IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BRIAN DAVID JOHNSEN, Defendant and Appellant.	Case No. S040704 **CAPITAL CASE** (Superior Court Case No. R239682 Stanislaus County)

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
for the County of Stanislaus

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TABLE OF CONTENTS

People v. Brian David Johnsen
No. S040704

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

OTHER STATE CASES

CONSTITUTIONS

United States Constitution

California Constitution

STATE STATUTES

California Statutes

Other State Statutes

CALJIC AND CALCRIM

CALCRIM

CALJIC

MISCELLANEOUS

Other Authorities

Internet Citations

Media Citations

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. The failure to address any particular argument, sub-argument, contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S MOTION FOR A CHANGE OF VENUE DEPRIVED HIM OF A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT.

A. Introduction.

Appellant argued in his opening brief that the trial court erred in denying his motion for a change of venue. Most of the governing factors – the nature and gravity of the offense, the inflammatory slant of the news coverage, the status of the victims and the accused, and the degree to which voir dire revealed the jury pool to be prejudiced – weighed heavily in favor of the conclusion that appellant could not and did not receive a fair trial in Stanislaus County, and the remaining factor – size of Stanislaus County – was neutral. As demonstrated in the opening brief, prior to jury-selection proceedings, there was far more than a reasonable likelihood that appellant could not obtain a fair trial in Stanislaus County. And this finding was confirmed during jury selection, where the effect of the pretrial publicity was shown to have prejudicially permeated the jury venire, thus depriving appellant of a fair trial. The erroneous denial of his motion for a change of venue violated the Sixth Amendment and the Due Process Clause and requires reversal of the entire judgment. (AOB 85-146.)[1]

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[1] The following abbreviations are used in this brief: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief; "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Respondent acknowledges that 59 of the 133 prospective jurors who had been advised during voir dire of the alleged facts of this case had been exposed to pretrial publicity, for a percentage of 44 percent. (RB 49.) And respondent does not dispute that that nine of the 17 sworn jurors had been exposed to publicity: five of the 12 seated jurors and four of the five alternate jurors).[2] (RB 49-50, 57-58; see Appendix G.) Thus, as explained in the opening brief, the percentage of seated and alternate jurors exposed to publicity was 41.6 percent of the seated jurors, 80 percent of the alternate jurors, or 53 percent of all sworn jurors. (See AOB 103-106.)

Nonetheless, respondent contends that appellant's argument is without merit because appellant fails to demonstrate a reasonable likelihood that (1) a fair and impartial trial could not have been had in Stanislaus County at the time of the denial of his motion; and (2) he did not actually receive a fair trial. (RB 44.) As demonstrated below, respondent is incorrect.

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[2] These jurors and alternates were Juror No. 1 (9CT 2315-2316; 13RT 2732-2733), Juror No. 4 (6CT 1701-1702; 11RT 2365-2367), Juror No. 6 (5CT 1285-1286; 10RT 2137-2138), Juror No. 8 (8CT 2241-2242; 13RT 2716-2723), Juror No. 10 (2CT 375-376; 8RT 1828-1830), Alternate Juror No. 1 (4CT 1129-1130; 10RT 2133-2134), Alternate Juror No. 2 (8CT 2143-2144; 12RT 2588-2596), Alternate Juror No. 4 (5CT 1207-1208; 10RT 2134-2135), and Alternate Juror No. 5 (9CT 2493; 13RT 2733-2737).

B. The Trial Court Erroneously Denied Appellant's Motion For Change Of Venue.

1. At The Time Of The Motion, It Was Reasonably Likely That A Fair Trial Could Not Be Had In Stanislaus County.

a. The Nature And Gravity Of The Offense.

Respondent concedes, as it must, that the nature and gravity of the offense militated in favor of a change of venue. (RB 50-51.) Indeed, as recounted in the opening brief, in addition to the fact that appellant was facing the death penalty, the facts and circumstances of the case were both sensational and unfathomable and were graphically illustrated by the sensational publicity. (AOB 110-113.)

Respondent, nonetheless, attempts to downplay the strong support which this factor provided for a change of venue on the basis that every capital case presents a serious charge. (RB 51.) Respondent also argues that although the crime involved gruesome details, they were not sensational enough to warrant a change of venue. (*Ibid*.) Not so. Respondent conveniently ignores the details and descriptions presented in the publicity, as well as the adjectives used, which painted the crime as cold-blooded, senseless, and gory. (See AOB 24-27.) Respondent also ignores that, as well documented in the opening brief, the questionnaires and voir dire of the prospective jurors reflected their recognition of and horrific reaction to the nature and gravity of the crimes. (See AOB 26-27.)

Accordingly, respondent has failed to rebut the fact that the nature and gravity of the offense were factors militating strongly in favor of a change of venue in this case.

b. The Nature and Extent of News Coverage.

In the opening brief, appellant argued that although the extent of the media coverage in this case was not extreme,[3] the nature of the coverage weighed heavily in favor of a venue change in that (1) the coverage was inflammatory with respect to both the crime and appellant; (2) the publicity described purported (and often inaccurate) facts, statements and circumstances strongly pointing to appellant's guilt; and (3) the newspaper coverage recounted very prejudicial inadmissible evidence. (See AOB 113-125.)

Respondent does not dispute that the publicity described both actual and non-existent evidence, statements and circumstances strongly pointing to appellant's guilt and that the press informed the public of highly prejudicial inadmissible evidence – appellant's invocation of his Fifth Amendment right to refuse to speak to the police, as well as his involvement in another homicide.[4] (RB 51.) Respondent responds,

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[3] The prosecution reported that the Modesto Bee published 19 news articles over a span of 21 months, and 35 newscasts regarding the case were aired on a six-day period during the month of March 1992. (7CT 1850-1851.) Dr. Schoenthaler described the publicity as "fairly moderate." (7CT 1838.)

[4] This included reporting of appellant's confession to jailhouse snitch Eric Holland, his counsel's attempt to suppress the confession, and the court's denial of that motion. (The Modesto Bee, September 17 and November 19, 1993; 7CT 1824-1826.) It also included inaccurate reporting that that detectives found a bloody hammer, bloody tennis shoes and several of Sylvia Rudy's possessions in appellant's apartment. (The Modesto Bee, January 29, June 19, and July 1, 1993; 7CT 1797, 1801; see also The Modesto Bee, March 27, 1992; 7CT 1802 [detectives serving a search warrant at appellant's apartment "reportedly found evidence linking Johnsen to the attack but declined to say what they turned up;" "Johnsen refused to talk to detectives"].)

however, that "'[t]here is no requirement that jurors be totally ignorant of the facts of a case as long as they can lay aside their impressions and render an impartial verdict.'" (RB 52, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 450.)

This fails to confront the problem created by the publicity in this case – that the coverage communicated appellant's guilt largely on the basis of non-existent evidence and inadmissible evidence, described the crime in graphic, sensational language, and portrayed appellant in inflammatory terms. In fact, in *Lewis*, this Court found that publicity which uses inflammatory terms and which reveals inadmissible facts about the crimes or the defendant and potentially prejudicial information such as the defendant's status as a suspect in other crimes and that he had confessed, weighs in favor of a change of venue. (*Lewis, supra,* at p. 449; see also *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [sensational media coverage referring to "cold-blooded killing" and emphasizing that victim was shot in the back, while lying on the floor, weighed in favor of a venue change]; *Williams v. Superior Court* (1983) 34 Cal.3d 584, 593 [media characterizations of killing as "cold-blooded" or "execution-style" created a high degree of sensationalism – sensational nature of crimes weighed heavily in favor of change of venue]; *People v. Williams* (1989) 48 Cal.3d 1112, 1127 [nature of newspaper reports was frequently sensational, with references to the victim's "bullet-riddled" body, description of the slaying as "execution style," and reporting that the victim had been raped and that authorities believed she had been "executed' so that she could not identify her assailant; nature and extent of such publicity militated in favor of a change of venue].)

That was exactly the case here. As documented in detail in the opening brief, the media (1) portrayed the crime in graphic, sensational

terms; (2) portrayed appellant in inflammatory terms, characterizing him as rejecting counsel after counsel, that such serial rejection of counsel was costing the county thousands of dollars, and that he was attempting to manipulate the system and delay the trial; (3) reported that appellant had confessed and his counsel had tried, but failed, to suppress the confession; (4) falsely reported the seizure of incriminating bloody evidence from appellant's home; and (5) reported highly prejudicial inadmissible evidence of appellant's involvement in another homicide. (See AOB 110-112, 114-123.) The net effect of all this coverage was to communicate to the community of potential jurors — largely on the basis of non-existent evidence — that appellant was guilty: the bloody implement of the murder as well as the property stolen during the crime had been found in his possession, he had attempted to destroy evidence linking him to the crime, and he had confessed. In fact, during voir dire, one of the jurors candidly stated that although he would try to be fair and impartial, "pretty well in my mind the newspaper made him guilty." (9RT 1989.)

Respondent has made no attempt to distinguish or respond to this Court's rulings in *Martinez, Williams v. Superior Court*, and *People v. Williams* that these kinds of facts DO strongly favor a change of venue.

Quoting the trial court, respondent argues, however, that although there "'certainly was some sensationalism at the time of the offense,'" "the coverage was not 'continuing or sustained. It was diluted over the passage of time.'" (RB 52, quoting 5 RT 1269.) This argument, upon which the trial court relied, overlooks the fact that, as demonstrated and discussed in the opening brief, jury selection revealed that community awareness of the crime remained high. (See AOB 135-142; see also *People v. Williams*, *supra*, 48 Cal.3d at p. 1127-1128 [State's argument discounting potential impact of publicity on ground that frequency of articles decreased after first

two weeks of defendant's arrest overlooks fact that jury selection revealed that community awareness of crime remained high].)

The trial court, and now the State, assert that "few of the prospective jurors had even 'heard about the case compared to the number of the people that actually came in.'" (RB 53, quoting trial court at 15RT 3022-3023.) That is simply not so. Of the 133 prospective jurors who completed questionnaires after being informed of the charges and case summary, 59, or approximately 44 percent, had read or heard of the case. (See Appendix G.) Indeed, five of the twelve jurors ultimately seated had read or heard of the case, as had four of the five alternate jurors. (See AOB 104-105, fn 94.)

The trial court, and now the State, also assert that "'[o]f those people that did read something in the newspaper, most of them had forgotten all about it.'" (RB 53, quoting trial court at 15RT 3023.) Again, not so. As detailed in the opening brief, voir dire of the venire confirmed that the passage of time had not erased the knowledge and impact of the case on the prospective jurors. (See AOB 135-142.) Numerous prospective jurors recited chapter and verse regarding the attack on the Braggs; several venirepersons who personally knew Rudy or her daughter had very strong feelings about the case; and others had paid particular attention to the case and were impacted, because either they or their friends lived in the vicinity of Sylvia Rudy's home. (See AOB 139-141.)

Finally, respondent relies on the trial court's assertion that "almost all" venirepersons said they "'wouldn't have any problem excluding things from their mind.'" (RB 53, quoting trial court at 15RT 3023.) Such assurances are meaningless, both generally and in this particular case. Cases are legion, from virtually every jurisdiction, that juror assurances of impartiality are entitled to little weight, and certainly are not dispositive. (See cases cited in opening brief at pp. 143-144.) As Dr. Schoenthaler

testified, it is very difficult to rehabilitate those with fixed opinions. (3RT 746.) Although they state that they can set aside their opinions, empirical evidence shows otherwise.[5] (3RT 747-748.) The instant record contains a considerable body of research demonstrating that a juror's declaration regarding his ability to act impartially is not trustworthy. (4RT 921-922.) Dr. Schoenthaler explained the difficulty is that venirepersons try very hard to please the Court and may say that they can set aside their prejudgment and follow the court's instructions when they cannot. (4RT 878.) And the examples provided in the opening brief at pages 144-145 illustrate both this principle in operation as well as the impossibility of setting aside information already received about a crime.

Moreover, it ignores the fact that the publicity in this case was likely to cause members of the community to remember the case. As Dr. Schoenthaler explained, when he questioned subjects who recognized the case during his qualitative survey, one of the factors that caused them to remember and prejudge the case was the media's reporting that appellant was under suspicion for another homicide in San Diego and had not been brought to trial for that. (3RT 795-796; 4RT 873.) The subjects' responses

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[5] Examination of the responses of several of the prospective jurors illustrates the impossibility of setting aside information already received about a crime. Charles Jones, upon recalling the case, stated: "I mean, how do you ignore something that you already – that you – that you. . . ." (10RT 2240.) The court interrupted Mr. Jones and told him that the law required him to put it out of his mind and decide the case solely on the basis of the evidence presented in court. (*Ibid.)* When asked if he could do so, the juror replied: "I can't say honestly that I could completely ignore anything that I heard before but I can try, I guess." (*Ibid.*) And venireperson David Johnston stated: "You can't help but form an opinion. . . . You're reading so much, it has to influence you. . . . I would certainly try to be open about it. But still you are influenced." (9RT 1985-1986.)

indicated that this aspect of the publicity created both concern and hostility toward appellant. (*Ibid*.)

Respondent also attempts to downplay the impact of the publicity revealing appellant's confession on the same ground asserted by the trial court -- that "the court had 'effectively . . . precluded the press from getting that information'" because it had closed the hearings on appellant's motion to suppress his confession. (RB 52.) That is utter nonsense. It mattered not whether the court closed the hearings for, as detailed in the opening brief, the articles made it clear that appellant had confessed to another inmate and reported both that appellant was seeking to suppress his confession and that the judge had denied his motion to suppress. (The Modesto Bee, September 17 and November 19, 1993; 7CT 1824-1826.) After the salacious reporting of the circumstances of the crime (see descriptions in AOB at pages 110-111), the jury did not need to hear the actual details of the confession to be impacted by the knowledge that appellant had confessed to committing the crime. The damage was done, regardless of whether the circumstances of the confession and its details were revealed. Indeed, this Court recognized the same in *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293 ["While no formal confession of defendant was released by law enforcement authorities, the public learned through the newspapers that defendant had made highly incriminating statements to 'snuff' or 'do away with' the Ohta family."].

In sum, the inflammatory coverage portraying the crime in graphic details, the inflammatory coverage erroneously implying that appellant was manipulating the system and was costing the taxpayers thousands of dollars, the reporting that appellant had confessed and invoked his Fifth Amendment right to refuse to speak to police, the erroneous reporting that incriminating evidence had been found in his home, and the reporting of

highly prejudicial and inadmissible evidence that appellant was involved in another homicide but had not been charged – all pointed to the necessity of a change of venue in this case.

c. The Size of the Community.

In the opening brief, appellant acknowledged that the size of Stanislaus County in 1994[6] must be viewed as a neutral factor – one which neither favors nor disfavors a change of venue. (AOB 125-126.) Respondent apparently agrees, merely arguing that this factor does not weigh in favor of a venue change. (RB 54.)

d. The Status of the Victim and the Accused.

i. Defendant's Status-Standing in the Community.

In the opening brief, appellant argued that his status or standing in the community favored a change of venue, because the publicity described him as a "weird" and "skinny stoner type," who was reported to have been dealing drugs in San Diego and then to have moved to Modesto less than a year before the crime because of "his link to the drug-related execution of his former girlfriend." (The Modesto Bee, May 26, 1992, and March 28, 1992; 7CT 1792, 1810.) As detailed in the opening brief and discussed below, this Court's case law shows that this publicity depicted appellant exactly as the type of defendant whom pretrial publicity could most effectively prejudice: one likely to engender hostility and unlikely to evoke the sympathy or concern of the community. (See AOB 127-128.)

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[6] It was stipulated at the venue hearing that (1) the total number of eligible potential jurors in Stanislaus County in 1994 was 244,941; and (2) of that pool of 244,941 eligible venirepersons, 40,941 were qualified to be called for jury duty. (5RT 1177-1178.)

Respondent parrots the trial court's reasoning for why this factor did not favor a change of venue. (RB 54-55.) The judge concluded that appellant's status – or lack of status – did not militate in favor of a venue change, because "'[t]here's no evidence that the defendant was well-known in this community or a public figure or that he grew up in Modesto and lots of people know him, whether he went to school here or high school or anything of that nature.'" (*Ibid.*, quoting trial court at 5RT 1263.)

This merely demonstrates respondent's and the trial court's lack of understanding of this factor and why the trial court got it wrong. The trial court found that appellant's status did not favor a change of venue, because there was no evidence that he had "some substantial status in the community." (5RT 1263.) But the defendant need not be well known or have some substantial status in the community in order for his status to militate in favor of venue change. In fact, it is most often quite the opposite. In assessing whether the defendant's standing in the community favors venue change, this Court has looked to whether his portrayal by the media would likely engender hostility or be "unlikely to evoke the sympathy or concern of the community." (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584.) And in those cases where this Court has found that was so, thus supporting a change of venue, the Court has relied on the following facts: (1) the defendant was a relative stranger or friendless in the community; (2) the defendant was viewed as an outsider or associated with a group to which the community was likely to be hostile; and (3) other facts about the defendant, such as drug addiction or association with other violent crimes, were likely to engender hostility.[7]

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[7] See *Odle v. Superior Court* (1982) 32 Cal.3d 932, 940 [pertinent to defendant's status is whether he "was viewed by the press as an outsider, unknown in the community or associated with a group to which the
(footnote continued on next page)

It is evident, under this Court's jurisprudence, that the media depiction of appellant as an unsavory, drug-dealing outsider, friendless in the community and linked to another murder, was likely to engender hostility. The trial court and respondent are wrong. This factor, appellant's standing in the community, favors a change of venue.

ii. Victims' Status.

Respondent again parrots the trial court's reasoning for why this factor did not favor a change of venue. (RB 55-56.) The trial court merely observed that there was no evidence that the victims were prominent in the community. They were visiting their daughter who lived in Modesto and thus, their only tie to the community was the daughter. (5RT 1264.) The trial court also observed that the victims only came to the public's attention because they were murder victims and prospective jurors would sympathize

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(footnote from previous page)
community is likely to be hostile"]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, 388 [defendants were strangers – "friendless in the community"]; *People v. Tidwell* (1970) 3 Cal.3d 62, 70 [defendants were strangers to the locale where the crimes occurred]; *Martinez v. Superior Court, supra,* 29 Cal.3d at p. 584 [the defendant, "a member of a minority group and an alleged heroin addict, 'friendless in the community,' represents exactly the type of defendant whom pretrial publicity can most effectively prejudice."]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293-294 ["[a]lthough defendant was also a resident of the area, he had chosen to 'drop out' of the ongoing life of the community and retained few if any close friends" and had become identified in the mind of the public as a hippie, a group which many county residents resented]; *Williams v. Superior Court, supra,* 34 Cal.3d at p. 594 [defendant was a young member of a minority group, a stranger to and friendless in the community, accused of additional violent crimes]; and *Fain v. Superior Court* (1970) 2 Cal.3d 46, 51-52 [defendant had been a resident of the Modesto area for only a few months prior to the crimes and had not been integrated into the community].

with them regardless of the location of the trial. (5RT 1265-1266; see RB 55-56.)

The trial court's reasoning, now adopted by respondent, does not controvert, or even acknowledge, the arguments presented in the opening brief. Appellant acknowledged that the victims were not prominent in the Modesto community. (See AOB 129.) Nonetheless, appellant argued, their status or standing in the community favored a change of venue, because (1) their daughter was an upstanding member of the community who worked for a prominent financial institution; (2) the media created enormous community sympathy for them, in effect turning them into posthumous celebrities; and (3) the particular circumstances of the crime likely resulted in high victim identification, thereby drawing more community sympathy and support. (See AOB 129-131.)

Notably, the first reason is a factor operative only in the Modesto community, thus militating in favor of a venue change. (See *People v. Williams*, *supra*, 48 Cal.3d at pp. 1129-1130 [although the victim was herself not especially prominent, she came from an extended family with long and extensive ties to the community]; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584 [although victim, the brakeman for the railroad, was "no public figure," his "prominence in the public eye . . . derive[d] from the status of his employer, and that factor undoubtedly engendered community sympathy"].) Here, the prominence of the victims derived from the status of their daughter's prominent employer and that factor undoubtedly engendered community sympathy. In fact, one article noted that Ms. Rudy's employer, Pacific Valley National Bank, was offering a reward of $10,000 for information leading to an arrest. (The Modesto Bee, March 4, 1992; 7CT 1786.) In *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 385, another case where a community fund was organized to help

defray the surviving victim's medical costs and the media urged every citizen to contribute, this Court found that such civic involvement is a strong indication that venue should be changed.

Moreover, voir dire revealed that the daughter's status and employment in the community did, in fact, cause several venirepersons to notice and remember the case and engendered prejudice against appellant. Several venirepersons reported that they knew either Rudy or people at the bank where she worked and that caused them to talk about and remember the case and to form opinions against appellant. (12RT 2473-2475 [venireperson knew Sylvia Rudy because he did business at the bank, the bank employees talked a lot about the case, and he was prejudiced as a result of what he had heard and read]; 11RT 2348-2849 [heard about case from Rudy's daughter – knew "a lot" and had formed opinions]; 14RT 2852-2853 [was a friend of Rudy's employer, knew Rudy and had "prejudge[d] this guy"].)

Thus, here again, the trial court and respondent are wrong. This factor, the status or standing of the victims in the community, favors a change of venue.

2. It Is Reasonably Likely That Appellant Did Not, In Fact, Receive A Fair Trial.

In the opening brief, appellant argued that retrospective review in light of the voir dire of the actual jury pool and the actual jury panel selected shows that the trial court's denial of appellant's venue motion was erroneous. As evidenced by the completed jury questionnaires and voir dire, (1) numerous prospective jurors had heard about and were familiar with details of the case through newspaper articles and television coverage; and (2) many were impacted by their exposure to publicity. (See AOB 135-141.)

Respondent argues, however, that there is no prejudice, because appellant has not demonstrated that any juror sworn to try the case was negatively impacted by exposure to the publicity. (RB 56- 59.) Not so. In particular, Juror No. 8 had been impacted by her exposure to the publicity and had formed prejudicial opinions as a result of that exposure. As acknowledged by respondent, Juror No. 8, who had both read accounts of the case in the newspaper and saw televised reports (8 CT-JQ 2241-2242), said that she was inclined to believe that appellant was guilty based in part on "reading the articles and seeing what is on television." (13RT 2717-2818, 2721; see RB 57.) She also strongly favored death. (13RT 2719-2720.)

Respondent contends, however, that this does not establish prejudice, because (1) Juror No. 8 had not "totally made up [her] mind" (13RT 2718); (2) when the trial court reminded her that what she had read in the newspaper or saw on television was not evidence and she would have to decide the case solely on the evidence presented at trial, Juror 8 responded that she understood (13RT 2717); and (3) she did not feel that the publicity would affect her decision in arriving at penalty (13RT 2722). (RB 57.)

Respondent does not dispute that Juror No. 8 came into voir dire with a strong predisposition toward death. It was only after the following exchange with the trial court, wherein she was told that she had to have an open mind and would have to exclude her previous strong opinions about the death penalty and rely on the evidence presented during trial, that she responded affirmatively to the court's question whether she was willing to keep an open mind:

> [The Court]: Now in this case you may not understand completely, but in this case there may be two parts of this trial. In the first part you determine

guilt or innocence. And in that part of the trial if you find the defendant guilty of first degree murder, and you find one of the special circumstances to have been proved, then you would move to second stage in the trial where you would decide what the appropriate penalty is.And from there you would have a choice between life without the possibility of parole and death. Okay.

Now with regard to those subjects you also have to have an open mind in this case. You indicated that you had strong opinions about the death penalty, that you favored it. Whatever your opinions before you get here you have to — on that issue, you have to also exclude from your mind and rely on the evidence that's presented during the course of the trial.

If -- at the penalty phase of the trial, they'll [sic] be what's called aggravating evidence and mitigating evidence submitted both on behalf and against the defendant. Those -- that evidence could include things like the defendant's history and age. And only one of the factors would be whatever happened in this particular case. All right? And you have to weigh those factors and then come up with some kind of decision.

[Juror 8]: Right.

[The Court]: So what I want to know is have you already made up your mind with regard to if he's found guilty and you get to the penalty phase of the trial have you already made up your mind that he should receive one penalty or the other or are you willing to keep an open mind and listen to all the evidence?

[Juror 8]: I could keep an open mind. Like I said, I do favor, you know –

[The Court]: I understand you said you favor the death penalty.

[Juror 8]: Right.

[The Court]: We all come here with predispositions about different things What you have to do in this case is set aside your opinions and listen to the evidence in the case and make your decision based on the evidence.

[Juror 8]: Right.

[The Court]: Do you feel you can do that in this case?

[Juror 8]: Yes.

[The Court]: You'll assure us that you will do that?

[Juror 8]: Yes.

(13RT 2719-2720.)

Notably, even though Juror No. 8 told the court that she could keep an open mind as to penalty, she immediately conditioned that response with the caveat that she did favor death. (13RT 2720.) Thus, that assurance did little to negate the prejudice resulting from this juror's exposure to pretrial publicity. Juror No. 8 only confirmed what Dr. Schoenthaler testified – that it is very difficult to rehabilitate those with fixed opinions. (3RT 746.) As noted above, although they state that they can set aside their opinions, empirical evidence shows otherwise. (3RT 747-748.) Here, we only need to look to the word of the juror herself. Moreover, Juror No. 8 was never asked, nor did she give any assurance that (1) her exposure to pretrial publicity would not affect her decision regarding appellant's guilt; and (2) she would keep an open mind regarding appellant's guilt or innocence. The juror made clear, even after subsequent voir dire by defense counsel, that although she had not "totally" made up her mind, she still had the feeling that appellant was probably guilty. (13RT 2721.)

Thus, contrary to respondent's contention, the record does establish that at least one juror was negatively impacted by exposure to pretrial publicity, and appellant has demonstrated a reasonable likelihood that he did not, in fact, receive a fair trial. The erroneous denial of appellant's motion for a change of venue thus requires reversal of the judgment.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT BOTH THE GUILT AND PENALTY PHASES BY ADMITTING INCRIMINATING STATEMENTS ELICITED FROM APPELLANT BY JAILHOUSE INFORMANT ERIC HOLLAND IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

A. Introduction.

Eric Holland, one of appellant's fellow inmates at the Stanislaus County Jail, was facing a slew of fraud and theft charges from various counties when he had his counsel contact the Stanislaus County District Attorney's Office to arrange for Holland to offer information against appellant in return for a favorable deal. Holland's attorney had clearly conveyed Holland's self-interest when he set up the initial meeting. Stanislaus County District Attorney Investigator Fred Antone expressly acknowledged Holland's expectation of benefits at the beginning of his first meeting with Holland: "I understand that you may want to work a deal or something along those lines." (5CT 1218.) That express acknowledgement of Holland's motivation was followed by ten weeks of negotiating, jockeying and maneuvering by both Holland and law enforcement. On one side was the prosecution – expressing a keen interest; suggesting that the deal was possible but difficult to arrange, that whether it would be made

depended on whether the information was worth it, and it would not be offered until the prosecution heard what Holland had to offer; and setting up a mechanism for future interviews. On the other side was Holland – overstating what he had and offering to get more incriminating information and written confessions to sweeten the deal. The end result of this course of negotiation was Holland's elicitation from appellant of incriminating admissions and confessions to (1) the capital case crimes ("Modesto case") and the two previous burglaries of the Rudy residence, which the prosecution introduced at the guilt phase, and (2) a previous homicide committed in San Diego ("San Diego case"), which the prosecution introduced at the penalty phase.

In the opening brief, appellant argued that the trial court erred in denying his motion to suppress Holland's testimony relating his conversations with appellant about the Modesto and San Diego cases, as well as appellant's written confessions and a number of handwritten notes exchanged about the two cases. As argued there, (1) the Stanislaus County District Attorney violated appellant's Sixth Amendment right to counsel by encouraging Holland to elicit the incriminating statements from appellant in return for benefits in his own case; and (2) the trial court committed prejudicial error at both phases of this capital case in denying appellant's motion to exclude this evidence. (See AOB 147-264.)

Respondent contends: (1) The written confessions and notes regarding the Modesto case were properly admitted because Holland was not a police agent; (2) Even if he was a police agent, any error was harmless because the written confession was cumulative to the oral confessions Holland made before Holland contact the district attorney; and (3) appellant had no right to counsel as to the San Diego case at the time he

made the oral and written admissions as to that case. (RB 60, 66-67, 69-70.) All lack merit.

B. Substantial Evidence Established That Holland Was Acting As A Government Agent.

Respondent does not dispute that: (1) Holland deliberately elicited incriminating admissions and confessions, both oral and written, from appellant in order to make a deal on his own pending charges; (2) Holland asked for a deal and made it clear that he wanted a quid pro quo in exchange for providing evidence against appellant; (3) Holland did, in fact, receive the deal he wanted in exchange for eliciting statements from appellant; and (4) Holland did not receive the written confessions to the Modesto and San Diego cases until after the second interview with Investigator Antone. (RB 66-70.) Where appellant and respondent part ways, however, is on the issue of agency and how much Holland knew before he first met with the prosecution.

Respondent contends that the trial court correctly determined that Holland was not acting as a government agent when he elicited the incriminating information from appellant. (RB 66-69.) The portion of Respondent's Brief that purports to justify the trial court's denial of the motion (RB 66-69) is not particularly helpful to this Court's resolution of the issue because it does not specifically address the findings of fact by the trial court, which are entitled to this Court's deference *if* supported by substantial evidence. Respondent instead argues only that "the trial court was correct in determining that Holland was not acting as a government agent when he elicited the incriminating information from Johnsen." (RB 67.) That, however, is a legal conclusion subject to this Court's independent review. (*People v. Memro* (1995) 11 Cal.4th 786, 846 [Upon review of an unsuccessful motion to exclude evidence, the reviewing court

defers to the trial court's factual findings if they are supported by substantial evidence, but independently reviews the court's legal conclusions].)

Counsel for appellant expended considerable effort in the Opening Brief to break down the trial court's ruling into its component findings of fact and conclusions of law. Respondent, however, has elected not to follow that format and instead simply summarizes the evidence presented and argues the ultimate correctness of the trial court's ruling without analyzing the trial court's factual findings for substantial evidence or its ultimate conclusion based on the facts actually established. For this reason, appellant has organized this portion of the Reply Brief into a concluding summary of the trial court's findings of fact accompanied by argument as to whether they are supported by substantial evidence, and if not, what the substantial evidence does show. Appellant then argues for this Court's independent consideration of whether the facts actually established require a conclusion that appellant's right to counsel was violated.

The Trial Court's Factual Findings

1. "[T]he 14 page confession dated July 4th, 1992 [the Modesto case confession]. And while this confession is written out, and dated that date didn't exist prior to the June 26th meeting or the July 3rd meeting." (2RT 352.) Finding of fact, which is correct.

As explained in the opening brief, that factual finding applies with equal force to the San Diego case confession.[8] (See AOB 236-238.)

[8] The trial court did not make any determination regarding when Holland obtained the San Diego case confession. (2RT 351-356.) Respondent does not dispute that Holland did not receive the written confessions until after his second interview with Holland. (RB 70.)

2. "As of the June 26th, 1992 meeting, Mr. Holland basically had the information against Mr. Johnsen. He had notes, he had been talking with Mr. Johnsen, it wasn't anything that the police had set up." (2RT 352.) Findings of fact, which are not supported by substantial evidence.

These findings of fact were based solely on that portion of Holland's testimony where he claimed to know all the information contained in both confessions and claimed to possess all the notes before June 26. (1RT 250, 253.) However, that claim was soundly refuted by the record, as demonstrated in great detail at pages 239-249 of the opening brief, and conspicuously ignored by respondent. (See RB 70.) Detailed examination of the Modesto case notes proves that the majority of them were written after June 26.[9] And examination of Holland's statements during his June 26 and July 3 interviews with Investigator Antone and his September 4 and 17 police interviews shows beyond dispute that (1) he did not learn the details of the San Diego homicide until after June 26; and (2) as of that date, he had heard only two early versions of the capital case crime which were disavowed by the prosecution at trial and he knew only a few details of that crime. Holland's statements during those interviews also refute Holland's claim that he possessed his own notes of the Modesto crime prior to June 26. As demonstrated in the opening brief, the record contains no credible evidence to support the claim that Holland knew everything about the two crimes before he met with the prosecution. (See AOB 239-249.)

3. "Obviously there is some self-interest involved in the case. It's a mixture of the two. But appears to me that it was an ethically

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[9] The objective analysis contained in Appendix E to the AOB establishes that that only three of the Modesto case notes (notes ##2, 20, and 34) were written before June 26. (See Appendix E, at pp. 075-077.)

motivated, as well as his interest in working a deal for himself, apparently." (2RT 353.) Finding of fact, which is partially correct.

As discussed in detail in the opening brief, there was substantial evidence to support the trial court's finding that Holland was motivated by his interest in working a deal for himself. (See AOB 184-187, 191-192.) Holland asked for a deal on June 26 and made it clear that he wanted a *quid pro quo* in exchange for informing against appellant. (*Ibid*.) In fact, review of the transcript of the first meeting between Holland and Investigator Antone makes it clear that Holland's main motivation was his desire to work a deal. His so-called "good citizen" motive was simply a response to Investigator Antone's offer of an alternative suggestion that he might also be coming forth as a good citizen:

> Antone: I understand that you may want to work a deal or something along those lines. Is that correct?
>
> Holland: Um, well at first….
>
> Antone: Or just being a good citizen and want to come forward with this? Or…
>
> Holland: Ok, well, my, my main purpose isn't making a deal. My main purpose is that if I testify, uh, I, I, don't want go to a CDC because I, I'm not gonna fuckin last very long. Ok? And because of the way that um, my charges, I'm already on federal prison.

(5CT 1218.) Immediately thereafter, Holland complained that the district attorney reneged on a prior deal to make his county cases concurrent with his federal cases, and it became clear that what Holland was angling for was a deal on his multiple county cases that would get him out of state custody simultaneously with the expiration of his federal sentence. (5CT 1219, 1224; see also 5CT 1246, 1248-1251, 1283.) Although Holland denied that was his motivation, claiming that he "just wanted to give

everything to the district attorney" and "didn't ask for anything" (1RT 198-199), his actions belied that denial: (1) he spent the majority of the June 26 interview describing the deal that he wanted and various conditions which had to be met before he would turn over his information (5 CT 1218-1242); (2) during the July 3 interview, he wanted assurance that the authorities would not use his information until the deal was done, and he refused to provide much of his information, or to turn over any documents until he knew that that condition was met (5CT 1246, 1254, 1256-1257); and (3) after the June 26 interview, Holland called Investigator Antone roughly a dozen times to discuss the status of the deal. (See 1RT 290-291.)

On this record, appellant could argue there is not substantial evidence to support any finding that Holland was motivated by a desire to be a good citizen. But given the factual finding that Holland was also motivated by his desire to cut a deal, it matters not, for purpose of the legal argument here, whether Holland also had some ethical interest. It cannot be doubted that his main motivation – indeed, the desire which drove his negotiations with the prosecution – was to get a deal that would resolve all of his pending county cases.

4. "At that meeting [June 26], Mr. Antone indicated that he was interested." (2RT 352.) Finding of fact, which is correct.

5. "He [Antone] did not instruct him [Holland] to elicit the information." (2RT 352.) Finding of fact, which is correct.

6. "Mr. Antone told him that he wasn't to consider himself a police agent." (2RT 354.) Finding of fact, which is correct.

7. "We don't have any payment of money in this particular case." "We don't have a paid informant here." (2RT 354-355.) Findings of fact, which are correct. Holland was not paid cash to elicit statements from appellant.

8. Holland was no more than a fellow inmate. (2RT 355.) Finding of fact, which is correct.

9. "[A]t that point [June 26] there were no inducements made to him [Holland] to do this." (2RT 353.) Finding of fact, which is not supported by substantial evidence.

As discussed in the opening brief in at pages 193-199, Investigator Antone gave Holland incentives to extract incriminating information from appellant and permission to continue his ruse to do so. During the June 26 interview, Investigator Antone made it clear to Holland that the only way he could get help from the prosecution on his own case was to bring helpful information against appellant. Investigator Antone opened that interview by advising Holland that the purpose of that interview was for him to get enough information so that the District Attorney's Office could make a determination regarding the deal Holland wanted. (5CT 1218.) Antone told Holland that he was "definitely" interested in what Holland was offering and that they would "get further into what's gonna be offered" during further meetings, which would be considered an "ongoing investigation." (5CT 1228-1233.) Antone inquired regarding the status of Holland's pending charges and discussed with Holland's attorney whether Holland's case could be put on hold long enough to attempt to put a deal together. (5CT 1223-1224, 1233, 1236-1237.) Antone told Holland that he would be dealing with Antone from that point on, and their further meetings would be held away from the jail. (5CT 1236-1237.)

Antone's statements that he was "definitely interested" in what Holland was offering them, and that they would "get further into what's gonna be offered" by Holland during the "ongoing" investigation, plus Antone's arrangement for future interviews and his discussion with Holland's counsel about whether Holland's case could be placed on hold long enough to attempt to put a deal together, all indicated that a deal was possible. Antone did avoid, on one occasion, a direct answer to Holland's question whether he thought they could get the deal done. However, Antone's statement that something would be resolved one way or the other, when considered with his other statements, would have been understood by any reasonable listener as dangling the possibility of the deal that Holland desperately wanted, so long as he would be able to provide useful incriminating evidence against appellant. Under these circumstances, the only reasonable inference is that Holland expected a quid pro quo and that the District Attorney's Office encouraged that expectation. By the end of the June 26 interview, the Stanislaus County District Attorney's Office thus provided incentives to Holland to provide information.

But, as shown in the opening brief at pages 195-196, the prosecution provided more than incentives on June 26; it gave Holland permission to continue his ruse in order to obtain more incriminating information. Antone assured Holland that he would not be prosecuted for "leading" appellant on in order to obtaining information from appellant. When Holland stated he was going to obtain information from appellant about a murder case involving his girlfriend and asked whether that information "would have any pertinence," Antone responded that he did not want anything construed that he said "it would be ok," but he did not "see … there's anything wrong with that." (5CT 1239-1240.)

As discussed in the opening brief, the incentives provided by Antone during the June 26th interview encouraged Holland to elicit additional incriminating statements from appellant. When Holland asked about when his information would be turned over to appellant's counsel as discovery, Antone responded, "what we're doing is considered *ongoing investigation*," and thus, the information would not have to be turned over until "it reaches a point where it's done." (5CT 1228, emphasis added.) Antone further explained: "But if, if we have an *ongoing investigation where something is actively occurring*, we're not going to discover that to him." (5CT 1229, emphasis added.)

These statements informing Holland that he was part of an ongoing investigation obviously contemplated that Holland's efforts to obtain incriminating statements from appellant would also be ongoing. Furthermore, near the end of the interview, shortly after telling Holland that "you'll be dealing with me *from now on*," Antone agreed that they would have "more discussions" but that "I think I have enough [information] *at this point*" so that he could "at least go back to, to Mr. Fontan. . . ." (5CT 1237.) Holland interrupted and asked if Mickey was being charged (*ibid.*), and Antone responded that Mickey had not been charged yet, though it was possible he could be, but that decision would be independent "of anything that you have told me *or will tell me.*" (5CT 1238.) Here, again, Antone's statements about "from now on," "at this point," and "will tell me" all supported the "ongoing investigation" message and told Holland that his role in eliciting information was yet not over. As the highlighted words clearly indicate, Antone was communicating that he was expecting Holland to "tell" him, in future interviews, further incriminating information from appellant.

Accordingly, the trial court's finding of fact that the prosecution made no inducements is not supported by substantial evidence. The prosecution dangled a deal, which encouraged Holland to obtain confessions from appellant.

10. "I don't think we have … any kind of a deal where Mr. Holland is working off something, or trying to get something." (2RT 355.) Finding of fact, which is not supported by substantial evidence.

The record shows that based on the prosecution's assurances and promises, Holland had an ongoing expectation that he would receive benefits in exchange for his information. As discussed in detail in the opening brief, after meeting with Investigator Antone on June 26 and describing the deal he wanted, Holland received assurances from the prosecution that it was "definitely interested" and the deal was possible, as well as a promise that the prosecution would pursue securing it. (See AOB 191-199.) From June 26 on – until the deal was finally consummated on September 4 with Holland's signing of the plea agreement, Holland obtained incriminating confessions from appellant in order to obtain the deal the State was dangling in front of him. (See AOB 208-211.)

Although Holland did not sign the deal agreement until September 4, it was clear that prior to that date, he anticipated receiving his deal and relied upon the prosecution's inducements regarding their intent to pursue it. Holland testified that prior to his actual signing of the agreement, he had several conversations with Investigator Antone and other law enforcement officers regarding the specifics of the deal and he had expected to receive

the deal. (1 RT 219-220.) Holland also testified that he was told beforehand that the deal was going to happen.[10]

Moreover, Holland's behavior evidenced his belief that he was going to receive the deal. When the detectives arrived with a search warrant on September 4, Holland told them that he had all of the written documents – the notes and the confessions – ready for them: "Everything all well you can see I mean I had it all ready for you I mean this all bundled up ready to go I mean I was ready to get this done." (5 CT 1359.) Holland's continued

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[10]

> Question: And you signed that [referring to deal agreement] on what date?
>
> Holland: September 3rd or September – no, September 4th.
>
> Question: Now, prior to that time, were there any agreements between the – between the district attorney's office and yourself?
>
> Holland: Well, there was all kind of verbal agreements that came down to this.
>
> Question: Like what?
>
> Holland: It's in here. Just never came to pass.
>
> Questions: Are you – are you saying that you had actually entered into an Agreement before September 4th?
>
> Holland: No. I'm saying that there was verbally things that were going to take place, but it didn't happen until this. . . . *I was told this was going to be the agreement*. But things just kept going on and on and on. There was obstacles in the way of this taking place, I guess.

(1RT 259, emphasis added.)

interviews with Investigator Antone and his continual telephone calls to him inquiring about the status of the deal also demonstrate that based on the State's inducements, Holland had an ongoing expectation that he would receive benefits in exchange for his information. (1 RT 290-291.)

11. "And it seems to me the deal was struck after the information was obtained." (2RT 353.) "I don't think any deal was struck till later in September." Findings of fact, which are partially correct.

As discussed above under fact finding number 10, although Holland did not sign the deal agreement until September 4, it was clear that prior to that date, he received inducements, assurances, and promises that the prosecution would pursue the deal. And, in anticipation of receiving that deal and in reliance on the prosecution's inducements, Holland obtained confessions from appellant.

12. "Mr. Holland wouldn't give him the information, and in fact they had to serve a search warrant to get it." (2RT 353.) Finding of fact, which is correct.

13. "Mr. Grogan testified that he never directed anyone at the jail regarding Holland's housing and the person from the jail testified as to the independence of the jail with regard to that subject." (2RT 354.) Finding of fact, which is correct.

14. "They did tell Mr. Holland, Mr. Antone told him that he would be moved when they got the papers and notes." (2RT 353.) Finding of fact, which is correct.

15. "There was no conditioning of the move of Mr. Holland by Mr. Antone." (2RT 354.) Finding of fact, which is not supported by substantial evidence.

The court ignored the following statement by Antone which made it clear that his promise to move was conditional. Antone specifically told Holland: "A couple of things that you need to understand. Number one is, again, *once you have given us everything that you think you can . . .* everything you know, you're gonna be moved." (5 CT 1257 [7/3/92 Interview].) As discussed in the opening brief at page 202, the highlighted language told Holland that he first had to extract all possible information from appellant. The court, however, ignored this evidence which demonstrated the condition placed by the district attorney's office on its promise to move Holland.

The trial court thus relied on the following factual findings to support its legal conclusion that Holland was not acting as an agent of the State after either the June 26 or July 3 interviews: (1) Holland acted from a mixture of motives – he was ethically motivated, as well as interested in working a deal for himself; (2) Holland was no more than a fellow inmate; (3) Holland was not a paid informant – he was not paid cash to elicit statements from appellant; (4) Antone did not instruct Holland to elicit information; (5) Antone told Holland he was not to consider himself a police agent; (6) Antone told Holland that he was interested; (7) the prosecution made no inducements to Holland to elicit information; (8) there was no deal where Holland was working off something or trying to get something; (9) the deal was not struck until after the information was obtained; (10) there was no evidence that the police had any involvement in Holland's continued housing next to appellant's cell; (11) the prosecution did tell Holland that he would be moved when they got the

papers and notes; (12) there was no conditioning of that move by Antone; (13) Holland would not give his documents to the authorities and they had to serve a search warrant to obtain them; (14) the 14-page Modesto case confession did not exist prior to Holland's first two meetings with the prosecution; and (15) prior to his first meeting with the prosecution, Holland had obtained basically all the information against appellant. The State merely echoes those reasons. (RB 68.)

As shown above, the seventh, eighth, twelfth, and fifteenth findings of fact are not supported by substantial evidence. Rather, the substantial evidence showed that at the June 26 meeting, the prosecution gave incentives to Holland to extract incriminating evidence from appellant and permission to continue his ruse to do so. The substantial evidence also showed that based on the prosecution's assurances and promises, Holland had an ongoing expectation that he would receive benefits in exchange for his information; and that in anticipation of receiving his deal and in reliance on the prosecution's inducements, Holland obtained confessions from appellant. And the substantial evidence showed that prior to his first meeting with the prosecution, Holland did not learn the details of the Holloway homicide, knew only a few details of the capital case homicide and had heard only two early versions of that crime, both which were disavowed by the prosecution at trial.

The third, fourth, fifth, tenth, and thirteenth findings – although factually correct – are legally insufficient to support a conclusion that Holland did not act as an agent; and the ninth reason is only partially correct and legally insufficient. The remaining reasons support a finding of agency in this case.

The third finding of fact (Holland was not a paid-in-cash informant) is legally insufficient to support a conclusion that Holland did not act as an

agent, given that the inducement which motivated him to act was the dangling of a deal which would dispose of his numerous pending charges. The law is clear that an informant need not be paid money to establish agency. Indeed, informants most often cooperate with the State in exchange for help on their own cases, as Holland did here. (See, e.g., *Maine v. Moulton* (1985) 474 U.S. 159, 163, 176-177, 180 [Sixth Amendment violation found where informant, defendant's codefendant, acted as government informant in exchange for a deal]; *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133 [Informant's hope to receive leniency in his own case in exchange for providing useful information against defendant established agency].) It is the expectation of benefits arising from police encouragement that creates the agency relationship. The key issue is whether Holland acted "with the expectation of some resulting benefit or advantage." (*In re Neely* (1993) 6 Cal.4th 901, 915.) As discussed here and in the opening brief, there is no question but that he obtained the incriminating statements and written confessions with the hope and expectation of getting a deal.

The fourth finding (Antone did not instruct Holland to elicit information) is also legally insufficient. As explained in the opening brief, an agency relationship does not require the State to direct an informant to obtain incriminating information. *Massiah* is also violated when the State has encouraged the informant to elicit incriminating statements. (See AOB 212; *In re Neely*, *supra*, 6 Cal.4th at p. 915.) As discussed here and in the opening brief, Investigator Antone provided powerful inducements for Holland to elicit incriminating statements from appellant and returned him to his cell next to appellant, knowing that Holland would continue his ruse to do so. By analogy, Antone treated Holland like a bounty hunter, an

independent contractor who would be rewarded for bringing in incriminating evidence as to appellant.

The fifth finding (Antone told Holland he was not to consider himself a police agent), too, is legally insufficient. In the opening brief at pages 202-208, appellant has explained why this statement did not shield the State from its responsibility for its knowing exploitation of Holland's extraction of information from appellant after providing incentives for Holland to do so. As discussed there, the Supreme Court has rejected similar attempts by the State to divorce itself from an informant's action by such admonishments when it knows that the informant intends to extract incriminating evidence and provides incentives for him to do so. (*United States v. Henry* (1980) 447 U.S. 264, 266 [rejecting officer's disclaimers that he had instructed informer not to question Henry as irrelevant, stating: "Even if the [officer's] statement that he did not intend that Nichols take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result."]; *Maine v. Moulton*, *supra*, 474 U.S. at p. 177, fn. 14 [Court rejects argument that state took steps to prevent informant from inducing defendant to make incriminating statements by instructing the informant not to interrogate him, finding such instruction to be inadequate where the State's officers -- aware that the informant and Moulton were expressly meeting to discuss their upcoming trial and pending charges -- asked the informant to wear a body wire transmitter to record their conversation].) Here, the prosecution, with knowledge that Holland intended to continue extracting information from appellant, provided inducements for him to do precisely that and gave him permission to continue his ruse to do so. (See AOB 202-206.) Notably, Holland responded to Antone's admonishments as it they were mere formalities. (See AOB 206.)

The ninth reason (that the deal was not struck until after the information was obtained) is only partially correct and is legally insufficient to support a conclusion that Holland did not act as an agent. As discussed in the opening brief at pages 231-232, although Holland did not sign the deal agreement until September 4, from June 26 on, he had been obtaining incriminating information from appellant in expectation of receiving the deal that the prosecution dangled in front of him. A deal need not be struck before an informant can become an agent. (*Randolph v. California*, *supra*, 380 F.3d at p. 1144 [An explicit deal or agreement is not necessary to a finding that an informer acted as an agent of the State; what matters is the relationship between the informant and the State, and whether the informant cooperated with the State in the expectation of receiving benefits].) The decisive questions are: (1) did the State create inducements for the Holland to elicit incriminating statements? and (2) did the State encourage Holland to provide information and insinuate that to do so would be to his benefit? As demonstrated above and in the opening brief at pages 193-199, 212-228, the State did both in this case. Thus, the fact that the deal agreement was not signed until after Holland obtained the information and the authorities obtained the written documents, is legally insufficient to support a conclusion that Holland did not become an agent of the State. From June 26 on, Holland and the Stanislaus County District Attorney's Office behaved as though there was an agreement between them – that Holland would provide evidence against appellant in exchange for leniency on his own pending charges.

The tenth finding (there was no evidence that the police had any involvement in Holland's continued housing next to appellant's cell) does not support a conclusion that Holland did not act as the State's agent after June 26. Although the trial court was correct in its finding of no evidence to

show the authorities' responsibility for Holland's continued housing next to appellant's cell, the court failed to consider that the Stanislaus County District Attorney's Office knew (1) Holland was continually housed in the cell next to appellant; and (2) Holland would continue his ruse and elicitation of incriminating statements from appellant, while the district attorney's office pursued making the deal. (See AOB 199-202.)

The thirteenth finding (that Holland would not give his documents to the authorities and they had to serve a search warrant) is also legally insufficient. Holland's refusal to turn over documents was merely a conditional refusal intended to secure his deal. At the hearing on the motion to suppress, Holland testified that he was not going to turn over the signed confession until the deal was done. (1 RT 197-199, 264.) As Holland had explained to Antone, he wanted to protect his deal by making sure that the authorities could not use any of his evidence until the deal was done. (5 CT 1254, 1256-1257 [7/3/92 Interview].) This is not inconsistent with a finding of agency. As demonstrated at pages 185-187 and 208-210 of the opening brief, it was clear that after June 26, Holland was working to "sweeten" his side of the deal, and that he elicited incriminating evidence from appellant so as to make the deal "worth it" to the prosecution. The fact that Holland did not want to turn over his documents until the deal was agreed to does not negate the fact that when he obtained the incriminating evidence, he did so in response to the State's inducements. In fact, at one point during the hearing, the court agreed that the authorities' seizure of Holland's notes and confession did not negate a finding that Holland was acting as a state agent. (1RT 275.)

Independent consideration of the facts supported by substantial evidence in this case requires a conclusion that Holland acted as an agent of the State in eliciting appellant's confessions. As established in the opening

brief, although the prosecution did not set up the initial interaction between appellant and Holland, it certainly took advantage of the situation created by Holland. In contacting the district attorney to set up a meeting, Holland's attorney Rozelle began the negotiations for Holland, and the prosecution then became invested in and began participating in the agency process. When Holland approached the district attorney's office with some information about appellant's case and made it clear that he wanted a deal in return, Investigator Antone encouraged Holland to understand that a deal was possible, but that it would be difficult to make and whether the prosecution would offer a deal of that difficulty depended on whether the information was "worth it." And when Holland stated that he intended to obtain more evidence from appellant, Antone did not tell him to refrain from initiating conversations with, or questioning, appellant. Instead, he responded that he didn't see anything wrong with that and gave Holland permission to continue his ruse in order to continue obtaining incriminating evidence. Antone then had Holland returned to his cell, knowing that Holland would, in fact, continue to extract statements from appellant. (See AOB 193-197, 199-208.)

These undisputed facts show that the prosecution provided inducements for Holland to extract as much information as possible to increase his chances of obtaining what the State described as a difficult deal to arrange. At the very least, the prosecution "must have known" that Holland was likely to obtain further incriminating statements from appellant because of the prospect of getting a deal. Just as in *Randolph v. California*, *supra*, 380 F.3d 1133, the prosecution knew that Holland was desperately trying to obtain a deal and that, encouraged to believe a deal was feasible, he proceeded to extract evidence from appellant to sweeten his offering. In returning Holland to his cell under these circumstances, the

prosecution intentionally created a situation likely to induce Holland to make incriminating statements without counsel's assistance. (*Randolph v. California*, *supra*, at p. 1146.) This was a knowing exploitation of an opportunity to confront appellant without counsel under *Maine v. Moulton*, *supra*, 474 U.S. 159, and thus a Sixth Amendment violation.

As demonstrated in the opening brief, this case cannot be meaningfully distinguished from *Randolph v. California*, *supra*, and under its reasoning, a finding of agency is compelled here. (See AOB 215-218.) Respondent argues that *Randolph* is distinguishable because although there was no explicit deal under which the defendant there was promised compensation for his testimony, it was clear that he hoped to receive leniency. (RB 69, quoting *Randolph v. California*, *supra*, 380 F.3d at p. 1144.) Respondent argues this case is different because the trial court found that Holland's motives were mixed and "it was not clear that Holland hoped to receive leniency in exchange for eliciting additional information from Johnsen rather than in exchange for the information that he had already received from Johnsen." (RB 69.)

That is nonsense. Whether or not Holland tried to mix in some altruistic motive along with his clear intent to work a deal to resolve his own legal problems is irrelevant. As found by the trial court, Holland was motivated by "his interest in working a deal for himself." (2RT 353.) Holland's agenda from the get-go was to obtain a deal to resolve all of his pending felony charges without having to go to state prison – and he was willing to build a case against appellant and put together a confession in order to obtain it. (See AOB 184-187, 191-192.)

Furthermore, examination of Holland's statements to Investigator Antone during their recorded meetings leaves no room to doubt that Holland's decision to obtain additional information was in the hope of

making his offer good enough to warrant the difficult deal he desperately sought. (5CT 1239 [6/26/92 Interview [Holland tells Antone that he is going to learn about appellant's involvement in another murder case and inquires whether that would be pertinent]; 5CT 1248, 1287 [7/3/92 Interview] [After Antone explains how difficult it would be to put the deal together and they would have to determine if Holland's information was worth it before it was done, Holland inquires whether California had a death penalty, if premeditated murder was a death penalty crime, and what if appellant wrote and signed a confession]; 5CT 1294 [7/3/92 Interview] [Holland tells Antone that he wanted to get the Modesto case confession for "you people (referring to prosecution]; 5CT 1297-1298 [7/3/92 Interview] [Holland tells Antone that he is "on the brink to where um I've got access to both the confessions" and inquires whether it would be pertinent to the case to have appellant write an agreement of why he is providing the information and to say he wants Holland to kill witnesses].) There is no question but that when Holland asked Antone whether obtaining some additional information would be "pertinent," he was asking whether it would help him cinch the deal. The record clearly establishes that after meeting with Investigator Antone, Holland continued his ruse to obtain additional incriminating evidence from appellant in order to get his deal.

Accordingly, for the reasons stated here and in the opening brief, this Court should find that in eliciting appellant's oral statements and written confessions, Holland acted as an agent of the State in violation of the principles set forth in *Massiah*.[11]

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[11] *Massiah v. United States* (1964) 377 U.S. 201.

C. Appellant's Sixth Amendment Right To Counsel Did Protect His Statements Concerning The Holloway Murder, Which Were Introduced At The Penalty Phase To Prove Factor (B) Criminal Activity.

Respondent argues that the trial court did not err in failing to suppress his statements concerning the murder of Terry Holloway, because his Sixth Amendment rights had not attached to that offense. (RB 66-67.) It is true, as respondent points out, that the Sixth Amendment right to counsel at issue in a *Massiah* claim "is offense specific" and "does not attach until a prosecution is commenced." (*Ibid*., citing *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175, and *People v. Thornton* (2007) 41 Cal.4th 391, 434; see also *Texas v. Cobb* (2001) 532 U.S. 162 and *People v. Webb* (1994) 6 Cal.4th 494, 524-528, discussed below.) Respondent recognizes that appellant's Sixth Amendment right had attached to the Modesto case capital charges. (RB 67.) It contends, however, that because appellant has not demonstrated that a prosecution had commenced against him as to the murder of Terry Holloway, his Sixth Amendment right did not protect against police informer interrogation concerning that criminal activity. (*Ibid*.) Respondent fails to acknowledge that a capital prosecution entails a prosecutorial investigation and presentation of evidence in aggravation, which the Holloway certainly was. (*Ibid*.)

Appellant is seeking to suppress his statements regarding the Holloway murder, because they were elicited as part of a unitary prosecutorial investigation of evidence of guilt as to the Bragg murder and attempted murder and evidence in aggravation of those crimes. The police investigation in a capital prosecution has two components -- finding and producing evidence of guilt and finding and producing evidence in aggravation. Both are equally important to a capital prosecution, and a capital defendant has a right to counsel to defend against the evidence at

both stages of a capital prosecution. As recognized by the American Bar Association in 1989, counsel appointed in any case in which the death penalty is a possible punishment must immediately upon counsel's entry into the case conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital case. (*American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), Guideline 11.4.1.) Such investigation must comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (*Ibid*.)

Here, the evidence of the Holloway murder was viewed from the outset as aggravating evidence in a pending capital prosecution. Holland wanted to get a confession to that murder, knowing that if he produced evidence to make the prosecution's penalty case stronger, he would have more leverage in negotiating the terms of his deal. Where, as here, evidence of another crime is produced for and used as aggravating evidence in a pending capital prosecution, the same Sixth Amendment right that attaches to the guilt phase evidence also attaches to the penalty phase aggravating evidence. This is because the prosecution is conducting the same investigation – a simultaneous investigation as to guilt and penalty evidence.

Suppose Investigator Antone had gone directly to appellant in the county jail and said, "I don't want to talk to you about the crimes against the Braggs because we have you dead to rights on that; rather, I want to talk to you about how much aggravation is out there so I can make an intelligent decision whether to make your Modesto case into a full-on death penalty prosecution. Let's start with poor Ms. Holloway." That scenario clearly demonstrates a *Massiah* violation because Investigator Antone was

expressly gathering evidence for the penalty phase of the Modesto capital murder case after appellant's right to counsel had attached. The result should not be different simply because Antone was working through an informant.

The fallacy of respondent's position is further demonstrated by an analogy under Evidence Code section 1108. Suppose an elementary school teacher was charged with one count of child molestation, and the teacher told police that the child had misinterpreted the teacher's efforts to tend to a playground injury. If the investigating officer then approached the now-represented teacher to question him about similar reports from other children to use as section 1108 evidence, that would also be a clear *Massiah* violation.

Accordingly, appellant's right to counsel, which had attached to the capital prosecution, protected statements elicited in response to each and every part of that prosecution, including the Holloway murder which was being investigated as potential aggravating evidence to present at the penalty phase. This situation is markedly different from the situations in *Texas v. Cobb* or *People v. Webb*, where the Supreme Court and this Court confronted situations involving new prosecutions of uncharged offenses.

In *Texas v. Cobb*, *supra*, 532 U.S. 162, the defendant, who had been indicted for the burglary of a residence, thereafter confessed to killing the home's occupants. The Texas Court of Criminal Appeals reversed on the basis that his confession to the murders was obtained in violation of his Sixth Amendment right to counsel, which had attached when counsel was appointed in the burglary case. (*Texas v. Cobb, supra,* at pp. 166-167.) The Supreme Court reversed, holding that Cobb's Sixth Amendment right did not attach to the new prosecution. The Sixth Amendment right to counsel is offense-specific and attaches only to charged offenses. (*Id*. at pp. 167-168.)

The Supreme Court refused to find an exception for uncharged crimes that are factually related to a charged offense. In so holding, the Court, while recognizing that "[t]he police have an interest in the thorough investigation of crimes for which *formal charges* have already been filed," emphasized that "[i]n seeking evidence pertaining to *pending charges,* however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused." (*Texas v. Cobb*, *supra*, 532 U.S. at p. 170.)

Similarly, in *People v. Webb*, *supra*, 6 Cal.4th at pages 524-528, where counsel had been appointed to represent the defendant in a drug and/or parole violation case, this Court refused to extend his Sixth Amendment right which had attached to those charges to statements concerning an uncharged, unrelated capital offense. As in *Texas v. Cobb*, this Court refused to do so because the Sixth Amendment right to counsel is "'offense-specific,' i.e., it attaches only to those offenses for which adversary proceedings have begun." (*People v. Webb, supra,* at p. 527.) Because Webb was not arrested on capital charges until after his statements were obtained, this Court found that his Sixth Amendment rights had not yet attached to the capital case and "[no] contrary conclusion is compelled by the fact that defendant had already been charged, incarcerated, and appointed counsel on wholly unrelated offenses." (*Ibid*.)

Thus, both *Texas v. Cobb* and *People v. Webb* involved new prosecutions of uncharged offenses whereas here, the evidence was solicited as part of the capital prosecution to be introduced against appellant in aggravation of the capital offense. Neither of those two cases govern the situation in this case involving investigation and presentation of evidence in one capital prosecution involving joint presentations of guilt and penalty evidence. In sum, because the prosecution obtained appellant's statements concerning the Holloway homicide as evidence to use in its capital case, to

which appellant's Sixth Amendment right to counsel had attached, the statements were protected. Respondent's claim to the contrary must be rejected.

D. This Error Was Prejudicial At Both The Guilt And Penalty Phases.

1. Guilt.

Respondent acknowledges that *Chapman's*[12] harmless beyond a reasonable doubt standard is applicable here. (RB 69.) Under *Chapman*, the inquiry is not "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Rather, this Court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Ibid*.)

Respondent's primary argument as to harmless error is that "Holland testified that Johnsen had already told him all of the information contained in the written confession before Holland first met with the prosecution team" (RB 70, citing 1 RT 250–251), and contending that "[a]s a result, all of the information was admissible, albeit not in the form of the written confession that Holland received from Johnsen after July 3, 1992." (*Ibid*.) The three most egregious flaws in respondent's argument are:

1. Holland's testimony that Johnsen had told him everything prior to June 26, 1993, was patently false, as demonstrated in great detail at pages 250–251 of the opening brief, and conspicuously ignored by respondent. The objective analysis contained in the opening brief's

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[12] *Chapman v. California* (1967) 386 U.S. 18, 24.

Appendix E establishes that that only three notes (notes ##2, 20, and 34) were written before June 26 (see Appendix E, at pages 075-077);

2. Holland's testimony standing on its own was patently unreliable and unconvincing given his motive to falsely incriminate appellant for his own benefit, as the trial prosecutor candidly acknowledged -- Holland was "a con artist and a thief…[t]here's no question about that," (20 RT 4452), and as argued at pp. 253–254 of the AOB and ignored by respondent. Respondent's suggestion that the jury would have given equal or at least comparable credence to Holland's uncorroborated testimony about pre-June 26 conversations with appellant as the jury gave to the subsequent hand-written confessions is fanciful; and

3. The trial prosecutor put all of his argumentative emphasis on the two written confessions and never once urged the jury to convict on the basis of Holland's testimony about pre-June 26 conversations, as set forth in detail at pages 252–253 of the opening brief and entirely ignored by respondent. Given that the prosecutor spent 47 of the 66 transcript pages of closing statement quoting and arguing the line-by-line incriminating import of appellant's hand-written confession, respondent's reliance on Holland's testimony about earlier oral admissions by appellant as a harmless error cure is risible.

In addition, there is a significant omission in respondent's prejudice analysis. It offers a conclusion that the error was harmless because other evidence sufficiently corroborated appellant's involvement in the murder (RB 70), yet ignores the affirmative prejudice analysis in appellant's opening brief at pages 256-260, which demonstrates otherwise. As discussed there, the jurors had ample reason to discount much of the DNA evidence and Mickey Landrum's testimony. Moreover, even had the jurors credited the DNA and witness testimony, that evidence only got the

prosecution so far in proving its case. It was the confession which the prosecution relied upon to establish (1) the elements of first degree murder; (2) the elements of first degree felony-murder; (3) the elements of the special circumstance allegations; (4) the elements of attempted murder; and (5) the elements of the robberies. Indeed, the prosecutor admitted to the court and counsel that he needed the confession to prove the special circumstance allegations and first degree murder. (20RT 4287-4288.) All this, respondent ignores.

2. Penalty.

Respondent also omits any response to appellant's affirmative prejudice showing as to penalty. As discussed in the opening brief at pages 260-264, the prosecutor relied on the confessions to argue and establish the aggravated natures of the Modesto capital case homicide and the Holloway homicide. Given that these two homicides constituted the backbone of the State's case for death, respondent cannot, and has not, argued that the death verdict in this case "was surely unattributable to the error." *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Accordingly, for all the reasons set forth in the opening brief, as well as in this brief, the prosecution cannot establish beyond a reasonable doubt that (1) the evidence of appellant's confession to the Modesto capital crime did not contribute to the guilt-phase verdict; and (2) evidence of that confession and his further confession to complicity in the gruesome death of his girlfriend, who was pregnant with his child, did not contribute to the death verdict.

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III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT, SUA SPONTE, REGARDING THE UNRELIABILITY OF ACCOMPLICE TESTIMONY AND THE REQUIREMENT OF CORROBORATION OF THE TESTIMONY OF AN ACCOMPLICE.

A. Introduction.

In the opening brief, appellant argued that the trial court committed reversible error in failing to instruct, sua sponte, on the law of accomplices with respect to all charged offenses – the burglary, robbery, attempted murder, murder and special circumstance (burglary-murder and robbery-murder) charges. Specifically, the trial court erred in failing to instruct (1) on the definition of an accomplice (CALJIC No. 3.10); (2) on the requirement that a defendant cannot be found guilty based upon accomplice testimony unless such testimony is corroborated by other evidence (CALJIC No. 3.11; Pen. Code, § 1111); (3) on the sufficiency of corroborative evidence (CALJIC No. 3.12); and (4) on the critical principle that accomplice testimony is to be viewed with distrust (CALJIC No. 3.18). These errors were compounded by the court's instruction with CALJIC No. 2.27 that one witness's testimony was sufficient to prove any fact. (See AOB 265-286.)

Appellant argued that these accomplice instructions were required because there was sufficient evidence from which the jury could conclude that Mickey Landrum was an accomplice in the March 1 murder, attempted murder, robberies, and burglary, as well as the previous two burglaries of the Rudy home on February 15 and September 3. First, there was abundant evidence that Landrum consciously possessed property stolen from the Rudy home on March 1, February 15, and September 3. He admitted that

on two occasions, he knowingly possessed property stolen during all three burglaries at the Rudy residence.[13] Second, Landrum admitted that he attempted to secret some of this stolen property from police officers.[14] Third, Landrum lied about his disposal on a third occasion of a camera stolen during the February 15 burglary.[15] Fourth, Landrum, a drug abuser,[16] who admitted that on at least one occasion he had traded a stolen item for drugs, had ample motivation to commit the burglaries to support his drug habit. And fifth, as detailed in the opening brief, there was direct evidence that Landrum had the opportunity to commit two of the burglaries -- the burglary on February 15 and the burglary on March 1, when the Braggs were attacked.[17] (See AOB 268-277.)

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[13] Landrum admitted that on February 19, 1992, he possessed property that had been stolen on February 15 and on September 3 and that on March 26, he possessed property that had been stolen on March 1 and on September 3). (15RT 3263-32s68, 3272; 16RT 3310-1311, 3279-3280, 3297, 3441-3444; 18RT 3842-3843.)

[14] Landrum testified that on February 19, 1992, he removed property taken during the September 3 and February 3 burglaries from appellant's home in order to avoid its discovery by the police. (15RT 3263.) Knowing the property had been stolen, Landrum first tried to give it to a friend, who refused to take it, and then gave the property to appellant's mother. (15RT 3266-3268, 3272.)

[15] Landrum testified that he traded a camera to Linda Lee for drugs without revealing that it had been stolen, but claimed he did not act alone and that the trade was done by both him and appellant. (16RT 3291.) But Lee, who no friend of appellant and had readily provided damaging testimony against him, testified that the camera had been stolen and that she bought it from Landrum alone. (16RT 3414.)

[16] Landrum acknowledged he was abusing crystal methamphetamine ("crank") at the time. (16RT 3289-90, 3295-3296.)

[17] As to the third burglary (September 3, 1991), the record contains no evidence concerning Landrum's whereabouts on that date.

In sum, the opening brief argued, Landrum was up to his ears in stolen property: on three separate occasions, he possessed property stolen during all three burglaries at the Rudy residence. Despite his attempts to place the blame on appellant, the suspicious circumstances surrounding his possession, in combination with his attempt to hide property from the police, his impeached statement concerning his possession on one of those instances, and his motive and opportunities to commit the crimes, provided sufficient corroboration to support an inference that he was an accomplice in the burglaries.

Respondent does not dispute the following points:

(1) The trial court has a duty to instruct sua sponte on the law of accomplices and to determine whether a witness was an accomplice whenever there is substantial evidence, i.e., evidence sufficient to deserve consideration by the jury, that a witness who implicated the defendant is an accomplice. (RB 71.)

(2) There was abundant evidence that Landrum consciously possessed stolen property stolen during the first and second burglaries at the Rudy home. (RB 72-74.)

Respondent contends, however:

(1) Although there was abundant evidence that Landrum possessed stolen property in violation of Penal Code section 496, this evidence made him liable only as an accessory, not as an accomplice. (RB 73-74.)

(2) There was not substantial evidence that Landrum consciously possessed property stolen during the third burglary. (RB 74.)

(3) There was insufficient evidence from which the jury could conclude that Landrum was involved in the March 1 burglary and attack on the Braggs. (RB 75-76.)

(4) Any instructional error was harmless. (RB 76-79.)

Respondent is wrong on all points.

B. There Was Sufficient Evidence From Which The Jury Could Conclude That Landrum Was An Accomplice, Rather Than An Accessory, In The Three Burglaries.

Respondent argues that there was insufficient evidence from which the jury could have reasonably concluded that Landrum was an accomplice. (RB 73.) According to respondent, the evidence merely showed that Landrum possessed stolen property in violation of Penal Code section 496 and because appellant was not charged with possessing stolen property, that would not make Landrum an accomplice to the "identical offenses charged." (RB 74.) At best, respondent argues, the substantial evidence of Landrum's transfer of stolen and bloody property made Landrum an accessory, but not an accomplice. (*Ibid*.)

Respondent does not dispute that in determining whether there is sufficient evidence to support accomplice instructions, the trial court is required to resolve any doubts in favor of the defendant and may not refuse to instruct on the basis of a credibility assessment. (See AOB 267.) Nor does respondent dispute that (1) conscious possession of recently stolen property, accompanied by corroborating evidence tending to show guilt, permits an inference of guilt, whether the crime charged is theft or burglary; (2) such corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt; and (3) in determining whether there is sufficient corroborating evidence, the jury may consider the time, place and manner of possession, that the witness had an opportunity to commit the charged crime, the witness's conduct such as false or contradictory statements or a false account of how he or she

acquired possession of the stolen property and any other evidence which tends to connect the witness with the crime. (See AOB 270-271.)

Respondent concedes the evidence showed Landrum's conscious possession of property stolen during the first and second burglaries[18] but disputes there was other evidence corroborating his involvement in those burglaries. (RB 74-75.) Respondent ignores Landrum's admission that he removed property stolen during those burglaries in order to avoid their discovery by police officers. (15RT 3263-3268, 3272; 16RT 3310-1311.) This, of course, was sufficient, in and of itself, to permit an inference of his involvement in the burglaries. (*People v. Crotty* (1925) 70 Cal.App. 515, 518-519 [evidence of defendant's possession of stolen property, his evasive actions to avoid police, and his effort to throw away the stolen property was

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[18] Respondent disputes that there was evidence also showing Landrum's possession of property stolen during the third burglary, stating that (1) Lee and Oliver testified that they received the property stolen during the third burglary from appellant and they convinced Landrum's mother to take it; and (2) "Landrum testified without contradiction that he was unaware of the property until three weeks later when his mother asked him to remove the property from her home."(16RT 3279-3281, 3299.)" (RB 74.)

The jury, however, was not required to believe Landrum's exculpatory testimony that he was unaware of the property before his mother asked him to remove it. This was especially so, given contradiction by prosecution witness Linda Lee of Landrum's attempt to blame appellant for another disposal of property stolen from the Rudy residence – the camera. (See discussion, *infra*, at page 58.) Moreover, and more importantly, respondent ignores Landrum's apparently contradictory testimony in response to questioning regarding how the "merchandise" got to his mother's house, that he and appellant took a bag of "merchandise" to his mother's house two to five days after the March 1 burglary. (16RT 3297-3298.) Although Landrum claimed he did not see what was in the bag (16RT 3297), he certainly testified that he and appellant were responsible for taking it to his mother's home.

sufficient to sustain his conviction for theft, despite his testimony providing an exculpatory explanation].)

Respondent also ignores direct evidence, based on Landrum's own testimony, that Landrum had the opportunity to commit the February 15 and March 1 burglaries. (See AOB 273-275.) As noted in the opening brief, such proof of opportunity to commit a charged crime has been held to be sufficient corroboration to support a conviction. Ipso facto, it supports the conclusion that a jury could reasonably conclude Landrum was a principal in the burglaries charged against appellant. (*People v. Mosqueira* (1970) 12 Cal.App.3d 1173,. 1176 [sufficient evidence supports theft conviction where defendant possessed recently stolen wallet and had clear opportunity to commit the theft in that he had access to the car trunk in which the wallet had been locked].)

But this was not all. There was also corroborating evidence that Landrum falsely testified that appellant participated with him in disposing of Rudy's stolen camera. That testimony was impeached by prosecution witness, Linda Lee, who testified that it was Landrum alone who sold her the stolen camera. (16RT 3291, 3414.) (See, e.g., *People v. Garcia* (1924) 68 Cal.App. 131, 133-34 [contradictions of material parts of the defendant's testimony by witnesses for the prosecution, as well as inconsistencies in his testimony, justify the inference that his explanation of his possession of the stolen property was false].) Respondent argues that Landrum's failure to reveal that the camera was stolen cannot be considered false testimony since he was not specifically asked whether the camera was stolen. (RB 75.) But that argument misses the boat. The issue here is that Lee's testimony contradicted Landrum's testimony that appellant participated in disposing of the camera. And respondent fails to acknowledge that uncontroverted fact.

Respondent thus has failed to acknowledge, let alone controvert, three significant corroborating circumstances -- Landrum's admission that he removed property stolen during those burglaries in order to avoid their discovery by police officers, the fact that his testimony accusing appellant of helping to dispose the stolen camera was impeached by the testimony of another prosecution witness, and Landrum's opportunity to commit at least two of the burglaries. As noted in the opening brief, to corroborate conscious possession of stolen property, the corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt. These three circumstances provided more than sufficient corroboration to connect Landrum to the three burglaries. Landrum's conscious possession of stolen property from all three burglaries, when considered with this corroborating evidence tending to show his guilt, provided sufficient evidence from which the jury could conclude that Landrum was not merely an accessory, but an accomplice in all three burglaries.

C. There Was Sufficient Evidence From Which The Jury Could Conclude That Landrum Was Involved In The March 1 Burglary And Attack On The Braggs.

Respondent argues that there was not substantial evidence that Landrum consciously possessed any of the property that had been stolen during the March 1 burglary and even if he did, possession of stolen property alone does not raise an inference of murder. (RB 75.) As discussed above, however, respondent ignores Landrum's own testimony that two to five days after the March 1 burglary, he and appellant took a bag of "merchandise" over to his mother's house, where it was subsequently recovered by the police. (16RT 3297-3298.) Although Landrum denied knowing what that merchandise was (16RT 3297), the jurors could

reasonably have rejected his exculpatory claims and repeated attempts to blame appellant. "[I]n all cases where the [possessor] offers an explanation as to the manner in which he came into possession of the stolen property, the question as to whether he is telling the truth is one solely for the jury. [Citations.] …. [E]ven though the story told by the [possessor] may exculpate him, such as where he claims an alibi and there is no direct contradiction of his story, it is still for the jury to say whether he shall be believed." (*People v. Russell* (1939) 34 Cal.App.2d 665, 669-670.) In fact, here, as noted above, there was contradiction by a prosecution witness of Landrum's claim that he and appellant traded the camera to Lee and Thorne, thus providing sufficient cause for the jurors to doubt all of Landrum's denials of complicity.

Moreover, as argued in the opening brief, the evidence supporting an inference that Landrum was an accomplice in the two prior burglaries and the following circumstances provided sufficient evidence from which the jurors could reasonably conclude that Landrum was involved in the March 1 burglary and attack on the Braggs: (1) when Landrum arrived to help the Johnsens move that morning, he had a gauze bandage wrapped around his hand, indicative of a recent injury (19RT 3988); (2) Landrum gave to an acquaintance, George Romo, a pair of yellow gloves which contained the blood of Mrs. Braggs (18RT 3753); and (3) Landrum had an opportunity to commit the March 1 crimes and his claim that he was sleeping at his mother's house at the time of the attack was not corroborated. (See AOB 275-276.) Respondent's attempts to dispute the significance of these three circumstances are unavailing.

Respondent disputes the significance of testimony that Landrum showed up immediately after the attack on the Braggs with a bandaged hand. According to respondent, this did not suggest that Landrum had been

an accomplice, because there was not substantial evidence that the assailant had suffered an injury. (RB 76.) Given respondent's description of the two victims' multiple stab wounds and multiple blunt force injuries, resulting in depressed skull fractures (see RB 8-9), it defies credulity to suggest that a suspect's recent injuries to his hand did not present circumstantial evidence tying him to the crime. Indeed, in *People v. Kaurish* (1990) 52 Cal.3d 648, 676, this Court found that evidence of recent abrasions on the defendant's left hand, "which could have been caused by the victim's fingernails as she struggled against her murderer's stranglehold," along with other circumstantial evidence (animosity between the defendant and the victim, his possession of keys to the victim's apartment and no signs of forced entry, the defendant's proximity to the victim's apartment shortly before crime, discolorations on the defendant's shirt that appeared to be blood and might have originated from the victim's knife wounds and defendant's ex-wife suspected him of being the murderer and claimed he was an escapee from state prison), were sufficient to allow a reasonable person to strongly suspect defendant of being the murderer, thus providing probable cause for his arrest.

Respondent next argues that evidence that Landrum, while in appellant's company, handed the bloody gloves to Romo did not lead to an inference that Landrum was an accomplice who participated in the March 1 crimes rather than an accessory who was merely helping appellant dispose of incriminating evidence. (RB 76.) Respondent fails to acknowledge, however, Landrum's false attempt to shift the blame from himself and pin this disposal on appellant. Landrum testified that he and appellant were both holding the gloves and that appellant, for reasons which Landrum claimed he did not know, wanted to get rid of the gloves, and so they both gave the gloves to Romo. (16RT 3283-3285.) Romo, however, testified

that it was Landrum who had both gloves, it was Landrum who asked Romo if he wanted them, and it was Landrum who gave them to him. (16RT 3421.) As noted above, false or contradictory statements and false testimony, when coupled with possession of stolen property, have been held sufficient to connect an accused with the crime.

Finally, respondent argues that there was nothing suspicious or inconsistent about Landrum's testimony that he slept at home with his mother during the night and early morning of the attack (See 19RT 3960-3961). (RB 75-76.) This argument fails to confront the point. The significance of the testimony regarding Landrum's whereabouts immediately before and during the time of the attack, including the lack of evidence to substantiate his story that he slept at his mother's house that night, was that it showed Landrum had an opportunity to commit the March 1 crimes and that his alibi was not corroborated. Landrum admitted being at appellant's home, located directly behind the Rudy residence, during the evening preceding the burglary and attack. (16RT 3317-3318.) And although Landrum claimed that he slept at his mother's house that night (16RT 2192; 19RT 3960-3961, 3863), there was no evidence to substantiate his claim. Thus, Landrum not only had an opportunity to commit the crime, but he was unable to verify his whereabouts during the time period in which the attack occurred. Moreover, he showed up with a bandaged hand shortly after the attack on the Braggs had occurred.

In sum, respondent has failed to controvert the significance of these additional circumstances connecting Landrum to the March 1 burglary and attack. Based on all the evidence connecting Landrum to the two prior burglaries and the March 1 crimes – Landrum's possession of stolen property and attempt to hide it from the police, his admitted physical proximity to the Rudy residence on the dates in question and thus his

opportunity to commit the crimes, his motive to steal, his bandage indicating a recent injury, the lack of corroboration of his whereabouts during the crime, the contradiction of some of his exculpatory accounts of possession, and his possession and disposal of gloves containing Mrs. Bragg's blood -- a reasonable jury could have concluded that Landrum was not only a principal in all three burglaries but that he actually committed the attacks on Mr. and Mrs. Braggs. In fact, a comparison of the circumstances present here, with those found by this Court to provide sufficient probable cause to support the defendant's arrest in *Kaurish*, as detailed above, drives home the sufficiency of the evidence here to support accomplice instructions for not only the two prior burglaries, but also the March 1 crimes.

D. These Instructional Errors Were Prejudicial And Require A New Trial.

Respondent argues that any instructional error was harmless, analyzing the prejudice as a matter of state-law error under the *Watson*[19] "reasonably probable" standard. (RB 76-79.) Respondent cites this Court's decisions in *People v. Williams* (2010) 49 Cal.4th 405, 456; *People v. Gonzales* (2011) 52 Cal.4th 254, 303-304; and *People v. Frye* (1998) 18 Cal.4th 894, 968, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, as authority that these errors constitute state-law error.

Respondent fails to address, however, appellant's opening brief arguments that these instructional errors were not only state-law errors but errors under the Sixth and Eighth Amendments, as well as the Due Process Clause, and the appropriate prejudice standard is *Chapman's* reasonable

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[19] *People v. Watson* (1956) 46 Cal.2d 818, 836.

doubt standard.[20] (*Chapman v. California, supra,* 386 U.S. at p. 24.) As argued there, the trial court's failure to instruct on the law of accomplices violated the Due Process Clause, because (1) it undermined appellant's due process right not to be convicted except upon the basis of evidence establishing guilt beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358, 364); lightened the State's burden of proof (*Francis v. Franklin* (1985) 471 U.S. 307, 313; *Carella v. Californi*a (1989) 491 U.S. 263, 265-266); and deprived appellant of a state-created liberty interest. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 557-558; *Vitek v. Jones* (1980) 445 U.S. 480, 488-489; *Hewitt v. Helms* (1983) 459 U.S. 460, 468-471; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The errors also violated appellant's Sixth and Fourteenth Amendment rights to a jury determination on the question whether guilt has been so established (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Cabana v. Bullock* (1986) 474 U.S. 376, 384-385); prevented the guilt verdicts, used to support appellant's death judgment, from having the degree of reliability necessary to satisfy the requirements of the Eighth and Fourteenth Amendments (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638); deprived appellant of the reliable capital sentencing determination

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[20] The authority upon which respondent relies also does not confront appellant's arguments why this error violated the Sixth and Eighth Amendments and the Due Process Clause. *Williams* merely stated that error in failing to instruct on accomplice principles is state-law error; it did not address any arguments why such error also violates the federal constitution. (*People v. Williams*, *supra*, 49 Cal.4th at p. 456.) *Gonzales*, too, did not address any such arguments. (*People v. Gonzales*, *supra*, 52 Cal.4th at pp. 303-304.) And *Frye*, although it addressed an argument that allocating the burden of proof to the defendant to prove the accomplice status of a witness violates the Due Process Clause, did not confront or address the arguments made in this case. (*People v. Frye, supra,* 18 Cal.4th at pp. 965-969.)

guaranteed by the Eighth Amendment (*ibid*.; see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585); and violated appellant's right to present a meaningful defense, to trial by jury, and to due process as guaranteed by the Sixth and Fourteenth Amendments. (See, e.g., *Taylor v. Illinois* (1988) 484 U.S. 400; *United States v. Escobar DeBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372.) (See AOB 279-282.)

Respondent further contends that the correct test to use in determining whether these instructional errors were prejudicial is the one set forth in *People v. Lewis* (2001) 26 Cal.4th 334, under which a reviewing court looks to see if the record contains corroboration of the accomplice's testimony. (RB 78-79.) Here again, however, neither respondent, nor the case upon which it relies, *People v. Gonzales* (2011) 52 Cal.4th 254, 303-304, address the arguments in the opening brief which demonstrate why the *Lewis* approach is not a constitutional one. (See AOB 284-286.) Appellant requests the Court to reconsider its approach in *Lewis* for the reasons set forth in the opening brief.

Respondent also contends that even if the corroborating evidence was insufficient, these instructional errors were harmless because it is not reasonably probable that the jury would have reached a different verdict. (RB 78-79.) Respondent's harmless error argument is predicated solely on the contention that the other instructions given – specifically, CALJIC Nos. 2.20 and 2.21.2, were sufficient to inform the jury to view Landrum's testimony with care and caution. (*Ibid*.) CALJIC No. 2.20, the standard instruction on witness credibility, simply contains a list of factors which the jury should consider in assessing a witness's credibility. Nowhere does that instruction inform the jurors that a defendant cannot be found guilty based upon accomplice testimony unless such testimony is corroborated by other

evidence. Nor does it inform jurors that accomplice testimony "should be viewed with distrust," as does CALJIC No. 3.18. Neither does CALJIC No. 2.21 inform the jury of these important principles embedded in the missing accomplice instructions. CALJIC No. 2.21 merely provides that a witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others.

Notably, although CALJIC No. 2.20 instructs jurors to consider "[t]he existence or nonexistence of a bias, interest, or other motive" in determining the believability of a witness, that part of the instruction was nullified in this case by the erroneous provision of CALJIC No. 2.11.5. The "bias, interest, and motive," which the defense wanted the jurors to consider in this case, was premised on Landrum's avoidance of prosecution by denying any involvement in the capital offense and instead pinning the blame on appellant. CALJIC No. 2.11.5 commanded the jurors not to consider why Landrum was not being prosecuted.

Essentially, respondent's argument is that accomplice instructions are always superfluous in light of standard instructions on witness credibility and bias. Respondent relies on this Court's decisions in *People v. Lewis*, *supra*, 26 Cal.4th at 371 and *People v. Gonzales*, *supra*, 52 Cal.4th at 304, in support. As explained in *Gonzales*, where the accomplice's testimony conflicted with statements he had made to a homicide investigator, the jury would have used the witness credibility instructions in evaluating the truth of his testimony. (*Gonzales*, *supra*, at p. 304.)

But here, the reason why the accomplice instructions were necessary is that Landrum, who was substantially involved in the crimes but never prosecuted for his role, had ample motive to fabricate testimony against appellant. It was thus essential that the jury be informed that Landrum's testimony deserved special scrutiny and corroboration. Moreover, the error

in the failure to instruct on accomplice principles in this case was compounded by additional instructional errors – addressed in the next argument – that the trial court erred in (1) giving CALJIC 2.11.5, which instructed the jurors not to discuss or to give any consideration as to why Landrum was not being prosecuted; and (2) refusing defense-requested instructions which would have corrected that error by informing that the jurors could consider third-party culpability evidence in determining appellant's guilt. Neither *Lewis* nor *Gonzales* dealt with this combination of instructional errors. As argued in Argument IV, these instructional errors, in combination, unduly constrained the jury's consideration of appellant's third-party culpability defense and restricted the jury's ability to evaluate Landrum's bias. These errors were prejudicial for the reasons stated in appellant's opening brief.

IV.

THE TRIAL COURT ERRED IN INSTRUCTING PURSUANT TO CALJIC NO. 2.11.5 AND REFUSING TO GIVE DEFENSE-REQUESTED INSTRUCTIONS WHICH WERE NECESSARY FOR THE JURY'S EVALUATION OF MICKEY LANDRUM'S TESTIMONY AND CONSIDERATION OF APPELLANT'S THIRD-PARTY CULPABILITY DEFENSE.

A. Introduction.

In the opening brief, appellant demonstrated that the trial court compounded the error discussed in the previous argument – the failure to instruct on the law of accomplices -- by committing two more instructional errors. First, the court erroneously instructed with CALJIC No. 2.11.5 that the jurors not discuss or give any consideration as to why Landrum was not

being prosecuted. As explained in the opening brief, this instruction likely misled the jurors to believe that they could not consider the evidence of Landrum's complicity in the crimes and the benefits he received for testifying against appellant. Second, the trial court erred in refusing defense-requested instructions which would have corrected the error in CALJIC No. 2.11.5 by (1) informing the jurors that they could consider third-party culpability evidence in determining whether there was reasonable doubt of appellant's guilt and (2) telling the jurors that the testimony of a prosecution witness who has been provided immunity or other personal benefit "must be examined to determine whether this testimony had been affected by the grant of immunity, by personal interest, [or] by expectation of reward." In combination, these instructional errors -- the failure to give accomplice instructions, the erroneous giving of CALJIC No. 2.11.5 and the refusal of defense instructions -- unduly constrained the jury's consideration of appellant's third-party culpability defense and restricted the jury's ability to evaluate Landrum's bias. (See AOB 286-313.)

Respondent contends that appellant forfeited his claim and that, in any event, there is no reasonable likelihood that the jury applied the totality of instructions in an objectionable way and any error was harmless. (RB 79.) Respondent's contentions are incorrect.

B. Appellant Has Not Forfeited His Claim.

In the opening brief, appellant acknowledged that appellant's counsel agreed that the trial court instruct with CALJIC No. 2.11.5, but demonstrated that the error was not invited because counsel did not make a conscious, deliberate tactical choice. Instead, counsel's actions were attributable to ignorance and mistake. (See AOB 299-307.) As explained in that brief, the invited error doctrine may operate to bar an argument on

appeal only where counsel makes a conscious, deliberate tactical choice which is clear from the record.

Respondent contends, however, that appellant forfeited the instruction by requesting the instruction and by not asking the trial court to modify it so that it would not apply to Landrum. (RB 83-84.)

Respondent does not dispute that appellant's counsel never articulated a tactical reason on the record for his acquiescence to instructing with CALJIC No. 2.11.5, or that in *People v. Wickersham* (1982) 32 Cal.3d 307, 330-335, disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186, this Court made clear that invited error will only be found if counsel articulates a tactical purpose for acceding to the instruction. (RB 83-84.) Relying on this Court's decision in *People v. Marshall* (1990) 50 Cal.3d 907, 931, respondent bases its entire invited error argument on the basis that a tactical purpose can be inferred from the record.

In *Marshall*, at defense counsel's request, the trial court instructed on penalty phase factors in conformity with language drafted by counsel, but on appeal, Marshall complained that the instruction omitted two factors. (*People v. Marshall, supra,* 50 Cal.3d at pp. 929-931.) This Court found that invited error did apply, despite the lack of an articulated basis on the record, because it was manifest that counsel requested the instruction in order to tailor the factors as favorably as he could in view of the defense case. In so doing, the Court limited *Wickersham's* requirement of an on-the-record express articulation of tactical purpose to situations in which the court is under an obligation to instruct sua sponte in a manner other than it did.

Given that this Court's jurisprudence is clear that a trial court must not instruct with CALJIC No. 2.11.5 when a nonprosecuted participant testifies at trial, it is questionable whether *Marshall's* limitation has any

value here. Nonetheless, given that the record in this case cannot support even an inference of tactical purpose, this issue is inconsequential to this claim.

Respondent argues that invited error may be inferred from the record, simply because defense counsel agreed to the instruction when the trial court asked if he wanted CALJIC No. 2.11.5 and after counsel asked what it was, the court recited an unmodified version of the instruction. (RB 83.) Respondent contends that this shows the choice to be conscious. Respondent then argues that the record shows the choice to be deliberate and tactical because one phrase in the entire instruction, "[t]here has been evidence in this case that a person other than the defendant was or may have been involved in the crime," supported the defense's theory of third-party culpability. (RB 83-84.)

That is preposterous, because when the instruction is read in its totality,[21] it is clear that it forbids consideration of such third-party culpability evidence. Here, defense counsel's strategy was to expose Landrum's complicity in the capital crime as a means of attacking his

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[21] The instruction reads:

> There has been evidence in this case indicating that a person(s) other than defendant was or may have been involved in the crimes for which the defendant is on trial.
>
> There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial.

(CALJIC No. 2.11.5 (1989 revision).)

credibility in attributing full blame for all acts to appellant and establishing reasonable doubt. Counsel argued that to the jury and to support his arguments, he submitted several special instructions. CALJIC No. 2.11.5, however, was contrary to those special instructions. As thoroughly demonstrated in the opening brief, it would have made no sense for counsel to accede to an instruction which would restrict consideration of that evidence and which contradicted his own special instructions. (See AOB 303-304.) Respondent fails to acknowledge these critical facts which negate any inference that counsel's action was either deliberate or tactical. (RB 83-84.) Review of those facts, which respondent ignores, leaves the reader with only one reasonable conclusion: counsel's acquiescence to the provision of CALJIC No. 2.11 resulted from neglect and ignorance. There was no reasonable tactical advantage for counsel to agree to an instruction which was erroneous under state law and would allow the jurors to give greater weight to Landrum's testimony. Respondent's attempt to infer a deliberate, tactical choice from the record must be rejected.

Respondent further argues that appellant forfeited this claim by not asking the trial court to limit CALJIC No. 2.11.5 so that it would not apply to Landrum. (RB 84.) As respondent points out, this Court has held that where the instruction is properly given as to some unjoined perpetrators but not others, a defendant ordinarily waives a claim of error arising from the giving of CALJIC No, 2.11.5 if he or she fails to request a limiting instruction. (RB 84, citing *People v. Valdez* (2012) 55 Cal.4th 82, 149; see also *People v. Lang* (1989) 49 Cal.3d 991, 1024 ["A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."].)

But appellant effectively did just that. He submitted two special instructions which would have corrected the error in 2.11.5 by permitting the jurors to consider the third-party culpability evidence concerning Landrum in determining whether there was reasonable evidence of appellant's guilt and by informing them that the testimony of a witness who provides evidence against a defendant for immunity from punishment (Landrum) must be examined to determine whether it had been affected by the grant of immunity or personal interest. (See AOB 291-293; See Special Instruction No. 15 at 8 CT 2093 and Special Instruction No. 28 at 8CT 2070.) Here, too, respondent ignores the record.

In sum, neither of respondent's theories for why the Court should find this error to be invited is tenable. Appellant has not forfeited this argument. Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Appellant has amply demonstrated that the error deprived him of substantial rights – namely, his rights to a fair trial, to present a defense, and to reliable guilt and penalty determinations.

C. CALJIC No. 2.11.5 Was Improper In this Case.

As respondent acknowledges, there was substantial evidence from which the jury could have found that Landrum, who was promised that he would not be prosecuted for his "handling" of the stolen property or his drug possession and use, "'was or could have been involved in the crime' within the meaning of CALJIC No. 2.11.5." (RB 85.) Respondent also does not dispute that CALJIC No. 2.11.5 should not be given or must be clarified when a nonprosecuted participant testifies at trial. (*Ibid*.)

Respondent points out that in determining whether the instruction hindered the jury's consideration of evidence this Court must look at the instructions as a whole. (RB 85-86.) Appellant agrees. This Court has held previously that instructing with 2.11.5 was harmless when it is "given with the full panoply of witness credibility and accomplice instructions .... [Jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." (*People v. Cain* (1995) 10 Cal.4th 1, 34-35; *see also People v. Price* (1991) 1 Cal.4th 324, 446 [no error where standard instructions on accomplice testimony was given].) Appellant's case is distinguishable from these cases because accomplice instructions were not given. Thus, if the jury followed the instructions, they would have determined that they could not consider Landrum's involvement in the crimes, the promise of non-prosecution, and the benefits he received for testifying against appellant in determining his credibility, and no other instructions told them to view his testimony with distrust.

Relying on this Court's decisions in *People v. Crew* (2003) 31 Cal.4th 822, 845, *People v. Williams* (2010) 49 Cal.4th 405, 457-458, and *People v. Moore* (2011) 51 Cal.4th 1104, 1134, respondent argues, nonetheless, that the failure to instruct with CALJIC No. 2.11.5 was not error, because the provision of CALJIC No. 2.20 was sufficient to allow the jurors to assess Landrum's credibility. (RB 85-86.) Specifically, respondent points to 2.20's language instructing that the jurors could consider any evidence bearing on a witness's credibility, including the existence or nonexistence of a bias, interest, or other motive. (*Ibid*.)

It is true that all three cases found no error in the giving of CALJIC No. 2.11.5 where the jury was also instructed with CALJIC No. 2.20, as was appellant's jury. However, given the evidentiary basis for Landrum's "bias, interest, or motive" in this case, that critical language in CALJIC No. 2.20 was, in effect, nullified by CALJIC No. 2.11.5. As explained in the opening brief, the "bias, interest, and motive," which the defense wanted the jurors to consider in this case, was premised on Landrum's avoidance of prosecution by denying any involvement in the capital offense and instead pinning the blame on appellant. CALJIC No. 2.11.5 commanded the jurors not to consider why Landrum was not being prosecuted. Thus, under the circumstances of this case, CALJIC No. 2.11.5 had the effect of undercutting CALJIC No. 2.20. CALJIC No. 2.11.5 would have told the jurors that despite these general considerations of bias, interest or other motive, they were not permitted to give any consideration to Landrum's promise of nonprosecution and why he was not being prosecuted. Instructing with CALJIC No. 2.20 was therefore insufficient to remedy the error in the failure to provide CALJIC No. 2.11.5.

Respondent also argues there is no reasonable likelihood that the jury misapplied CALJIC No. 2.11.5 in light of defense counsel's argument that the jury should find a reasonable doubt based on evidence of Landrum's involvement in the crimes, his immunity from prosecution, and hence, his motivation to testify against appellant. (RB 86.) Counsel's arguments, however, were fairly worthless, where the jury was instructed that they could not consider why Landrum had not been and would not be prosecuted. Given that command, it is reasonably likely that the jurors believed they could not consider the evidence of Landrum's complicity and the benefits he received for testifying against appellant.

Respondent relies on several of this Court's cases where, in finding no error in instructing with CALJIC No. 2.11.5 when a nonprosecuted participant testified at trial, the Court has additionally observed that counsel's argument urged the jury to consider the witness's grant of immunity in evaluating the witness's credibility. (RB 86, citing *People v. Crew*, *supra*, 31 Cal.4th at p. 845, *People v. Williams*, *supra*, 49 Cal.4th at p. 458.) "But arguments of counsel cannot substitute for instructions by the court." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489 [rejecting State's argument that no additional instructions were required because defense counsel argued the presumption of innocence].)

As demonstrated here and in the opening brief, the trial court erred in instructing with CALJIC No. 2.11.5.

D. The Court Also Erred In Refusing Defendant's Special Instructions Numbers 14 and 28; They Were Not Duplicative.

Respondent contends that the trial court properly rejected appellant's special instructions numbers 14 and 28, because they duplicated other instructions. (RB 87-88.) Respondent is wrong.

Respondent first argues that the trial court did not err in refusing special instruction number 14, because it was duplicative of CALJIC No. 2.20,[22] which instructed the jurors that they could consider the existence or nonexistence of bias, interest or other motive in evaluating a witness's credibility. (RB 87-88.) Not so. Number 14 would have told the jurors

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[22] Respondent actually states that number 14 was duplicative of CALJIC No. 2.02, the instruction regarding sufficiency of circumstantial evidence to prove specific intent or mental state. (RB 88.) It is clear that is a typographical error and respondent is referring, instead, to CALJIC No. 2.20, the instruction which lists factors to consider in evaluating a witness's credibility.

that the testimony of a prosecution witness who had been provided immunity or other personal benefit "must be examined to determine whether this testimony has been affected by the grant of immunity, by personal interest, [or] by expectation of reward." (8CT 2093.) As explained above, *supra*, although CALJIC No. 2.20 instructs jurors to consider a witness's bias, interest, or other motive in determining the believability of a witness, that part of the instruction was nullified in this case by the erroneous provision of CALJIC No. 2.11.5. The "bias, interest, and motive," which the defense wanted the jurors to consider in this case, was premised on Landrum's avoidance of prosecution by denying any involvement in the capital offense and instead pinning the blame on appellant. CALJIC No. 2.11.5 commanded the jurors not to consider why Landrum was not being prosecuted. Special instruction number 14 was necessary to ensure that the jurors understood they could, in fact, consider why Landrum was not being prosecuted for his involvement in the capital offense and the incentives which might have colored his testimony against appellant.

Respondent next argues that that the trial court did not err in refusing special instruction number 28, because it was duplicative of CALJIC No. 2.90, which was sufficient to advise the jurors that appellant was presumed innocent, that he was entitled to a verdict of not guilty if the jury had a reasonable doubt regarding his guilt, and that the prosecution bore the burden of proving his guilt beyond a reasonable doubt. (RB 88.) Defendant's special instruction number 28, however, was necessary to allow the jury to consider third-party culpability evidence – an essential element of appellant's defense. That instruction proposed to modify CALJIC No. 2.11.5 so as to permit the jurors to consider evidence of "the

guilt of any other person" in determining whether there was reasonable doubt of appellant's guilt. (8CT 2070.)

The law is clear that a defendant is entitled to a pinpoint instruction, an instruction that relates particular facts to a legal issue in the case or "pinpoints" the crux of a defendant's case, such as mistaken identification, alibi, or third-party culpability, when there is evidence supportive of the defense theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Although pinpoint instructions are required to be given upon request when there is supportive evidence, they are not required to be given sua sponte." (*Ibid.*, citing *People v. Rincon–Pineda* (1975) 14 Cal.3d 864, 885.) Respondent has not disputed the evidentiary basis for special instruction number 28, or the fact that appellant requested this pinpoint instruction below. (RB 88-89.) Nor does respondent suggest that the requested instruction is argumentative or contains any incorrect statements of law. (*Ibid*.)

No, respondent's only argument is that CALJIC No. 2.90 was sufficient to replace special instruction 28 and for this argument, respondent relies on one case - *People v. Gutierrez* (2009) 45 Cal.4th 789. In *Gutierrez*, the defendant complained of the failure to provide a third-party culpability pinpoint instruction along with the burden of proof instruction, but Gutierrez failed to request the instruction. (*Id*. at p. 824.) This Court merely held that the trial court had no duty to provide, sua sponte, a pinpoint instruction regarding third-party culpability, and that CALJIC No. 2.90 was sufficient to satisfy the court's obligation to instruct "'sua sponte on general principles which are closely and openly connected with the facts before the court.'" (*Id*. at pp. 824-825, citing *People v. Holt* (1997) 15 Cal.4th 619, 688.)

Gutierrez, a case concerning sua sponte instruction obligations, does not govern the situation here where appellant requested a pinpoint

instruction supported by the evidence, which contained correct principles of law, was not argumentative, and was necessary to guide the jury's consideration of Landrum's testimony by pinpointing appellant's third-party culpability theory of the case. In fact, as explained in the opening brief, special instruction number 28 was especially critical in this case because, as recognized by the CALJIC committee and this Court, the erroneously given CALJIC No. 2.11.5 was likely to mislead the jurors to believe that they were not to consider third-party culpability evidence and benefits received by a prosecution witness, whereas number 28 informed the jurors that they could consider such evidence in determining whether reasonable doubt existed. (See AOB 297-299.)

In sum, respondent's argument here is nothing more than the comparison of "apples" to "oranges." For the reasons stated here and in the opening brief, appellant was entitled to have his jury instructed with special instruction number 28, and the trial court erred in refusing that instruction.

E. These Errors, In Combination With The Failure To Instruct On The Law Of Accomplices, Were Prejudicial And Require Reversal Of The March 1 Crimes And The Two Prior Burglaries.

In the opening brief, appellant presented well-detailed discussions of why (1) the trial court's erroneous giving of CALJIC No. 2.11.5 and its refusal to give the requested defense instructions violated the federal Constitution as well as state law; and (2) these instructional errors, in combination with the failure to instruct on the law of accomplices, were prejudicial and require reversal of the charged March 1 offenses -- burglary, two robberies, special circumstance murder, and attempted murder -- and the September 3 and February 15 burglaries. (See AOB 307-313.) Respondent's argument to the contrary (see RB 87) has been met by the

discussion in the opening brief at pages 307-313, and appellant refers the Court to that discussion.

V.

APPELLANT WAS DENIED DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY THE ERRONEOUS ADMISSION OF TESTIMONY CONCERNING THE RESULT OF DNA TESTING OF A HAIR FOUND AT THE CRIME SCENE, BECAUSE THE PROSECUTION FAILED TO ESTABLISH WITH REASONABLE CERTAINTY THAT THE TESTING RESULT COULD BE ATTRIBUTED TO THAT HAIR.

A. Introduction.

In the opening brief, appellant argued that the trial court erred in admitting testimony concerning the result of DNA testing of a hair found at the crime scene, because the prosecution failed to establish with reasonable certainty that the testing result could be attributed to that hair. (See AOB 313-332.) As explained in that brief, a single blond hair was found inside a pair of pantyhose located at the Rudy residence. A Cellmark analyst, Julie Cooper, performed DNA testing on the hair but by the time that the "hair" arrived at Cellmark, it was no longer one hair, but two hairs. Cooper tested both hairs in one test tube without first determining whether they were from one or two individuals. She testified that the hair matched appellant's DNA profile, which was shared by about nine percent of the general population.

Respondent contends that (1) appellant forfeited his challenge to the admissibility of that testimony; (2) the trial court did not abuse its discretion in admitting the testimony, because the evidence of contamination and substitution or addition of the hair went to weight, rather

than admissibility; and (3) any error was harmless. (RB 89, 94-95.) Appellant disagrees.

B. <u>This Claim Has Not Been Forfeited</u>.

Respondent acknowledges that appellant "appears to have initially raised the chain-of-custody issue in a timely manner and with sufficient specificity." (RB 94.) Nonetheless, it argues that appellant has forfeited appellate review by not pressing for a ruling in a timely manner. (RB 94-95.) According to respondent, appellant did not ask the trial court to rule on his chain of custody challenge before Cooper mentioned the results of the DNA analysis, nor did he ask the court to rule on the issue at any time during Cooper's testimony. (RB 95.) Instead, the issue was discussed and ruled upon the next day. (*Ibid*.) This, respondent contends, constitutes a forfeiture.

Respondent's forfeiture claim ignores several crucial record facts: (1) the parties had apparently agreed that the prosecution would not elicit testimony regarding Cooper's DNA analysis due to chain-of-custody issues; (2) Cooper's testimony regarding the DNA match was a nonresponsive answer to defense counsel's question during cross-examination and as such, came as a complete surprise to the parties and the trial court, thus affording no opportunity to object; and (3) although the prosecutor argued below that the objection was not timely, the trial court disagreed, recognizing the objection as timely and ruling on it.

First, all parties agree here that defense counsel raised the chain-of-custody objection before Ms. Cooper testified. Although the record does not elucidate when defense counsel first raised his chain of custody objection, it does indicate that the court had previously been alerted to it. (See 18RT 3662 [before presentation of evidence concerning the handling and testing of the pantyhose hair(s), the court stated its understanding that

there was a "chain of custody problem that's in issue is going to be brought up later," the prosecutor confirmed that the hair was the subject of that "issue," and defense counsel agreed that questioning regarding that issue would be conducted in front of the jury], 3798 [at the close of the day immediately after Ms. Cooper's testimony and the brief recall of another Cellmark employee, Dr. Word, the trial court stated that it had been researching chain of custody problems].) On the very next day following Cooper's testimony, the trial court asked counsel if he wanted to make a formal objection regarding the hair and told counsel that would have to be done outside the presence of the jury. (18 RT 3846-3847.) After the State finished its witnesses, the court heard, considered and ruled upon the objection. (18RT 3863-3868.)

Second, the record suggests that the parties had agreed that the prosecution would not elicit testimony regarding Cooper's DNA analysis due to chain-of-custody issues. On direct examination of Ms. Cooper, the prosecutor simply elicited testimony that she opened the container, saw two hairs, and subjected both to PCR testing. (18RT 3776-3778.) He did not ask for the result of her testing. (18RT 3778.) And later, when the parties and the court discussed appellant's chain-of-custody objection, the prosecutor stated:

> In fact, the evidence came in on cross-examination, not direct. We had the witness Julie Cooper up on cross-examination. There was a question about the pantyhose going to Cellmark. I knew darn well it hadn't gone. I tried to preclude further inquiry along there by raising an appropriate objection, assuming a fact not in evidence. I was overruled.
>
> The exchange between Mr. Faulkner and the witness continued and then she answered, I think in good faith, anticipating that that's what he wanted – being a layperson, she couldn't know that we were arguing

> about the chain of custody – and she responds that "Yeah, I did the typing on the hair and it was a 2,4."

(18RT 3863-3864.)

Third, it is clear that Ms. Cooper's surprising testimony regarding the DNA match – which respondent acknowledges was a nonresponsive answer to defense counsel's question (RB 99) – afforded appellant no opportunity to object. During cross-examination, defense counsel asked Ms. Cooper, "[w]hat DQ-Alpha type did you get from the **pantyhose** that you processed?" (18RT 3780, emphasis added.) The prosecutor objected that Cellmark did not process the pantyhose at all, but the court said to let the witness answer. (*Ibid*.) Cooper responded that "[t]he DQ-Alpha type that was obtained from the hair in the box labeled 'hair from pantyhose' was a 2,4." (*Ibid*.) Defense counsel then asked Ms. Cooper if she had ever processed the pantyhose, and Cooper testified no, she had never received the pantyhose. (18RT 3780-3781.)

Cooper thus erroneously answered defense counsel's question seeking information regarding her processing of the pantyhose, not the hair obtained from the pantyhose. As evidenced by the prosecutor's statements above, neither he nor defense counsel anticipated that Ms. Cooper would answer a question regarding processing of the pantyhose with testimony regarding DNA results from testing of the hair evidence. (See 18RT 3864 ["she answered, I think in good faith, anticipating that that's what he wanted – being a layperson, she couldn't know that we were arguing about the chain of custody"].)

Given the witness's unresponsive answer to defense counsel's question, counsel was utterly surprised by the answer and had no opportunity to object before the objectionable testimony was introduced. Under these circumstances, especially where the trial court had already

been apprised of the nature of counsel's objection to the evidence and promptly ruled on the objection on the very next day, counsel's failure to object at the time of the testimony should not constitute a forfeiture. (See, e.g., *In re Khonsavahn S.* (1998) 67 Cal.App.4th 532, 536-537 [counsel's failure to object not characterized as forfeiture where "it appears counsel here was utterly surprised by the court's ruling and had little opportunity to react"]; *People v. Scott* (1994) 9 Cal.4th 331, 356, as modified on denial of reh'g (Mar. 14, 1995) [Failure to object will not be characterized as a forfeiture where there is insufficient notice and/or lack of a meaningful opportunity to object.].)

Respondent relies on forfeiture holdings in *People v. Demetrulias* (2006) 39 Cal.4th 1, *People v. Ramirez* (2006) 39 Cal.4th 398, and *People v. Lewis, supra,* 43 Cal.4th 415, to support its forfeiture claim, but none of those cases do so. *Demetrulias* found forfeiture proper, because "[w]hen the nature of a question indicates that the evidence sought is inadmissible, there must be an objection to strike is not sufficient." (*People v. Demetrulias*, *supra*, at p. 21.) But that is not the case here, where the objectionable testimony was a surprising nonresponsive answer.

Lewis, also, is inapplicable. There, this Court found that the defendant's failure to articulate clearly a *Wheeler* motion and press for a ruling forfeited the issue for appeal, because such failure deprived the trial court of an opportunity to correct the error. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 481–482.) Here, on the other hand, the trial court found that counsel had previously clearly articulated his chain-of-custody objection and although the court did not rule on that objection until the next day, it had the opportunity to correct the error by striking that portion of the testimony had it found it to be improper. (See *People v. Melton* (1988) 44 Cal.3d 713, 735 as modified on denial of reh'g (May 26, 1988) [While there

was no objection at the time the prejudicial remark was made, there was an objection at the bench conference after the witness was excused; held, there is no reason to hold that this issue was waived where there was still an opportunity for the trial court to cure error by giving an admonition to the jury.].) This is a far cry from jury selection where the lack of an adequate objection, or a late objection after the jury has been sworn, deprives the trial court of an opportunity to correct the error.

And neither does this Court's finding of forfeiture in *Ramirez* aid respondent's position. *Ramirez* held that the defendant forfeited an objection to the trial court's failure to give a defense-requested instruction where the defendant withdrew the instruction. (*People v. Ramirez, supra*, 39 Cal.4th at p. 472.) In response to Ramirez's argument on appeal that he only withdrew the instruction in response to the trial court's request, this Court merely stated:

> Rather than explain why the proposed instruction was proper and request a ruling, trial counsel simply withdrew the proposed instruction. In order to preserve an issue for review, a defendant must not only request the court to act, but must press for a ruling. The failure to do so forfeits the claim.

(*Ibid.*)

Rather, this Court's resolution of a similar issue in *People v. Riel* (2000) 22 Cal.4th 1153, should govern the situation here. There, after a forensic serologist had testified without objection to regarding his examination of the bloodstains found on the defendant's pants and boots, the defendant challenged the expert's testimony and moved to strike his testimony. (*Id.* at pp. 1191-1192.) The State argued on appeal that the motion to strike came too late to preserve the issue for appeal, but this Court decided not and addressed the issue on its merits, stating: "This

question is close and difficult. As we have done on occasion in similar situations, we will assume the issue is cognizable and decide it on the merits." (*People v. Riel, supra,* 22 Cal.4th at p. 1192.) This case, of course, presents even a stronger case for rejecting forfeiture, given that the trial court had already been apprised of the basis for the defense objection and the objectionable testimony came as a complete surprise.

Fourth, and perhaps most importantly, the trial court found defense counsel's objection to be timely and rejected the very argument advanced by the State here. As discussed above, there is no question but that defense counsel had earlier raised the chain-of-custody discussion. On the next day when the court and counsel discussed defense counsel's chain-of-custody objection, the prosecutor argued that counsel had failed to object when the testimony was elicited. (18RT 3863-3864.) The trial court, however, rejected his timeliness argument, found that chain-of-custody objection was timely, and overruled it on its merits. (18RT 3864-3868.) Inasmuch as the trial court did consider and rule upon the issue, there is no reason for this Court to find the issue forfeited. (See *People v. Abbott* (1956) 47 Cal.2d 362, 372-373 [An issue can be raised when the trial court considered and ruled on the issue as if an objection had been properly made.].)

For all of these reasons, this Court should reject respondent's request to find this issue forfeited. Should the Court disagree, however, as argued in the opening brief, counsel's failure to immediately move to strike Cooper's testimony as nonresponsive and inadmissible on chain-of-custody grounds, deprived appellant of effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) (See AOB 325-328.) Given that counsel had earlier objected on chain-of-

custody grounds and later argued the matter, there could be no reasonable tactical reason for his failure to object when the witness provided the objectionable, albeit nonresponsive, answer. (See, e.g., *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366 ["The fact that counsel objected to the felony-murder instructions at all, however, refutes any inference that he was pursuing some tactical advantage by withholding the collateral estoppel argument. If counsel objected on the grounds of insufficient evidence, there is no reason why he should not have done so on the grounds of collateral estoppel--except for failing to realize that such an objection was available."].)

Respondent acknowledges that Cooper's testimony was improper in that it was nonresponsive to defense counsel's questioning, but argues that counsel might have made a tactical reason "not to object to the non-responsive nature of her answer lest the prosecutor elicit the same answer from her on further examination." (RB 99.) Respondent also argues that appellant has failed to demonstrate that "the chain of custody was so defective that every objectionable reasonable defense attorney would have realized the defect and objected to the testimony on that ground." (*Ibid*.)

These arguments ignore two crucial points. First, the prosecutor had obviously elected NOT to elicit this evidence during his direct examination of the witness. Based on the discussions regarding the hair evidence, the record suggests, as noted above, that this election was made because of concerns concerning the chain-of-custody problems with this evidence. Second, it is credulous to suggest that any defense attorney would not realize there might be a chain of custody problem when one hair is discovered at the crime scene but the testifying analyst says she saw and analyzed two distinct hairs. As argued in the opening brief, given that counsel had earlier raised the chain-of-custody objection, which was

pursued on the very next day, there could be no reasonable tactical reason for the failure to object at the time of the testimony.

C. The Trial Court Erred In Admitting The DNA Evidence Because It Did Not Meet The Chain Of Custody Requirements Set Forth By This Court In *People v. Riser*.

Respondent relies on this Court's decisions in *People v. Williams* (1989) 48 Cal.3d 1112, 1135, and *People v. Goldsmith* (2014) 59 Cal.4th 258, 267, for the proposition that "evidence is admissible so long as the proponent makes 'at least a prima facie showing that the evidence had not been tampered with.'" (RB 95.) Respondent then argues that the trial court did not err in admitting the DNA evidence, because Dr. Lynd's testimony provided a prima facie showing that the hair evidence had not been altered by contamination and/or substitution/addition. (RB 95-96.)

This argument begs the issue. *Williams* and *Goldsmith* may have included language regarding a prima facie showing, but the issue is how is that prima facie case established. *People v. Riser* (1956) 47 Cal.2d 566, of course, is the case which sets forth the standard for how such a prima facie showing is made. In articulating the "chain of custody" rule for the admissibility of expert analysis of demonstrative evidence, *Riser* stated:

> Undoubtedly the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between receipt and analysis there has been no substitution or tampering . . . .
>
> The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, *it is reasonably certain that there was no alteration*.

> *The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for,* because then it is likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

(*People v. Riser* (1956) 47 Cal.2d 566, 580-581, internal citations omitted, emphasis added.)

Accordingly, in order to make that prima facie case, respondent must show that it is reasonably certain that the pantyhose hair was not contaminated or altered and that every vital link in the chain of custody had been accounted for. For the reasons set forth in the opening brief at pages 323-325, Dr. Lynd's testimony was insufficient to (1) explain the critical anomaly between the hair evidence discovered at the scene and that analyzed by Cellmark analyst Julie Cooper; and (2) account for every vital link in the chain of custody of the hair. Thus, *Riser's* requirement of reasonable certainty was not met in this case. Because the prosecution failed to meet its burden of establishing a proper chain of custody as required by *Riser*, the trial court erred in admitting the result of the DNA testing of the pantyhose hair.

D. The Erroneous Admission Of The TestimonyRegarding The Results Of The PCR Testing Of The Hair Violated Appellant's Rights Under The Federal Constitution And Was Prejudicial, Requiring Reversal.

Respondent's argument that any error in the admission of this DNA evidence was harmless (RB 97-98) has been met by the detailed discussion in the opening brief at pages 328-332. For the reasons set forth in the opening brief, the erroneous admission of this evidence which appeared to

place appellant directly at the capital crime scene was both violative of appellant's federal constitutional rights to due process and a fair jury trial and prejudicial.

VI.

APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE PROSECUTOR AND DEFENSE COUNSEL MISDEFINED AND SUBSTANTIVELY DILUTED THE REASONABLE DOUBT STANDARD AND IMPROPERLY SHIFTED THE BURDEN OF PROOF DURING THEIR GUILT PHASE ARGUMENTS.

A. Introduction.

In his arguments, the prosecutor misstated the standard of reasonable doubt by telling the jurors that a doubt is not reasonable unless they can (1) "point to something in the evidence" which creates that doubt; and also (2) convince the other jurors that the doubt is reasonable. In his argument, defense counsel disputed the prosecutor's second misstatement but agreed with, and confirmed, his first misstatement. As argued in the opening brief, these misstatements were a substantive dilution of the requisite standard of proof and improperly shifted the burden to appellant to produce evidence which creates reasonable doubt in violation of his state and federal constitutional rights to proof beyond a reasonable doubt, due process, trial by jury, a unanimous jury verdict, and a reliable guilt determination in a capital case, requiring reversal of appellant's convictions. (See AOB 332-355.)

Respondent contends that (1) appellant forfeited his challenge to the prosecutor's misstatements, because he did not object; (2) there is no

reasonable likelihood that the jury would have construed and applied the prosecutor's argument in an objectionable manner; and (3) defense counsel's misstatements did not deprive appellant of effective assistance of counsel. (RB 100.) Respondent's contentions are incorrect.

B. Appellant Has Not Forfeited His Challenge To This Material Misdirection Of The Jury On The Vital Concept Of Reasonable Doubt.

Respondent argues that appellant has forfeited his challenge to the prosecutor's argument because he did not object to it and did not request an admonition to cure the harm. (RB 104.) In the opening brief, however, appellant demonstrated that because this misdirection of the jury on the vital concept of reasonable doubt affected appellant's substantial rights, it is reviewable on appeal despite the lack of objection below. (See AOB 349-350.) Respondent has failed to address this argument. (See RB 104-105.) Its failure to offer any argument to the contrary should be viewed as a concession.

C. The Prosecutor Misstated And Considerably Diluted The Reasonable Doubt Standard And Shifted The Burden Of Proof.

The prosecutor argued:

> I'm going to suggest to you that, based on this definition of reasonable doubt, if any one of you feels that he or she might have a reasonable doubt, he or she should be able to do three things. One, they should be able to put the doubt into words; two, they should be able to point to something in the evidence that makes them have that doubt; and, three, that juror should be able to convince his or her fellow jurors that the doubt is reasonable.
>
> If you can't do all three of these things then I suggest to you, ladies and gentlemen, the doubt that you are

> contemplating is the imaginary or mere possible doubt that is referred to in the Court's instruction.

(20RT 4390-4391.)

As demonstrated in the opening brief, this argument misstated and diluted the standard of reasonable doubt by telling the jurors that a doubt is not reasonable unless they can (1) point to something in the evidence which makes them have that doubt; and (2) convince the other jurors that the doubt is reasonable. (See AOB 338-344.)

Respondent contends that the first argument did not dilute or shift the burden of proof to appellant to produce evidence, because when the prosecutor stated that a juror should be able to point to something in the evidence that makes him or her have a doubt, he was referring to all of the evidence, including anything that was lacking, contradictory or unclear. (RB 105.) Thus, respondent argues, rather than shifting the burden, the prosecutor was simply reinforcing the principle that the jury had to decide the case based on all the evidence presented, including any deficiencies in that evidence. (*Ibid*.)

Respondent cannot explain away the clear language used by the prosecutor – that a doubt is not reasonable unless the jurors can point to something in the evidence which makes them have that doubt. Even if the prosecutor was merely telling the jurors that they had to identify a deficiency in the evidence which caused them to doubt the defendant's guilt, such would dilute and shift the burden of proof. As evidenced by the authorities cited in the opening brief at pages 339-340, a juror need not point to something in the evidence that causes the juror to conclude that the prosecution has not met its burden of proving the defendant's guilt's beyond a reasonable doubt. A juror's doubt can arise simply from the absence of evidence, rather than pointing to "something in the evidence that

makes them have that doubt." A juror can say that there is not enough evidence to convince me, or the prosecution's case has too many holes, or I am simply not persuaded to a near certainty. In short, as explained in the opening brief, a juror may simply not be persuaded by the prosecution's case and is not required to identify anything in the evidence that causes that doubt.

Moreover, a reasonable interpretation of the prosecutor's language is not merely that a juror must be able to point to something in the evidence but that the juror must be able to identify some piece of evidence that causes the juror to have that doubt. Indeed, this is exactly how defense counsel interpreted the prosecutor's language as evidenced by his argument in response:

> Mr. Fontan mentioned that the Court is going to talk about reasonable doubt and there's going to be an instruction on that issue, and, in fact, I think he read part of it. And Mr. Fontan talked about a method to decide whether or not any doubt that you might have on any particular fact is reasonable.
>
> And I agree with the first two steps that he said to take, and that number one step is articulate the doubt. If you have a doubt that you can talk about, if you can put it into words, if you can articulate it, it may be a reasonable doubt. If you can point to a particular piece of evidence to support that doubt and say, "I don't feel good about this evidence and it makes me doubt that which it's offered to prove," those are two steps that you should do.

(20RT 4458-4460.)

The jurors could only conclude, after hearing both the prosecutor's argument and defense counsel's reinforcing argument, that a doubt is not reasonable unless the juror can identify some piece of evidence that causes the juror to have that doubt. That approach to reasonable doubt presumes

guilt for its starting point and then suggests that the defense must overcome that presumption by producing some evidence which creates reasonable doubt. For the reasons set forth in the opening brief and based on the authorities cited therein (see AOB at pages 336-344), none of which respondent attempts to distinguish or rebut, this argument was patently improper. It both diluted and shifted the burden of proof in this case.

As for the prosecutor's second erroneous argument – that a doubt is not reasonable unless a juror can convince his fellow jurors – respondent suggests that after defense counsel challenged this argument during his argument, the prosecutor clarified his argument and in so doing, made clear that "[t]he agreement of another juror was not posited as a requirement for the reasonableness of a doubt." (RB 106.) Not so.

This is what the prosecutor argued in rebuttal:

> Reasonable doubt is the burden of proof which the People shoulder. And the operative word is "reasonable." If you don't have any method of assessing whether or not any doubt that you have is reasonable or unreasonable, then the instruction is meaningless. The concept is useless.
>
> And you have to test the reasonableness of any doubt. And one of the ways you do that is to discuss any perceived doubt with your fellow jurors, put it into words, test it, and see if anybody else agrees with you that that is a reasonable doubt. That's how you test it. There's no other way to assess any doubt. There's no way to tell whether a doubt is fanciful, imaginary, or just a mere possible doubt.

(21RT 4509-4510.) The prosecutor clearly reinforced his position made during his initial argument – that a doubt is not reasonable unless the juror can convince his or her fellow jurors that the doubt is reasonable. The prosecutor did not, as respondent suggests, merely state "what he meant was that a juror could test the reasonableness of a doubt by seeing if anyone

else agreed with it." (RB 106.) Although he began with language suggesting this is one of the ways the jurors could test the validity of their doubts, he made clear with his follow-up language that this was the only way to assess any doubt: "That's how you test it. There's no other way to assess any doubt." (21RT 4510.) Respondent's interpretation ignores this crucial language in the prosecutor's rebuttal.

Respondent's further argument that CALJIC No. 17.40 was sufficient to cure the prosecutor's improper arguments has been met by the discussion in the opening brief at pages 351-352. For the reasons set forth in this brief and in the opening brief, it is clear that the prosecutor's arguments misstated and considerably diluted the reasonable doubt standard and shifted the burden of proof.

D. Defense Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To The Prosecutor's Misconduct And By Repeating In His Own Argument The Same Erroneous Claim That A Doubt Is Not Reasonable Unless The Jurors Could Point To Evidence On Which To Base It.

Defense counsel did not object to the prosecutor's arguments even though they were patently erroneous and considerably lowered and shifted the prosecution's burden of proof. (20RT 4389-4391; 21RT 4509-4510.) To the contrary, defense counsel compounded the error by agreeing with the prosecutor's assertion that a doubt is not reasonable if the jurors cannot point to a piece of evidence that creates the doubt. (20RT 4459-4460; 21RT 4506.) As argued in the opening brief, this failure to object to the misstatements, and subsequent agreement with one of them, deprived appellant of effective assistance of counsel in violation of the state and federal constitutions. (See AOB 344-347.)

Respondent contends that counsel made a tactical decision not to object to the prosecutor's argument and instead, to face the matter head-on in his own closing argument. (RB 107.) The problem with respondent's argument is twofold. First, as explained in the opening brief, although defense counsel attempted to counter the prosecutor's second argument — that a doubt is not reasonable unless the jurors can persuade their fellow jurors — counsel's effort was insufficient to cure the harm. (See AOB 345-346.) Such competing formulations by the advocates would only have confused the jury's understanding of the court's reasonable doubt instruction. (See *People v. Beltran* (2013) 56 Cal.4th 935, 954-955.)

Second, and more importantly, defense counsel did not challenge the other improper dilution and shifting of the burden of proof by the prosecutor – his first argument that the jurors must identify some piece of evidence that causes the juror to have that doubt. In fact, counsel provided ineffective assistance by agreeing with, and confirming, this improper argument:

> And I agree with the first two steps that he said to take, and that number one step is articulate the doubt. If you have a doubt that you can talk about, if you can put it into words, if you can articulate it, it may be a reasonable doubt. If you can point to a particular piece of evidence to support that doubt and say, "I don't feel good about this evidence and it makes me doubt that which it's offered to prove," those are two steps that you should do.

(20RT 4459.) Thus, like the prosecutor, defense counsel encouraged the jurors to apply a standard of proof that reduced the prosecution's burden to prove its case beyond a reasonable doubt and placed a burden on the defense to point to/come up with evidence that supported a verdict of not guilty. Respondent fails to counter, or even acknowledge, this further deficient representation and offers no suggestion that this action could be

justified as based on a reasonable tactical reason. (RB 106-108.) As explained in the opening brief, counsel's own misstatement of the requirements of the reasonable doubt standard demonstrates his obvious ignorance of the law, and thus his actions cannot be excused as a reasonable tactical decision. (See AOB 346-347.)

For the reasons set forth in this brief and in the opening brief, counsel's actions were outside the range of reasonably competent counsel and thereby constituted deficient performance. Had counsel performed competently, it is reasonably probable that the guilt phase verdict would have been different. Counsel thereby deprived appellant of effective assistance of counsel. (See AOB 344-347.)

E. The Prosecutor's And Defense Counsel's Substantial Dilution Of The Reasonable Doubt Standard And Improper Shifting Of The Burden Of Proof Was Prejudicial.

Respondent argues that any error was harmless, because the trial court instructed the jurors on the presumption of innocence, reasonable doubt and the prosecutor's burden of proof. (RB 108.) According to respondent, when argument runs counter to instructions given a jury, the reviewing court will ordinarily conclude that the jury followed the instructions and disregarded the argument. (RB 108-109.) Respondent's argument fails for several reasons.

First, as demonstrated in section G of this argument in the opening brief, this principle is inapplicable here where counsel's arguments purported to expound upon and provide a test to implement the definition of reasonable doubt set forth in CALJIC No. 2.90. In this situation, the given instructions did not cure the error, because nothing in those instructions contradicted or dispelled counsels' arguments. (See AOB 351.)

Second, as also demonstrated in section G in the opening brief, CALJIC No. 2.90 contains such an ambiguous definition of reasonable doubt that the jurors most likely looked to the prosecutor's "test" for determining whether their doubts were "reasonable." (See AOB 352.) Given that No. 2.90's confusing definition of reasonable doubt in no way conflicted with the prosecutor's arguments and that the jurors were given no specific guidance to understand that definition, it is reasonably likely that jurors would have relied on the prosecutor's arguments to provide that guidance. (See *People v. Morales* (2001) 25 Cal.4th 34, 58-59 (dis. opn. of Brown, J.).)

Respondent fails to address or even acknowledge these arguments. (See RB 108-109.) For the reasons set forth here and in the opening brief, this instructional error caused by both counsel's arguments allowed, indeed exhorted, the jurors to convict appellant based on proof insufficient to meet the *Winship*[23] beyond-a-reasonable-doubt standard. Such constitutionally deficient reasonable doubt instructions can never be harmless error. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 278-282.) Reversal is thereby required.

* * * * * *

[23] *In re Winship* (1970) 397 U.S. 358, 364.

VII.

REVERSAL OF THE DEATH JUDGMENT IS REQUIRED BECAUSE OF THE TRIAL COURT'S FAILURE TO EXCUSE A JUROR WHO ADMITTEDLY VIOLATED HER OATH AND INSTRUCTIONS BY CONTACTING HER PRIEST AND LEARNING THE CHURCH'S POSITION ON THE DEATH PENALTY, BUT IF NOT, THE COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO SUCH MISCONDUCT REQUIRES REVERSAL.

A. Introduction.

As discussed in the opening brief, immediately after rendering her verdict convicting appellant of capital murder, a juror (Juror Y.P.), contacted her priest to inquire whether it would be a sin to vote for the death penalty. Although the priest gave her an opportunity to decline to hear his answer, Juror Y.P. persisted and was informed not merely that it would not be a sin but that the Catholic Church did "believe in capital punishment." In a phone conversation with the trial court four days after receiving this information, the juror attempted to minimize the reason why she contacted her priest. However, as demonstrated in the opening brief, her behavior and the nature of the information she obtained clearly demonstrated that the Church's support for the death penalty was very important to her as a juror during the penalty phase.

This behavior constituted misconduct. Juror Y.P., along with the other jurors, had been admonished continually and specifically throughout the trial not to discuss any matter connected to the case with anyone. In fact, immediately before the jurors were sent home after returning the guilt phase verdict, the trial court thoroughly admonished them not to talk to anybody about any matter connected to the trial and not to seek or receive information from any outside source. Yet, despite these admonishments,

Juror Y.P. contacted her priest for the express purpose of acquiring information relevant to her penalty determination. And despite her concern that she might "get in trouble," despite the priest's admonition that she would have to tell the judge, and despite being afforded an opportunity to decline to hear his answer, the juror pushed ahead and told the priest she wanted him to answer her question.

The trial court did not question Juror Y.P. in person. Nor did the court ask any questions designed to probe the effect of the priest's information on her ability to decide appellant's fate free from outside influence and solely on the basis of the court's instructions. To the contrary, the judge told Y.P. not to "worry about" what she had done and that it was "fine." The court failed to instruct Y.P. not to consider what she had been told, and it even failed to tell her not to tell other jurors about what she had done and learned.

In the opening brief, appellant argued that appellant's death judgment must be reversed because of the trial court's failure to excuse this juror who admittedly violated her oath and the court's instructions. Alternatively, appellant argued that even if this Court were to conclude otherwise, reversal would still be required because of the trial court's failure to conduct an adequate inquiry into Y.P.'s misconduct.

Respondent contends that (1) these claims are forfeited, because defense counsel did not ask the court to conduct a further inquiry nor ask the court to remove the juror; (2) the trial court did not abuse its discretion as to either the scope of its investigation or its decision that the juror's solicitation and receipt of outside information did not warrant her removal; and (3) there is not a substantial likelihood that Juror Y.P. had an actual bias on the issue of punishment. (RB 109.) Respondent is wrong on all three points.

The seminal points raised by respondent's argument, which will be discussed below, are:

1. Respondent acknowledges that Juror Y.P. committed misconduct: "The People do not quarrel with trial court's conclusion [th]at Juror Y.P. should not have solicited or received outside information from a priest regarding the death penalty." (RB 116.)

2. Respondent fails to acknowledge this Court's jurisprudence that it is not merely misconduct but rather "serious misconduct" for a juror to disobey instructions from the trial court, regardless of the nature of the disobedience.[24] (*People v. Williams* (2015) 61 Cal.4th 1244, 1261.)

3. The trial court erred first in failing to conduct any inquiry of Juror Y.P. as to why she disobeyed the explicit instruction given the day before not to converse with "anyone else" regarding "any subject connected to the trial." (See Pen. Code, § 1122; 21RT 4658-59.) It was incumbent on the trial court to determine whether Y.P.'s flagrant disobedience was mitigated in some way, or whether it was indicative of a general inclination on her part to flout judicial directives. Instead, the trial court concluded his telephone conversation with her with the soothing words, "Don't

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[24] Penal Code Section 1122 requires that "[t]he jury shall also, at each adjournment of the court before the submission of the cause to the jury, … be admonished by the court that it is their duty not to … converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them." (Pen. Code, § 1122, subd. (b).) Those admonitions were given as required. (See AOB 363-364.) A juror's violation of these directions constitutes serious misconduct (emphasis supplied).

worry about it" and "that's fine" (RT 4669), which it certainly was not.

4. Respondent attempts to shield the trial court's error from this Court's scrutiny by contending that trial counsel forfeited appellate review by not objecting to the court's handling of the matter. However, respondent's position is incompatible with this Court's delineation of the trial court's responsibility: "The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defense objects to such an inquiry." (*People v. Cowan* (2010) 50 Cal.4th 401, 506.[25]) Defense counsel neither requested nor opposed further inquiry by the trial court.

5. The trial court additionally erred in failing to recognize that Juror Y.P.'s misconduct created a presumption of prejudice, and in failing to develop the record sufficiently to permit an informed determination whether that presumption was rebutted. Once the trial court confirmed in the telephone conversation with Y.P. that she had consulted a priest regarding the Catholic Church's position on the death penalty, the court was obligated to inquire as to whether the *substance* of the improperly obtained information was sufficiently important as to support the presumption of prejudice, or whether it was sufficiently trivial as to rebut it.

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[25] But see, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1341.

The trial court *knew* that Y.P.'s understanding of Church doctrine based on her improper inquiry was both *wrong* and *skewed toward the imposition of the death penalty*, because the court had, during voir dire, corrected the prosecutor's misconception of the Church's position during a sidebar involving a different juror. The court was thus aware that not only had Y.P. improperly sought extrinsic information regarding the death penalty, but also that what she obtained was inaccurate and skewed against the defense. Moreover, the trial court failed to probe as to the juror's degree of deference to or acceptance of the Church's various positions on social issues (as opposed to theological issues) generally. The trial court failed to probe as to her general deference to or acceptance of the Church's various positions on public issues such as initiatives regarding abortion, marijuana, the Three Strikes Law, etc. Obviously, the more deference the juror paid to the Church's position on social issues, the more likely that the presumption of prejudice should be sustained. The only question asked by the trial court regarding Y.P's attitude toward the Church's position on the death penalty was, "You were just curious?" (RT 4669.) That is patently insufficient to permit a reliable determination that her misconduct was driven by idle curiosity unlikely to affect her jury ballot, or whether the answer rendered her more likely to vote for the death penalty.

6. The presumption of prejudice cannot be rebutted on this record, particularly in light of the priest's incorrect and overly broad characterization of the Church's position on capital punishment (see AOB 376 – 379), which respondent has ignored entirely.

B. Respondent Has Failed To Rebut The Presumption of Prejudice Raised by Juror Y.P.'s Misconduct.

As noted above, respondent does not dispute that Juror Y.P. committed misconduct in contacting her priest in violation of her oath and the trial court's instructions, but fails to acknowledge this Court's jurisprudence that it is not merely misconduct but rather "serious misconduct" for a juror to disobey instructions from the trial court regardless of the nature of the disobedience. (RB 116; see *In re Hitchings* (1993) 6 Cal.4th 97, 118 ["Violation of this duty (imposed under Penal Code section 1122 not to converse with anyone else on any subject connected with the trial) is serious misconduct."] *People v. Nesler* (1997) 16 Cal.4th 561, 586 [a juror's violation of her oath and the court's instructions constitutes serious misconduct]; *People v. Pierce* (1979) 24 Cal.3d 199, 207 [juror committed serious misconduct when, in derogation of his oath and promise on voir dire not to engage in conversations with others about the case, he consulted a friend, an officer who worked on the case].)

The trial court, as well, failed to recognize the serious nature of Juror Y.P.'s willful violation of her oath and instructions. Although it acknowledged that Juror Y.P. should not have been talking about the death penalty and by doing so, violated her oath and the court's instructions (21RT 4663, 4671), the court simply dismissed her willful violation as inconsequential, stating it did not "see any reason to do anything." (21RT 4671.) The court thus erred first in failing to conduct any inquiry of Y.P. as to why she disobeyed the explicit instruction given the day before not to converse with "anyone else" regarding "any subject connected to the trial." (See Pen. Code, § 1122; 21RT 4658–59.) It was incumbent on the trial court to determine whether Y.P.'s flagrant disobedience was mitigated in some way, or whether it was indicative of a general inclination on her part

to flout judicial directives. Instead, the trial court concluded its telephone conversation with her with the soothing words, "Don't worry about it" and "that's fine" (RT 4669), which it certainly was not.

The trial court additionally erred in failing to recognize that Juror Y.P.'s misconduct created a presumption of prejudice,[26] and in failing to develop the record sufficiently to permit an informed determination whether that presumption was rebutted. Once the trial court confirmed with Y.P. that she had consulted a priest regarding the Catholic Church's position on the death penalty, the court was obligated to inquire as to whether the *substance* of the improperly obtained information was sufficiently important as to support the presumption of prejudice, or whether it was sufficiently trivial as to rebut it.

Significantly, the court (1) knew that Y.P.'s understanding of Church doctrine based on her improper inquiry was both *wrong* and *skewed toward the imposition of the death penalty*; (2) understood the effect that the Church's position could have on a Catholic juror's penalty determination; and (3) knew that church doctrine on the death penalty was a minefield which had to be avoided. When the prosecutor began to question another prospective juror during voir dire regarding his understanding of the Catholic Church's official position on the death penalty, the court called for a sidebar. (14RT 2897.) During that sidebar, the judge, who was Catholic, stated that he knew the Church's position on the death penalty, because he had just read the "new encyclical that came out last year." (*Ibid*.) The court stated its understanding that "the church's position is that

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[26] In making his ruling, the trial judge herein made no mention whatsoever of the presumption of prejudice and cited nothing rebutting that presumption. (21RT 4671.)

they're not against the death penalty in certain circumstances." (*Ibid*.) The court also acknowledged that there were a lot of misconceptions and wrong information circulating about the Church's official position – "[w]hoever you talk to, the church can have a million different positions…." (14RT 2898.) The court made it clear that it did not want any more questioning about the Catholic Church's position on the death penalty, "[b]ecause we can't tell then what the church's position is." (14RT 2898-2899.)

The court was thus aware that not only had Y.P. improperly sought extrinsic information regarding the death penalty, but also that what she obtained – that the moral authority of the Church was in favor of capital punishment -- was inaccurate[27] and skewed against the defense. And the

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[27] The information Y.P. received from the priest was inaccurate and more pro-death penalty than the Church's position actually was. According to the encyclical, to which the court referred during voir dire:

> "Over the centuries, the church has repeatedly affirmed the state's right and duty to protect the common good by punishing and executing felons. As recently as in the first edition of the Catechism of the Catholic Church (1994), this traditional viewpoint is repeated, affirming 'the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty.'"

(http://www.uscatholic.org/culture/ethic-life/2011/10/what-does-church-say-about-death-penalty; no. 2266.) Y.P. reported the priest told her that the Catholic Church does "believe in capital punishment" (21RT 4668), an apparently *unqualified general endorsement* that is inconsistent with the actual and much more restrictive position that it was acceptable to the church only "in cases of extreme gravity." In fact, as discussed in the opening brief at pages 377-379, the Church's position on the death penalty was not cut-and-dried as suggested by the priest's response. Although the traditional teaching of the Church was that the death penalty was not a moral evil, in 1995, Pope John Paul II acknowledged in his encyclical Evangelium Vitae (The Gospel of Life) a "growing tendency" in the church and civil society to demand that the death penalty be restricted or abolished.
(footnote continued on next page)

court's handling of the questioning during voir dire indicated that it was well aware of the potential prejudicial impact that this knowledge could have on Y.P.'s ability to render an impartial, personal verdict. Yet, although the court took the position during voir dire that any information about the Church's official doctrine on capital punishment was out of bounds, it took a different position when confronted with a juror who was quite possibly tainted by such knowledge. Rather than acknowledge and confront the minefield that Y.P. had just stepped into, the trial court ignored it.

The court failed to probe as to the juror's degree of deference to or acceptance of the Church's various positions on social issues generally. Obviously, the more deference Y.P. paid to the Church's position on social issues, the more likely that the presumption of prejudice should be sustained. And the only question which the court asked regarding Y.P's attitude toward the Church's position on the death penalty was, "You were just curious?" (RT 4669.) That was patently insufficient to permit a reliable determination that Juror Y.P.'s misconduct was driven by idle curiosity unlikely to affect her jury ballot, or whether the answer rendered her more likely to vote for the death penalty.

Moreover, the court did not even admonish Juror Y.P. to disregard what the priest told her or to refrain from informing the other jurors of her conversation with him.[28] And its concluding remarks to Y.P. -- "Don't worry about it. That's fine" (21RT 4669) – must have impressed upon her that she had done nothing wrong and need not concern herself with the

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(footnote from previous page)
And even before 1995, American Catholic bishops voiced strong opposition to the death penalty. (See AOB 377-379.)

[28] The court only admonished Juror Y.P. to remember the admonition not to discuss the case with anybody. (21RT 4668.)

ramifications of her conversation. In sum, the judge's treatment of Juror Y.P.'s misconduct as trivial was erroneous, for her violation of her oath and the court's instructions and the information received from the priest were not insignificant. As discussed in the opening brief, the trial court failed to afford sufficient consideration to the evidence of Juror Y.P.'s conduct which demonstrated the willfulness of her misconduct, as well as the significance of the priest's counsel to her penalty decision. (AOB 382-402.)

In the opening brief, appellant demonstrated that the presumption of prejudice was not rebutted in this case. (*Ibid*.) As argued there, the following facts shows a substantial likelihood that Juror Y.P. was actually biased with respect to the penalty decision: (1) Juror Y.P. willfully violated her oath and instructions; (2) she deliberately sought outside guidance for making her penalty decision; (3) the extrinsic information went to the key issue at the penalty phase, and both her behavior and the nature of the information imparted to her indicate that the priest's information was vital to her penalty phase decision; and (4) she was never admonished to disregard the extraneous information or to refrain from sharing it with the other jurors. Respondent's attempts to challenge all four are meritless.

Respondent first contends the misconduct was not intentional because the trial court "'did not specifically tell them not to talk about the death penalty,'" and the trial occurred before this Court recommended in *Danks* that juries be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations and that includes spouses, spiritual leaders or advisers or therapists. (RB 116, citing *People v. Danks* (2004) 32 Cal.4th 269, 306, fn. 11.)

Juror Y.P., along with the other jurors, was admonished continually and specifically throughout the guilt phase not to discuss any subject or matter connected with the trial with anyone and not to seek or receive

evidence or information from any source outside of the witnesses and evidence presented at trial. (See AOB 363.) And, on the day before she spoke to her priest, the juror was again admonished:

> Remember it's your duty not to converse among yourselves or with anyone else nor permit anyone to talk with you on any subject or matter connected with the trial or to form or express any opinion thereon until the cause is finally submitted to you. [¶] You're further admonished not to visit the scene or the place where any material fact occurred nor must you seek or receive evidence or information from any source outside of the witnesses and evidence presented at this trial.

(21 RT 4658-4659.) These admonishments clearly informed the juror that she should not be seeking any information from *any* outside source. She did not need to be specifically told that such an outside source included her priest. They also clearly informed that she was not to discuss any subject or matter connected with the trial with anyone Given that the sole issue to be decided at the penalty phase was whether the juror would sentence appellant to death or to life without the possibility of parole, it should have been clear to her that she should not be seeking information about the very issue she would be determining.

However, even if one might argue whether these admonishments were sufficient to put Y.P. on notice that she should not be contacting her priest to seek information relevant to her penalty decision, the facts here show that (1) the juror was placed on notice, (2) she was concerned that her conversation with the priest might get her in trouble, but (3) despite that concern, she pressed the priest to answer her questions. After Juror Y.P. asked the priest "if it was a sin to decide on the death penalty," her priest responded that if he answered her question, she would have to tell the judge. (21RT 4668.) The juror said okay but asked if she would "get in trouble." (*Ibid*.) As the juror said to the court, "I kept asking him, 'Am I

going to get in trouble?'" (21RT 4668-4669.) Although the priest did not think so, he gave Y.P. an opportunity to decline to hear his answer. The juror persisted in her inquiry for his answer. The priest's admonishment that she would have to tell the judge must have alerted Y.P. to the fact that their communications were not entirely kosher. And the fact that she persisted in obtaining an answer even after the priest gave her an opportunity to walk away evidences that this was an intentional violation. Thus, the juror's own behavior in this case demonstrated that she knew she was doing something wrong in contacting her priest and pressing him to tell her the Church's position on the death penalty.

It is true that in *Danks*, this court suggested in dictum that jurors be expressly instructed not to speak to spouses, spiritual leaders or advisors or therapists because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations may assume such an instruction does not apply to confidential relationships. (*People v. Danks*, *supra*, 32 Cal.4th at p. 306, fn. 11.) However, examination of the Court's handling of the two instances of misconduct in *Danks* refutes respondent's suggestion that this dictum supports a finding that the misconduct in this case was merely inadvertent.

In one of the instances of misconduct in *Danks*, the one involving Juror K.A., this Court expressly found the misconduct to be inadvertent. There, the juror encountered her pastor at church during regular services and because she was under such stress in serving as a juror, her husband suggested she talk to the about the Bible verses she had read or her feelings about the verdict. Juror K.A. responded, however, that she did not need to discuss anything. When her pastor said that he understood she had read several scripture verses, Juror K.A. responded that she had read the scriptures and they gave her comfort. It was then that the pastor offered his

unsolicited advice that they were good scriptures and jokingly said that if he were a juror, he would impose the death penalty on defendant. (*People v. Danks*, *supra*, 32 Cal.4th at pp. 306-307.) This Court found this to constitute misconduct since "[i]t is misconduct for a juror during the course of trial to discuss a case with a nonjuror." (*Id*. at p. 307.) However, the Court characterized it as an inadvertent receipt of information, given that "Juror K.A. told her pastor she had nothing to talk to him about, and he nevertheless insisted on imparting his personal, unsolicited view regarding the appropriate penalty verdict." (*Ibid*.)

In the second instance, however, where Juror B.P. spoke to her pastor and asked if there was anything in the Bible which speaks against the death penalty, this Court did not find the misconduct to be non-intentional. (*Danks*, *supra*, at p. 309.) Rather, this Court stated:

> Here, Juror B.P. asked her pastor about the Bible's stand on the very issue she was deliberating. Thus, her misconduct was more egregious than that of Juror K.A.

(*Ibid*.)

Here, like Juror B.P.'s solicitation, Juror Y.P.'s contact with the priest was not inadvertent, but an intentional seeking of advice about the decision she knew she would have to make. Despite her concern that she might "get in trouble," despite the priest's admonition that she would have to tell the judge, and despite being afforded an opportunity to decline to hear the answer, Juror Y.P. pushed ahead and told the priest that she wanted him to answer her question. This was not inadvertent misconduct, but a purposeful seeking and receiving of information which evidences how important the answer was to her decision-making process at the penalty phase.

Respondent next challenges the significance of the sought-after information to Y.P.'s penalty determination. (RB 116-117.) As argued in

the opening brief, the information provided about the Catholic Church's position on the death penalty went to a key issue at the penalty phase and the juror's behavior indicated that it was vital to her decision whether or not to impose the death penalty. (AOB 388-396.) Moreover, as discussed above, the priest's incorrect and overly broad characterization of the Church's position on capital punishment rendered the extrinsic information particularly prejudicial in this case.

Respondent, however, ignores the key issue here – the significance of an incorrect and overly broad characterization of the Church's position to a juror who obviously felt that information was important enough to violate both her oath and instruction. Instead, respondent trivializes the issue with an argument disputing that the solicited information went to the key issue at the penalty phase. Respondent argues that the Church's position on the death penalty was not at issue in the trial. (RB 117.) In the same vein, respondent attempts to diminish the importance of the sought-after information on the basis that Juror Y.P. only solicited information regarding the Church's general position on the death penalty. (RB 116.)

Of course, the key issue was whether to impose a sentence of death or life without possibility of parole. But, as discussed in the opening brief, both state and federal courts have recognized the great potential of general religious doctrine to influence a juror's penalty determination. (See AOB 390-392.) And the facts show that certainly was true in this case. A critical factor here is that Juror Y.P. was Catholic and the Church's position on the death penalty was very important to her, as evidenced by her beginning remark to the Court: "The thing …. I'm Catholic." (21RT 4666.) Y.P.'s question to her priest, "whether it was a sin to decide on the death penalty" (21RT 4666-4667) suggested that she was struggling with the decision whether to deprive a fellow human being of his life and was seeking the

Church's blessing to impose a death sentence. The priest's response -- that the Catholic Church endorsed the death penalty -- was substantially likely to relieve that struggle and contribute significantly to a decision by Juror Y.P. that death was the appropriate punishment for Brian Johnsen. Thus, whether or not in every case the Church's position is key to the penalty decision, the record shows that it was here.

Respondent neither discusses these facts nor acknowledges the body of case law discussed in the opening brief. (RB 116-117; see AOB 388-396.) Respondent merely argues that "[a]s in *Danks*, her inquiry 'was to determine not whether her vote was correct, but whether it violated a religious proscription.'" (RB 116, quoting *People v. Danks*, *supra*, 32 Cal..4th at p. 310.) Respondent fails to mention that the juror in *Danks* had already made up her mind and had voted three times for death before she spoke with her pastor. This, not the general nature of her inquiry, was the critical factor supporting this Court's determination that the pastor's information about the Bible's stand on the death penalty was not substantially likely to influence the juror. (*Id*. at pp. 309-310.) *Danks* was not faced with the issue here, where the juror's own words showed that she was struggling with the decision whether to impose life or death and knowing whether the church would bless a decision to impose death or would consider it a sin was critical to her struggle.

Respondent also relies on Juror Y.P.'s statements that she was simply curious and the priest's information did not change the way she felt. (RB 117.) As discussed in the opening brief, when questioned by the court, Juror Y.P. understandably attempted to downplay the significance of her contact with the priest, but her behavior contradicted her explanations. If Juror Y.P. was just curious, why would she make the effort, and risk getting into trouble, to contact the priest after hearing the court's repeated

admonitions not to discuss any aspect of the case with anyone? Given that she was so admonished not long before her call to the priest and, in fact, asked the priest whether she could get into trouble, she plainly understood she was not supposed to consult her priest, but went ahead and did it anyway. Moreover, even after the priest told her that she would have to tell the judge and asked if she still wanted to hear the answer, Juror Y.P. responded affirmatively. If the opinion of the church was not significant to her penalty decision, why did she insist on hearing it? The facts show the Church's position on the death penalty was relevant for her, and the further facts that she asked even though she had doubts about whether it was proper and was given an opportunity to withdraw the question, heightens its importance. In short, the active and persistent nature of this juror's conduct, in addition to the very nature of what the priest said, establishes a substantial likelihood that she was influenced by the information she received. (See, e.g., *In re Boyette* (2013) 56 Cal.4th 866, 902 (conc. & dis. opn. of Corrigan, J.) [the "active nature" of the jurors' misconduct in renting and watching a film, "provides insight into the film's potential influence on them…. That they devoted such time to acquiring this extraneous information reflects that they believed it was important to consider in deciding upon a penalty."].)

Respondent argues that the trial court implicitly found that Juror Y.P. was being truthful when it decided not to remove her from the jury, but, as discussed in the opening brief, a juror's statements are not dispositive and both state and federal courts recognize that a juror's assurance of impartiality is legally insufficient to demonstrate lack of bias. (See AOB 393-396.) This Court has made clear that where misconduct raises a presumption of prejudice, as was the case here, a trial court cannot merely accept a juror's statement that she can remain impartial. "It is not

enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 477, quoting *People v. McNeal* (1979) 90 Cal.App.3d 830, 838.) The trial court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1109.) As discussed in the opening brief, the court failed to make an adequate inquiry to evaluate Juror Y.P.'s claim of impartiality. (See AOB 402-407.)

The final reason for why the presumption of prejudice was not dispelled here is the lack of proper admonishments. As discussed in the opening brief, this Court has held that an admonition by the trial court may dispel the presumption of prejudice arising from misconduct. (See AOB 396-397.) But here, Juror Y.P was never admonished to disregard the information she received from her priest or not to share it with the other jurors. To the contrary, the trial court told her not to worry about it and that all was fine. (21RT 4669.) Thus, the juror was left with the message that it was okay for her to consider and follow her church's position on the death penalty in determining the appropriate sentence and she was free to discuss the Catholic Church's belief in the death penalty with the other jurors during deliberations.

Respondent argues not so, because the court reminded Y.P. of the admonition "not to discuss the case with anybody," and it later admonished the jurors that they must decide all questions of fact from the evidence received at trial and not from any other source. (RB 117.) Respondent is wrong. These admonitions did not dispel the presumption of prejudice. The admonition not to discuss the case with anybody did not speak to the juror's ability to discuss the issue during deliberations with her fellow jurors. And, as for the second admonition, this Court's case law is replete with examples

where jurors considered and discussed religious authority in determining the appropriate penalty despite receiving this standard admonition. (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 191 [after juror spoke to priest who said that the Church approved the law of the land and thus a vote for death would not be a violation of any church law, juror told other jurors about that conversation]; *People v. Mincey* (1992) 2 Cal.4th 408 [a juror brought a Bible into the jury room during penalty phase deliberations and read verses with other jurors.) The kind of admonition necessary to dispel the presumption of prejudice is one where the court specifically admonishes the juror to disregard the improper information. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 925; *accord, People v. Zapien* (1993) 4 Cal.4th 929, 996.) That was not done here.

Respondent's final argument is that the presumption of prejudice has been rebutted because "there was compelling evidence at the penalty phase favoring the imposition of the death penalty. (RB 117.) But this argument focuses on the wrong issue. The question to be decided here is not whether Juror Y.P. could have imposed a sentence of death on the basis of the aggravating evidence presented at the penalty phase, but whether the prosecution can prove there is no substantial likelihood that she was influenced by the information she received from her priest. (*People v. Marshall* (1990) 50 Cal.3d 907, 951 [The test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless error analysis.].) "If [this Court] find[s] a substantial likelihood that a juror was actually biased, [it] must set aside the verdict, no matter how convinced [it] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 579.)

As discussed in the opening brief, the prosecution has a heavy burden to meet in proving that this presumption has been rebutted. It is a heavy burden to begin with and in a capital case, it is even stronger, for it is vital that jurors must decide the case free from any external cause that might disturb the juror's exercise of deliberate and unbiased judgment. (See AOB 382-385.) Moreover, when the misconduct goes to a key issue in the case, as it did here, the presumption of prejudice has its most forceful effect. (*In re Stankewitz* (1985) 40 Cal.3d 391, 402.)

The factors bearing on this issue are those very factors which appellant has discussed above and in the opening brief – the strength of the evidence that the misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. (*Elsworth v. Beech Aircraft Corp*. (1984) 37 Cal.3d 540, 557.) Using these factors, appellant has presented several strong reasons showing why Juror Y.P. was likely influenced by her conversation with the priest. Respondent has presented no reason to find the presumption of prejudice rebutted in this case. When all of the circumstances of Juror Y.P.'s misconduct are considered, it is clear that it was not:

(1) Evidence that the misconduct occurred was uncontested and incontestable. Juror Y.P. admitted calling and pursuing her inquiry with her priest.

(2) The misconduct was serious in that Juror Y.P. deliberately sought outside information in violation of her oath and the court's repeated instructions and admonitions.

(3) The extrinsic information went to the one and only issue to be determined at the penalty phase, and Juror Y.P.'s behavior showed how important the information was to her sentence determination.

(4) The extrinsic information Y.P. received from the priest was that the moral authority of her church was "in favor of" the death penalty, thus putting that moral authority on the death side of YP's weighing process.

(5) Juror Y.P. was never admonished to disregard the church's purported stand in favor of the death penalty or to refrain from sharing that information with the other jurors.

In short, Juror Y.P. deliberately set out to obtain information from her priest regarding the penalty decision she was faced with making. Her behavior indicated that she was struggling with the decision she would have to make and that this information was very important to her decision-making process. Despite her concern that she might "get in trouble," despite the priest's admonition that she would have to tell the judge, and despite being afforded an opportunity to decline to hear the answer, she persisted in obtaining an answer. The priest's response -- that a vote for death would not be a sin and that the Catholic Church endorsed the death penalty -- was substantially likely to relieve that struggle and contribute significantly to a decision that death was the appropriate punishment for Brian Johnsen. As recognized by Justice Mosk, in his concurring and dissenting opinion in *People v. Sandoval*, the kind of answer provided by the priest to Juror Y.P. offered her "an easy way to avoid a hard choice - in fact, an especially hard choice," to evaluate the aggravating and mitigating circumstances and then determine the appropriate penalty. (*People v. Sandoval* (1992) 4 Cal.4th 155, 205 (conc. & dis. opn. of Mosk, J.)

C. The Trial Court Erred in Failing to Conduct a Sufficient Inquiry Into Juror Y.P.'s Misconduct.

In the opening brief, appellant demonstrated how the trial court abused its discretion in failing to conduct an adequate inquiry into Juror

Y.P.'s misconduct. Given the juror's deliberate behavior evidencing how important the sought-after information was to her penalty decision and given the nature of the priest's information – that the juror's church sanctioned a vote for death, it was critical for the court to determine whether Y.P.'s impartiality had been affected. Yet, the trial court failed to ask any questions to determine the impact of the priest's information on Juror Y.P. It asked only three questions: (1) When did the juror speak to her priest? (2) Did the conversation occur during confession? and (3) Which priest did she talk to? (21 RT 4666-4669.) Instead of probing the details of Juror Y.P.'s conversation with her priest, the court simply repeated and affirmed the juror's own limited description and assessment that the information would make no difference. (*Ibid*.) In fact, it was the court who suggested to the juror that she was "just curious." (21RT 4669.) In short, the court asked no questions to test and assure Juror Y.P.'s impartiality. Furthermore, the telephonic nature of the chat was insufficient to allow the court to assess the juror's demeanor and credibility – both necessary to the court's ability to determine her ability to remain impartial. (See AOB 402-407.)

Respondent argues that the trial court did not abuse its discretion by examining the juror telephonically and by deciding there was no need to conduct a further examination but fails to refute, or even acknowledge, appellant's arguments. (RB 118-119.) Indeed, respondent does not even discuss the factual circumstances of the court's inquiry. Instead, respondent offers two general contentions, one which is belied by the record and one which is legally incorrect. (*Ibid*.)

Respondent first argues that the telephonic examination was warranted because it was particularly important for the court to act expeditiously. (RB 119.) This argument misses the mark. The telephone

conversation occurred on March 15 – 13 days before the jurors were scheduled to return for the penalty phase on March 28. (21 RT 4662, 4671.) There was no reason why the court could not have followed up with an in-person examination of Juror Y.P. well before the start of the penalty phase. Indeed, the court itself stated its intent to have a further discussion with Juror Y.P. on the 28th when the jurors arrived for the penalty phase. (21RT 4671.) Yet the court failed to do so.

Respondent's second argument is that the court did not abuse its discretion in failing to conduct any further examination, because there was no material conflict in the evidence warranting a further hearing. (RB 119.) Respondent contends that since Juror Y.P, admitted she had solicited and received information from her priest, there was no conflict and nothing more was required. (*Ibid*.) This, too, misses the mark, for the trial court failed to conduct an adequate inquiry to determine the material issue here – whether Juror Y.P.'s impartiality had been affected by her conversation with the priest. As discussed above, the law is clear that once a trial court is put on notice of the possibility that a juror is subject to improper influences and unable to perform his or her duties, it is the court's obligation to make whatever inquiry is reasonably necessary to determine whether the juror's impartiality has been affected. A hearing is required "where the court possesses information which, if proven true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Ray* (1996) 13 Cal.4th 313, 343.) The trial court was thus required to assess Y.P.'s impartiality and as discussed above and in the opening brief, it could not merely accept her assessment that the information would not affect her. Rather, the court had the responsibility to make sufficient inquiry to determine whether that was

so. The court's failure to do so constituted an abuse of discretion, requiring reversal of appellant's death sentence.

D. <u>These Claims Have Not Been Forfeited</u>.

Respondent argues that appellant has forfeited these claims because he did not lodge a contemporaneous objection to the adequacy of the trial court's investigation and never asked the trial court to dismiss Juror Y.P. (RB 113.) However, respondent's position is incompatible with this Court's delineation of the trial court's responsibility to conduct an investigation whenever the court possesses information that might constitute good cause to remove a juror whether or not the defense requests an inquiry, and even if the defense objects to such an inquiry. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 506.) Here, defense counsel neither requested nor opposed further inquiry by the trial court. As discussed below, respondent's forfeiture argument, RB 113 – 115, is untenable in light of controlling decisions of both this Court and the United States Supreme Court.

The Supreme Court has placed the responsibility for determining the existence of misconduct and its prejudicial effect squarely on the trial court to ensure the fairness of the verdict. In *Remmer v. United States* (1954) 347 U.S. 227, that Court vacated a conviction because the trial court had responded to information about an improper juror communication with an ex parte investigation and resolution. As noted in *Remmer*, "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." (*Remmer v. United States*, *supra*, 347 U.S. at p. 229.) In vacating the

conviction because of the trial court's ex parte investigation and resolution, *Remmer* set forth a procedure necessary for the adjudication of Sixth Amendment juror misconduct claims: "The trial court should not decide and take final action ***ex parte*** on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." (*Remmer v. United States, supra*, 347 U.S. at pp. 229-230.)

This Court, too, has placed the responsibility for determining the existence of misconduct and its prejudicial effect on the trial court to ensure the fairness of the verdict: "The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defense objects to such an inquiry." (*People v. Cowan, supra*, 50 Cal.4th at p. 506.) As emphasized in *Cowan*, this Court places the "'ultimate responsibility upon the court to make [an] inquiry' when the trial court is 'alerted to facts suggestive of potential misconduct.'" (*Ibid*.)

Both federal and California law are now well-settled that the trial court's receipt of information from whatever source that juror misconduct has occurred triggers the trial court's duty to conduct an inquiry sufficient under *Remmer* to resolve the issue. (See *Smith v. Phillips* (1982) 455 U.S. 209, 217 ["Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."]; *United States v. Brande* (9th Cir. 2003) 329 F.3d 1173, 1178 ["It is thus a special duty of the district court to ensure the impartiality of the jury," and "[a]lthough the parties may — and should —

aid the court in ensuring a fair trial by calling attention to any irregularities promptly and in a proper manner, *the failure of the parties to do so does not, in itself, relieve the court of its obligations*." (emphasis supplied)]; accord, *People v. Cowan*, *supra*, 50 Cal.4th at p. 506 ["because defendant's claim is that the trial court erred by failing, sua sponte, to conduct an adequate inquiry, no trial court action by the defense was required to preserve the claim"]; *People v. Martinez* (2010) 47 Cal.4th 911, 941 ["[O]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged"]; *People v. Adcox* (1988) 47 Cal.3d 207, 253 [cases place the "ultimate responsibility upon the *court* to make [an] inquiry" when the trial court is "alerted to facts suggestive of potential misconduct"]; see also *People v. Ray*, *supra*, 13 Cal.4th at pp. 342–344 [addressing the merits of a claim that the trial court had erred by failing to investigate a juror's relationship with the victim's daughter, even though the defendant had objected to any inquiry]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694; *People v. Keenan* (1988) 46 Cal.3d 478, 532 ["when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud"].)

It necessarily follows that if a trial court's duty to investigate and resolve possible juror misconduct is triggered in the course of a trial, the defendant is entitled to appellate review of the trial court's investigative procedure and substantive determination without having to take further "trial court action" to "preserve the claim." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 506.) The claim is preserved for appeal because the trial court

had an independent and constitutionally-based duty to fairly resolve the claim.

Respondent appropriately cites the applicable law and even quotes *People v. Martinez, supra,* for the proposition that "[i]f, during the course of a trial, the court has notice of prejudicial juror misconduct 'it is the court's duty to make whatever inquiry is reasonably necessary to determine whether the juror should be discharged.'" (RB 111, citing *People v. Martinez, supra,* 47 Cal.4th at pp. 941-942.) However, respondent then interjects a contention that "Johnsen forfeited his claims because he did not lodge a contemporaneous objection to the adequacy of the trial court's investigation, and he never asked the court to dismiss juror Y.P." (RB 113.)

It is illogical and untenable to argue for a requirement that a defendant must independently object to judicial action performed as a sua sponte duty in order to preserve appellate review. This Court has imposed sua sponte duties on trial courts in various circumstances where the actions involved are necessary to insure the fairness and integrity of the justice system notwithstanding partisan preferences. By analogy, the trial court's sua sponte duty to instruct on lesser included offenses applies and is reviewable on appeal even if the defendant actively opposes the lesser included offense instruction. *People v. Barton* (1995) 12 Cal.4th 186, concluded that the "interests of justice" superseded the "defendant's interests" so as to require lesser included offenses in the face of a defense objection.[29]

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[29] As explained by this Court in *Barton*:

> "In this case, defendant was prepared to roll the dice in a high stakes game of chance, betting that the jury, faced with the

(footnote continued on next page)

An unbiased jury is similarly recognized as a preeminent fixture of the interests of justice such that an erroneous exercise of the sua sponte duty to discharge a biased juror cannot be subject to waiver or forfeiture. Where a trial court discharges a juror for cause during voir dire, that judicial action is reviewable regardless of whether the defendant objected because of the paramount interest in providing both parties and the community a fair and representative jury. (*People v. Cleveland* (2004) 32 Cal.4th 704, 734["Contrary to the Attorney General's argument, this failure to object [to erroneous discharge of juror for cause] does not forfeit the right to raise the issue on appeal"]; *People v. Memro* (1995) 11 Cal.4th 786, 818 ["[W]e note that the court excluded the potential jurors on its own motion after eliciting their views on the death penalty, and that counsel failed to object. It continues to be the rule that 'the failure to object does not waive the right to raise the issue on appeal [citation].'"].)

The identical rule should be applied when the trial court sua sponte addresses an issue of mid-trial juror misconduct under Penal Code section

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(footnote from previous page)

> choice of convicting him of murder or acquitting him entirely, would find him not guilty. If successful, this gamble would have served defendant's interests. It would not, however, have served the interests of justice, for it would have denied the jury the chance to consider the possibility, between the extremes of a murder conviction and an acquittal, that defendant was guilty of voluntary manslaughter, a lesser offense included in murder. Instructions that fail to inform the jury of its option to convict the defendant of a lesser included offense shown by the evidence are necessarily incomplete. 'Trial courts have a sua sponte duty to instruct regarding lesser included offenses because neither the defendant nor the People have a right to incomplete instructions.'"

(*Barton, supra,* 12 Cal.4th at p. 204.)

1089 so that the interests of justice may be effectuated. The same potential harm to the value placed upon a fair and impartial jury arises whether the potential disqualification is identified during voir dire or subsequently during the trial itself.

Moreover, there are very practical reasons why a failure to object by the defense should not constitute a waiver or forfeiture. In any case in which the juror misconduct occurs after jury selection has been completed, the defense will likely have mixed views regarding the juror. On one hand, the juror was at least sufficiently acceptable to the defense to avoid a peremptory challenge. In this case, Y.P. made certain statements in her questionnaire that suggested she may have been viewed as a positive juror by the defense at least with respect to penalty. However, when it was revealed that she had consulted her priest about the Church's position regarding the death penalty, and that she was led to believe that the Church *favored* it, defense counsel's view of Y.P. would likely have become distinctly ambivalent. When a defense counsel is called upon to object to the sitting of a juror whom he or she originally accepted on the panel, such objection requires counsel to reverse a previous position or commitment. Defense counsel is not the best party at that point to render an objective decision whether the juror should remain on the panel or whether the misconduct requires the juror's discharge. At that point, the trial court is in a much better position to behave as an objective arbiter to ensure that the interests of justice are preserved.

Respondent cites to three decisions of this Court in which a jury misconduct claim was held to have been waived: *People v. Dykes* (2009) 46 Cal.4th 731, 808 fn. 22; *People v. Holloway* (2004) 33 Cal.4th 96, 124; and *People v. Foster* (2010) 50 Cal.4th 1301. (RB 113-114.) *Dykes* is patently distinguishable from this case. There, the defendant filed a post-verdict

motion for new trial based in part on an investigator's report of interviews with the jurors, and alleged three types of misconduct: jury discussion that a death sentence would not likely be carried out; jury discussion that the defendant's lack of remorse should be viewed as an aggravating factor; and jury discussion that life without parole did not in fact preclude the possibility of parole release. This Court reviewed and denied those three claims on the merits. (*Dykes, supra*, 46 Cal.3d at pp. 806-813.)

Dykes also raised for the first time in this Court *other* claims of juror misconduct that the investigator had found but that had *not* been presented to the trial court. It was only as to those previously unadjudicated claims that this Court found waiver: "The circumstance that defendant raised some juror misconduct claims in his motion for new trial does not serve to preserve other bases for his claim on appeal." (*Dykes, supra,* at p. 818, fn. 22.) Nothing in *Dykes* suggests that a defendant must independently object or take other preservative action where the trial court is otherwise on notice of potentially prejudicial misconduct.

People v. Holloway, *supra*, 33 Cal.4th 96, is similarly distinguishable because the juror conduct in question there was far different than the patent misconduct displayed by Y.P. The juror in *Holloway* asked the court (through the bailiff) if he could see photos of the two decedent victims while they were alive, because he wanted "something" to put together with the other testimony about their deaths. During a direct colloquy with the juror, the trial court characterized his request as one for "completion of the entire picture involving this case," and denied the request. (*Id.* at p. 123.) When the juror returned to the jury room, other jurors asked what he had requested, and he told them. The trial court conducted a further inquiry regarding that exchange, and subsequently instructed all of the jurors that on occasion the court might make inquiry of an individual juror, and that

the other jurors should not ask that juror what it was about because "'[t]hat would be talking about this case, and it's something that you're not to [do].'" (*People v. Holloway*, *supra*, 33 Cal.4th at p. 124.)

Holloway argued on appeal that the trial court erred in not discharging the curious juror, but this Court "conclude[d] that defendant forfeited this issue by failing to seek the juror's excusal or otherwise object to the court's course of action." (*Ibid.*) *Holloway* cited four cases in support of this conclusion, three of which share the two characteristics that (1) the conduct at issue was not clearly misconduct; and (2) defense counsel expressly stated his *opposition* to discharge of the juror.[30] (*Ibid.*) Thus, *at most*, *Holloway* stands for the proposition that an appellate forfeiture may arise where (1) the juror's conduct is not clearly improper; and (2) defense counsel opposes excusal. Here, Juror Y.P. clearly engaged in misconduct, and defense counsel neither acquiesced in nor opposed her continued service.

Finally, respondent cites *People v. Foster*, *supra*, 50 Cal.4th 1301, where in investigating claims of juror misconduct, the trial court questioned all possibly impacted jurors in person, invited counsel to question them, and then thoroughly admonished the jurors. (RB 114.) Because defense counsel did not propose additional questions, object to any juror's continued service, or request a mistrial, this Court stated that appellant had

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[30] These three cases were *People v. Majors* (1998) 18 Cal.4th 385, 428; *People v. Gallego* (1990) 52 Cal.3d 115, 188; and *People v. Wilson* (1965) 235 Cal.App.2d 266, 281, each of which entailed an express opposition to excusing the juror. The fourth case, *People v. McIntyre* (1981) 115 Cal.App.3d 899, 906, involved an issue regarding a jury instruction, and thus, is not relevant to this analysis.

forfeited his claim of juror misconduct. (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1339-1343.)

This case is different from *Foster* in that, unlike the trial court in that case, the trial court here failed to conduct a sufficient inquiry in the first instance and failed to adequately admonish Juror Y.P. As discussed in the opening brief, the court did not question Juror Y.P. in person, did not ask any questions designed to probe the effect of the priest's information on her ability to decide appellant's fate free from outside influence and solely on the basis of the court's instructions, but instead told Y.P. not to "worry about" what she had done and that it was "fine." Moreover, the court failed to instruct Y.P. not to consider what she had been told, and it even failed to tell her not to tell other jurors about what she had done and learned. (See AOB 404-407.)

In contrast, in *Foster*, the trial court thoroughly investigated two possible instances of misconduct involving third-party contacts with the jurors. In the first, the court had been informed that notes had been left on the windshield of a juror's car and the juror had been somewhat concerned. The juror was brought into the courtroom where the court thoroughly probed the circumstances of the notes. It turned out that the notes had been left by a friend of the juror who was playing a joke on him. The notes contained nothing concerning the trial or the juror's duties as a juror, and the juror reported that the episode would not affect his service as a juror. The court admonished the juror not to discuss the incident with the other jurors, but because he had already mentioned it to one other juror, that juror was also brought into the courtroom for questioning. The court informed the juror that the notes had simply been left by the other juror's friend and were not related to the trial. The second juror confirmed that the incident did not affect him in any way and would not affect his decision. (*People v.*

Foster, *supra*, 50 Cal.4th at pp. 1339-1340.) And then, the court brought in the entire panel, whereupon it informed the jurors of the incident and instructed them "'to disregard that occurrence. It was a joke arising out of a friendship and has nothing to do with the trial.'" (*Id*. at p. 1340.) The jurors all confirmed that this information did not cause anybody concern and no one was affected by it. (*Ibid*.)

In the second episode in *Foster*, another juror had heard persons in the parking lot commenting to each other that the juror was a juror in the case; one of the individuals said, "'I wouldn't want to be a juror on this trial.'" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1341.) This juror was also thoroughly questioned about the incident, the impression it made on him, whether it bothered him or would affect the way he viewed the case, whether he recognized the individuals, and whether they were present in the courtroom. It was clear from the juror's responses that he was not bothered "'in any way, shape, or form'" or affected by the incident. He was admonished not to mention the incident to the other jurors and to disregard whatever he heard. (*Ibid*.) Thus, in both incidents in *Foster*, the trial court thoroughly investigated, questioning the affected jurors in person and inviting participation by counsel, before concluding that there was nothing requiring any further action. As is evident by these summaries, there was not.

Foster cited *People v. Lewis* (2009) 46 Cal.4th 1255, 1308, in which it came to the trial court's attention that a juror had discussed the case with her husband. Upon inquiry, the juror stated that she had "vented" to her husband about a procedural aspect of the deliberations, but did not discuss any substantive aspects of the evidence or deliberations. *Lewis* concluded that "[a]t no time did defense counsel object to Juror No. 9's continued

service, or request a mistrial on the ground of juror misconduct," with the result that "defendant has forfeited this claim." (*Ibid*.)

Both *Foster* and *Lewis* cited *People v. Stanley* (2006) 39 Cal.4th 913, in which a juror read a newspaper article about the case – "Juror C.'s reading of the newspaper article, and 'his inadvertent receipt of information outside the court proceedings,' was misconduct giving rise to a rebuttable presumption of prejudice." (*Id*. at p. 950.) However, *Stanley* determined: "At the outset, we note defendant has conceded that his counsel failed to object to Juror C.'s continued service on the jury, and failed to request a mistrial on grounds of juror misconduct. As such, the claim is waived on appeal." (*Ibid*.) *Stanley* is the only case either cited by respondent or cited in respondent's cases in which an instance of clear misconduct was deemed waived because defense counsel made no affirmative objection to the continued service of the juror. As such, it is an outlier, incompatible with the reasoned view set forth in *People v. Cowan, supra*, and incompatible with appellant's Sixth Amendment right to a fair and impartial jury.

Appellant recognizes that where a juror's conduct is arguably but not self-evidently misconduct, and where the trial court offers the defense an opportunity to substitute an alternate for the questionable juror but defense counsel declines, there are valid policy reasons for a forfeiture rule, as was applied in *People v. Gallego*: "the trial court agreed the problem was 'de minimis' but nevertheless decided to permit defendant to consider over a three-day weekend whether he wished to have the two jurors replaced with alternates," after which defense counsel stated, "'I feel that the damage is prejudicial, but I feel that -- I feel their honesty in coming forth would nullify any damage, and I would ask that they stay on.'" (*Gallego*, 52 Cal.3d at p. 188.)

That is a very different situation from this case. Where as in *Gallego*, the court offers the defense an optional juror substitution out of an abundance of caution after finding that actual prejudice was de minimis, and the defense declines the offer, the defense should not be permitted to switch positions on appeal. However, where, as here, there is clear misconduct directly relating to the most important issue in the case, it is the trial court's responsibility to make a finding sua sponte whether the presumption of prejudice is rebutted on the record. For these reasons, forfeiture is not appropriate and respondent's contention should be rejected.

E. Conclusion.

For the reasons stated in this brief and in the opening brief, these errors – the failure to remove Juror Y.P. and the to conduct an adequate inquiry – require reversal of the sentence of death.

VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL EVIDENCE REGARDING THE SURVIVING VICTIM'S REHABILITATION AND THE IMPACT OF HIS INJURIES ON HIMSELF AND HIS FAMILY, IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In addition to presenting evidence at the penalty phase regarding the impact of Mrs. Bragg's death on her family, the prosecution presented considerable evidence regarding Mr. Bragg's injuries, his rehabilitation, and the impact of his injuries on himself and his family. In the opening brief, appellant argued that because Mr. Bragg was not the victim of the

capital offense, the trial court erred in admitting the extensive evidence regarding his rehabilitative process and the impact of his injuries[31] on himself and his family. (AOB 410-435.) Appellant's argument was threefold: First, the admission of evidence regarding the impact on his family was improper under state law. (AOB 420-425.) Second, the admission of both that evidence and evidence regarding Mr. Bragg's rehabilitative process and the impact of his injuries on himself exceeded the constitutional boundaries of *Payne v. Tennessee.*[32] (AOB 426-430.) And third, even if some victim-impact evidence regarding Mr. Bragg was admissible, the volume and nature of the evidence introduced at appellant's trial was so excessive as to violate the Eighth Amendment and Due Process. (AOB 430-433.) As argued in the opening brief, the presentation of this evidence was prejudicial, requiring reversal of the death judgment. (See AOB 434-435.)

In response to appellant's first argument, that the admission of evidence regarding the impact of Mr. Bragg's injuries on his family was improper under state law, respondent offers two responses. Both are meritless.

First, respondent argues that California has sanctioned the admission of testimony regarding the impact of a surviving victim's injuries on his or her family members. (RB 120-121.) Not so. As discussed in the opening brief, examination of this Court's victim impact cases shows that the Court has never approved the admission of testimony, such as that presented here,

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[31] Medical testimony describing the injuries suffered by Mr. Bragg during the attack was presented by two doctors at the guilt phase. (See 15 RT 3154-3159; 17 RT 3450-3454.) Appellant does not contest the admission of that evidence detailing his injuries.

[32] (1991) 501 U.S. 808.

regarding the impact of a defendant's *non-capital* offense on the family of the non-capital victim, regardless of whether the offense was committed simultaneously with the capital offense or at another time. In cases involving the surviving victim injured in the same attack that claimed the life of a capital victim, this Court has only authorized presentation of evidence regarding (1) the surviving victim's injuries and (2) the impact and harm caused by the defendant's criminal conduct on the *surviving victim*, including psychological and physical effects. (See AOB 420-425.)

Respondent, contends, however, that the Court did approve admission of this kind of victim impact evidence in *People v. Edwards*. Respondent argues "this Court observed in *People v. Edwards* (1991) 54 Cal.3d 787 that 'there is not such prohibition,' and that the decision in *People v. Benson*, *supra*, 52 Cal.3d 754 'strongly implies that such evidence comes within section 190.3, factor(b), 'criminal activity' involving force or violence.'" (RB 120-121, quoting *People v. Edwards*, *supra*, at p. 835.)

Respondent is wrong. What it quotes in *Edwards* is merely dictum. The issue there was whether the trial court erred in admitting three photographs of the victims. *Edwards* argued that they constituted improper victim impact evidence under *Booth*[33] and *Gathers*.[34] During the pendency of his appeal, however, those cases were partially overruled by the Supreme Court in *Payne v. Tennessee*, *supra*, 501 U.S. 808. Edwards then argued that even aside from Eighth Amendment considerations, this victim impact evidence was inadmissible in California because it did not come within any of the aggravating factors listed in Penal Code section 190.3. In answering

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[33] *Booth v. Maryland* (1987) 482 U.S. 496.

[34] *South Carolina v. Gathers* (1989) 490 U.S. 805.

the question whether photographs of the victims were admissible as a circumstance of the crime under factor(a), this Court reviewed the pre-*Booth* and *Gathers* California cases, including *Benson*. Although it summarized *Benson* as described by respondent, *Edwards* did not squarely address, consider or hold that evidence regarding the impact of a defendant's *non-capital* offense on the family of the non-capital victim is admissible. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 65–66; *People v. Dillon* (1983) 34 Cal.3d 441, 473–474; see also *People v Cortez* (1998) 18 Cal.4th 1223, 1236 ["It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."].)

As demonstrated in the opening brief, this has not been decided by this Court but, rather, is an issue of first impression. (AOB 420-425.) Respondent fails to address any of the authorities cited in the opening brief on this issue and does not demonstrate otherwise.

Respondent's second response to appellant's argument of error under state law is also baseless. Respondent argues: "In any event, the victim-impact evidence admitted in the present case would not have fallen under the categorical bans that Johnsen now proposes because the evidence related not only to the attempted murder of Mr. Bragg but also to the capital murder of Mrs. Bragg." (RB 121.) Respondent relies on *People v. Taylor* (2001) 26 Cal.4th 1155, 1163-1164, 1171-1172, where this Court found no error in the admission of evidence regarding the surviving victim's injuries, including his paralysis, pain, and inability to care for himself. *Taylor* explained that the jury was entitled to hear that the surviving victim would

require extensive care that his decedent wife would have provided but for her murder. (*Id*. at p. 1172.) Respondent argues that "[l]ikewise, the evidence in this case showed that, because he suffered severe injuries at Johnsen's hand, Mr. Bragg required extensive care from his family and that Mrs. Bragg might have provided that care but for her murder." (RB 121.)

But appellant has not challenged the admission of evidence regarding Mr. Bragg's rehabilitative process and the impact of his injuries on himself under state law.[35] Appellant's state law challenge concerns only the impact of that evidence on Mr. Bragg's family. (See AOB 412, 419-425.) *Taylor* said nothing at all about the admissibility of evidence regarding the impact of a surviving victim's injuries on his or her family members. The victim impact evidence challenged in *Taylor* fell into two categories: (1) the impact of the capital case victim on her family, including the surviving victim – her husband Kazumi; and (2) the extent of injuries that Kazumi alone suffered. (*Taylor*, *supra*, 26 Cal.4th at p. 1171.) *Taylor* merely held that evidence regarding Kazumi's injuries constituted admissible victim impact evidence. (*Id*. at p. 1172.) It offers nothing to rebut appellant's argument that admission of evidence regarding the impact of Mr. Bragg's injuries on his family was improper.

In sum, respondent has failed to controvert appellant's argument that this kind of victim impact evidence was not admissible under state law. For the reasons stated in the opening brief, the trial court erred in admitting

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[35] Appellant does argue that admission of evidence regarding Mr. Bragg's rehabilitative process and the impact of his injuries on himself exceeded the constitutional boundaries of *Payne v. Tennessee* and violated appellant's rights to a fair penalty trial and reliable penalty determination in violation of the Eighth and Fourteenth Amendments. (See AOB 426-430.)

evidence regarding the impact of Mr. Bragg's injuries on his family. (See AOB 419-425.)

As for appellant's second argument, that the admission of evidence regarding Mr. Bragg's rehabilitative process and the impact of his injuries on himself and his family exceeded the constitutional boundaries of *Payne*, respondent suggests that appellant forfeited this claim by not objecting on this ground. (RB 121.) Not so. Respondent fails to acknowledge the written motion filed by appellant, in which appellant so objected. That motion, after summarizing and discussing *Booth*, *Gathers*, and *Payne* and the limits imposed on the admission of victim impact evidence under the Due Process Clause and the Eighth Amendment, requested exclusion of victim impact evidence in this case. (8CT 2277-2282.) Appellant also objected orally to admission of this victim impact evidence both on the ground that it fell outside the purview of Penal Code section 190.3, subdivisions (a) and (b), and on the ground that its admission would violate appellant's Eighth and Fourteenth Amendment rights. (22RT 4734-4735.) Respondent's forfeiture contention is belied by the record and must be rejected.

Respondent next argues that evidence regarding Mr. Bragg's rehabilitation and the impact of his injuries on himself and his family paled in comparison to the evidence regarding the effect that Mrs. Bragg's death had on the same family members. (RB 122.)

Again, the record belies respondent's contention. Four witnesses provided victim impact testimony in this case – one medical witness and three family members. The medical witness, Dr. Lloyd Brown, medical director of the rehabilitation facility where Mr. Bragg received therapy, devoted his entire testimony to discussing Mr. Bragg's rehabilitation and the cognitive, psychological and emotional effects of his injuries. (22RT

4908-4920.) And of the three family members, one witness, Merriam Bragg, Mr. Bragg's daughter-in-law and primary caretaker, devoted her entire testimony to providing details about his rehabilitation, the changes in Mr. Bragg after his assault, and the impact of those cognitive and emotional changes on her and her husband's life. (22 RT 4935-4944) She provided extensive, painfully detailed testimony regarding Mr. Bragg's functioning before and after the crime and the changes that she and her husband had to make in their lives to care for him. (*Ibid*.) Merriam Bragg was not asked to, and did not, provide any testimony regarding Mrs. Bragg.

And although the Braggs' daughter and son, Sylvia Rudy and Leo Bragg Jr., both testified to how the loss of their mother impacted them, that testimony paled in comparison to their testimony about the impact of Mr. Bragg's injuries on them. Leo Bragg Jr. spent approximately a half page of testimony describing the impact of his mother's death and then went on for five pages to describe how his father's assault impacted him. (22RT 4929-4934.) He described the details of his father's rehabilitation, how active his father had been before his assault, and the changes in him afterwards. Leo Bragg Jr. also provided detailed information about how Leo Bragg currently spends his time and explained how his father's assault turned their lives upside down. (*Ibid*.) While Sylvia Rudy devoted a bit more time to discussing the impact of her mother death (22RT 4923-4925), she spent considerably more time discussing the impact of her father's death. She described her relationship with him prior to his assault, his life-style before his assault, his rehabilitation, the differences in his functioning after the assault, and how difficult it had been for her to communicate with him and see his decline in cognitive functioning. (22RT 4925-4928.) As is evident, the record shows just the opposite of what respondent argues. Almost all of the victim impact evidence in this case focused on Mr. Bragg's injuries and

their impact on his life and the lives of his family members, rather than on the impact of Mrs. Bragg's death.

For the same reasons, respondent's prejudice argument is meritless. Respondent argues that evidence regarding Mrs. Bragg's death on her family members was so compelling that the evidence regarding Mr. Bragg's rehabilitation and the impact of his injuries on himself and those same family members would not have made a difference. (RB 122.) However, as demonstrated above, the bulk of the victim impact testimony here was devoted to describing the painful circumstances of Mr. Bragg's injuries, his rehabilitation, and his decline in functioning and their effect on his family. As discussed in the opening brief, there were many reasons why the jurors could have chosen a life sentence over a death sentence absent the admission of such prejudicial evidence. (See AOB 434-435.) This error requires reversal of the death judgment.

IX.

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE VIOLATED THE UNITED STATES CONSTITUTION.

Appellant submitted two proposed jury instructions to ensure that the jury was instructed regarding the appropriate use of the extensive victim impact evidence presented at his penalty phase, but the trial court refused to give either instruction. (25RT 5615, 5627-5628; see defendant's instructions 35 and 61 at 9CT 2477, 2449.) In the opening brief, appellant argued that the trial court's refusal of these proposed instructions and failure to provide adequate guidance regarding the appropriate use of victim impact evidence violated appellant's right to a decision by a rational and

properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (AOB 435-440.) Respondent contends that this claim is meritless and that any error was harmless. (RB 123-125.)

Appellant believes that this issue has been adequately presented and the positions of the parties are fully joined.

X.

THE ERRONEOUS ADMISSION OF IRRELEVANT, GRUESOME PHOTOGRAPHS OF VICTIM THERESA HOLLOWAY REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

At the penalty phase, the prosecution sought admission of three autopsy photographs of Theresa Holloway, appellant's former girlfriend who had been killed by appellant's friends Robert Jurado, Denise Shigemura and Anna Humiston while appellant was in jail. Evidence of appellant's participation in Holloway's death was admitted as Penal Code section 190.3, factor (b), violent criminal activity. According to the medical examiner, the three photographs depicting close-up shots of Holloway's face, neck and scalp were helpful only to show the extensive nature of Holloway's injuries and that the blunt force injuries could have been caused by a scissors jack. (22RT 4757.) Appellant offered to stipulate to the cause of death and that Holloway had been struck a number of times by a scissor jack. (22RT 4758.) But the trial court admitted all three photographs over appellant's Evidence Code section 352 objection on the basis that they were "probative of establishing the circumstances of the crime of this prior criminal activity and how it occurred." (22RT 4760.) In the opening brief, appellant argued that the trial court erred in admitting the

photographs, because they were not relevant to any disputed issue at the penalty phase, and even if they had some minimal probative value, that value was substantially outweighed by their prejudicial effect. (See AOB 440-457.)

At trial, the prosecution offered the photos as relevant to the medical examiner's conclusions regarding the cause of death, the instrumentality used to inflict the injuries and the extent of injuries. Appellant established in the opening brief that the photographs were not necessary to support the doctor's testimony on those issues. Furthermore, they were not relevant to establish appellant's statement of mind or actions or any other issue required to establish his guilt under an aiding and abetting theory where he did not inflict any of the injuries, was not present when they were inflicted, and had no knowledge of how Holloway was, or was to be, killed. The photographs of injuries inflicted by Jurado shed no light on appellant's state of mind or involvement, provided no link between appellant and Holloway's death, and had no bearing on his role, if any, in her death. For the same reason, the photographs had no bearing on aggravation of the crime and choice of penalty. (AOB 444-456.)

On appeal, the State offers a new and novel relevance theory: (1) Holloway's injuries corroborated the testimony of witnesses who had been told about the murder by the Anna Humiston and Denise Shigemura who aided Robert Jurado in killing Holloway. (2) Humiston and Shigemura described how Holloway had been strangled and beaten with a scissors jack. (3) The involvement of Shigemura and Humiston tied appellant to Holloway's murder. (4) The prosecutor was obliged to prove appellant's involvement in that murder in order to present the evidence under factor (b). (RB 130.) Thus, according to respondent, pictures of injuries which corroborate the manner of killing described by participants who were

connected to appellant are therefore relevant to connect appellant to the murder.

This extremely tenuous thread of relevance does not have any support in the case law, as discussed in the opening brief (AOB 444-456), and respondent provides none supporting it in its brief. (RB 130.) This Court has upheld the introduction of autopsy photographs disclosing the manner in which a victim was killed as relevant to the question of intent to kill, deliberation, premeditation, and malice or other theories underlying the prosecution's case, at least when the defendant participated in the killing. (See AOB 445-447.) Never has it approved the use of gruesome, prejudicial photographs[36] simply to corroborate the description of the manner of killing by others who were connected to the defendant, thus connecting the latter to the crime. Moreover, it was not Shigemura and Humiston, but witness Mark Schmidt, who connected appellant to that fateful evening when Robert Jurado, Humiston and Shigemura killed Holloway. It was Schmidt who testified to appellant's telephone call from jail to Jurado that evening. (22RT 4786-4794.) In short, even if this Court were to find any inkling of relevance under this novel theory, the photographs were certainly not necessary and, as discussed in the opening brief, they exhibited substantial potential for prejudice. (See AOB 452-456.) The photos were inflammatory and that was why they were introduced – to inflame the jurors and secure a sentence of death. Any possibly de minimus theory of relevance was substantially outweighed by the prejudicial effect of the photos and required exclusion under Evidence Code section 352.

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[36] All three photos provided close-range shots of the face and scalp of a young woman beaten to a pulp. (See Exhibits 185, 186, 187.)

With respect to the remainder of respondent's argument, appellant considers the issue to be fully joined by the opening brief. For all of the reasons set forth there and in this brief, the trial court erred in admitting the three photographs. The resulting use of that evidence to inflame the jury against the jury on the basis of another's actions deprived appellant of his Fifth, Sixth, and Eighth Amendment rights to due process, a fair jury trial, and a reliable, individualized determination of sentence, requiring reversal of appellant's sentence.

XI.

REVERSAL IS REQUIRED DUE TO PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE ARGUMENTS TO THE JURY.

In the opening brief, appellant argued that the prosecutor committed flagrant misconduct during his penalty phase arguments by urging the jury to put appellant to death on the basis of improper (1) appeals to passions, fears, and prejudices and (2) argument designed to ensure that the jury would not consider mercy as a mitigating factor. The prosecutor also argued that (1) the jurors had a duty, as representatives of 30 million Californians, to impose a sentence of death; (2) if they did not have the will and courage to impose such a sentence, their decision for a life sentence would be immoral, weak, and criminally negligent; (3) a life sentence would be interpreted as valuing appellant's life more than the victim's life; and (4) a sentence of death was necessary to maintain the integrity of the law. (AOB 458-477.) Furthermore, with respect to the evidence of the conspiracy to murder Doug Mynatt, which had been introduced for the limited purpose of establishing motive, the prosecutor improperly urged the jurors to consider this evidence as an aggravating 190.3, factor (b), offense,

despite the fact that as a matter of law the conspiracy was not supported by sufficient evidence, and he also based his argument on a mischaracterization of the evidence. (AOB 477-486.) As argued there, this misconduct was deliberate and prejudicial, requiring reversal of appellant's sentence. (AOB 491-496.)

Respondent argues that (1) these claims have been forfeited, (2) the prosecutor's arguments were not unduly emotional or inflammatory and there is not a reasonable likelihood that the jurors construed them in an objectionable manner, (3) the prosecutor did not improperly use or incorrectly describe the evidence regarding Mynatt, and (4) any error was harmless. (RB 132-146.) Appellant disagrees with respondent's contentions, and believes that this issue has been adequately presented and the positions of the parties are fully joined.

XII.

THE CUMULATIVE PREJUDICIAL EFFECT OF THE TRIAL COURT'S ERRORS REQUIRES REVERSAL OF THE GUILT AND PENALTY PHASE VERDICTS.

Appellant's opening brief summarized the various errors that occurred during the guilt and penalty phases and the manner in which they had a combined, negative impact, rendering the degree of unfairness to appellant more than that flowing from the sum of the individual errors. (*People v. Hill* (1988) 17 Cal.4th 800, 844, 847.) As argued there, the cumulative effect of those errors requires reversal of the judgments of conviction and death. (AOB 496-499.) Respondent does not address – or even mention – *Hill* or appellant's arguments. Respondent simply offers that no errors were committed and even if there were multiple errors, none caused prejudice sufficient to require reversal. (RB 146-147.)

Respondent's argument is unhelpful in deciding the issues raised in this claim. It is, of course, up to the Court to determine whether appellant's contentions of error have merit. If, as respondent contends, there were no errors, then appellant's cumulative error argument would be moot. But if the Court does find error, then the issue becomes what relief, if any, is appropriate in this case.

Where the Court finds more than one error, it should carefully review not only the impact of each individual error, but the combined impact of all errors found. (*People v. Hill*, *supra*, at pp. 844-847; see also *People v. Catlin* (2001) 26 Cal.4th 81, 180; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [cautioning against "balkanized, issue-by-issue harmless error review"].) For the reasons discussed in the opening brief, the cumulative, synergistic effect of the multiple errors identified and discussed in the opening brief requires reversal of appellant's conviction on all counts, reversal of the special circumstances, and reversal of the judgment of death.

XIII.

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

In his opening brief, appellant argued that the California death penalty scheme, as interpreted by this Court and applied at appellant's trial, violates the federal constitution. (AOB 512-537.) Respondent contends that the Court's prior decisions are correct and should not be reconsidered, and that appellant's claims should all be rejected, consistent with this Court's previous rulings. (RB 148-160.) After appellant filed his opening

brief, the United States Supreme Court held that Florida's death penalty statute was unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].) *Hurst* supports appellant's argument in Argument XIII(2) of his opening brief that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn.14), does not require factual findings within the meaning of *Ring,* and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto, supra,* 30 Cal.4th at p. 275).[37] (See AOB 512-537.)

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstance(s) Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt.

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona, supra,* 536 U.S. at p.

[37] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for his argument in XIII(2). (See AOB 512-537.) To the extent this Court might disagree, appellant asks the Court to deem this argument a supplemental brief.

589; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483.) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at p. 494 and pp. 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The high court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, 136 S.Ct. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The

Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid*.)[38]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "*Ring*'s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn.4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Supreme Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the

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[38] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts…[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

Court refers not simply to the finding of an aggravating circumstance but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[39] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi, supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt.

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See

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[39] See 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*." [italics added].)

People v. Merriman (2014) 60 Cal.4th 1, 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentence makes two additional findings. In each jurisdiction, the sentence must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentence to impose a death sentence. The sentence must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstance'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fl. Stat. § 921.141(3)).[40]

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[40] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California
(footnote continued on next page)

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida, the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentence must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

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statute. For *Hurst* purposes, under California law, it is the jury determination that aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increase to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of

a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[41]

C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence Of Death.

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512, rev'd on other grounds sub nom., *California v. Brown* (1987) 479 U.S. 538, does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Brown, supra,* 40 Cal.3d at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors… Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

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[41] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus, the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[42]

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[42] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital
(footnote continued on next page)

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e., in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death."].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding

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cases. Post-*Boyde*, California has continued to use Brown's gloss on the sentencing instruction.

whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravation circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist…which outweigh the aggravating circumstances found to exist; and…[b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist…and (b) [t]hat there are insufficient mitigating circumstances…to outweigh the aggravating circumstances." (*Id*., subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentence finds the aggravating circumstances outweighed the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of

section 190.3.[43] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006) Volume 1, Preface, at p. v.), make clear this two-step process for imposing a death sentence:

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[43] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at page 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under Ring And Therefore Does Not Require Proof Beyond A Reasonable Doubt.

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment…that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th 1, 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted); accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the

gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[44] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process. The recent decision of the Florida Supreme Court in *Hurst v. State* (2016) 202 So.3d 40, supports appellant's claim. On remand following the decision of the United State Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in capital sentencing. The court began by looking at the rems of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Hurst v. State*, *supra,* at p. 53; Fla. Stat. (2012) § 921.141(1)-(3).) Each of these

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[44] The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

considerations, including the weighing process itself, were described as "elements" that the sentence must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at p. 53.) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Hurst v. State*, *supra*, 202 So.3d at p. 57.) There was nothing that separated the capital weighing process from any other finding of fact. The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 ("*Rauf*") further supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id*. at p. 457.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*. One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances

unanimously and beyond a reasonable doubt. (*Id*. at pp. 436 (per curiam opn.), 485-486 (conc. opn. of Holland, J.).) With regard to this defect:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors…." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Id*. at p. 485 (conc. opn. of Holland, J.), footnotes omitted.)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is…[a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [finding that – under *Apprendi* and *Ring* – the finding that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating

and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, his death sentence must be reversed.

* * * * * *

CONCLUSION

For the reasons set forth above and in appellant's opening brief, appellant respectfully requests this Court to reverse both the convictions and sentence of death in this case.

Dated: March 20, 2018

Respectfully submitted,

/s/ Neoma Kenwood
NEOMA KENWOOD
Attorney for Appellant
BRIAN DAVID JOHNSEN

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(B)(2)

I, Neoma Kenwood, am the attorney appointed to represent appellant Brian David Johnsen in this automatic appeal. I conducted a word count of this reply brief using computer software. On the basis of that computer-generated word count, I certify that this brief, exclusive of the table of contents, the proof of service, and this certificate, contains **46,138** words.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on March 20, 2018, at San Francisco, California.

/s/ Neoma Kenwood
NEOMA KENWOOD

PEOPLE V. BRIAN DAVID JOHNSEN, Automatic Appeal No. S040704
Stanislaus County Superior Ct. No. R239682

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STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I declare as follows:

I, NEOMA KENWOOD, am over the age of 18 years, and not a party to the within action; my business address is P.M.B. #414, 1569 Solano Avenue, Berkeley, CA 94707.

On March 21, I served a true and correct copy of the attached

APPELLANT REPLY BRIEF

on the interested parties or counsel for interested parties named below, by placing a true copy enclosed in a sealed envelope, with postage fully prepaid, in an official depository under the care and control of the United States Postal Service:

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(Appellant)

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San Francisco, CA 94102

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 21, 2018, at San Francisco, California.

/s/ Neoma Kenwood
NEOMA KENWOOD

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Neoma Kenwood

Signature

Kenwood, Neoma (101805)

Last Name, First Name (PNum)

Law Office of Neoma Kenwood

Law Firm