But Respondent

[25] Dissenting in *Payne,* Justice Stevens, joined by Justice Blackmun, cautioned that the differences in status among victims "risks decisions based upon the same invidious motives" as race-based prosecutorial charging decisions. (*Payne v. Tennessee, supra*, 501 U.S. at p. 866 (dis. opn. of Stevens, J.).)

ignores the difference between victim impact testimony that describes the effect of Michael Broome's death on the community of Vista, California, and testimony that describes the effect of his death on the New Jersey business community. Michael Broome lived in Vista at the time of the crime. (7 RT 762.) The shooting occurred at his business, a small jewelry store located in a Vista shopping center, not in New Jersey. (7 RT 763.) As argued in Mr. Weaver's Opening Brief, testimony about the response of the New Jersey business community to Mr. Broome's death served no purpose other than to expand Mr. Weaver's moral culpability well beyond the consequences that could be specifically attributable to him. (AOB 132-134; *People v. Harris* (2005) 37 Cal.4th 310, 352.)

c. Testimony about a bomb scare during trial

Lastly, the trial court improperly admitted Annette Broome's testimony about a bomb threat, which occurred at the courthouse at the time of Mr. Weaver's trial. Respondent argues that this testimony was permissible because it related to Mr. Weaver's culpability. (RB 56.) Specifically, Respondent contends that Michael Broome's death was responsible for Annette Broome's reaction to the bomb scare. (*Ibid.*) Respondent is wrong.

First, the bomb threat, which occurred in the courthouse (not the courtroom), was unrelated to Mr. Weaver's trial. (2 RT 319-320.) Second, as argued in Mr. Weaver's Opening Brief, this Court's precedent directly

supports Mr. Weaver's argument on appeal. (AOB 135-136, citing *People v. Harris, supra.*) In *Harris*, this Court found that victim impact testimony, which described the inadvertent opening of the victim's casket at the funeral, causing great distress to family members, was "too remote from any act of defendant to be relevant to his moral culpability." (*People v. Harris*, *supra*, 37 Cal.4th at p. 352.) As in *Harris*, Annette Broome's reaction to a bomb threat at the courthouse where Mr. Weaver's trial was taking place, with no evidence that Mr. Weaver was involved, is not relevant to Mr. Weaver's moral culpability for the death of Mr. Broome, nor is it logically or materially related to the crime itself.

Testimony admitted by the trial court regarding all three events — the Broome family's move from New Jersey to California; the New Jersey business community's response to the shooting; and the bomb scare — violated this Court's statutory limitations on admissible victim impact evidence. All three subjects were too far removed from any act by Mr. Weaver to be relevant to his moral culpability and to the specific harm he caused to Michael Broome and his family.

Furthermore, this evidence is too attenuated under *Payne* to be relevant. In her concurring opinion, Justice O'Connor stated, "Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830) (conc.

opn. of O'Connor, J.).) Thus, the Court did not hold that all victim impact evidence is relevant and thus per se admissible. Because this evidence is far outside the range of harm that Mr. Weaver could have "obviously" foreseen, it has no relevance to assessing Mr. Weaver's moral culpability or blameworthiness. (*Id.* at pp. 838-839 (conc. opn. of Souter, J.).) Thus, admission of this evidence not only violates statutory limits, it also violates *Payne*'s constitutional restrictions. (AOB 128, 131.)

C. The Trial Court Imposed Death Under The Mistaken Belief That Admission And Consideration Of Victim Impact Evidence Was Mandatory

Judge Lester applied the wrong legal standard and committed reversible error when he treated the admission and consideration of victim impact evidence as mandatory. (AOB 103-106.) Respondent argues that the trial judge did not mean what he said, and understood he was under no obligation to admit and consider victim impact evidence. (RB 50-51.) Respondent suggests that the trial record as a whole reflects Judge Lester's understanding that he did not have to admit victim impact evidence at all. (*Ibid.*) Respondent's reliance on the trial record is wrong for two reasons. First, Judge Lester explicitly stated that the law mandated him to admit and consider victim impact evidence. (12 RT 1371.) Nothing in the record suggests that he did not mean what he said. In fact, he reiterated his position moments later. (12 RT 1373.) Second, Respondent conflates the decision to admit victim impact evidence, in the first instance, with Judge

Lester's purported limitation of the evidence once the decision to admit it had been made.

1. Judge Lester was explicit in his sentencing verdict that the law mandated admission and consideration of victim impact evidence

Judge Lester's own words leave no doubt that he mistakenly believed he was obligated to admit and consider victim impact evidence. In delivering his sentencing verdict, he stated that the recent "changes" to the law of victim impact evidence "gave this court not only the ability, but also the *mandate* to consider [victim impact] evidence." (12 RT 1371, italics added.) Moments later, Judge Lester confirmed his erroneous understanding of the law, stating: "[T]he court reiterates for purposes of review [that] the newer changes in this law permitting victim-impact evidence permitted this court, and *mandated* this court, to give full consideration to such evidence." (12 RT 1373, italics added.) He then went on to direct his comments to this Court, noting that "any reviewing court should know" that it was this recent change in the law that made the difference and resulted in a death verdict. (12 RT 1373.)

The record is unambiguous: Judge Lester was aware that he was sentencing Mr. Weaver to death, and he chose his words carefully, directing them to this Court. The trial judge made a point of stating that the law gave him "not only the ability, but also the mandate," and later stated that the law "permit[ted] ... and mandate[d]" consideration of victim impact

evidence. (12 RT 1371, 1373.) Judge Lester's use of two different words when describing his understanding of the law – "permit" and "mandate" – show that he was distinguishing between discretion and obligation. Respondent's contention that Judge Lester understood that he had discretion in admitting and considering victim impact evidence simply cannot be reconciled with the record. (RB 50.)

In addition, as mentioned above, Judge Lester announced that he wanted any reviewing court to know that absent his understanding of the law, he would not have sentenced Mr. Weaver to death. (12 RT 137.)[26] The record demonstrates that Judge Lester believed his hands were tied, and that had he not been required to consider such evidence, he would not have sentenced Mr. Weaver to death. The record also shows that Judge Lester was deliberate in memorializing his understanding of the law for the automatic appeal. (12 RT 1371, 1373.)

2. Respondent conflates the initial decision to admit with the later decision to limit the victim impact evidence

Respondent argues that the trial judge's restriction of the "scope of victim impact testimony" shows that he understood that he had discretion regarding its admissibility. (RB 50.) This argument fails for two reasons.

[26] Since, as explained below, Judge Lester's understanding of the law was incorrect, Respondent's argument that his words were "no more than acknowledgement that [he] understood the law" holds no weight. (RB 51.)

First, nothing in the trial record suggests, much less establishes, that Judge Lester limited the victim impact evidence in this case. Second, Respondent conflates two issues. Whether or not the trial court limited the scope of the victim impact evidence is a separate issue from whether or not the trial court understood that it had the discretion to exclude victim impact evidence in its entirety. (*Payne v. Tennessee*, 501 U.S. at p. 827 [holding that victim impact evidence was not per se inadmissible, and that states could therefore choose to allow it during the sentencing phase of capital trials].)

Respondent omits the account of what transpired during the hearings on victim impact evidence. Not once during the three hearings did Judge Lester state that he had the choice to exclude victim impact evidence altogether or that he was choosing to admit it at his discretion. In fact, the record shows the opposite.

At the first hearing, Judge Lester discussed the law of victim impact evidence since this Court's adoption of *Payne*, *supra,* in *Edwards*, *supra*. (7 RPT 48-54.) At the conclusion of the hearing, he ruled that victim impact evidence is admissible under *Edwards*, and ordered the prosecution to provide details of the victim impact evidence it intended to present. (7 RPT 53.) Judge Lester, however, never acknowledged that, although victim impact evidence is admissible under *Edwards*, he still had the discretion to exclude it altogether. Instead, Judge Lester went from

affirming the admissibility of victim impact evidence to announcing that, under federal and state precedent, once the prosecution produced the evidence it intended to present, then he would consider whether to impose any restrictions of the prosecution's proffer. (7 RPT 53-54.) Judge Lester mistakenly treated the *Edwards* decision as requiring the admission of victim impact evidence in all capital cases. (7 RPT 52-54.)

At the second hearing on victim impact evidence, Judge Lester again summarized his understanding of the applicable law, stating that "the Court must strike a careful balance between allowing a certain amount of victim impact evidence under *Payne v. Tennessee* and its progeny, which includes *People v. Edwards*, in [*sic*] not allowing an unlimited portrayal that takes the focus of the jury unfairly off any other mitigating factors." (9 RPT 41-42, internal citations omitted.) Again, Judge Lester's statement that he must strike a balance between allowing "a certain amount of evidence" and allowing too much supports Mr. Weaver's contention that Judge Lester failed to understand that he was not obligated to admit any victim impact evidence.

In addition, Respondent mistakenly relies on the trial court's sentencing verdict as evidence that it exercised discretion in deciding whether to admit *any* victim impact evidence. Respondent cites the following portion of Judge Lester's sentencing verdict: "The court limited the amount of [victim impact evidence] that was receivable or admissible,

and it did so to comport with the California Supreme Court *Edwards* decision and the U.S. Supreme Court decision, *Payne versus Tennessee*." (RB 50, citing 12 RT 1360.) As discussed above, the judge did not limit the victim impact evidence in any way.[27] Furthermore, Respondent's reliance on Judge Lester's sentencing verdict is misplaced because whether or not Judge Lester actually limited the victim impact evidence that was admitted is irrelevant to whether or not he understood that he had the discretion to exclude victim impact evidence altogether.

Judge Lester's mistaken understanding of the law has prejudiced Mr. Weaver. Had Judge Lester understood that he had the choice to exclude victim impact evidence in this case, Mr. Weaver would not have been sentenced to death. As he delivered his sentencing verdict, Judge Lester stated that "[a]ny reviewing court should know that absent the strength and force of the extremely high level and heavy weight of such evidence, this court would have reached a different result." (12 RT 1373.) The trial court's mistake was of constitutional dimension and cannot be considered harmless beyond a reasonable doubt. Therefore, Weaver's death sentence must be reversed. (AOB 106.)

[27] To the extent that Judge Lester intimated that he would limit the evidence, for example, by prohibiting opinions about the crime or Mr. Weaver, (7 RT 743-744), he did not do so.

D. To The Extent That Precedent Permitted The Introduction Of Victim Impact Evidence At Trial, That Precedent Should Be Overruled

The legal precedent permitting the introduction of victim impact evidence should be overruled. As argued in Mr. Weaver's Opening Brief, this Court should acknowledge that *Payne v. Tennessee, supra* was wrongly decided and hold that victim impact evidence is barred by the U.S. and California Constitutions. (AOB 136-142.) In addition, Mr. Weaver argues that this Court should overrule its decision in *People v. Edwards, supra.* (AOB 142-146.) In the alternative, Mr. Weaver requests that this Court, like the courts of many other jurisdictions, carefully limit the scope of victim impact testimony that is admissible at trial. (AOB 146-153; *People v. Robinson, supra*, 37 Cal.4th at p. 657 (conc. opn. of Moreno, J.) [discussing examples of testimony that were "essentially characterizations of . . . the defendant" and suggesting "a general rule that testimony of victims' friends and family regarding their imagined reenactments of the crime be excluded"]; *People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.) [suggesting Court adopt definition of circumstances of crime that encompasses only "those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced . . . at the guilt phase"].)

For years, this Court has expressed concern about grave risk of undue prejudice created by the introduction of victim impact evidence.

(AOB 106-108, and cases cited therein.) It is time for this Court to finally impose limits, and this is the case in which to do it.

VI. RESPONDENT MISCHARACTERIZES THE TRIAL COURT'S ERRONEOUS CONSIDERATION OF MITIGATING EVIDENCE AS EVIDENCE IN AGGRAVATION AND RELIES UPON AUTHORITIES THAT ARE INAPPOSITE

As Mr. Weaver stated in his Opening Brief, this Court has ruled repeatedly that penalty phase evidence offered in mitigation cannot be used in aggravation. (AOB 154-156, and cases cited therein.) The Court has also consistently held that a trier of fact may choose to give mitigating evidence little weight or reject it entirely, but he or she may not consider such evidence as an aggravating factor. (AOB 158, and cases cited therein.) And, the Court has held that evidence presented under Penal Code section 190.3, factors (d), (g), and (k) may be considered in mitigation only. (AOB 154, 155-156, 166, 169, and cases cited therein.)

Here, the trial court relied upon evidence that Mr. Weaver's trial counsel offered under factors (d), (g), and (k) as aggravating circumstances in support of the death verdict, in violation of state statutory and state and federal constitutional law. (AOB 154-158, 163-165, 168-169). For example, the trial judge considered in aggravation evidence of Mr. Weaver's family background, despite the fact that this evidence was offered as part of the defense case in mitigation under factors (g) and (k). (12 RT 1358.) The trial judge relied on this evidence to conclude that the

"[d]efendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background." (12 RT 1358.) The court also relied on the statements Mr. Weaver made to mental health professionals, who had been retained by the defense, to describe aggravating circumstances of the crime under factor (a). (12 RT 1357-1358.) The trial judge would have acted properly had he simply rejected the mental health professionals' opinions as not credible. (AOB 163, citing *People v. Robertson* (1989) 48 Cal.3d 18, 55.) But he did more than reject their opinions; he explicitly considered them as aggravation. (12 RT 1357-1358.)

A. Respondent Focuses On A Series Of Irrelevant Issues That Fail To Advance Its Argument And Demonstrates A Misunderstanding Of Mitigating Evidence

As an initial matter, Respondent makes several points that are irrelevant to Mr. Weaver's claim of judicial error.

Respondent contends that, because the prosecutor did not use the word "aggravating" in discussing Mr. Weaver's family background or imply that the trial court should use mitigating evidence as aggravating, no error occurred. (RB 63.) But the claim alleged here is not prosecutorial misconduct. Rather, the error is the trial court's adoption of an impermissible use of the evidence in reaching its penalty verdict. (AOB 156-162.)

Respondent also notes that, in his Opening Brief, Mr. Weaver omitted the conclusion (italicized here) of the trial court's statement that "[d]efendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background, *and joined with a man he knew as a drug dealer, Byron Summersville*." (RB 61, 12 RT 1358, italics in RB.) Respondent fails to show how this concluding phrase alters Mr. Weaver's argument that the trial court erred in treating Mr. Weaver's family background as an aggravating factor. (RB 61.) First, evidence of Mr. Weaver's supportive family was offered in mitigation as a reason to spare Mr. Weaver's life. The family's love for Mr. Weaver was not conditional, i.e., it was not contingent on Mr. Weaver's good behavior. The law does not permit a fact-finder to treat this mitigating circumstance as aggravating because, in his or her view, the defendant's conduct is unworthy of that love and support.

Second, the judge's concluding phrase supports Mr. Weaver's argument that the trial court improperly gave aggravating weight to evidence offered in mitigation by the defense. The only evidence about Byron Summersville admitted during the penalty phase was offered by the defense to show that Mr. Weaver had acted "under the domination of a sophisticated, cold-blooded killer and rapist." (13 RT 864.) To that end, the defense obtained a stipulation from the prosecution that Summersville was "a violent and vicious person" who had committed an aggravated

assault and a rape. (13 RT 859.) Defense counsel also relied on guilt phase evidence establishing that Summersville owned the car used during the crime (1 RT 382-383) and leased the apartment in which Mr. Weaver had been living (1 RT 326), as well as Mr. Weaver's account of the events to Dr. Rabiner (9 RT 1135-1139, 1212-1213), and Dr. Rabiner's opinions about Mr. Weaver's "borderline intelligence" (9 RT 1134), "low sense of self-confidence, self-esteem" (9 RT 1141) and "dependen[ce] on others." (9 RT 1145.) As Mr. Weaver has acknowledged, the trial court was free, under the law, to reject or give little weight to the mitigating factor of "substantial domination." (AOB 158.) Initially, by deciding to treat this evidence under factor (k) rather than factor (g), it appeared that Judge Lester intended to do just that. (12 RT 1340-1343, 1349-1350.) Ultimately, however, he went further and gave the evidence – about Mr. Weaver's family and his relationship with Byron Summersville – aggravating weight. (12 RT 1358.)

Third, Respondent states: "[T]he record reflects that the prosecutor argued Mr. Weaver's proffered mitigating evidence did not excuse his crime." (RB 64.) Respondent's use of the word "excuse" demonstrates a fundamental lack of understanding of the purpose of mitigating evidence under the state and federal Constitutions and the California statutory scheme. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *People v. Frye, supra,* 18 Cal.4th at pp. 1022-

1023.) The jury instructions approved in *Frye* describe a "mitigating circumstance" as "any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (CALJIC No. 8.84.1 (1986 rev.).)[28] Additionally, as discussed above, this is not a prosecutorial misconduct claim. The relevant inquiry is not, therefore, whether the prosecutor's argument was proper, but whether the trial court impermissibly used the evidence in reaching its penalty verdict.

Fourth, Respondent devotes nearly a full page to describing the trial court's lengthy summarization of the evidence in order to assert that it had conducted an "exhaustive and detailed recitation of the evidence in this case." (RB 65.) According to Respondent, "the trial court's detailed recitation of the facts surrounding the murder demonstrates that the trial court properly relied on the circumstances of the crime in rendering its penalty verdict." (RB 65-66.) Respondent seems to argue that, so long as the trial judge can recite the detailed facts of the crime, he is insulated from misapplying the law. Not so. Mr. Weaver has demonstrated in his Opening

[28] This jury instruction is now found at California Criminal Jury Instruction 763 and provides in pertinent part: "A *mitigating circumstance or factor* is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime." (CALCRIM No. 763 (Summer 2010), italics in original.)

Brief, (AOB 154-171), and in this Reply how the trial court's treatment of the evidence violated Mr. Weaver's rights under state law and the state and federal Constitutions. The fact that the trial court conducted an exhaustive review of the facts of the case does not rebut this conclusion.

B. Respondent Misreads Both The Record And This Court's Precedents

Respondent attempts to refute Mr. Weaver's argument that the trial court improperly characterized factor (d) and (g) evidence as aggravating by contending that the judge found the evidence not credible and rejected it as he was entitled to do. (RB 64.) However, Respondent ignores the fact that the trial court explicitly treated the mitigation testimony as bad character evidence in aggravation. (12 RT 1342-1343, 1350; AOB 163-166.) For example, whereas the reports of the defense's mental health professionals explained Mr. Weaver's conduct as a product of his limited intelligence and limited capacity for abstract thinking, Judge Lester reframed that evidence as evidence of bad character, explicitly using it to aggravate Mr. Weaver's role in the crime:

> One personal trait that has come clear through the evidence is that the defendant is a person of immediate gratification. He does not wait if something can be achieved sooner. The defendant acted alone, used the cloth bag, took the loaded pistol, gave loud, clear orders to store employees, took an innocent hostage, and shot and killed an innocent, cooperative person.

(12 RT 1354.) Such use of mitigating evidence in aggravation is reversible error. (AOB 154-156.)

Moreover, Respondent misapplies this Court's precedent regarding the permissible weighing of evidence offered by the defense in mitigation against aggravating evidence offered by the prosecution in its case-in-chief or in rebuttal. For example, Respondent cites to *People v. Millwee* (1998) 18 Cal.4th 96 to argue that the prosecutor did not engage in misconduct by casting factor (k) evidence in an aggravating light during his closing argument. (RB 63-64.) In *Millwee*, the Court held that it is permissible for a prosecutor to describe the defendant as heartless, dangerous, and unable to be rehabilitated when such claims are based not on mitigation evidence presented by the defense, but rather on evidence introduced in aggravation, such as a defendant's lengthy criminal history. (*People v. Millwee*, *supra*, 18 Cal.4th at pp. 151-152.)

Respondent's reliance on *Millwee* is misplaced for two reasons. First, as stated above, Mr. Weaver has not raised a claim of prosecutorial misconduct on this issue. The prosecutor's arguments are relevant to Mr. Weaver's claim only because the trial judge relied on them when he improperly shifted factor (k) evidence to the aggravation side of the scale.[29]

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[29] In fact, the prosecutor's argument was improper. (*People v. Whitt* (1990) 51 Cal.3d 620, 655; *People v. Montiel* (1993) 5 Cal.4th 877, 937-938, 944; *People v. Edelbacher* (1989) 47 Cal.3d. 983, 1033, disapproved on another ground by *People v Loyd* (2002) 27 Cal.4th 997, 1008, fn.12.)

(AOB 155-162; 12 RT 1357.) Even if the prosecutor had never made such arguments, however, the trial court's consideration of mitigating evidence as aggravation in this case would be reversible error. (*People v. Edelbacher, supra,* 47 Cal.3d. at p. 1033.)

Second, in contrast to *Millwee*, the prosecutor here argued that Mr. Weaver had "a malignant heart" on the basis of the family background evidence presented in mitigation rather than on the basis of any aggravating evidence introduced by the prosecution, such as prior criminal history or prior acts of violence. (AOB 156-157; 11 RT 1251-1254; see also *People v. Millwee, supra,* 18 Cal.4th at pp. 151-152.) Also, in contrast to *Millwee*, the prosecution did not present any aggravating evidence under factors (b) or (c). (12 RT 1339-1340.) Indeed, Mr. Weaver's lack of prior criminal record or past violent behavior were factors in mitigation. (12 RT 1339-1340). Thus, the prosecutor turned the factor (k) evidence on its head and characterized it as aggravating to bolster his contention that Mr. Weaver was undeserving of mercy. (AOB 156-157; 11 RT 1251-1254.) As Mr. Weaver argued in his Opening Brief, the court's verdict improperly embraced this argument. (AOB 157-158.)

Respondent's conclusion that the trial judge weighed the evidence of Mr. Weaver's family background against the aggravating evidence is also

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However, trial counsel did not object (11 RT 1251-1254), and, consequently, on appeal, Mr. Weaver has not raised a claim of prosecutorial misconduct on this issue.

belied by the sequence in which he discussed his penalty phase findings. First, the judge announced that the court "turns to aggravating factors." (12 RT 1357.) Then, he stated that "[d]efendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background, and joined with a man he knew as a drug dealer, Byron Summersville." (12 RT 1358.) This statement came before the judge ended his discussion of aggravating factors, (12 RT 1367), which compels the conclusion his statement was not a weighing of Mr. Weaver's family background against aggravating factors, but rather part of his enumeration of the evidence in aggravation.

Respondent also cites to *People v. Rodriguez* for the proposition that a prosecutor may present bad character evidence under factors (a), (b), or (c) to rebut factor (k) evidence.[30] (RB 64, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) This reliance is also misplaced. Again, Mr.

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[30] The decision in *Rodriguez* was based upon a claim of prosecutorial misconduct under *People v. Boyd* (1985) 38 Cal.3d 762. In *Boyd*, the Court stated that "the prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (k), since that factor encompasses only extenuating circumstances and circumstances offered as a basis for a sentence less than death." (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776.) The Court also held, however, that, "[o]nce the defense has presented evidence of circumstances admissible under factor (k), . . . prosecution rebuttal evidence would be admissible as evidence tending to 'disprove any disputed fact that is of consequence to the determination of the action.'" (*Id.* at p. 776 [citing Evid. Code, § 210].) At the penalty phase in Mr. Weaver's case, the prosecution did not introduce any evidence to rebut the factor (k) evidence. (11 RT 1332).

Weaver has not raised a prosecutorial misconduct claim on this issue. Rather, he argues that reversible judicial error occurred, and that the prosecutor's argument, which was adopted by the trial court, illuminates this error. (AOB 156-158.) Furthermore, unlike *Rodriguez,* the prosecutor did not introduce evidence in aggravation to rebut good character evidence offered by trial counsel under factor (k). Rather, he argued that the very same factor (k) evidence, which had been introduced by the defense in mitigation, was the basis for concluding that Mr. Weaver had "a malignant heart." (RB 64.) As discussed in detail in Mr. Weaver's Opening Brief, the trial judge adopted the prosecution's misuse of the evidence in violation of clearly established law. (AOB 156-158, 163-164, 168-169; *People v. Young* (2005) 34 Cal.4th 1149, 1219.) Respondent fails to offer any authority that justifies this error.

Finally, Respondent tries to rely on several of this Court's opinions to support its contention that the trial court permissibly considered evidence of Mr. Weaver's family background, intellectual and emotional deficits, and substantial domination by Byron Summersville as circumstances of the crime under factor (a). (RB 60-63, 66, citing *People v. Edwards, supra,* 54 Cal.3d 787; *People v. Blair* (2005) 36 Cal.4th 686; *People v. Smith* (2005) 35 Cal.4th 334.) Once again, this reliance is misplaced.

It is undisputed that the trier of fact may consider the circumstances of the crime as evidence in aggravation under factor (a). (Pen. Code §

190.3, subd.(a).) Although the Court has interpreted "circumstances of the crime" broadly, each case relied upon by Respondent involved the proper introduction of factor (a) evidence by the prosecution, which is not the situation here. (*People v. Edwards, supra,* 54 Cal.3d at pp. 832-833; *People v. Blair, supra,* 36 Cal.4th at pp. 748-749; *People v. Smith, supra,* 35 Cal.4th at p. 350.)[31] None of this precedent alters the basic principle, stated in Mr. Weaver's Opening Brief, that evidence offered by the defense under factors (d), (g) and (k) cannot be shifted into factor (a) and considered in aggravation. (AOB 154, 155-156, 166, 169, and cases cited therein.) Respondent ignores this distinction and misstates the law when it suggests that mitigating evidence, if relating to the circumstances of the crime, can be transformed into aggravating evidence. (RB 66.)

In *People v. Smith,* the prosecutor called a clinical psychologist, Dr. Hatcher, to present expert testimony on the general characteristics of individuals who commit crimes similar to those of which the defendant had been convicted. (*People v. Smith, supra,* 35 Cal.4th at p. 345.) The prosecution relied on Dr. Hatcher's testimony as aggravating evidence during the penalty phase. (*Id.* at pp. 351-352, 360.) On appeal, the defense

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[31] In *Edwards*, the Court interpreted *Payne v. Tennessee, supra,* to allow victim impact evidence as properly fitting under factor (a). *People v. Edwards, supra,* 54 Cal.3d at p. 833. Victim impact evidence is not at issue here. To the extent that Respondent relies on *Edwards*, Mr. Weaver incorporates his objection on appeal to this Court's definition of the "circumstances of the crime." (AOB 142-146.)

argued that evidence of mental illness may only be considered in mitigation and that the prosecution's presentation of Dr. Hatcher's testimony was therefore improper. (*Id.* at pp. 350, 354.) The Court rejected this claim, holding that evidence regarding the circumstances of the crime may be presented by either the prosecution or the defense. (*Id.* at p. 352). The Court found that Dr. Hatcher's testimony described the circumstances of the crime insofar as it explained the motive for the crime, the significance of the methods used to commit the crime, and how the defendant had premeditated the crime. (*Ibid.*) The Court concluded that "[e]vidence of the circumstances of the crime is admissible as aggravating evidence in the prosecution's penalty phase case-in-chief, even though that evidence would have been inadmissible as prosecution evidence if offered only under factors (d) or (k)." (*Id.* at p. 354.)

Smith thus draws a bright line between, on the one hand, evidence offered by the prosecution under factor (a) that the trier of fact may consider in aggravation, and, on the other, evidence offered by the defense under factors (d) or (k) that the trier of fact may only consider in mitigation.[32] The trial court in Mr. Weaver's case impermissibly crossed this line.

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[32] Similarly, in *Blair*, the Court held that the testimony of a prosecution penalty phase witness was admissible as factor (a) evidence. (*People v. Blair*, *supra*, 36 Cal.4th at p. 749.) The defendant was convicted of poisoning his neighbor using cyanide. (*Id.* at p. 697.) During the

C. The Trial Court's Error Violated Mr. Weaver's Statutory And Constitutional Rights And Was Not Harmless Beyond A Reasonable Doubt

California's statutory scheme and this Court's interpretations of those provisions have placed limitations on the admissibility and consideration of aggravating evidence. (AOB 154-162.) For the reasons stated above, the trial court did not comply with the state statute. Under *Hicks v. Oklahoma*, *supra,* 447 U.S. at page 346, this failure also amounts to a Due Process violation. (AOB 159-162.)[33] Respondent fails to acknowledge the critical distinction this Court has established between the permissible consideration of aggravating evidence and the improper mischaracterization of mitigating evidence as evidence in aggravation. (RB 58, 61-62, 63-66.) Because Respondent never concedes that an error occurred, it fails to address the issue of harmlessness. (RB 66.) For

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penalty phase, the prosecution, over the defendant's objection, called the defendant's former chemistry professor, Emily Maverick. (*Id.* at p. 702.) Maverick testified that the defendant had conducted an experiment using cyanide while taking her course several years before the crime. (*Ibid.*) The defendant was sentenced to death. (*Id.* at p. 696.) On appeal, the defendant argued that Maverick's testimony was improperly admitted under factor (a). (*Id.* at p. 749.) This Court rejected this claim, stating that the testimony of the prosecution's witness was relevant in that it demonstrated the defendant's particular interest in and familiarity with cyanide. (*Ibid.*) As such, the Court found that the evidence "surrounded materially, morally, or logically the crime" pursuant to factor (a). (*Ibid*, citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 833.)

[33] Since Respondent's only argument in response to this portion of Mr. Weaver's claim is that the trial court "properly followed state law," it has conceded that if this Court finds error, it must find that the trial court violated Mr. Weaver federal constitutional right to due process. (RB 66.)

reasons stated in Mr. Weaver's Opening Brief, the error prejudiced the outcome of Mr. Weaver's trial. (AOB 169-171.) The Court should therefore reverse Mr. Weaver's death sentence.

VII. MS. DEIGHTON'S TESTIMONY WAS IMPROPER AND PREJUDICAL, AND TRIAL COUNSEL'S OBJECTIONS PRESERVED THE INADMISSIBILITY OF HER TESTIMONY AS AN ISSUE FOR APPEAL

Mr. Weaver argued in his Opening Brief that the trial court improperly admitted and considered lay witness testimony that Mr. Weaver displayed "hatred" towards Mr. Broome. (AOB 172-180.) Respondent contends that (1) Mr. Weaver forfeited the right to appeal the issue of Ms. Deighton's inadmissible testimony because the grounds raised on appeal are not those objected to at trial; (2) even if the issue was not forfeited, the testimony was permissible lay witness testimony and; (3) even if there was error, it was harmless beyond a reasonable doubt. (RB 66-72.) Respondent is wrong on all counts.

A. Trial Counsel's Timely Objection Was Made On The Same Grounds As Mr. Weaver Now Raises On Appeal

Evidence Code section 353 governs this Court's review of appellate claims based on evidentiary issues. It requires that "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353.) Respondent relies on *People v. Seijas* to support its argument that "Weaver forfeited this claim when he

failed to object on the same ground in the trial court as he raises on appeal." (RB 67-68; *People v. Seijas* (2005) 36 Cal.4th 291, 301.) Although *Seijas* states the rule on which Respondent relies, Mr. Weaver's case is distinguishable because, here, the grounds on which trial counsel objected to the question asked of Ms. Deighton are the same as those Mr. Weaver raises on appeal. (AOB 172, 174-176.)

Trial counsel objected to the prosecutor's question on the grounds that it called for speculation and a conclusion on the part of the witness. (7 RT 839-840.) On appeal, Mr. Weaver argues that the question called for speculation and improper lay witness opinion. (AOB 174-176.) Therefore, the issue here is whether trial counsel's objection that the question called for a conclusion by the witness is the same as Mr. Weaver's claim on appeal that the question asked for improper opinion testimony. The answer is "yes."

An objection on the ground that a question calls for an inadmissible conclusion is the same as an objection that the question calls for improper opinion testimony. (See Allen, et al., Evidence (4th Ed. 2009), at p. 116 [equating objection that question calls for opinion with one that question calls for conclusion].) This is because a question that calls for a conclusion on the part of the witness violates the rule limiting lay opinion testimony to those opinions and inferences that are rationally based on the witness's perception of an event and help the jury understand the facts of the case.

(See Evid. Code, § 800.) Indeed, this Court has long treated these objections as synonymous. (See *Huyck v. Rennie* (1907) 151 Cal. 411, 416-417; *Jersey Island Dredging Co. v. Whitney* (1906) 149 Cal. 269, 272 [both equating objection on ground that question calls for conclusion with one that seeks to exclude impermissible opinion testimony].) Based upon this line of cases, trial counsel's two-part objection preserved this issue for appeal on the same grounds as Mr. Weaver now raises.

Finally, trial counsel's objection to the inadmissible testimony was timely. An objection is considered timely if it is raised after the objectionable question was asked, but before the witness has answered. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 660 [upholding denial of motion to strike because trial counsel did not move to strike first expert's testimony until it was contradicted by second expert witness].) Here, trial counsel objected after the prosecutor asked Ms. Deighton whether Mr. Weaver had displayed a different attitude towards Mr. Broome, but before she answered the question. (7 RT 840.) Therefore, the objection satisfies the rule that an objection must be timely. (See Evid. Code, § 353(a).)

B. Ms. Deighton's Statement That Mr. Weaver "Displayed Hatred" Was Speculation And Impermissible Lay Witness Opinion Testimony

The trial court improperly admitted Ms. Deighton's testimony and relied on it as a factor in aggravation. Respondent tries to argue that Ms.

Deighton's testimony was proper because it was based on her personal observations and described Mr. Weaver's behavior as being consistent with a state of mind. (RB 70.) Respondent is incorrect, ignores this Court's precedent, and relies on authorities that do not support its position.

1. Respondent relies on authorities that are either inapposite or support Mr. Weaver's claim

The trial court erred in allowing Ms. Deighton's testimony because it was inadmissible under California Evidence Code section 702, which provides that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702.) Ms. Deighton's testimony was likewise impermissible under Evidence Code section 800, which provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." (Evid. Code, § 800.)

Courts routinely allow lay witnesses to give opinions on matters such as (1) identity (see *People v. Gonzalez* (1968) 68 Cal.2d 467, 472); (2) measurements, *e.g.*, speed, distance or size (see *Jordan v. Great Western Motorways* (1931) 213 Cal. 606, 612); and (3) age (see *Frederick v.*

Federal Life Ins. Co. (1936) 13 Cal.2d 585, 589). However, even on issues such as these, courts scrutinize the circumstances that form the basis of the lay opinion. (See, e.g., *United States v. LaPierre* (9th Cir. 1993) 998 F.2d 1460, 1465 [excluding police officer's identification of the defendant as person in surveillance photos because it was based entirely on his review of photos].)

Respondent cites three cases in support of its position that Ms. Deighton's testimony was properly admitted: *People v. Anderson* (2001) 25 Cal.4th 543, 575-574; *People v. Farnam* (2002) 28 Cal.4th 107, 153; and *People v. Chatman* (2006) 38 Cal.4th 344, 397. (RB 68-70.) Respondent provides misleading descriptions of the opinions and fails to acknowledge that each case is factually distinguishable from the circumstances presented here.

The issue in *Anderson* was whether the witness was so delusional that she lacked the capacity to perceive and recollect events accurately. (*People v. Anderson, supra,* 25 Cal.4th at pp. 574-575). Mr. Weaver did not raise that objection here.

Farnam actually supports Mr. Weaver's argument that Ms. Deighton's opinion testimony was improper. There, a correctional officer testified that the "defendant threatened to forcibly resist" providing court-ordered hair and blood samples. (*People v. Farnam, supra,* 28 Cal.4th at p. 152.) The prosecution laid the foundation for the officer's opinion that the

defendant stood "in a posture like he was going to start fighting" by eliciting testimony that the defendant was being very defiant and stood with his hands at his sides and his left foot forward. (*Id.* at p. 153.) Holding that the trial judge did not err in allowing the officer's opinion, this Court relied on the officer's observations of the defendant's conduct, emphasizing that his "perceptions [were] . . . certainly within the experience of a correctional sergeant .... who had 15 years of security experience at a prison hospital." (*Id.* at p. 153.) By contrast, Ms. Deighton did not observe any behavior by Mr. Weaver that supported the opinion sought by the prosecutor, nor did she have any experience that would have allowed her to offer an opinion that Mr. Weaver "displayed hatred" toward Mr. Broome before the shooting.

Respondent devotes most of its discussion to *Chatman*. (RB 68-70.) In so doing, it misstates the general rule, the facts in that case, and the record in this case. In *Chatman*, a witness testified that he had seen the defendant kick a high school custodian four or five times. (*People v. Chatman*, *supra,* 38 Cal.4th at p. 397.) The prosecutor then asked whether the defendant "seemed to be enjoying it." When the witness responded, "Yeah," defense counsel objected on grounds that the answer was speculation, irrelevant, and inadmissible under Evidence Code section 352. The trial court overruled the objection. (*Ibid.*) On appeal, this Court reiterated the general rule that a "lay witness may not give an opinion about

another's state of mind." (*Ibid.*) However, the Court then found that, because the witness spoke from personal knowledge, the trial court did not abuse its discretion in allowing him to testify to his opinion that the defendant's "behavior and demeanor were consistent with enjoyment." (*Ibid.*)

In an attempt to show that there was no error under this authority, Respondent misstates the record. Respondent asserts that Ms. Deighton's opinion was admissible because it described Mr. Weaver's demeanor "as being consistent" with hatred. (RB 70.) This is incorrect. Unlike the defendant in *Chatman*, who the witness testified "*seemed* to enjoy kicking the [victim]" (*People v. Chatman*, *supra*, 38 Cal.4th at p. 397, italics in original), Ms. Deighton gave an unambiguous, unqualified opinion about Mr. Weaver's state of mind. (7 RT 840.) Respondent's argument that Ms. Deighton's testimony was a proper opinion that described "behavior consistent with a state of mind" therefore fails. (RB 70.)

The distinction between the foundation provided for the lay opinion testimony in *Farnam* and *Chatman* and the lack of foundation for Ms. Deighton's testimony is dispositive. In the instant case, the prosecutor began his penalty phase examination of Ms. Deighton by asking her a series of questions — all except one of which were leading — about Mr. Weaver's actions after he shot Mr. Broome and Mr. Broome fell to the ground. (7 RT 839.) He inquired, "[D]id you ever see the defendant look toward

Michael?" (*Ibid.*) Next, he asked whether Mr. Weaver "ever made an inquiry about Michael's welfare?" (*Ibid.*) The witness responded in the negative to both questions. (*Ibid.*) When asked what Mr. Weaver had done, Ms. Deighton replied that he "just continued [with the robbery] as if nothing had happened." (*Ibid.*) The prosecutor followed with three leading questions, inquiring whether Mr. Weaver had acted "surprised" or said he was "sorry" and whether he "continued to demand jewelry." (*Ibid.*) The witness answered "no" to the first two questions and "yes" to the third. (*Ibid.*)

The prosecutor then turned to the events preceding the shooting by posing the question that drew trial counsel's objection and is at issue on appeal. (7 RT 839-40 ["Before Michael was actually shot and dropped to the floor, was there any sort of different attitude displayed by the defendant toward Michael than the other people in the store?"].) After trial counsel objected, (7 RT 840), the court simply instructed the prosecutor to "lay the foundation" by rephrasing his question to inquire whether Ms. Deighton "was able to notice a difference" between Mr. Weaver's attitude toward Mr. Broome and the percipient witnesses. (*Ibid.*) Consistent with *Farnam* and *Chatman*, however, the necessary "foundation" for the witness's opinion required a description of Mr. Weaver's "objective behavior" prior to the shooting that was "consistent" with "hatred." In this case, the prosecutor did as directed by the trial judge, and no more. He did not ask the witness

to describe conduct by Mr. Weaver that formed the basis of her opinion about Mr. Weaver's mental state, and she did not do so.[34] Ms. Deighton's testimony should therefore have been excluded.

Moreover, nothing in Ms. Deighton's guilt phase testimony laid the foundation for her penalty phase opinion that Mr. Weaver displayed "hatred" toward Mr. Broome before the shooting. (1 RT 27-35.) As Mr. Weaver argued in his Opening Brief, it was undisputed that the crime occurred during a period of 57 seconds. (AOB 174.) For the "first five seconds," Ms. Deighton did not "know what was happening" because the situation seemed "unreal." (1 RT 91.) For some time before the shooting, Ms. Deighton was not looking at Mr. Weaver. (1 RT 30-34, 73.)

In addition to the fact that Ms. Deighton only saw Mr. Weaver for a matter of seconds, her testimony indicates that her ability to observe details

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[34] Respondent's argument is misplaced to the extent that it relies on Ms. Deighton's subsequent testimony that Mr. Weaver was "really angry," "hostile," and "kind of cocky" toward Mr. Broome, and that he behaved differently toward the women in the store. (RB 70.) First, even if, as discussed below, terms such as "angry" or "kind of cocky" are not susceptible of analysis and detailed description, it does not follow that the foundation for "hatred" can simply be laid by using conclusory terms without objective description or evidence of a verbal expression of hatred on the part of Mr. Weaver. (See *People v. Deacon* (1953) 117 Cal.App.2d 206, 210.) Second, under Respondent's logic, so long as no bystanders were harmed, a shooting did not appear accidental, or the defendant did not help the victim following the shooting, the defendant in any murder trial, and, particularly, any robbery-murder trial, could be classified as showing "hatred" toward the victim, even if no objective evidence suggested this fact. Such a rule would obviate the need for a hate-murder special circumstance. (See Pen. Code, § 190.2, subd. (a)(16).)

of Mr. Weaver's demeanor was compromised. As pointed out in the Opening Brief, during the guilt phase, Ms. Deighton initially testified that Mr. Weaver did not have anything on his face. (AOB 175; 1 RT 54.) The prosecutor next showed the witness a pair of sunglasses (People's Exhibit 22), and asked whether she recognized them. (*Ibid.*) Ms. Deighton responded that she did not recall whether Mr. Weaver was wearing sunglasses. (*Ibid.*) Immediately following a recess, Ms. Deighton testified that she recalled that he was wearing sunglasses. (AOB 176; 1 RT 57.) The inconsistency in Ms. Deighton's testimony underscores her lack of personal knowledge. If Mr. Weaver was wearing sunglasses, this fact diminished Ms. Deighton's ability to observe his demeanor, and supports Mr. Weaver's contention that she lacked sufficient personal knowledge to testify that he "displayed" hatred. (7 RT 840-841). If, as she also testified, Ms. Deighton was unable to even remember whether Mr. Weaver was wearing sunglasses, this suggests another reason why she would have been unable to observe behavior by Mr. Weaver sufficient to allow her to offer an opinion about his mental state. (1 RT 57, 89-90.)

Ms. Deighton's testimony that Mr. Weaver exhibited "hatred" towards Mr. Broome went beyond what this lay person "rationally" could have concluded about the mental state of a total stranger prior to the shooting, and under the circumstances of this 57-second, frightening, high-

stress encounter. (Evid. Code § 800.) Ms. Deighton's testimony was therefore speculation and its introduction was error.

2. This Court's precedents support a finding of error

A review of this Court's decisions, as well as decisions of the Court of Appeal, supports Mr. Weaver's argument that it was error for the trial court to allow Ms. Deighton to testify that Mr. Weaver showed "hatred" towards Mr. Broome. For example, in *People v. Deacon, supra,* 117 Cal.App.2d at page 210, the Court of Appeal upheld the introduction of lay witness testimony that the defendant's tone of voice was "angry." It did so, however, "under the exception to the opinion rule that laymen can give their opinion on matters of common knowledge that are not susceptible of analysis and detailed description." (*Ibid.*) By contrast, as Mr. Weaver explained in his Opening Brief (AOB 177-178), "hatred" is a mental state that, in the criminal law context, is best understood by reference to California's "hate crimes" statutes, and the fact that hate crimes are punished with greater severity than offenses committed by a defendant who did not act with this state of mind. (*Ibid.*; Pen. Code, § 422.75.)

For example, in order to convict a defendant of a hate crime, the prosecution must prove that the defendant had a specific mental state – "bias motivation" – when he acted.[35] (Pen. Code, § 422.75.) In *People v.*

[35] The jury must find that "the defendant was biased against the victim based on the victim's actual or perceived (disability, gender,

Lindberg (2008) 45 Cal.4th 1, 38, this Court explained that, in order for a hate-murder special circumstance to be proved beyond a reasonable doubt, the victim must have been "intentionally killed because of his or her race, color, religion, nationality, or country of origin." Here, in contrast to these related statutory and common law requirements, the prosecution failed to elicit testimony from Ms. Deighton that Mr. Weaver engaged in any conduct in relation to Mr. Broome, which supported the opinion that Mr. Weaver "displayed hatred" toward him before the shooting.

The Court's decisions on the admissibility of "overt remorselessness" at the time of the offense as a circumstance of the crime under factor (a) of Penal Code section 190.3 also support Mr. Weaver's argument.[36] (See, e.g., *People v. Gonzalez, supra,* 51 Cal.3d at pp. 1231-1232.) Argument about the defendant's "overt remorselessness" is permissible only when it is supported by evidence of the defendant's unambiguous statements or actions that are contemporaneous with or occur after the offense. (See *People v. Ochoa, supra,* 26 Cal.4th at pp. 448-449,

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nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with (this/one or more of these) actual or perceived characteristic[s])" and "the bias motivation caused the defendant to commit the alleged acts." (CALCRIM No. 1354 (Summer 2010).)

[36] By using this analogy, Mr. Weaver does not concede that the Court's precedent on the subject of remorse as a "circumstance of the crime" is constitutionally sound.

disapproved on another ground in *People v. Prieto*, *supra,* 30 Cal.4th at p. 263, fn. 14 [allowing prosecutor to argue lack of remorse when evidence showed that defendant announced: "Hey, I just shot the guy" and had bragged about the crime at scene]; *People v. Cain* (1995) 10 Cal.4th 1, 77, disapproved on another ground by *People v. Moon* (2005) 37 Cal.4th 1, 17 [allowing argument on lack of remorse when evidence showed defendant boasted that "he had 'knocked' the victims 'smooth out' and gotten 'thousands'"]; *People v. Cox* (1991) 53 Cal.3d 618, 685, disapproved on another ground in *People v. Doolin*, *supra*, 53 Cal.3d at p. 421, fn. 22 [allowing argument on lack of remorse when evidence showed defendant boasted, "'I just blew the bitch's head off'" to friends].)

Throughout both phases of the trial, the prosecutor's examination of the percipient witnesses emphasized Mr. Weaver's conduct after the shooting, focusing on the fact that Mr. Broome was lying on the floor and asking for help, but that Mr. Weaver did not respond, completed the robbery and fled the store. (See e.g., 1 RT 34-37; 106; 4 RT 574-576; 615).[37] The prosecutor did so with the purpose of bolstering his penalty

[37] Without diminishing the gravity of the offense of which Mr. Weaver stands convicted or its tragic consequences, it must be noted that Mr. Weaver's actions following the shooting were in no way unusual, much less unique, among cases in which a killing occurs during the course of a robbery. (*See e.g., People v. Mitcham* (2005) 1 Cal. 4th 1027, 1038-1039 [robbery-murder case where the defendant shot a jewelry store owner and another employee, stole jewelry and ran out of the store]; *People v. Johnson* (1989) 47 Cal. 3d 1194, 1212 [robbery-murder case where the defendant

phase argument that the killing was "an execution." (11 RT 1287-1291.) With regard to Ms. Deighton's testimony, it is clear from the sequence and substance of her direct examination that the prosecutor was attempting to bootstrap her understandable fear and anger following the shooting into an opinion about Mr. Weaver's mental state when he shot Mr. Broome. (7 RT 839-841.) However, nothing about Mr. Weaver's conduct toward Mr. Broome before or after the shooting indicated "hatred" even remotely similar to the "overt remorselessness" manifested by the defendants' behavior in the three cases cited above. (See *Ochoa*, *supra*, 26 Cal.4th at pp. 448-449; *Cain*, *supra*, 10 Cal.4th at p. 77; *Cox*, *supra*, 53 Cal.3d at p. 685.) There was therefore no foundation for Ms. Deighton's opinion and her testimony should have been excluded.

C. Ms. Deighton's Testimony Was Not Harmless

Respondent contends that even if the objection to Ms. Deighton's testimony was preserved for appeal, her statements were harmless. (RB 71.) For the reasons stated in Appellant's Opening Brief, (AOB 177-180), Mr. Weaver argues that Respondent is wrong and that reversal of the death judgment is required.[38] Additionally, when announcing and reconsidering

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shot and killed a jewelry store proprietor, stole two trays of rings, and fled the store].)

[38] Respondent does not reply to Mr. Weaver's argument that the inadmissible evidence also violated his rights under the Eighth and Fourteenth Amendments. (AOB 178.) Mr. Weaver relies on the arguments made in his Opening Brief and does not repeat them here.

the death verdict, the trial judge emphasized Ms. Deighton's testimony that Mr. Weaver "showed hatred" towards Mr. Broome. (12 RT 1360; 13 RT 1449.) The trial court considered this highly inflammatory and constitutionally impermissible testimony in reaching its death verdict, acknowledging that he voted for death only by virtue of the victim impact evidence. (12 RT 1371-1374.) Respondent cannot show beyond a reasonable doubt that, absent consideration of Ms. Deighton's improper opinion, the balance would have been the same. The error was therefore not harmless, requiring reversal of the death sentence. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

VIII. THE CUMULATIVE EFFECT OF ERRORS IN THE PENALTY PHASE REQUIRES REVERSAL OF MR. WEAVER'S DEATH SENTENCE

The cumulative effect of the errors that occurred during the penalty phase prejudiced Mr. Weaver and rendered his death sentence unconstitutional. Respondent's only argument in response is that since there was no error, there was no prejudice. (RB 72.) To the extent that this Court might agree there was error, Respondent has conceded its cumulative effect. Therefore, while this Court may find that no single error warrants reversal of Mr. Weaver's death sentence, the cumulative effect of the errors here deprived Mr. Weaver of his rights to due process, to a fair trial, to present a defense, and to a reliable sentencing determination in violation of state law, as well as the U.S. and California Constitutions.

IX. THE TRIAL COURT FAILED TO INDEPENDENTLY REVIEW MR. WEAVER'S DEATH VERDICT AS REQUIRED BY PENAL CODE SECTION 190.4, SUBDIVISION (e)

In his Opening Brief, Mr. Weaver argued that Penal Code section 190.4, subdivision (e) requires the trial court to independently review every death verdict, even when the penalty phase was tried to a judge. (AOB 182.) At no time did Mr. Weaver receive the independent review of the penalty phase evidence to which he was constitutionally entitled. Accordingly, Mr. Weaver has argued, this Court must either read into the California statute a mechanism for independent review of a trial court's penalty verdict and remand this case so that the review can take place, or the Court must declare the California statute unconstitutional as applied to cases in which a jury trial has been waived. By either avenue, this Court should vacate Mr. Weaver's death sentence. (AOB 185.)

Respondent claims that Mr. Weaver waived the right to a modification hearing and independent review by waiving a jury trial. (RB 73-74.) Alternatively, Respondent contends that Mr. Weaver was not entitled to independent review under section 190.4, subdivision (e). (RB 76-79.) Finally, Respondent argues that any error was harmless because the trial judge stated his reasons for the death verdict on the record. (RB 73.) Respondent's arguments are unpersuasive.

A. Mr. Weaver Did Not Waive His Right To An Independent Review Of His Death Verdict

Respondent incorrectly asserts that Mr. Weaver waived his right to independent review under section 190.4, subdivision (e) by waiving his right to a jury trial. (RB 75.) Mr. Weaver did not waive his right to a modification hearing because section 190.4, subdivision (e) is an unwaivable, constitutionally mandated aspect of California's death penalty scheme. Moreover, even if Mr. Weaver did waive that right, the trial judge invalidated the waiver by conducting a hearing at which he attempted to "independently review" his own penalty phase verdict. Finally, contrary to Respondent's claim, Mr. Weaver did not forfeit this issue on appeal.

1. The right to a modification hearing is a constitutionally mandated aspect of California's death penalty scheme

Respondent contends that "[c]riminal defendants can waive even the most fundamental rights," citing the right to jury trial, the privilege against self-incrimination and the rights to confrontation, counsel, and trial. (RB 79, fn. 19.) However, unlike the fundamental rights cited by Respondent, which are personal to the defendant, the right to independent review under section 190.4, subdivision (e) is tethered to broader policy considerations and to the essential components of a constitutional death penalty scheme. (AOB 186-188.) A capital defendant cannot waive the right to a section 190.4, subdivision (e) modification hearing.

Section 190.4, subdivision (e) adds a constitutionally required level of review to California's death penalty scheme, and provides capital defendants with a critical safeguard against the arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments, and article I of the California Constitution. (AOB 186-188.) Both this Court and the Supreme Court have recognized that independent review at the trial level is a key element of the constitutionality of California's death penalty scheme. (*Pulley v. Harris*, *supra,* 465 U.S. at pp. 51-53 [citing section 190.4, subdivision (e) as one of the key "checks on arbitrariness" in California's death penalty scheme].)

This Court has repeatedly referred to the right to a modification hearing as "automatic" for defendants sentenced to death. (AOB 192; *People v. Frierson* (1979) 25 Cal.3d 142, 179.) Section 190.4, subdivision (e) states that "[t]he defendant shall be deemed to have made an application for modification of such verdict or finding." This Court has never qualified the "automatic," mandatory nature of this right. (AOB 192.)

Finally, the right to a section 190.4, subdivision (e) modification hearing is unwaivable because it is part of a capital defendant's right to an automatic appeal. Pursuant to Penal Code section 1239, subdivision (b), this Court's precedent, the Eighth and Fourteenth Amendments to the U.S. Constitution and article I, sections 15 and 17 of the California Constitution, a capital defendant cannot waive the right to an automatic appeal in whole

or in part. (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139; *People v. Stanworth* (1969) 71 Cal.2d 820, 832-834.) Because independent review under section 190.4, subdivision (e) is essential to the constitutionality of California's death penalty scheme and part of a defendant's right to an automatic appeal, the right to a modification hearing is unwaivable.

2. Even if Mr. Weaver waived his right to a modification hearing, the trial court invalidated the waiver

Even if this Court finds that Mr. Weaver waived his right to a modification hearing under Penal Code section 190.4, subdivision (e), the trial judge invalidated any waiver by conducting a quasi-modification hearing, attempting to "independently review" his death verdict, and ruling on the modification motion. (13 RT 1401, 1435-1453, 1458.) Counsel for both parties also invalidated any waiver: defense counsel filed a motion for modification; the prosecution did not argue that Mr. Weaver had waived his right to a modification hearing and did not object when the trial court conducted the quasi-modification hearing; and both sides argued the modification motion. (4 CT 797-798, 834; 13 RT 1404-1431.)[39]

[39] Respondent asserts that the trial court informed Mr. Weaver several times that the court could not independently review the penalty phase verdict under section 190.4, subdivision (e). (RB 73-74; 14 PRT 46-47; 12 RT 1338, 1373.) Mr. Weaver agrees. (AOB 184.) Mr. Weaver has argued elsewhere in this appeal that portions of his jury waiver were not knowing, intelligent, and voluntary. His agreement with Respondent on the limited issue of the record of the 190.4, subdivision (e) review is not inconsistent with Mr. Weaver's other arguments regarding the jury waiver. (AOB 24, 37.)

Defense counsel filed a motion for modification of the verdict and argued that Mr. Weaver was entitled to an independent review under section 190.4, subdivision (e).[40] (4 CT 797-798.) The trial judge told counsel that he would attempt to conduct "something akin to [a 190.4, subdivision (e) hearing] or a de facto version." (13 RT 1378-1379.) The trial judge then stated that he would "hold a hearing under 190.4 as best any individual human being can ever be expected to do when the very same person is asked to independently weigh and consider such factors." (13 RT 1402.) The prosecution did not object. Both the prosecutor and defense counsel argued the modification motion. (13 RT 1404-1431.) The trial court then made an attempt to conduct a modification hearing – a hearing which did not approximate a real modification hearing because, as Mr. Weaver argues below and as the judge himself recognized, he was incapable of independently reviewing the death verdict. (13 RT 1435-1453.) In any event, the trial court then denied the motion for modification. (13 RT 1458.)

Respondent cannot claim that Mr. Weaver waived his right to a modification hearing, because the judge did conduct some semblance of a

[40] In response to defense counsel's modification motion, the prosecution filed points and authorities in opposition. (5 CT 834.) The prosecution's opposition did not argue that Mr. Weaver had waived his right to a modification hearing. (*Ibid.*)

modification hearing, even if it was ultimately an ineffectual one.[41] (Cf. *United States v. Buchanan* (9th Cir. 1995) 59 F.3d 914, 917-18 [abrogating waiver of right to appeal because the district court judge told the defendant he had a right to appeal and the prosecution did not object].) Thus, even if this Court finds that Mr. Weaver initially waived his right to a modification hearing, the subsequent conduct of the trial judge and counsel for both sides invalidated any purported waiver, especially because all he received was "something akin" to a true modification hearing.

3. Mr. Weaver did not forfeit the issue on appeal

Respondent tries to compare Mr. Weaver's case to *People v. Horning* (2004) 34 Cal.4th 871, 912, and claims that Mr. Weaver's "contention is not cognizable on appeal" because he waived his right to an independent review. (RB 76.) For the reasons argued above, Mr. Weaver did not waive the right to an independent review of his death verdict. Nor did Mr. Weaver forfeit the issue on appeal.

The purpose of the forfeiture rule is to bring errors to the trial court's attention so that, if feasible, the judge may cure them at the earliest opportunity. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) However, where counsel's objections would have been futile, the forfeiture rule does

[41] For the reasons argued in his Opening Brief, Mr. Weaver maintains that the modification hearing was not proper under section 190.4, subdivision (e). (AOB 184-185, 201-202.)

not apply. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1126, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

In *Horning*, after a bench trial, the judge refused to rule on the motion for modification because he felt it was unnecessary to repeat the reasons for the verdict. (*People v. Horning, supra*, 34 Cal.4th at p. 912.) Defense counsel agreed. (*Ibid.*) On appeal, Horning argued that the court had erred in failing to rule on the motion to modify the verdict. (*Ibid.*) Under those circumstances, this Court held that "because defendant did not object . . . the issue is not cognizable on appeal." (*Ibid.*, citations omitted.)

This Court recently decided another case involving a motion for modification of penalty verdict. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1140.) In *Mungia*, after a jury trial, the trial court failed to state any reasons for denying the modification motion. (*Ibid.*) This Court found that the trial court had erred under section 190.4, subdivision (e), but held that the defendant had forfeited the issue by failing to raise a specific objection to the court's ruling at the modification hearing. (*Id.* at p. 1141 [noting that "the defendant must bring any deficiency in the ruling to the trial court's attention by a contemporaneous objection, to give the court an opportunity to correct the error"].)

The forfeiture rule relied upon in *Horning* and *Mungia* does not apply in Mr. Weaver's case. Unlike *Horning* and *Mungia*, where a contemporaneous objection could have had a practical effect, there was no

foundation for an objection in this case, and thus no objection could possibly have been made. It is reasonable to conclude that a timely objection in *Horning* would have caused the trial court to rule on the modification motion. In *Mungia*, a timely objection likely would have prompted the trial court to state more detailed reasons for denying the motion.

Here, by contrast, the trial judge acknowledged several times that "it is impossible for a court to conduct an independent review of a court's own actions" in the penalty phase. (13 RT 1378; 12 RT 1338.) The issue, therefore, was made plain by the judge's comments and there was no foundation for an objection. Furthermore, since there is no existing mechanism to provide independent review for defendants tried by a judge, there was no objection that in any way could have cured the trial court's error. Because a contemporaneous objection would have been futile and could not have "easily corrected or avoided" error, the Court should reach the merits of Mr. Weaver's challenge to section 190.4, subdivision (e).

In the event the Court finds that Mr. Weaver failed to object, the issue is still preserved for appeal because the trial court's error implicates fundamental constitutional rights. (See *People v. Vera* (1997) 15 Cal.4th 269, 267-277, abrogated on another ground in *People v. French, supra,* 43 Cal.4th at p. 47, fn. 3.) A lack of timely objection in the trial court does not forfeit the right to raise a claim asserting the deprivation of certain

fundamental constitutional rights for the first time on appeal. (*Ibid.*) As discussed below, the trial court's failure to independently review Mr. Weaver's death verdict under section 190.4, subdivision (e) violated Mr. Weaver's rights to Due Process and Equal Protection. Therefore, the issue is preserved for appeal, even in the absence of a specific objection.

B. Penal Code Section 190.4, Subdivision (e) Entitles All Capital Defendants To Independent, Trial-Level Review

Respondent contends, in the alternative, that Mr. Weaver was not entitled to independent review because his case was tried to a judge, not a jury. (RB 76.) Therefore, Respondent concludes that the trial judge fulfilled his duty under Penal Code section 190.4, subdivision (e) by twice stating on the record his reasons for imposing the death penalty, and by providing this Court with a record from which to review the propriety of the penalty determination. (RB 76-77.) Respondent is wrong because the Constitution and Penal Code section 190.4, subdivision (e) guarantee independent, trial-level review to all capital defendants.

Respondent's argument is tied to *dicta* in *People v. Horning*, *supra*. (RB 76-78.) In *Horning*, this Court — after holding that the defendant had forfeited his claim by failing to object — suggested in *dicta* that for defendants who have waived a penalty phase jury, section 190.4, subdivision (e) only requires a statement of the reasons for the judge's penalty phase findings. (*People v. Horning*, *supra*, 34 Cal.4th at p. 912,

quoting *People v. Diaz*, *supra,* 3 Cal.4th at p. 576, fn. 35.) However, the Court did not resolve the issue of whether a statement of reasons would be enough, and emphasized that it has never decided whether defendants who have waived jury are entitled to a modification hearing. (*People v. Horning*, *supra*, 34 Cal.4th at p. 912; *People v. Diaz*, *supra*, 3 Cal.4th at p. 576.) Thus, *Horning* is not dispositive, and the *dicta* in *Horning* should be disapproved because the Court did not consider the plain language and purpose of the statute, legislative history, nor the constitutional rights at stake. (AOB 186-194.)

First, the purpose of section 190.4, subdivision (e) is to provide independent review of the death verdict, not simply to ensure that a statement of the reasons for the judge's findings appears on the record. (AOB 191, fn. 21.) Penal Code sections 190.4, subdivision (e) and 1181, subdivision (7), trigger an automatic application for modification of the verdict in every case in which a death verdict is returned. (AOB 182.) Section 190.4, subdivision (e) imposes two obligations upon the trial court: (1) to independently review the verdict to determine whether it was contrary to the law or evidence by reweighing the aggravating and mitigating factors presented at trial; and (2) to state reasons for its findings on the record. If the trial court only states findings justifying the death penalty and fails to independently reweigh the evidence, the statute is not satisfied. (See *People v. Rodriguez* (1986) 42 Cal.3d 730,793-794

[vacating death verdict because it was not clear from the face of the trial court's ruling whether the court had conducted an independent review].)

Second, the legislature intended to provide independent review for all capital defendants under section 190.4, subdivision (e). (AOB 188-194.) In his Opening Brief, Mr. Weaver explained that although the language of 190.4, subdivision (e) is ambiguous, the legislative history shows that the statute applies equally to both bench and jury trials. (*Ibid.*) As Mr. Weaver argued, section 190.4, subdivision (e) is rooted in Penal Code section 1181, subdivision (7), which states that the trial court may modify the verdict "in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed." (AOB 193.) Moreover, the legislature drafted section 190.4, subdivision (e) to function as some substitute for proportionality review by providing independent, trial-level review of all death verdicts, not just those of defendants tried by juries. (AOB 188-194.) There is no evidence in the legislative history that the legislature intended to exempt defendants who waived jury trial. (AOB 192.) If the legislature had wished to limit section 190.4, subdivision (e) to defendants tried by juries, it would have done so. (*Ibid.*)

Third, independent review under section 190.4, subdivision (e) is a constitutionally required element of California's death penalty scheme and an important "safeguard" for adequate appellate review. (AOB 186-188;

People v. Rodriguez, *supra*, 42 Cal.3d at p. 794 [holding that failure to specify reasons for denying modification motion prevents the assurance of "thoughtful and effective appellate review"].) Both this Court and the U.S. Supreme Court have emphasized that the independent review guaranteed by section 190.4, subdivision (e) is necessary to ensure that the death penalty is not arbitrarily imposed. (AOB 186-188.) This Court has also warned of the constitutional dangers of Respondent's approach: "if subdivision (e) were construed as precluding independent review of the death verdict by the trial judge, questions of federal constitutionality might arise." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 794, citing *People v. Frierson, supra*, 25 Cal.3d at pp. 178-179.) Respondent's view must be rejected in order to preserve the constitutionality of the statute. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 237-38; *United States v. Jin Fuey Moy* (1916) 241 U.S. 394, 401 ["A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"].)

Other than the *dicta* cited in *Horning*, Respondent offers nothing to support its position that Mr. Weaver was not entitled to a proper modification hearing. Contrary to Respondent's argument, a statement on the record by a judge who explains his own verdict is not an independent review of that verdict, and does not satisfy section 190.4, subdivision (e). Based on the language, purpose, and legislative history of the statute, as

well as the constitutional rights at stake, this Court should reject Respondent's argument and interpret section 190.4, subdivision (e) as mandating independent review of all death verdicts at the trial level. To the extent that *Horning* suggests otherwise, this Court should disapprove the *dicta* in that case.

C. Mr. Weaver Did Not Receive An Independent, Trial-Level Review Of His Death Verdict

In ruling on the motion for modification, the trial judge enumerated his reasons for imposing death. (RB 77.) These findings, however, were nothing more than a rote statement of the judge's penalty phase verdict. (AOB 185.) The judge's words and conduct confirm that he did not independently reweigh the evidence. He conceded that it was "impossible for the court to conduct an independent review of the evidence which is done in a jury trial," and that he could, at best, conduct "something akin [to a section 190.4, subdivision (e) hearing] or a de facto version." (12 RT 1338; 13 RT 1378-1379.) The modification hearing was an "exercise in futility," not because Mr. Weaver was not entitled to such a hearing as Respondent argues, (RB 77), but because no court can "independently" review its own verdict.

For the reasons argued above, section 190.4, subdivision (e) statutorily and constitutionally entitles all defendants who have received a death verdict to a modification hearing, including an independent review of

the verdict. Until this Court squarely addresses the issue, defendants who have waived jury trial will, at best, receive a formulaic restatement of the trial court's verdict, without an independent review. In order to uphold the constitutionality of Section 190.4, this Court must read into the section a mechanism for independent review, such as providing for another superior court judge to review the sentencing judge's verdict, and remand this case so such a review can take place. (AOB 185.) Because Mr. Weaver never received the independent review to which he was statutorily and constitutionally entitled, this Court must vacate Mr. Weaver's death sentence.

D. The Denial Of Mr. Weaver's Right To An Independent Review Of His Death Verdict Violated Mr. Weaver's Constitutional Rights To Due Process And Equal Protection

If the Court finds that section 190.4, subdivision (e) does not entitle defendants tried by a judge to independent review, then the statute is unconstitutional because it violates Mr. Weaver's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I of the California Constitution. (AOB 185, 194-200.)

Respondent claims that Mr. Weaver's rights were not violated because the trial judge twice gave his reasons for imposing the death penalty. (RB 78.) Respondent asserts that the judge's statements provide "this Court with a record from which it can conduct a meaningful review of

Weaver's sentence in the same manner as if a jury found the death penalty appropriate." (*Ibid.*)

Respondent does not address Mr. Weaver's argument. Mr. Weaver agrees that Judge Lester announced his reasons for imposing the death penalty. However, the record contains nothing more than a restatement of the judge's penalty phase findings and does not satisfy section 190.4, subdivision (e). (AOB 185; 13 RT 1435-1453.) The failure to provide Mr. Weaver with the independent review guaranteed by section 190.4, subdivision (e) denied him a reliable sentencing determination and violated his due process and Eighth Amendment rights. (AOB 195-196.) Because Mr. Weaver was deprived of a statutorily and constitutionally required layer of review that is guaranteed to all capital defendants by section 190.4, subdivision (e), this Court does not have a record from which it can properly review Mr. Weaver's death sentence.

Respondent asserts that Mr. Weaver's equal protection claim is meritless because Mr. Weaver was not "similarly situated" to capital defendants whose cases were decided by juries. (RB 78.) Respondent's distinction misses the point of Mr. Weaver's equal protection argument.

California's death penalty scheme provides for automatic independent review at the trial level for all capital defendants under section 190.4, subdivision (e). (AOB 197-198.) This statewide classification scheme affects the fundamental rights of all capital defendants, regardless

of whether they waived any right to a jury trial. (*Ibid.*) Therefore, for equal protection purposes, Mr. Weaver is similarly situated to all capital defendants. If this Court reads section 190.4, subdivision (e) as creating separate classifications for judge- and jury- sentenced defendants, then this disparate treatment is arbitrary and violates Mr. Weaver's equal protection rights under the state and federal constitutions. (AOB 198.) The State has no compelling interest that would justify depriving judge-sentenced defendants of independent review at the trial level and Respondent does not show otherwise. (*Ibid.*)

E. The Denial Of Mr. Weaver's Right To An Independent, Trial-Level Review Of His Death Verdict Was Reversible Error

Reversal is required because Mr. Weaver was prejudiced by the lack of independent review of his penalty phase findings in violation of his federal constitutional rights, and Respondent fails to show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra,* 386 U.S. at p. 24.) Even if the error was only a matter of state law, reversal is required because there is at least a reasonable possibility that independent review of Judge Lester's verdict would have resulted in modification of that verdict. (AOB 200-202; *People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn. 11.) Specifically, Mr. Weaver was prejudiced because the trial judge was incapable of conducting an independent review, and unable to objectively determine whether he had misinterpreted the law with regard to victim

impact evidence; relied upon impermissible victim impact testimony; and improperly treated mitigating evidence as aggravating. (AOB 73, 154, 202.)

Respondent claims that there was "no error and no prejudice" because Mr. Weaver waived his right to an independent review of his death verdict. (RB 79.) Respondent also contends that Mr. Weaver was not prejudiced by the absence of independent review because the trial judge stated his reasons for imposing the death penalty. (*Ibid.*)

Respondent again misses the point of Mr. Weaver's argument. The trial judge was incapable of independently reviewing his own penalty phase verdict and, at best, conducted what the judge considered "something akin" to a section 190.4, subdivision (e) hearing. (13 RT 1378-1379.) Under these circumstances, the judge was able only to restate his penalty phase findings. (AOB 184.) Contrary to Respondent's argument, these state and constitutional law errors were not cured by having such a reiteration on the record. A reiteration of the trial judge's findings, in the absence of independent review, is form without substance, and undermines the central purpose of the statute. Section 190.4, subdivision (e) requires independent review of every death verdict, not simply the appearance of such review. Therefore, this Court does not have a record from which it can conduct the necessary appellate review of the modification hearing.

Respondent further suggests that Mr. Weaver cannot demonstrate prejudice because this Court is in the position of conducting an independent review of the death verdict. (RB 79, fn. 20.) Respondent is incorrect.

On appeal, this Court reviews a ruling on a motion for modification of a death verdict for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 859.) The Court's "role is to review the trial court's ruling on a defendant's modification motion for error, rather than to independently evaluate whether the evidence shows that the defendant's sentence of death is appropriate." (*People v. Hines* (1997) 15 Cal.4th 997, 1080.) The Court has held that it will "not make a de novo determination of penalty." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 859.) Moreover, the legislature entrusted independent review to the trial courts under section 190.4, subdivision (e), and intended this additional level of review to function as a substitute for appellate-level proportionality review. (AOB 190.) This Court is not in the position of providing Mr. Weaver with the independent, trial-level review guaranteed by section 190.4, subdivision (e). In fact, without an independent review at the trial level under section 190.4, subdivision (e), this Court does not have a record upon which it can determine whether Mr. Weaver was reliably sentenced.

Mr. Weaver did not receive the independent review of his death verdict mandated by section 190.4, subdivision (e), in violation of his statutory and constitutional rights. (AOB 185.) Mr. Weaver was

prejudiced by this error. If Mr. Weaver had received independent review of his death verdict, there is at least a reasonable possibility that his motion for modification would have been granted. (AOB 201.) This Court must vacate Mr. Weaver's death verdict and either remand his case for independent review, or declare section 190.4, subdivision (e) unconstitutional as applied to defendants who have waived a penalty phase jury.

X. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE THE STATUTORY SPECIAL CIRCUMSTANCES ARE IMPERMISSIBLY BROAD

In his testimony before the California Commission on the Fair Administration of Justice, this Court's Chief Justice described the state's death penalty system as "dysfunctional."[42] In his Opening Brief, Mr. Weaver established that California's death penalty scheme fails to quantitatively or qualitatively narrow the class of offenders who are eligible for the death penalty. (AOB 207-258.) He acknowledged that this Court has rejected similar claims, but asked that it reconsider those decisions in part because of empirical evidence demonstrating that death sentence ratios

[42] (Ronald M. George, Chief Justice of California, testimony before the California Commission on the Fair Administration of Justice (Jan. 10, 2008), reported in California Commission on the Fair Administration of Justice, Report and Recommendations On The Administration Of The Death Penalty In California (June 30, 2008), p. 115, fn. 6 (hereafter California Commission Report).)

in California are at least as arbitrary as those found unconstitutional in *Furman v. Georgia* (1972) 408 U.S. 238.

Respondent simply cites some of the Court's recent decisions and asserts without argument that they should not be reconsidered. (RB 79-80.) Respondent does not address Mr. Weaver's argument – which has never been addressed by this Court – that *Gregg v. Georgia* (1972) 428 U.S. 153 requires the special circumstances be created and defined by the legislature, not voter initiative. (AOB 244-256.)

For all the reasons delineated in Mr. Weaver's Opening Brief, he respectfully requests that this Court reconsider its prior rulings in this area, hold that the overbroad statutory special circumstances violated his fundamental rights, and reverse the death judgment. (See California Commission Report, *supra,* at p. 66 ["Some of the gravest concerns about the fairness of the death penalty might be alleviated or eliminated if its use were limited to the most aggravated cases"].)

XI. MR. WEAVER'S DEATH SENTENCE IS INVALID BECAUSE, AS APPLIED, PENAL CODE SECTION 190.3, SUBDIVISION (a) ALLOWS FOR THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

In his Opening Brief, Mr. Weaver argued that Penal Code section 190.3 (a) (hereafter factor (a)) has been employed in such a wanton and freakish manner that almost all features of murder have been characterized by prosecutors as "aggravating." (AOB 259-269.) He pointed out that,

while the Supreme Court held that factor (a) was not unconstitutional on its face, it has not addressed an as-applied challenge. (AOB 267-269, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976, 993-994.)

Respondent does not dispute that, given the expansive interpretation of factor (a) by prosecutors and this Court, virtually any circumstance of the crime can be argued as aggravating. (AOB 261-264.) Respondent does not dispute that factor (a) has allowed prosecutors to make diametrically inconsistent arguments. (AOB 264-266.) Respondent simply cites this Court's prior holdings and provides no further argument. (RB 81.)

Some time ago, the Supreme Court rejected the premise "that a particular set of facts surrounding a murder . . . [can be] enough in themselves, and without some narrowing principles to apply to those facts, to warrant imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362-363.) As a result of the vagueness and overbreadth of factor (a), and for the reasons fully detailed in Mr. Weaver's Opening Brief, California's death penalty scheme, as applied, does not meet the minimum federal constitutional requirement that it rationally narrow the class of death-eligible defendants. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 971-973.) Mr. Weaver therefore respectfully requests that this Court reconsider its prior opinions in this area, hold that the expansive application of factor (a) caused Mr. Weaver to be sentenced

to death in an arbitrary and capricious manner, and reverse his death sentence.

XII. CALIFORNIA'S DEATH PENALTY SCHEME HAS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING

In his Opening Brief, Mr. Weaver argued that, because California's death penalty scheme has no safeguards to avoid arbitrary and capricious sentencing, it is unconstitutional. (AOB 270-315.) Respondent mainly relies on a series of this Court's decisions to the contrary. (RB 82-84.) For the reasons stated in his Opening Brief and those discussed below, Mr. Weaver respectfully requests that this Court reconsider these decisions.

A. *Cunningham v. California* Makes It Clear That California's Death Penalty Scheme Is Unconstitutional Because Of Its Failure To Require That The Prosecution Charge And The Jury Find All Sentencing Factors Beyond A Reasonable Doubt

After Mr. Weaver filed his Opening Brief, the Supreme Court decided *Cunningham v. California* (2007) 549 U.S. 270. The Supreme Court's reasoning in that case provides further support for Mr. Weaver's argument that *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny require that all essential factors, including penalty phase aggravators, be charged and proved beyond a reasonable doubt. (AOB 273-278, 283-289.) Accordingly, *Cunningham* lends further support to the argument that this Court has misinterpreted *Apprendi* and its progeny.

In *Cunningham*, the Supreme Court reaffirmed and applied the

principle that "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.'" (*Cunningham v. California, supra*, 549 U.S. at pp. 288-289, citing *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) In that case, the California Determinate Sentencing Law (hereafter DSL) had given judges discretion to choose within a statutory range by balancing aggravating and mitigating facts, but did not require that the aggravating fact be submitted to a jury or proved beyond a reasonable doubt. (*Cunningham v. California, supra*, 549 U.S. at pp. 274-275.) In *People v. Black* (2005) 35 Cal.4th 1238, 1254, 1258, this Court held that the DSL did not violate the principles set forth in *Apprendi* and *Blakely v. Washington* (2005) 542 U.S. 296, because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been a part of the sentencing process."[43] In *Cunningham*, the Supreme Court rejected that analysis and instead found that circumstances in aggravation under the DSL

[43] The Supreme Court went on to fault this Court's analysis in *Black* for not recognizing the bright line rule established by *Apprendi.* (*Cunningham v. California, supra*, 549 U.S. at p. 291.) In contrast to this Court's view that the DSL did not "significantly" implicate Sixth Amendment concerns, the Supreme Court noted that no such examination is permitted, and that "[a]sking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* 'bright-line rule' was designed to exclude." (*Ibid.*, citing *Blakely v. Washington,* 542 U.S. at pp. 307-308, italics in original.)

(1) are factual in nature, and (2) are required for a defendant to receive the upper term. (*Cunningham v. California, supra,* 549 U.S. at pp. 276-279.) As a result, the DSL violated the rule that "[i]f the jury's verdict alone does not authorize the sentence, [and] the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Id.* at p. 290.)

There are three reasons why this Court should reconsider its conclusion that *Cunningham* does not apply to California's death penalty scheme.

First, this Court has held that *Apprendi* and *Ring* do not apply in capital cases because the penalty phase is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra,* 30 Cal.4th at p. 275.) But, as discussed above, in *Cunningham*, it made no difference to the constitutional question whether the fact-finding was something "traditionally" done by the sentencer; the only relevant question is whether a fact is essential for increased punishment. (*Cunningham v. California, supra,* 549 U.S. at p. 290.) The answer in all California death penalty cases is that the aggravators are not included in the guilt and special circumstance verdicts. (Penal Code § 190.3.) Therefore, these factual findings, which must subsequently be made in order to impose the death penalty, must be proved beyond a reasonable doubt.

Second, this Court has held that *Ring* does not apply to the penalty phase because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People* v. *Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People* v. *Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) The Court has continued to so hold even after *Cunningham*. (See, e.g., *People v. Loker* (2008) 44 Cal. 4th 691, 755; *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298.) In *Prince*, the Court asserted that, once the jury convicts and finds one or more special circumstance to be true, death is "no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1297-1298, quoting *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.)

In the wake of *Cunningham*, however, in determining whether *Ring* or *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. Under California law, once a special circumstance has been found true, life without parole is the default sentence. Death is not an available option unless the sentencer makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code § 190.3.) The issue of the Sixth

Amendment's applicability hinges on whether the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. (*Cunningham v, California*, *supra*, 549 U.S. at pp 288-289.) In California, as in Arizona, the answer is "Yes." *Ring* and *Cunningham* thus require the requisite fact-finding in the penalty phase to be made unanimously and beyond a reasonable doubt.

Third, as Mr. Weaver discussed in his Opening Brief, this Court has labeled the entire penalty phase determination as "inherently moral and normative," and therefore concluded that it is not fact-finding as in *Apprendi*, *Ring*, and *Blakely*. (AOB 288.) Just as discussed above, it does not matter to the Sixth Amendment question that fact-finders, once they have found aggravation, have to make an individual "moral and normative" assessment about what weight to give aggravating factors. Whatever label is applied, merely categorizing a decision as one involving "normative" judgment does not exempt it from constitutional requirements. What matters is that the fact-finder has to find facts, and all facts essential to the increased sentence must be found by the fact-finder beyond a reasonable doubt. (See *Ring v. Arizona, supra,* 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

Cunningham also establishes an important analogy between non-capital and capital sentencing that supports Mr. Weaver's argument. Just as a jury in a non-capital case must find an aggravating factor before the judge

can sentence the defendant to the upper term, a death penalty fact-finder must find a factor in aggravation, and must find that the aggravating circumstances substantially outweigh the mitigating circumstances before it can sentence a defendant to death. (See *People* v. *Duncan* (1991) 53 Cal.3d 955, 977-978; CALJIC No. 8.88.) Because, at all of these steps, additional findings are necessary to impose the death penalty, *Apprendi* and its progeny establish that life without possibility of parole is the statutory maximum unless a fact-finder makes the requisite findings beyond a reasonable doubt. (See *Cunningham v. California*, *supra*, 549 U.S. at p. 290.)

For the reasons set forth in the Opening Brief and herein, the prosecution violated Mr. Weaver's federal and state constitutional rights by failing to plead all essential sentencing factors in a charging document, while the trial court violated Mr. Weaver's federal and state constitutional rights by failing to impose a burden of proof and failing to require that the sentencing factors be found unanimously beyond a reasonable doubt. As a result, Mr. Weaver's death sentence must be reversed.

B. Neither *Pulley v. Harris* Nor This Court's Recent Rulings Foreclose Inter-Case Proportionality Review

With regard to proportionality review, Respondent does nothing more than restate the Court's prior rulings. (RB 83.) Mr. Weaver acknowledged the prior case law in his Opening Brief and does not repeat

his argument here. (AOB 300-301.) However, Mr. Weaver makes two additional points.

First, Mr. Weaver acknowledges that the cases Respondent relies upon are based on *Pulley v. Harris, supra.* (RB 83.) However, that was then and this is now. Respondent provides no response to Mr. Weaver's argument that the assumptions *Pulley* relied upon, i.e., that California limits the death penalty to the most atrocious murders, are now demonstrably untrue. (AOB 301-302.)

Respondent also provides no response to Mr. Weaver's argument that the arbitrariness of the implementation of capital punishment has undermined the retributive and deterrent purposes of the death penalty. (AOB 298-299.) As Mr. Weaver has demonstrated in his Opening Brief, the intervening 26 years between *Pulley* and the present time have seen the California sentencing scheme expand to become one that requires proportionality review to ensure its constitutional application.

Second, just last year, this Court suggested that it has not categorically forbidden inter-case proportionality review. (*People v. Martinez* (2009) 47 Cal.4th 399, 455.) This Court should therefore undertake such a review in this case, examining similar cases in which the death penalty was not imposed and evaluate the mitigating factors, aggravating factors, and special circumstances. (See, e.g., *Walker v. Georgia* (2008) 129 S.Ct. 453 (separate statement of Stevens, J.).)

C. *Tennard v. Dretke* Forecloses The Constitutionality Of Portions Of Penal Code Section 190.3 And CALJIC 8.85 And 8.88

On appeal, Mr. Weaver argued that the use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigating evidence, and that the court erred in relying on CALJIC Nos. 8.85 and 8.88. (AOB 302-303, 310-315.) In both instances, Mr. Weaver argued that use of the word "substantial" resulted in a constitutional violation, while in the context of factor (d), Mr. Weaver argued that the use of the word "extreme" similarly resulted in a constitutional violation. (*Ibid.*) Respondent simply cites prior decisions of this Court that either predate, or simply restate the reasoning of cases predating, *Tennard v. Dretke* (2004) 542 U.S. 274. (RB 84.)

In *Tennard*, the Supreme Court affirmed the "expansive" relevance standard applicable to mitigating evidence in capital cases. (*Tennard v. Dretke, supra,* 542 U.S. at p. 284, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-41.) Once this "low threshold" is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence. (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 285.)

Contravening *Tennard*, factors (d), (f), (g), and (h) limit mitigating evidence by the use of restrictive adjectives. (AOB 302-303; Pen. Code, § 190.3, subd. (d), (f), (g), (h).) Similarly, the standard jury instructions

employed by the trial judge permitted him to give effect to certain mitigating evidence only when it was substantial or produced a condition that was extreme. (CALJIC No. 8.85, 8.88.) This Court therefore cannot square its prior holdings with the mandate of *Tennard*. For this reason, as well as those raised in his Opening Brief, this Court should hold that sections 190.3 (d), (f), (g), and (h), as well as CALJIC Nos. 8.85 and 8.88, are unconstitutional, and reverse Mr. Weaver's death sentence.

XIII. CALIFORNIA'S CAPITAL PUNISHMENT SCHEME VIOLATES CONSTITUTIONAL AND INTERNATIONAL LAW BY ALLOWING THE DEATH PENALTY FOR FELONY MURDER SIMPLICITER

In his Opening Brief, Mr. Weaver argued that, because the California death penalty scheme lacks any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder, it violates both federal and state constitutional proportionality requirements, as well as international law. (AOB 316-332.) Respondent argues that, where the defendant is the shooter and is found guilty of felony murder, the mens rea requirement is satisfied. (RB 85-87.)

Respondent misstates Supreme Court case law and Mr. Weaver's argument. Respondent is correct that *Tison v. Arizona* (1987) 481 U.S. 137, 158 does not require proof of intent to kill. However, the opinion and its subsequent interpretation by the Supreme Court and every lower federal court that has considered the issue establish a minimum mens rea before a

death sentence can be imposed. (*Id.* at pp. 157-158; AOB 321-324.) Respondent therefore incorrectly suggests that Mr. Weaver is arguing for a specific intent requirement; Mr. Weaver is instead arguing that this Court follow Supreme Court case law and require that the prosecution prove a minimum mens rea. The minimum mens rea requirement applies to both actual shooters and accomplices.

The Supreme Court made this clear in *Hopkins v. Reeves* (1998) 524 U.S. 88, 99, and in doing so, referred to *Tison* and *Enmund*'s requirement of proof of a culpable mental state. Respondent is therefore incorrect in its assertion that Mr. Weaver's case does not implicate the Eighth Amendment concerns raised in *Tison* and *Enmund*. (RB 87.) The majority in *Reeves* agreed that a state's capital punishment scheme could satisfy *Enmund* and *Tison* "at sentencing or even on appeal," but that the Eighth Amendment required compliance "at some point." (*Hopkins v. Reeves, supra,* 524 U.S. at p. 100.) California's statute and this Court's jurisprudence, which allow the imposition of the death penalty for actual killers in robbery-burglary murders based upon felony murder *simpliciter* violate the Eighth Amendment. (See Shatz, *The Death Penalty and Ordinary Robbery-Burglary Murderers* (2007) 59 Fla. L.Rev. 719, 759-761) [explaining that "[t]he '*Enmund-Tison*' principle established a minimum mens rea for the death penalty applicable to all felony-murders, which was confirmed by *Reeves*, but has not been recognized by this Court"].) The Supreme

Court's decisions in *Apprendi, Ring* and *Cunningham,* discussed above, further support Mr. Weaver's contention that sentence of death may not be imposed without a finding by the fact-finder that the defendant acted with intent to kill or reckless indifference to human life.

Lastly, Respondent does not dispute the relevance of international law, nor does it dispute that imposition of the death penalty for robbery-murder *simpliciter* serves no penological purpose. Mr. Weaver does not repeat those arguments here, but does reiterate that California's death penalty scheme, as written and as applied, is nothing more than the purposeless and needless imposition of pain and suffering because it fails to meet *Gregg*'s mandate. (See *Baze v. Rees* (2008) 553 U.S. 35, 79-85 (conc. opn. of Stevens, J.) [examining rationales of deterrence and retribution, finding them to have "diminishing force," and concluding that because death penalty represents "needless extinction of life with only marginal contributions to any discernible social or public purposes," it is " patently excessive" in violation of Eighth Amendment (internal citation omitted)]; see generally Colon, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment* (2009) 97 Cal. L.Rev. 1377 [demonstrating that capital punishment in California violates *Gregg* because it is no more retributive or deterrent than a life-without-parole sentence]; see also *Shatz, supra,* 59 Fla. L.Rev. at pp. 761-768 [arguing that, absent an intent to kill, robbery murder violates the Eighth

Amendment and international law].)

For all these reasons, as well as those stated in his Opening Brief, Mr. Weaver respectfully requests that this Court hold that the prosecution must prove that an actual killer had a culpable state of mind, and therefore reverse Mr. Weaver's death sentence.

XIV. THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT OFFENDS EVOLVING STANDARDS OF DECENCY

In his Opening Brief, Mr. Weaver argued that recent events and shifting public opinion, coupled with California's broad and arbitrarily imposed death penalty scheme, demonstrate that the death penalty is inhumane and offends evolving standards of decency. (AOB 333-336.) Respondent simply states that this Court has rejected that contention. (RB 90.) Respondent does not dispute the relevance of international norms.

Mr. Weaver acknowledges the prior case law and does not repeat his argument here. However, Mr. Weaver points out that, since this Court's opinion in *People v. Moon*, *supra*, which Respondent relies upon, circumstances have changed and have put the logic of that and other decisions into serious question.

In *Moon*, this Court held that there was no national consensus against the imposition of capital punishment and that it was not used with diminishing frequency in states where it is legal. (*People v. Moon, supra,* 37 Cal.4th at p. 48.) At the time *Moon* was decided, the Court noted that 38

states had some form of death penalty. (*Ibid.*) Since *Moon*, however, three states (New York, New Jersey, and New Mexico) have abolished capital punishment. (Death Penalty Information Center, *Facts About The Death Penalty* <www.deathpenaltyinfo.org/documents/FactSheet.pdf> [as of December 5, 2010], hereafter DPIC; see also Amnesty International, *Abolitionist and Retentionist Countries* <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> [as of December 5, 2010] [showing that since the beginning of 2007, eight countries have abolished the death penalty for all crimes, and one country has abolished the death penalty for ordinary crimes].)

In addition, recent statistics on death penalty sentencing and executions indicate that, contrary to what this Court said in *Moon*, capital punishment is used with diminishing frequency in those states in which it is legal. (See DPIC, *supra* [demonstrating overall decline, with 138 death sentences and 60 executions in 2005 as compared with 106 death sentences and 52 executions in 2009]; see also Death Penalty Information Center, *The Death Penalty in 2009: Year End Report* <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf> [as of December 5, 2010] [reporting that 2009 had "the fewest death sentence since the death penalty was reinstated in 1976"].) At the same time, the American Law Institute withdrew the capital punishment statute that it had approved for the 1963 Model Penalty Code based upon a paper providing

"the major reasons why many thoughtful and knowledgeable individuals doubt whether the capital-punishment regimes in place in three-fourths of the states, or in any form likely to be implemented in the near future meet or are likely ever to meet basic concerns of fairness in process and outcome." (American Law Institute, Report of the Council to the Membership of the American Law Institute On the Matter of the Death Penalty (2009) <http://www.ali.org/doc/Capital%20Punishment_web.pdf> [as of December 5, 2010], p. 5.) Also, concluding that the death penalty violates the Eighth Amendment, Justice John Paul Stevens became the fifth *Gregg* Justice to renounce capital punishment. (See *Baze v. Rees, supra*, 553 U.S. at p. 85 (conc. opn. of Stevens, J.); Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment* (2008) 43 U.C. Davis L.Rev. 783, 791, fn. 28 [discussing decisions by Justices Thurgood Marshall, William J. Brennan, Harry A. Blackmun, Lewis F. Powell, Jr.]; see also *id.* at pp. 866-871[discussing other indicators of diminishing use of death penalty].) These reasons, as well as those set forth in Mr. Weaver's Opening Brief, demonstrate that the death penalty cannot be reconciled with evolving standards of decency. Mr. Weaver therefore respectfully requests that this Court reverse his death sentence.

XV. MR. WEAVER'S CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW

In his Opening Brief, Mr. Weaver argued that his conviction and sentence were obtained in violation of international treaties and customary international law. (AOB 337-343.) Respondent simply relies on prior case law, stating that Mr. Weaver's death sentences were rendered in accord with state and federal constitutional and statutory requirements. (RB 91.) As a result, Respondent asserts that there was no violation of international law in Mr. Weaver's case.

Respondent does not dispute the relevance of international law. Respondent's position also concedes that if this Court finds any constitutional or statutory error, it must also find that Mr. Weaver's conviction and sentence were obtained in violation of international law. Mr. Weaver has demonstrated numerous violations of his federal and state constitutional and statutory rights. For this reason, as well as those stated in his Opening Brief, he respectfully requests that this Court find that his conviction and sentence were obtained in violation of international law, and reverse his conviction and death sentence.

XVI. MR. WEAVER'S DEATH SENTENCE WAS IMPOSED THROUGH THE ARBITRARY AND DISPARATE APPLICATION OF CALIFORNIA'S DEATH PENALTY LAWS

In his Opening Brief, Mr. Weaver argued that because of prosecutorial discretion, the application of California's death penalty statute

is arbitrary and standardless. (AOB 344-353.) Respondent simply recites this Court's prior holdings to the contrary. (RB 91.)

While Mr. Weaver acknowledged the prior case law in his Opening Brief and does so herein as well, he respectfully requests that this Court reconsider its prior rulings, find that California's death penalty scheme is arbitrary and standardless in application, and reverse his death sentence. (See California Commission Report, *supra*, at p. 65, citing Kreitzberg, et al., A Review of Special Circumstances in California Death Penalty Cases (2008), at p. 8 ["California needs to determine how to eliminate these geographic disparities in the imposition of the death penalty"].)

XVII. THE CUMULATIVE EFFECT OF CONSTITUTIONAL AND INTERNATIONAL LAW INFIRMITIES IN THE CALIFORNIA DEATH PENALTY SCHEME REQUIRES REVERSAL OF MR. WEAVER'S CONVICTIONS AND DEATH SENTENCE

The cumulative effect of the constitutional and international law infirmities in the California death penalty scheme rendered Mr. Weaver's convictions and death sentence unconstitutional. Respondent's only response is to rely on prior cases holding that if there is no such error, the claim should be rejected. (RB 92.) To the extent that this Court might agree there was error, Respondent has conceded its cumulative effect. Therefore, while this Court may find that no single error may warrant reversal of Mr. Weaver's conviction and death sentence, the cumulative effect of the errors here deprived Mr. Weaver of his rights to due process,

to a fair trial, and to a reliable sentencing determination in violation of state law, the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, article I of the California Constitution, and international law.

CONCLUSION

For the reasons discussed, appellant requests that this Court reverse the convictions, the special circumstance findings, and the sentence of death.

DATED: December 14, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuit to Rule 8.630(b)(1)(c), I hereby certify that, according to our word processing software, this brief contains 37,560 words.

DATED: December 14, 2010

JAMES THOMSON

CERTIFICATE OF SERVICE

I, Jessica Michalski, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 392 Simon Hall, School of Law, University of California, Berkeley, California, 94720. On December 14, 2010, I served the within **APPELLANT'S REPLY BRIEF** on the below-listed parties, by depositing true copies thereof in a United States mailbox regularly maintained by the United States Postal Service, in sealed envelopes, with postage paid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed December 14, 2010 at Berkeley, California.

JESSICA MICHALSKI