SUPREME COURT COPY

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No. S042346

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BRYAN MAURICE JONES, Defendants and Appellants.	SUPREME COURT FILED JUN 22 2011 Frederick K. Ohlrich Clerk Deputy

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of San Diego

HONORABLE LAURA P. HAMMES, JUDGE

MICHAEL J. HERSEK
State Public Defender

JOSEPH E. CHABOT
Deputy State Public Defender
Cal. Bar. No. 104810

NINA WILDER
Deputy State Public Defender
Cal. Bar. No. 100474

LISA ANNE D'ORAZIO
Legal Counsel
Cal. Bar. No. 252834

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

DEATH PENALTY

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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S042346
v.	)	(San Diego County Superior Ct. No
BRYAN MAURICE JONES,	)	CR 136371
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply brief, appellant Bryan Maurice Jones addresses specific contentions made by respondent, but does not reply to arguments already addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Mr. Jones (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has

been adequately presented and the positions of the parties fully joined.[1]

In the introduction to the opening brief, Mr. Jones offered some simple arithmetic: six times zero is zero. The prosecution charged Mr. Jones with crimes against six victims on six different occasions, which took the prosecutor six years to file. The charges were based on the thinnest of evidence, particularly the four murder charges; the jury returned verdicts on only two. The prosecutor candidly admitted to the trial court that the cases made no sense individually and one case was so weak it could not stand on its own. (8RT 336, 469.) The prosecutor even conceded to the jury that the murder cases had significant holes, and he needed the live complaining witnesses to "fill in the blanks that are *obviously* there on the murder victims." (45RT 4987, italics added.)

Those blanks remain on appeal. Respondent has sought to remedy this problem by mixing one argument with another and confusing one case with another, with the apparent intent of overwhelming the reader to the point of bewilderment. But the law protects against such machinations. These cases must rise or fall on their own, and the facts of one should not be confused with the facts of another. Mr. Jones respectfully requests that

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[1] The following abbreviations and initials are used in this brief. RT and CT mean the reporter's and clerk's transcript respectively. In argument 1, N.S. are the initials of a prospective juror improperly struck by the prosecutor. In argument 2, Y.J. and C.G. are the initials of prospective jurors improperly struck by the prosecutor. In various arguments, B.R. (referred to as Bertha R. in respondent's brief), are the initials of a witness who testified during the guilt and penalty phases regarding a prior conviction against Mr. Jones. In various arguments, K.M. and M.R. (referred to as Karen M. and Maria R., respectively, in respondent's brief) are the initials of two witnesses who testified during the guilt phase regarding counts in this action.

the reader carefully examine the evidence, and if so, the reader will discover that all six cases, *especially the murder cases*, were very weak and should have resulted in not guilty verdicts.

Six times zero is still zero. It simply does not add up to more.

ARGUMENT

1.

THE JUDGMENT MUST BE REVERSED BECAUSE THE COURT ERRED IN FAILING TO FIND A PRIMA FACIE *BATSON/WHEELER* VIOLATION.

Three times the trial court found Mr. Jones had established a prima facie case of discrimination committed by the prosecutor against African-American women. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) Mr. Jones argued in his opening brief that the court erred prejudicially in failing to find that he had established a fourth prima facie case of discrimination by the prosecutor against yet another African-American woman, N.S.

Respondent opposes Mr. Jones's argument on three grounds.

First, respondent claims that this Court should review the lower court's ruling for an abuse of discretion, and not conduct the independent review proposed by Mr. Jones, even though (a) the trial court candidly admitted it was unclear as to the test for a prima facie case, (b) the court applied *Wheeler's* "strong likelihood" standard, which the United States Supreme Court has disapproved, and (c) this Court has frequently held that it will perform an independent review where it is not sure the trial court applied the correct *Batson* prima facie test.

Second, respondent claims that N.S. is "clearly" not African-American as the "record clearly establishes," even though N.S. has very

black skin, she swore under penalty of perjury that she is African-American, and the prosecutor never asked when he examined her why she would pretend to be a member of a race to which, according to respondent, she clearly does not belong.

Third, respondent claims that the record suggests grounds upon which the prosecutor might reasonably have made the challenged peremptory, even though Mr. Jones produced ample evidence sufficient to permit the trial judge to draw an inference that discrimination occurred.

Respondent's first claim is readily disposed of; the second is offensive; and the third, if successful, would do serious violence to the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 85). For the reasons stated here and in Mr. Jones's opening brief, respondent's claims should be rejected and the judgment should be reversed.

A. Independent Review Is Warranted in Light of the Trial Court's Admitted Lack of Clarity and Its Reliance on *Wheeler's* Incorrect "Strong Likelihood" Test to Determine a Prima Facie Case.

In *Johnson v. California* (2005) 545 U.S. 162, the United States Supreme Court disapproved this Court's "strong likelihood" standard under *People v. Wheeler*, *supra*, 22 Cal.3d 258, to determine whether a defendant establishes a prima facie case. (*Id.* at pp. 166-168.) Under *Batson v. Kentucky*, *supra*, 476 U.S. 79, a defendant's prima facie burden is not so onerous as *Wheeler's*; instead it is simply to "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) Thus, as this Court has often held, where the Court cannot be certain the trial court

applied the correct step-one *Batson* test, the Court will review the record independently. (E.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 487.)

Here, all indications are that the trial court applied the more onerous *Wheeler* strong likelihood test. In addressing an earlier *Wheeler* motion, the trial court admitted that it was not "very clear" as to when a "prima facie case has been made" under *Wheeler*. (22RT 1642.) As respondent notes, the trial court did not state the precise test it applied when it denied Mr. Jones's *Wheeler* motion concerning N.S. (RB 75.) Nevertheless, because defense counsel moved to dismiss the jury panel under *Wheeler* and the trial court mentioned *Wheeler* and not *Batson* in ruling on Mr. Jones's motions, the only reasonable inference is that the court applied *Wheeler's* strong likelihood test. (22RT 1646 [the Court: "the *Wheeler* challenge will be denied"]; 23RT 1989; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

Furthermore, in ruling on the earlier *Wheeler* motion, the trial court reflected a view that *Wheeler* requires a "substantial" showing, a view that *Johnson* rejected in applying *Batson*. The prosecutor argued to the trial court that a prima facie showing must be "substantial" under *Wheeler* and that this showing had not been made. Nevertheless, the court responded that a prima facie case had been made, thereby implying its agreement with the prosecutor that *Wheeler* requires a substantial showing. (22RT 1642.) In *Johnson*, the high court rejected this Court's position that a prima facie case requires a "substantial" showing, which this Court defined as "strong evidence" making discriminatory intent *more likely than not.* (*Johnson v. California*, *supra*, 545 U.S. at p. 167.) Hence, contrary to *Batson*, the trial court believed a prima facie case of discrimination required a substantial showing of evidence sufficient to make it more likely than not that the prosecutor had discriminatory intent. Consequently, deferring to the trial

court's ruling is improper and de novo review is required.

B. N.S. Is a Member of a Cognizable Group, Black African-American Women, Just as the Record Clearly Shows.

Respondent's second argument that N.S. is *clearly* not African-American, the record *clearly* establishes that she is not African-American, and N.S. simply "identified with African-Americans" is an insult to N.S. and reflects the kind of bias she had to endure in the trial court. (RB 69.) It is entirely consistent, moreover, with the prosecutor's equally offensive remark that N.S. merely "likes to think of herself as black." (23RT 1993.)

The prosecutor and deputy attorney general based their affronts on N.S.'s juror questionnaire, where she swore under penalty of perjury, "I consider myself African-American," in answer to the question, "How would you describe your feelings toward African-Americans?" (44CT 8455, 8469.) In the minds of the prosecutor and deputy attorney general, "I consider myself African American" somehow means *I am clearly not African-American but merely like to think I am African-American.* Of course, it means no such thing. "I consider myself African American" means *I regard myself as African-American*, that is, *I am African-American.* It does not mean *I regard myself as something I clearly am not.*[2]

When *consider* is used with an object, as in the sentence, *I consider myself African-American*, the American Heritage Dictionary of the English Language (4th ed.) defines *consider* to mean: to think carefully about; to think or deem to be; *regard as*; to form an opinion about; judge. The

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[2] When Lou Gehrig stood before a packed house at Yankee Stadium on July 4, 1939, and spoke the immortal words, "today *I consider myself* the luckiest man on the face of the earth," he obviously meant that he regarded himself as the luckiest man on earth.

dictionary notes that the verb refers to holding opinions or views that are based on evaluation. Thus, *consider* connotes thoughtfulness, the opposite of the flippant construction the prosecutor and deputy attorney general have given it.

As the American Heritage Dictionary notes further, "[c]onsider suggests objective reflection and reasoning." N.S.'s responses on her juror questionnaire and during voir dire suggest objective reflection and reasoning as well. According to the prosecutor, he carefully examined each juror's questionnaire (22RT 1642-1643), which should have given the prosecutor plenty of reason to conclude that N.S. was not a person who would pretend to be a member of a race to which she does not belong or a person who would reject her own family history while pretending to be someone she was not. N.S.'s juror questionnaire specifically showed her to be a responsible and earnest citizen, precisely the kind of person one hopes would serve on a jury.

N. S. was a 15-year State of California employee who made policy decisions, supervised a staff of 27, and had the authority to hire and fire employees. (44CT 8450-8451.) Exhibiting an admirable work ethic, N.S. noted that being a juror would be difficult because she "had not plan[ned] at this time to be out of my job for that period of time." (44CT 8462.) Moreover, she intended soon to take promotional exams. (44CT 8454.)

N.S. raised three children, two of whom became correctional officers. (44CT 8452, 8457; 23RT 1918.) Showing interest in her community, N.S. was a sponsor for Alcoholics Anonymous (44CT 8459) and was a registered voter; she also worked for a church (23CT 8454, 8459; 23RT 1920).

N.S.'s juror questionnaire reflects honest, careful thinking as well. In response to a question exploring her feelings about supervising others, she wrote: "At first I was intimidated but I learn[ed] to develop more confidence as the time went on." (23CT 8450.) N.S. was against alcohol and drug use. (44CT 8464.)

Her questionnaire answers also would have pleased many prosecutors. While working for the Department of Corrections, she learned that inmates were given "just too much leniency." (23RT 1921.) Inmates were sentenced to "just a couple of years," she wrote, and "given too many chances to go and commit the same crimes." (23RT 1922.) She could "fully support" the death penalty under the right circumstances. (44CT 8465.)

Asked "[a]re you a good judge of character," N.S. answered, yes. She explained why she is a good judge of character: "*I consider myself* a good judge of character because of the variety of people I have dealt with in jobs, in the different places I've lived, and the many situations that have develop[ed] my awareness skills." (23CT 8454, italics added.) Note N.S.'s use of the phrase *I consider myself* in the above sentence. Her plain meaning was, *I regard myself as someone who is a good judge of character.* Her meaning was not, *I like to think of myself as someone who is a good judge of character, though I clearly am not.*

N.S. is not alone in using *consider* to mean *regard as*. On page 51 of respondent's brief, the deputy attorney general wrote: "There were either four or five African-American women eligible to serve on the jury, depending upon whether Ms. N. S. is *considered* African-American." (Italics added.) The deputy attorney general clearly used *considered* to have the same meaning N.S. intended. He meant *regarded as*.

Even without taking into account N.S.'s questionnaire, Mr. Jones produced evidence sufficient to conclude that N.S. was a black female. The trial judge described N.S.'s skin color as *very black*. The prosecutor admitted that N.S. had *dark skin*. (23RT 1993.)

This Court recognized in *Wheeler* that a cognizable class may be "distinguished on racial, religious, ethnic, or *similar grounds*." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276, italics added.) Thus, regarding persons with black skin, the Court has repeatedly confirmed: "'In *Wheeler*, we imposed no requirement that the defendant establish that systematically excluded *black* jurors were of Afro-American, Caribbean, African or Latin American descent.'" (*People v. Gray* (2005) 37 Cal.4th 168, 187, fn.3, quoting *People v. Trevino* (1985) 39 Cal.3d 667, 687, italics added.) The Court also holds that black women in general are a cognizable class, not only black women who on the spot during voir dire are able to trace their roots to Africa. (*People v. Clair* (1992) 2 Cal.4th 629, 652 ["Black women are a cognizable subgroup for *Wheeler*"].)

Defense counsel specifically argued that N.S. belonged to a cognizable class of *black* females, exactly like three other women struck by the prosecution, not merely to a narrower class of black females with African ancestry. (23RT 1989.) Therefore, Mr. Jones established that N.S. was a member of a cognizable group, black women. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. omitted.)

Even if a person with very black skin must have African ancestry to be a member of a cognizable group, Mr. Jones made that showing. N.S. swore under penalty of perjury that she was born in Puerto Rico; she spent her childhood in New York City, went to college in the Bronx (earning an A.A. degree in Early Education in 1976), and considered herself African-

American. (44CT 8450-8469.)

Approximately 11 percent of Puerto Rico is of African heritage.[3] Puerto Rico is an American territory. (*Boumediene v. Bush* (2008) 553 U.S. 723, 756.) In fact, persons born in Puerto Rico are Americans. (*Katzenbach v. Morgan* (1966) 384 U.S. 641, 658, fn. 21.) Thus, 11 percent of Puerto Ricans are African-Americans. It should surprise no one that at least one African-American from Puerto Rico made her way to San Diego. Like one prospective juror in *People v. Huggins* (2006) 38 Cal.4th 175, N.S. is "an African-American woman of Puerto Rican descent." (*Id.* at p. 236.)[4]

Accepting at face value N.S.'s representation that she is African-American is consistent with the burden *Batson* and *Wheeler* impose on a defendant. The United States Supreme Court has described *Batson's* prima facie showing as not "onerous," particularly because some facts, which Mr. Jones suggests must include a prospective juror's true race or ethnicity, "are

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[3] Mr. Jones requests that the Court take judicial notice that in 2000, eight percent of Puerto Rico was Black or African American alone, while 10.9 percent was Black or African American alone or in combination with one or more other races. (United States Census (2000) http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US72&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U.)

[4] In a footnote, respondent digs a deeper hole of disrespect against N.S. by alleging defense counsel acknowledged that she was not African-American. (RB 69, fn. 33.) Nowhere did defense counsel acknowledge this, let alone on the specific page, "23 RT 1993," that respondent cites. Clearly, respondent must understand that one can be both Puerto Rican *and* African-American, and that the two are not mutually exclusive. Consider some well-known baseball players who are African-American *and* Puerto Rican: Orlando Cepeda, Roberte Clemente, Bernie Williams, Ruben Sierra, Carlos Delgado, and Jose Cruz.

impossible for the defendant to know with certainty." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) Thus, "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid.*) Moreover, a defendant is permitted to satisfy *Batson's* prima facie step by relying "'*solely* on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.'" (*Id.* at p. 169, quoting *Batson v. Kentucky*, *supra*, 476 U.S. at p. 96, italics added.) And under *Wheeler*, a defendant need only "make as complete a record of the circumstances as is *feasible*." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280, italics added.) Neither *Batson* nor *Wheeler* contemplates the unfeasible DNA testing, background check, or invasive cross-examination of prospective jurors that respondent is apparently demanding.

The manufactured controversy over N.S.'s heritage should be understood for what it was, a desperate but transparent attempt by the prosecutor to remove from the trial judge's consideration her prior three rulings that the prosecutor had committed prima facie discrimination against three black African-American women. Like those three women, N.S. is black and African-American, clearly.

C. Mr. Jones's Carried His Prima Facie Burden by Producing Evidence Sufficient to Permit the Trial Judge to Draw an Inference That the Prosecutor Committed Discrimination Against N.S.

In his opening brief, Mr. Jones argued at length that this Court should not scour the record looking for a hypothetical reason, not necessarily the prosecutor's real reason, to justify the prosecutor's use of a peremptory challenge against N.S. (AOB 69-84.) Mr. Jones explained that endorsing any but the prosecutor's real reason for striking a juror means

"that this Court will affirm even in those situations where the prosecutor *actually intended to discriminate*, simply because the Court was able to discover somewhere in the record grounds on which the prosecutor might reasonably have struck the prospective juror." (AOB 69-70, italics in original.) Doing so, however, would subvert the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 85).

Respondent failed to specifically address any part of Mr. Jones's 15-page argument. Instead respondent's asks the Court to affirm the trial court's denial of Mr. Jones's *Wheeler* motion because, even though the prosecutor declined the court's invitation to state *his* reasons for striking N.S., "the record suggests grounds upon which the prosecutor might reasonably have made the challenged peremptory." (RB 68-69.)

It appears that this Court has recently developed a stricter standard of review than advocated by respondent. That is, where a *Batson/Wheeler* claim is based on alleged race discrimination, and the prosecutor has declined the court's invitation to state any reasons for striking the prospective juror, the Court will affirm a trial court's finding that a defendant failed to establish a prima facie case if "the record discloses *obvious* race-neutral reasons for excusing" the juror. (*People v. Taylor* (2010) 48 Cal.4th 574, 616, italics added; *People v. Davis* (2009) 46 Cal.4th 539, 584 ["there were obvious race-neutral grounds for the prosecutor's challenges to the prospective jurors in question"].) Nevertheless, the Court's *obvious-grounds* test for affirming a trial court's failure to find a prima facie case is inconsistent with *Batson* and *Johnson v. California*, *supra*, 545 U.S. 162, because the new test still does not determine the real reason the prosecutor struck a juror. (*Johnson v. California*, *supra*, 545

U.S. 162, 172, citing *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090, a first-step case; *Holloway v. Horn* (3d Cir. 2004) 355 F.3d 707, 725, a third-step case.) Furthermore, a comprehensive review of the entire record for this case, in contrast to an abstract consideration of respondent's proposed grounds, reveals that the trial court erred in failing to find a prima facie case of discrimination against N.S.

At trial the court commented that because N.S. was a "care-giver," was married to a convicted murderer, and "came across rather weakly toward the penalty," it was "very evident" that N.S. would have been subject to a peremptory challenge by the prosecution, and "it would not have mattered what color" she was. (23RT 1994.) But as shown in Mr. Jones's opening brief, these are not the real reasons *the prosecutor in this case* struck N.S. (AOB 106-108.) And if the purpose of the *Batson* framework is "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process" (*Johnson v. California, supra*, 545 U.S. at p. 172), then any review of the record must be in an effort to discover the real reasons that Mr. Jones's prosecutor, not some hypothetical prosecutor, struck N.S.

The prosecutor accepted as jurors a man who studied to be an emergency medical technician, two elementary school teachers, and perhaps most relevant, a special education technician who helped severely handicapped students. (21RT 1498; 40CT 7486; 41CT 7654, 7774.) Therefore, it is not obvious at all that the prosecutor would have struck N.S. because she was a care-giver.

N.S. married her husband long after his conviction, did not discuss the conviction with him, and did not know the details of the conviction. (23RT 1917.) N.S. stated unequivocally that she could "completely

separate out" her husband's from Mr. Jones's case, and that she could be fair to both sides. (23RT 1918.)

N.S. worked for the Department of Corrections, which in her view, was "too" lenient on inmates. (23RT 1921.) She especially objected to inmates being given too many chances to commit the same crimes. (23RT 1922.) Her two sons were correctional officers. (23RT 1918.) N.S. further demonstrated her strong feelings against crime when, exhibiting no sympathy for her husband, she told the court that her husband's current incarceration for a parole violation was his responsibility: "He brought it onto himself, whatever happened. He's an adult, and he was aware that if . . . he was still on parole and if he went and did something that eventually [he] was going to get caught, he was going to get sent back." (23RT 1920.) N.S. was the victim of a hold-up at knife-point, when a gang broke into her home and "terrorized" her and her children. (23RT 1920.)

Thus – and this is the most important point about N.S.'s marriage, given that *Batson's* aim is to eradicate real discrimination by real attorneys in our criminal justice system by uncovering what real attorneys are thinking when they strike a particular juror – the *prosecutor* may very well have *believed* the tough-on-crime N.S. when she said that she could "completely separate out" her husband's case from Mr. Jones's case and could be fair to both sides. (23RT 1918.) But we do not know the prosecutor's view because he declined to answer when the court invited him to explain why he challenged N.S. Nevertheless, based on a review of the entire record, it is simply not obvious that Mr. Jones's prosecutor would have struck N.S. because of her marriage.

Finally, that N.S. checked a line of her questionnaire indicating that she weakly supported the death penalty may have been no concern to Mr.

Jones's prosecutor because he accepted another juror who not only checked the same line on his questionnaire, that juror also studied to be an emergency medical technician; in the words of the deputy attorney general, the prosecutor accepted as a juror someone who was a care-giver "to a fault." (40CT 7465, 7477; RB 71.) The prosecutor's lack of concern for N.S.'s weak support might have been especially lacking given that N.S. wrote that she could "fully support" the death penalty under the right circumstances. (44CT 8465.) Thus, although N.S.'s support for the death penalty might have been an obvious reason for the judge to strike N.S., it was not obvious for Mr. Jones's prosecutor. Were it obvious, moreover, the prosecutor probably would have said so when the court asked him to state his reasons for striking N.S. (23RT 1995.)

As shown in the opening brief at pages 79-82, all 12 of the seated jurors would have been subject to peremptory challenges based on obvious race and gender neutral reasons, though all were accepted by the prosecutor. One apparently white juror who stands out as a likely object of a peremptory challenge for obvious neutral reasons was a teacher who had training in child psychology, believed that a cause of crime was the failure to nurture children in the home, and called the death penalty "unfortunate." (40CT 7486, 7489, 7491, 7496, 7501.) Yet *she* was acceptable to the prosecutor, as N.S. would have been except that N.S. was an African-American woman, just like three others struck by the prosecutor.

If the trial court's reasons for the prosecutor's striking N.S. were so obvious, then why would the deputy attorney general add his own speculation to the collection? But add he did. In fact, the deputy attorney general has proposed at least *six* more reasons why the prosecutor could have struck N.S. (RB 71-72 [AA and narcotics anonymous sponsor;

husband currently incarcerated for probation violation involving drunk driving and "crack" cocaine; system not fair; nurturer to a fault; decided one of life's most important decisions without having all facts; expressed reservations about being juror].) Ultimately, however, it still just adds up to speculation because the prosecutor never explained his reasons for striking N.S., though he had the opportunity to do so.

Furthermore, what makes not obvious the race and gender neutral reasons speculated by the trial judge and deputy attorney general is the strong evidence that race and gender were the real reasons the prosecutor struck N.S.

First, the trial judge found three times that Mr. Jones had established a prima facie case of discrimination by the prosecutor against three African-American women.

Second, the prosecutor's statements in exercising his peremptory challenges support an inference of discriminatory purpose. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; see also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281 [trial court may determine whether there has been discrimination based in part on court's knowledge of local prosecutors].)[5]

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[5] The trial judge would have known the prosecutor well from her years as a judge, his as a prosecutor, and their overlapping years in the San Diego County District Attorney's Office. According to a June 1, 2006 news release from the San Diego County Superior Court, Judge Laura Hammes served more than 20 years on the San Diego bench as of June 2006. Before her appointment by Governor George Deukmejian in 1984, she was a San Diego County Deputy District Attorney, where she served from 1972 to 1984. "Judge Hammes' expertise has been in the field of criminal law where she has spent the past 21 of her 22 years on the bench." http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/NEWS/NEWSRELEASES/2006_NEWS_RELEASES/6-1_JUDGE_HAMMES_RETIREMENT.PDF. Prosecutor Jeff Dusek became

In defending one peremptory challenge against an African-American woman, the prosecutor said he evaluated each juror based on the juror's questionnaire "without knowing what they look like." (22RT 1642-1643.) The prosecutor's statement was not credible. The prosecutor struck four out of the five African-American women eligible to be jurors. (21RT 1520; 22RT 1640, 1746; 23RT 1967, 1992.) As shown, N.S. indicated on her questionnaire that she was African-American. (44CT 8455.) Two other women wrote they were African-American. (41CT 7683; 48CT 9249.) The prosecutor was disingenuous at best to represent that he evaluated these three jurors "without knowing what they look like," when he knew exactly what color they were, black.

In evaluating jurors, the prosecutor said that he had the assistance of "one person who is a two time minority; female from a minority racial group." The prosecutor offered that the person assisting him rated a struck African-American woman even lower than he rated the juror. (22RT 1643.) The prosecutor mentioned the "two time minority" in an obvious effort to enhance his credibility. But he did not explain how having the assistance of a female from an unspecified minority racial group enhanced his credibility in striking an African-American woman. The prosecutor either lacked candor by not specifying the minority group to which the assistant belonged or believed that one minority was fungible for another. As *Wheeler* expressly recognized in underpinning its rationale, the two sexes are not

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a member of the California State Bar on December 22, 1976 (http://members.calbar.ca.gov/search/member_detail.aspx?x=70719), and was reportedly a San Diego County Deputy District Attorney on June 21, 1982 (*People v. Williams* (1988) 45 Cal.3d 1268, 1306) and in 2002 (*Westerfield v. Superior Court* (2002) 119 Cal.Rptr.2d 588, 590, unpublished opinion not cited for precedential authority).

fungible and neither is one racial or ethnic group fungible for another. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 266-268.)

N.S. wrote on her questionnaire, "I consider myself African-American." (44CT 8455, 8469.) The prosecutor, without quoting N.S.'s words to the court, told the judge that N.S. "likes to think of herself as black." As stated, the prosecutor's remark was insulting. But even casting it in the most positive light, that the prosecutor sincerely believed N.S. was not African-American and N.S. merely meant to indicate that she identified with African-Americans, no reasonable person could be certain that is what N.S. intended. It would be very peculiar indeed for a middle-aged mother of three, a policy-making manager who supervised a staff of 27 and had the authority to hire and fire employees, to swear under penalty of perjury in a matter as serious as a capital case, *I like to think of myself as black, though clearly I am not black*, in response to a question exploring her feelings toward African-Americans. At the very least, the prosecutor should have asked for an explanation. That he did not, though he had the opportunity to do so when he examined N.S. during voir dire (23RT 1954), is evidence that, at the very least, the prosecutor suffered from serious racial insensitivity.

Third, the prosecutor struck four of the five African-American women who entered the jury box. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [inference of discrimination raised where prosecutor used three of first four strikes on African-Americans and four of first 49 potential jurors were African-American, as was defendant]; *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 682 ["Statistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race

that gives rise to a prima facie *Batson* violation"]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [prima facie case when the prosecutor struck four out of seven (57 percent) Hispanics, and prosecutor exercised 21 percent (four out of nineteen) of his challenges against Hispanics – "standing alone," this was "enough to raise an inference of racial discrimination"]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813, overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) (en banc) 182 F.3d 677 [prima facie case when five of nine (56 percent) African Americans struck, and 56 percent (five out of nine) of the challenges were made against African Americans who constituted only 29 percent of the venire]; *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255 [prima facie case when prosecutor struck four of seven minority venirepersons].)

By eliminating four of the five African-American women who entered the jury box, the prosecutor could be confident that he would not encounter more because, as the trial court observed, there were "so few African-Americans in the potential audience." (22RT 1642.)

That one African-American woman remained on the jury does not defeat a prima facie showing of wrongful discrimination against an African-American woman. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 240, 266 [finding *Batson* violation even though African-American remained on jury]; *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [finding *Wheeler* violation despite jury having three African-American jurors and three African-American alternates]; *People v. Snow* (1987) 44 Cal.3d 216, 225 ["that the prosecutor 'passed' or accepted a jury containing two Black persons [does not] end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion"].)

Here, the savvy prosecutor likely left one African-American woman on the jury to disguise his consistent race and gender discrimination, and not because he believed a peremptory challenge was otherwise unwarranted, particularly because the juror he left on believed "nonparental guidance" caused crime, she did "not feel anyone is guilty if I have not witnessed any crime" (41CT 7688), she apparently used drugs when she was younger (41CT 7691), and she did not believe in an "eye for an eye" (41CT 7694).

Fourth, the prosecutor used a disproportionate percentage (25 percent) of his peremptory challenge to strike African-American women, who were just nine percent of the eligible jurors. He excused African-Americans at twice the rate as non-minority whites; he used 31 percent of his peremptory challenges against African-Americans, though they were only 19 percent of the eligible prospective jurors. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97 ["pattern" of strikes might give rise to inference of discrimination].)

Fifth, by the time N.S. was excused, the prosecution had exercised 16 peremptory challenges against 12 women and four men, or against three times as many women as men (21RT 1519-1520; 22RT1639-1640, 1746-1747; 23RT1856-1857, 1967), even though the number of men and women eligible as jurors were about equal, 27 women and 26 men (RT 1303-1979). Thus, although 51 percent (27/53) of the eligible jurors were women, the prosecution used 75 percent (12/16) of its peremptory challenges against women.

Sixth, the prosecutor raised suspicions when he declined the court's invitation to state his reason for striking N.S., though he offered an explanation for striking another juror when the court invited an explanation after finding no prima facie case involving that juror. (23RT 1995.)

Seventh, Mr. Jones "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 96 [quoting *Avery v. Georgia* (1953) 345 U.S. 559, 562].)

Eighth, Mr. Jones is African-American, pertinent by itself to finding a prima facie case. (21RT 1523; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 96.)

In sum an independent review of the entire record shows that Mr. Jones, an African-American, produced evidence sufficient to draw an inference that the prosecutor struck N.S., an African-American woman, due to race and gender discrimination.

2.

THE COURT ERRED IN DENYING MR. JONES'S *WHEELER* MOTIONS AFTER FINDING PRIMA FACIE CASES OF DISCRIMINATION AND THE PROSECUTOR OFFERED UNSUPPORTED AND IMPLAUSIBLE EXCUSES FOR STRIKING TWO AFRICAN-AMERICAN WOMEN.

Mr. Jones argued in his opening brief that the prosecutor offered implausible and unsupported reasons for striking from the jury two African-American women, Y.J. and C.G. (AOB 113.) Respondent opposes Mr. Jones's argument, but like the prosecutor, respondent is unconvincing in light of the prosecutor's dishonesty, his insensitive belief that one race was

fungible for another when selecting a jury, his insulting remark against an African-American woman, and his sham excuses for striking Y.J. and C.G.

Y.J.

The prosecutor began the defense of his peremptory challenge against Y.J. by claiming that he did not know any prospective juror's race or color when he evaluated the juror before trial based on the juror's questionnaire answers. (22RT 1642-1643 ["We developed a rating system, if you will, where we numerically evaluate jurors based on the questionnaires *without knowing what they look like*," italics added].) The prosecutor's statement – either a flat out lie or a reckless misrepresentation – was plainly not true. Four African-American jurors struck by the prosecutor – including Y.J. – each wrote on a jury questionnaire that he or she was African-American. (44CT 8455; 45CT 8624, 8744; 48CT 9249.) The prosecutor obviously knew what these African-Americans looked like when he evaluated whether they were acceptable to him as jurors. He knew these jurors were black. Yet he attempted to mislead the court by claiming that he "numerically evaluate[d] jurors based on the questionnaires without knowing what they look like." (22RT 1642-1643.)[6]

Because an accusation of dishonesty is a serious charge not to be taken lightly, the opening brief did not make the blunt charge in the off chance that Mr. Jones's appellate counsel overlooked something in the record dispelling that view. Instead, and so the issue would not be overlooked, the opening brief prominently asserted at the beginning of the second argument that "the prosecutor was at least being disingenuous when

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[6] The prosecutor intended his misleading remark to apply to a juror's race or color and not to gender given that he knew each juror's name and could conclude with confidence whether a juror was female or male.

he suggested that, in evaluating her, he did not know that [Y.J.] was African American. Thus, from the outset, the prosecutor's credibility was seriously undermined." (AOB 114.) Nevertheless, in its brief respondent chooses to ignore the issue entirely. By doing so respondent cements the suspicion that the prosecutor intentionally misled the trial court and purposefully discriminated against Y.J.

Not only does respondent not condemn the prosecutor's deceit, respondent quite remarkably insists four times that this Court should rubberstamp the prosecutor's excuses. That is, according to respondent, the Court must "presume that a prosecutor uses peremptory challenges in a constitutional manner" (RB 55), "this Court must review the prosecutor's reasons with great restraint, presuming the prosecutor exercised peremptory challenges in a constitutional manner" (RB 58), "the prosecutor's reasons . . . must be given deference" (RB 62), and in case simple deference is not enough, respondent argues that "[t]he prosecutor's reasons . . . should be given *great* deference" (RB 64, italics added). Before triggering deferential review, however, a prosecutor must speak the truth to the trial court. That respondent fails to address the point at all suggests that the prosecutor's deceit was not merely inadvertent, it was intentional and lends strong support to the conclusion that the prosecutor's excuses were pretexts for purposeful discrimination.

The prosecutor's discriminatory attitude toward race and jury selection was reflected in a comment to the trial court when the prosecutor sought to justify his peremptory challenge against Y.J. In evaluating jurors, the prosecutor said that he had the assistance of "one person who is a two time minority; female from a minority racial group." The prosecutor offered that the person assisting him rated Y.J. even lower than he rated

Y.J. (22RT 1643.) The prosecutor mentioned the "two time minority" in an obvious effort to enhance his credibility. But he did not explain how having the assistance of a female from an unspecified minority racial group enhanced his credibility in striking an African-American woman. The prosecutor either lacked candor by not specifying the minority group to which the assistant belonged or believed that one minority was fungible for another. As *Wheeler* expressly recognized in underpinning its rationale, the two sexes are not fungible and neither is one racial or ethnic group fungible for another. (*People v. Wheeler* (1978) 22 Cal.3d 258, 266-268.)

As shown in the first argument of this brief, the prosecutor insulted prospective juror, N.S., an African-American woman, by saying to the court that N.S. "likes to think of herself as black." (23RT 1993.) The prosecutor based his remark solely on N.S.'s written statement, "I consider myself African-American," in answer to the question, "How would you describe your feelings toward African-Americans?" (44CT 8455, 8469.) Although the prosecutor examined N.S. during voir dire, he did not ask N.S. to clarify her statement, even assuming the prosecutor sincerely misconstrued N.S.'s intent. (23RT 1954.) Instead, the prosecutor belittled N.S. – a middle-aged mother of three, a policy-making manager who supervised a staff of 27 and had the authority to hire and fire employees – by claiming that in a matter as serious as a capital case, she would swear under penalty of perjury she was someone she was not, thereby disavowing her own heritage.

Respondent claims that the "primary reason" for the prosecutor's peremptory challenge against Y.J.'s was "her employment experience at the Job Corps [and] her favorable working knowledge of the program which other potential jurors did not have." (RB 57.) Mr. Jones attended the Job Corps nine years before Y.J. worked there. (50RT 5419; 51RT 5633, 5688;

37CT 7107; exh. VV.) According to respondent, when the prosecutor spoke of his concern that Y.J. and Mr. Jones might have a "link," it was "obvious" that the prosecutor did not mean Mr. Jones and Y.J. might have known someone in common at the Job Corps, as was guessed in the opening brief given the prosecutor did not explain what *he meant* by "link." Rather it was obvious, writes respondent, that the prosecutor meant Y.J.'s "understanding of the Job Corps and affinity for her work" and Y.J.'s "favorable working knowledge of the program which other potential jurors did not have." (RB 58.) As evidence of Y.J.'s "favorable working knowledge of the program," respondent quotes from Y.J.'s juror questionnaire where she wrote, "I enjoy it and they enjoy helping me" in answer to the question, "How do you feel about supervising others?" (RB 58, fn. 29.) Thus, Y.J.'s questionnaire indicated that she enjoyed supervising students in her job as a Clerk Typist, a job that respondent fails to mention, and the students enjoyed helping her. (45CT 8619.)

Wasting a valuable peremptory challenge on a prospective juror in a capital case because the juror enjoyed supervising students and they enjoyed helping her would be a bizarre reason to say the least, let alone a primary one, to strike that juror. As *Wheeler* explained and the experienced prosecutor likely knew well, the purpose of a peremptory challenge is "to remove jurors who are believed to entertain a specific bias, and no others." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 274.) And a specific bias is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*Id.* at p. 276.) What specific bias did Y.J.'s answer really show? That she likes working with kids? How does that distinguish Y.J. from two teachers the prosecutor accepted as jurors? (40CT 7486; 41CT 7774.) It does not. And how does enjoying her work with students and they with her

relate to the specific charges against Mr. Jones or to him or to anticipated witnesses? They do not.

That Mr. Jones was enroled in the Job Corps, and Y.J. worked there as a Clerk Typist nine years later, are wholly irrelevant to any guilt phase issue in this case, and in the real world where experienced capital prosecutors practice, wholly irrelevant to a juror's choice between death and life without parole, after that juror has been part of any jury that has unanimously found that Mr. Jones was guilty of murder with a special circumstance. The lack of relevance to this case of Y.J.'s employment with the Job Corps as a Clerk Typist explains why the prosecutor had nothing to say about it and why respondent, citing no case in support, struggled to come up with something to offer other than "c'mon, it's obvious."

By attributing Y.J.'s job as the primary reason for the prosecutor's peremptory challenge, respondent implicitly concedes that the other scattershot reasons are of even lighter weight, and indeed they are, to the extent they have any weight at all. The marital status of Y.J.'s two daughters must have been the kind of "silly" excuse the United States Supreme Court had in mind when it alluded to an implausible justification that a court would probably find as a pretext for purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) The prosecutor's submission of one daughter's divorce and the other's marital separation as evidence of Y.J.'s specific bias against the prosecution is yet another instance of the prosecutor's lapse in credibility. Telling, too, is the fact that respondent makes no effort to explain how Y.J.'s daughters pertain to any aspect of this case. Respondent simply throws in the towel on this one, apparently hoping no one would notice.

Respondent might as well as thrown in the towel on the prosecutor's

other excuses, too, given that attempts at defending them fail completely. Respondent claims that the record does not indicate *any* of the jurors who had multiple marriages and were acceptable to the prosecutor had been divorced twice. (RB 59, FN. 30.) But one of those jurors had been married four times (46CT 8860) and another three times (41CT 7751). If not divorced, then what? Respondent insists that counselors (Y.J. wanted to be one) and emergency medical technicians and teachers (both acceptable to the prosecutor as jurors) are not comparable because, unlike counselors, emergency medical technicians and teachers "are not necessarily trying to 'get everyone better.'" (RB 60.) This will come as news to EMTs and teachers.

Respondent cites *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124, for the proposition that "factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge." (RB 60-61.) This is inarguable, as evidenced by the prospective juror in *Gutierrez* who "appeared extremely emotional and overwhelmed by outside stresses [and] cried twice during voir dire" (*ibid.*), but the prosecutor did not mention any concern with Y.J.'s ability to focus on the evidence because there was no reason for concern. Nevertheless, respondent implies that the following factors troubled the prosecutor in this regard: Y.J.'s divorce, her daughters' marital status, Y.J.'s having seen a psychiatrist, and according to respondent, "the *fact* she was a 'loner.'" First, Y.J.'s divorce could have occurred decades earlier; the prosecutor never asked her when it happened, probably because he did not really care. Second, respondent cannot seriously suggest that Y.J.'s daughters' marital status had any impact on Y.J.'s ability to focus on the trial. Furthermore, there is nothing in the record to indicate when her first daughter divorced or when the second

separated from her spouse, so any distraction they once caused could be long gone. Third, Y.J. saw a psychiatrist *four years* before the trial, a distant memory, hardly a reason for current concern. (45CT 8619, 8632.) Fourth, "the fact" that Y.J. was a loner was only in the prosecutor's imagination. The prosecutor labeled Y.J. a loner simply because she was not involved in clubs and was choosy about her friends, certainly no reasonable basis for concluding Y.J. was a loner. (22RT 1644.) Moreover, it would be anyone's guess why being a loner would negatively influence an ability to focus on a trial. If anything, it might reduce distractions and permit greater focus on the evidence. The prosecutor did not mention any of these four "factors" as causing him concern him about Y.J.'s ability to focus on the evidence because none would cause concern and none did.

Next respondent notes that a peremptory challenge may legitimately be based on the juror's appearance, demeanor, and hostility towards the prosecutor, as well as a subjective mistrust of a juror's objectivity (RB 61), but again, the prosecutor said nothing of the kind about Y.J., which may explain why respondent does not cite to the record for support.

Finally, respondent attempts to distinguish Y.J. from a white male juror acceptable to the prosecutor who, like Y.J., weakly supported the death penalty. Respondent first notes that the white male stated that "the punishment should fit the crime." (RB 62.) But Y.J. more than matched that tough-on-crime catchphrase with her own, "Do the crime do the time," while also expressing a preference for the permanence of the death penalty over the uncertainty of life in prison without the possibility of parole because "sometimes prisoners do not remain in prison the remainder of life." (45CT 8634.) Respondent then adds that the white male was a firefighter who regularly worked with members of the Police Department.

(RB 62.) It seems unfair to use this as a mark against Y.J., given that the San Diego Fire Department did not hire its first female firefighters until 1974, and they were all promptly fired.[7]

C.G.

As demonstrated in the opening brief, the prosecutor offered one false excuse after another – seven in total – to cover up his purposeful discrimination for striking C.G. And nothing in respondent's brief proves otherwise.

First, respondent argues that the prosecution believed the clubs or organizations C.G. belonged to "were 'liberal,' i.e., a source of a subjective mistrust. A subjective mistrust of a potential juror supports the peremptory challenge of a potential juror." (RB 65-66.) Respondent fails to cite any authority for the proposition that exercising a peremptory challenge against an African-American woman merely for belonging to a "liberal" organization is a legitimate use of a peremptory challenge. After all, Americans already belong to a liberal organization, the liberal democracy known as the United States. Furthermore, respondent who represents all of the People of the State of California, cannot seriously be asking this Court to sanction the striking of a juror solely for belonging to a liberal organization, or as here, one that an uninformed prosecutor believes is liberal. Were this Court to do so, a terrible precedent would be set that would allow trial courts to endorse a prosecutor's striking, for example, African-American women who belong to the National Organization for Women, the NAACP, the Democratic Party, any group associated with the University of California, Berkeley, any group with an office in San

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[7] http://www.sandiego.gov/fireandems/about/history.shtml.

Francisco or Oakland, and so on. Permitting peremptory challenges against racial minorities or women for belonging to a "liberal" organization would not be race or gender neutral and would mark the end of *Batson/Wheeler* in this state.

Second, the Robert Alton Harris/newspaper *scary* excuse is particularly artificial, so much so that respondent ignored the Harris part of it in its brief, except to note that it was one of the prosecutor's excuses. (RB 64.) The opening brief stated that "the prosecutor accepted as jurors *four others* who were not aware that Harris had been executed. (Citations omitted.) One must ask why *these individuals* did not 'scare' the prosecutor. Clearly, the prosecutor's credibility was highly doubtful." (AOB 125, Italics added.) By choosing not to address the prosecutor's fake assertion that any juror who was not aware of Robert Alton Harris scared him, respondent concedes the prosecutor was again dishonest.

As for the newspaper component of the excuse, respondent competes with the prosecutor in disregarding the truth. The prosecutor unequivocally stated to the court: "She does not read the paper." And of course this "scared" the prosecutor, as he told the court. (22RT 1645.) Thus, the prosecutor represented to the court that C.G. did not read the newspaper – *at all*. But that is not what C.G. indicated on her questionnaire. By checking the "no" box (as opposed to the "yes" box), C.G. indicated that she did not "read a newspaper on a *regular basis*." (43CT 8090, italics added.) Although she did not read a newspaper on a regular basis, she still read a newspaper on occasion, as she noted on her questionnaire. Thus, C.G. wrote that she "*read* about [DNA technology] in *newspapers*." (43CT 8099, italics added.) In addition, she wrote, "I find myself exposed to crime on a daily basis thanks to TV, radio & *newspapers*." (43CT 8104, italics

added.) The opening brief explained all this to respondent and then concluded: "The prosecutor was inaccurate in asserting that Ms. Gatson did not read the newspaper." (AOB 125.) So what is respondent's mind boggling reply? C.G. "checked the box stating she did not read a newspaper on a regular basis (43 CT VD 8090), so even though *she answered inconsistently* with this response in other portions of her questionnaire, the questionnaire supports the prosecutor's assertion." But as shown here and in the opening brief, C.G. did *not* answer inconsistently and in fact answered consistently, precisely, and correctly. Moreover, her questionnaire did *not* support the prosecutor's assertion but exposed his assertion as yet another misrepresentation to the trial court, very much like respondent's assertion to *this* Court that C.G. answered inconsistently and very much like respondent's claim that the questionnaire supports the prosecutor's assertion, which it obviously does not.

But lest we forget, the more important issue here is that the prosecutor pretended to care about newspaper reading and awareness of the Harris case, but only so long as the person reading about the Harris case was an African-American woman. This was one more example of the prosecutor's improper use of a peremptory challenge to deprive Mr. Jones of his the right to trial by a jury drawn from a representative cross-section of the community.

According to the prosecutor, his third reason for excusing C.G. was that she was purportedly dissatisfied with police response to a burglary. (22RT 1645.) Like the Harris excuse, respondent merely repeats that this was one of the prosecutor's excuses (RB 64-65), but respondent then fails to address the point expressed in the opening brief that "[t]he prosecutor's alleged concern over [C.G.'s] response to the burglaries must be viewed in

light of her overall opinion of law enforcement, and accordingly must be seen as pretextual." (AOB 126.) Respondent's reluctance to address each of the prosecutor's feigned excuses is understandable given that there are so many of them and they are consistently shown to be implausible or not supported by the record. Nevertheless, they are the *prosecutor's* excuses and no one else's. Accordingly, respondent's repeated failure to address them must be deemed a reflection of their unworthiness and pretextual nature.

The prosecutor's fourth excuse was his purported concern over C.G.'s early confusion between *beyond a reasonable doubt* and *beyond a shadow of a doubt*. (22RT 1645.) Respondent actually addresses this one, by combining it with a nod towards the prosecutor's fifth excuse, C.G.'s pretrial understanding of the meaning of circumstantial evidence. (RB 66.) The legal definitions of beyond a reasonable doubt and circumstantial evidence are difficult to grasp for most anyone, and not surprisingly, C.G. had her own understandings of these concepts probably based on pop culture, or in the case of circumstantial evidence, a story she heard in fifth grade. (22RT 1629.) But after the court explained them to C.G. and the other prospective jurors, she no longer confused *reasonable doubt* with *a shadow of a doubt* (21RT 1544; 22RT 1627-1628), and her prior view of circumstantial evidence was clarified (22RT 1629).

But that was not enough for the prosecutor and respondent. According to the latter, C.G.'s newly informed and now accurate understanding of these legal principles need not be taken at face value and could still justify a peremptory challenge. Respondent likens C.G. to a juror who initially states reservations about the death penalty but then later indicates an ability to impose the death penalty. The analogy fails.

Deciding whether someone lives or dies is a moral decision, effectively defined by each individual juror, where there is no right or wrong choice. The legal definitions of beyond a reasonable doubt and circumstantial evidence, though difficult as they may be to understand, are not left up to the individual's moral perspective. There *is* a right definition of each, and an accurate understanding of the legal terms is achieved after instruction by the trial court and consultation with the other 11 jurors. That the prosecutor exploited C.G.'s preliminary though reasonable misunderstanding of opaque legal rules was a transparent attempt to camouflage his real mission, to remove a voice from the jury that might bring balance to a jury heavily weighted toward a special group that looked quite unlike C.G. in color and gender.

Finally, respondent addresses the prosecutor's seventh excuse, that C.G. was seeing a therapist for depression. (22RT 1646.) Here, again, respondent continues in an effort to outdo the prosecutor in making things up. According to respondent, "the prosecutor expressed that a 'big factor' was a concern that [C.G.] would be 'harmed' by the evidence to be presented; that is, a concern about [C.G.'s] ability to *focus* on the evidence, given her ongoing treatment for depression." (RB 66-67, italics added.) While the prosecutor commented that he did not "want the responsibility of harming this woman," the word "focus" or any word like it never passed his lips. His only concern was "*harming* this woman. I think she is going to be *harmed* based on what she has to hear in this case and what she has to do in this case. And I don't want that or someone with that background, that current background, sitting on a case of this magnitude." (22RT 1646, italics added.) The reason that respondent brings up "focus" is because focus is a legitimate concern, whereas responsibility for harming a juror is

irrelevant to the exercise of a peremptory challenge because it is unrelated to whether C.G. was biased against the prosecution, as the opening brief explained. (AOB 129-130.) Hence, the prosecutor's last excuse is as phony as the rest.

In sum, the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both. Accordingly, reversal is required.

3.

THE COURT ERRED IN ADMITTING EVIDENCE OF THE B.R. OFFENSE TO PROVE IDENTITY, MOTIVE, AND INTENT IN THE JOANN SWEETS AND SOPHIA GLOVER CASES.

A. Introduction

In its factual discussion of the B.R., JoAnn Sweets and Sophia Glover cases, respondent unwittingly demonstrates that the similarities between the B.R. offense and the Sweets and Glover charges are not so unusual and distinctive as to constitute a signature crime and the B.R. offense is not highly similar to the Sweets and Glover charges. Therefore, the court erred in admitting the B.R. evidence to support an inference of the perpetrator's identity in the Sweets and Glover cases. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

Moreover, as evinced by respondent's omission of the word *motive* from its argumentative heading (RB 91), respondent does not dispute Mr. Jones's contention that the trial court erred in admitting the B.R. evidence as probative of the motive for the Sweets and Glover offenses. Hence, the

court erred in admitting the evidence to establish motive.[8]

Finally, the B.R. evidence was not admissible as well on the issue of intent in the Sweets and Glover matters. (*People v. Soper* (2009) 45 Cal.4th 759, 778.)[9]

B. The Court Erred in Admitting the B.R. Evidence on the Issue of Identity.

Respondent maintains that three cases – *People v. Sully* (1991) 53 Cal.3d 1195, *People v. Kipp* (1998) 18 Cal.4th 349, and *People v. Carter* (2005) 36 Cal.4th 1114 – control the result here with respect to identity, and indeed they do, though not in the way respondent would have the Court believe. (RB at 94.)

As the most recent of the three cases explains: "Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a pattern and characteristics so unusual and distinctive as to be like a signature. The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of

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[8] Without discussion or argument, respondent merely concludes that the court did not abuse its discretion in finding the B.R. evidence admissible to establish motive. (RB 92.)

[9] It should be obvious that, like many members of the legal community, the trial court was befuddled by the complex law of character evidence. (Mendez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters."* (1998) 49 Hastings L.J. 871, 872 ["More students encounter difficulties in understanding the rules governing character than any other evidentiary concept. They are not alone. To this very day, appellate judges continue to write opinions that betray their incomplete mastery of the rules."] To be fair, the law on character evidence was not substantially clarified by this Court until 20 days after the beginning of the trial in this case. (38 CT 7215; *People v. Ewoldt* (1994) 7 Cal.4th 380; *People v. Balcom* (1994) 7 Cal.4th 414.)

individual shared marks, and (2) the number of minimally distinctive shared marks." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148, citations, internal quotation marks, ellipses, and italics omitted; *People v. Abilez* (2007) 41 Cal.4th 472, 501 ["'The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense'"].)

Factual reviews of *Sully*, *Kipp*, and *Carter* demonstrate that unlike those cases, which involved highly distinctive patterns, the shared marks of the B.R., Sweets, and Glover cases reveal generic crimes lacking any distinctive pattern that could "serve as a signature or a fingerprint supporting a conclusion that because he had committed the earlier offense he must have committed the one[s] for which he was on trial." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056-1057.) Accordingly, admitting the B.R. evidence to prove identity in the Glover and Sweets cases violated the well-established principles enunciated in *Sully*, *Kipp*, and *Carter*.

In *People v. Sully*, *supra*, 53 Cal.3d 1195, this Court held that the trial court did not abuse its discretion in admitting evidence of two assaults by the defendant to prove his identity as the murderer of several women. *Sully* noted that common to all of defendant's crimes were (1) cocaine – defendant freebased cocaine with the assault victims while each murder victim was lured on a pretext related to defendant's penchant for cocaine – and (2) sadistic sex involving the savage abuse of prostitutes – defendant handcuffed, gagged, raped twice, and orally sodomized several times one prostitute during a more-than-eight-hour ordeal; he strung up a second prostitute by her wrists from the ceiling and choked and punched her; the murdered prostitutes were left nude and several were bound or physically abused. But as the *Sully* Court emphasized – in stark contrast to

respondent, which failed to acknowledge this most significant and distinctive feature common to each crime – they all occurred in a warehouse that the defendant not only owned but also lived and worked, and "controlled 'what came in and out.'" (*Id.* at p. 1223-1225; RB at 94.) Thus, "[t]he highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that *anyone other than the defendant* committed the charged offense[s]." (*People v. Balcom* (1994) 7 Cal.4th 414, 425, italics added.)

In *People v. Kipp*, *supra*, 18 Cal.4th 349, in both the charged and uncharged offense, a 19-year-old woman was strangled in one location, carried to an enclosed area belonging to the victim, and covered with bedding. In addition, both victims had been bruised on the legs. Finally, both were found with a garment on the upper body, though the breast and genital areas of each were unclothed, and neither victim's clothing had been torn. Thus this Court stated: "Based on both the *number* and the *distinctiveness* of the shared characteristics, we conclude that the trial court did not abuse its discretion when it ruled that the charged and uncharged offenses display a pattern so unusual and distinctive as to support an inference that the same person committed both." (*Id.* at p. 370, italics added.)

But according to respondent, this Court did not base its conclusion on the *number* of shared marks, but only on what respondent exaggerated as "highly distinctive features – strangulation of 19-year-old women, the murders occurring in a location other than where the body was found, [and] the bodies being covered with bedding." (RB at 95.) Clearly, as shown by the many more features listed in the preceding paragraph supporting this Court's conclusion that the offenses were "signature" crimes, respondent is

mistaken in claiming that the court relied on highly distinctive features alone when in fact the Court also relied on the high number of shared characteristics. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 370.) Furthermore, contrary to respondent's unfounded view, not *all* of the features cited by respondent are highly distinctive, particularly the strangulation of 19-year-old women and the movement of the bodies. What is highly distinctive, however, is a feature that respondent chose not to mention – each body was first carried from a location where the killing occurred to an *enclosed area belonging to the victim*, then put on its resting place, and finally covered with bedding, an unusual modus operandi suggesting a twisted sense of respect for the deceased. Hence, like the incomplete treatment of the *Sully* controlling facts, the distortion of *Kipp's* facts demonstrates that *Kipp* is no help to respondent either.

In *People v. Carter*, *supra*, 36 Cal.4th 1114, "the charged and uncharged offenses displayed common features that revealed a highly distinctive pattern," that is, each fatally strangled woman was young (two were 25 years old and the third was 24) and each body was found in a *closed bedroom closet* of an apartment where the victim lived. (*Id.* at pp. 1130, 1132-1133.) Thus, this Court concluded that the charged and uncharged offenses displayed a pattern and characteristics so unusual and distinctive as to be like a signature, the closed bedroom closet being the most distinctive shared feature. (*Id.* at p. 1148.)

Here, contrary to respondent's implausible claim that the "decisions in *Sully*, *Kipp*, and *Carter* are directly on point with the instant case because the facts are substantially similar" (RB at 94), the facts in the B.R., Sweets, and Glover cases are unlike the cases cited by respondent, and respondent's own recitation of the facts bears this out.

According to respondent, "four unique and distinctive facts" were common to the Sweets, Glover, and B.R. cases:

> First, Sweets and Glover were both found in close proximity to where appellant stayed; Sweets by appellant's apartment and Glover by the Wilsie residence. Second, DNA evidence established Glover and Sweets had sex, and appellant could not be ruled out as the sperm contributor – [B.R.] had forced sex with appellant. Third, Glover and Sweets had drugs in their systems, and [B.R.] smoked marijuana with appellant. [¶] Fourth, appellant choked or strangled all of his victims and threatened to kill them.

(RB 97-98.)[10]

Although the issue here is whether the ***B.R.*** offense was admissible to prove identity in the Glover and Sweets cases, respondent does not even mention the B.R. location – the Wilsie residence in San Diego – in setting forth the first unique and distinctive fact it supposedly had in common with the Glover and Sweets cases. Even with the inclusion of the Wilsie residence, however, it is readily apparent that the B.R. offense was a garden variety sexual assault, where a woman who smoked marijuana was choked into submitting to sex at a house in San Diego (though as shown below, B.R. was not choked or strangled). Respondent's own factual description demonstrates that the B.R. offense is indistinguishable from sexual assaults that must happen with regularity in a major metropolitan area like San Diego. And as a generic offense that is not "highly unusual and distinctive," it is incapable of supporting an inference of identity. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.)

Moreover, an examination of the marks (location, sex, drugs, and

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[10] Deleted from the block quote are respondent's citations to the record and its references to the attempted murder charges.

choking/threat to kill), which respondent claims the Sweets and Glover cases shared with the B.R. offense, shows their common features as nothing unusual or distinctive, singly or in the aggregate.

As respondent concedes, JoAnn Sweets was found nowhere near the Wilsie residence, the site of the B.R. offense. (RB 107.) Thus, the Sweets and B.R. offenses do not share a common location. The most that can be said about the location for each offense is that Ms. Sweets was found by the Jones apartment and Mr. Jones had access to the Wilsie residence, a very broad application of the shared mark concept, and surely not a highly unusual and distinctive common feature.

Next, respondent writes: "DNA evidence established . . . Sweets had sex, and appellant could not be ruled out as the sperm contributor – [B.R.] had forced sex with appellant." The shared mark here is sex, but that is all. Of course, Mr. Jones could not be ruled out as a contributor. Had he been ruled out, there would be no need to use the B.R. offense to identify him as a perpetrator of the alleged sexual assault of Ms. Sweets. In any event sex is a elemental aspect of a sexual assault, so its significance is ordinary and not distinctive.

Respondent points out that B.R. smoked marijuana, and drugs were detected in JoAnn Sweets's system. Respondent conspicuously fails to mention that the drug found in Sweets was cocaine, a much less prevalent drug than the commonly used marijuana. (30RT 3218.) Furthermore, although B.R. smoked marijuana before the assault, there is no evidence of when Sweets used cocaine so there is no evidence that cocaine was related to her assault. Thus, B.R. and Sweets did not have any drugs in common.

Finally, respondent asserts, "appellant choked or strangled all of his victims and threatened to kill them." (RB 98.) There is no evidence that

anyone threatened to kill JoAnn Sweets or Sophia Glover. Furthermore, B.R. was not choked or strangled. B.R. testified that "he just grabbed me from behind by his right hand." The prosecutor described B.R.'s hand motion for the record: "she was moving her hand like someone would put their hand around a date's back at the theater." (26RT 2643-2644.) Grabbing is not choking, and it is certainly not strangling. Thus, respondent misrepresents to this Court elsewhere that B.R. "was strangled into submission." (RB 104.)

Accordingly, the facts regarding their assaults that B.R. and Ms. Sweets had in common are as follows: each arguably had sex, each had her neck grabbed, and each instance occurred in San Diego, B.R. in the Wilsie residence where Mr. Jones had access, and Sweets in an unknown location before her body was found by the Jones apartment. The dissimilarities need not even be examined to conclude that the B.R. offense does not support an inference of identity. (See *People v. Abilez* (2007) 41 Cal.4th 472, 501 ["compelling reason exists to support the trial court's decision" to exclude evidence of "criminal activity . . . offered to prove identity" because prior juvenile sex "offense appears completely different from those of the crime here, namely, the sodomizing and murder of an older woman"].)

As respondent states, Sophia Glover was found by the Wilsie residence, DNA evidence established she had sex, she had drugs in her system, and she was strangled. But similar to Sweets, Glover had cocaine detected, not marijuana like B.R., and there was no evidence when Glover used cocaine. (30RT 3243.) And also like Sweets, there is no evidence Glover was threatened. Accordingly, the only facts B.R. and Glover had in common were nearby but not identical locations, sex, and grabbing of the neck. And as with Sweets, this description omits the significant

dissimilarities between B.R. and Glover.[11]

The Sweets, Glover, and B.R. facts do not come close to satisfying the requirement that the "[t]he highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that *anyone other than the defendant* committed the charged offense[s]." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425, italics added.) Clearly, the trial court erred in admitting the B.R. evidence to identify the perpetrator in the Sweets and Glover matters.

C. The Court Erred in Admitting the B.R. Evidence on the Issue of Intent.

According to respondent, evidence of intent was admitted "for purposes of establishing the special circumstance of murder committed while engaged [in] the commission of rape and sodomy (Pen. Code, § 190.2, subd. (a)(17))." (RB 97.) But as the trial court instructed the jury, it could consider the B.R. evidence "*only* for the *limited purpose* of determining if it tends to show: The existence of the intent, which is a *necessary element of crimes charged.*" (45RT 5114, italics added.) A special circumstance is not a crime, nor was the jury instructed that a special circumstance is a crime. Thus, the B.R. evidence was irrelevant on the issue of intent for the rape and sodomy special circumstances. (RB 97.)

In the opening brief, Mr. Jones argued that the trial court erred in

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[11] Note that although respondent alludes to forced sex in connection with B.R., respondent does not claim that JoAnn Sweets or Sophia Glover had forced sex. Thus, the lack of forced sex distinguishes Sweets and Glover from B.R. If Sweets and Glover had forced sex, then there would be no need to admit the B.R. evidence on the issue of intent, as discussed below, related to respondent's claimed "purposes of establishing the special circumstance of murder committed while engaged [in] the commission of rape and sodomy." (RB 97.)

admitting the B.R. evidence on the issue of intent because the identity of the Glover and Sweets perpetrators was in dispute. (AOB 148.) In support, the brief quoted the following from *People v. Hassoldt* (2000) 84 Cal.App.4th 153: "where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature' standard enunciated in *Ewoldt*, the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident – all of which issues presume the identity of the actor is known." (*Id.* at p. 166 [citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2] [italics added]; *People v. Kelley* (1967) 66 Cal.2d 232, 242 ["the standard framework for admission of evidence of other crimes is if there is no doubt that defendant has committed an act, but some question as to his intent in doing so"].)

Ewoldt had sought to explain the subtle distinction between the use of uncharged acts to establish a common plan as opposed to identity. The Court offered the following example: "in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) *Hassoldt* interpreted *Ewoldt's* example as quoted above in the preceding paragraph. *Hassoldt* further stated: "Indeed, it would make no sense to admit evidence of uncharged misconduct on the issue of intent, motive or lack of mistake or accident where the identity of the actor is not yet determined. Stated otherwise, it would not be relevant to inquire into the issues of intent or motive until it is established the defendant is the person or entity whose

motive or intent is at issue." (*People v. Hassoldt*, *supra*, 84 Cal.App.4th at pp. 166-167.)

Notwithstanding the example in *Ewoldt's* footnote 2, this Court overruled *Hassoldt* in *People v. Soper* (2009) 45 Cal.4th 759, stating that to prove intent in a charged crime through reliance on an uncharged crime, "[t]here is no requirement that it must be conceded, or a court must be able to assume, that the defendant was the perpetrator in both sets of offenses." (*Id.* at p. 778.) Instead *Soper* ruled that "a fact finder properly may consider admissible 'other crimes' evidence to prove intent, so long as (1) the evidence is sufficient to sustain a finding that the defendant committed both sets of crimes, and further (2) the threshold standard articulated in *Ewoldt* can be satisfied – that is, 'the factual similarities among the charges tend to demonstrate that in each instance the perpetrator harbored' the requisite intent." (*Ibid.*, citations omitted.) Under *Soper*, the B.R. evidence was inadmissible because neither condition was satisfied.

Respondent attempts to show that Mr. Jones was the Sweets perpetrator by stating as follows: "Sweets was found nude with only a black shirt and bra, strangled to death in the dumpster directly behind appellant's apartment, covered by a blanket made by appellant's mother which had carpet fibers matching appellant's apartment's carpet, wrapped in a sheet with semen stains consistent with appellant's DNA, and in a plastic bag with appellant's fingerprints on it." (RB 106, fn. omitted.) The opening brief addressed this anticipated assessment of the evidence. (AOB 157-163.) But even assuming for the sake of argument that respondent's statement is entirely accurate, it does not support a conclusion, by a preponderance of the evidence, that Mr. Jones was the Sweets perpetrator. (*People v. Soper*, *supra*, 45 Cal.4th at p. 778.) If this is all it takes to satisfy

a more-likely-than-not standard, then to successfully point the finger at someone else, a perpetrator need only retrieve discarded material from an apartment complex dumpster and wrap his victim in it. This latter explanation is equally as plausible as the one proposed by respondent. Hence, the evidence does not support a conclusion that Mr. Jones was the Sweets perpetrator.[12]

The evidence that Mr. Jones was the Glover perpetrator is even weaker. Sophia Glover's body was found about a block from the Wilsie house, where Mr. Jones's mother worked and he helped out on occasion. (25RT 2247-2249, 2287, 2309; 26RT 2607; 34RT 3936.) Along with over 15 percent of the population, Mr. Jones could not be eliminated as a source of DNA found on Glover. (43RT 4843-4846.) Hence, the evidence does not support a conclusion that Mr. Jones was the perpetrator.[13]

And as shown in the factual discussion on the inadmissibility of the B.R. evidence to support an inference of identity, the generic B.R. sex offense shares only a few features in common with the Sweets and Glover charges – sex, grabbing of the neck, and location in the broadest and hence not identical sense. This degree of similarity could not be lower. If the

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[12] Respondent adds "that appellant sexually assaulted and attempted to murder Maria by strangulation at the same apartment and Glover was found nude with semen consistent with appellant's DNA in her anus, wrapped in a blanket near the Wilsie residence," but fails to explain any alleged significance in identifying the Sweets perpetrator. (RB 105-106.)

[13] Respondent adds the K.M. alleged offense at the Wilsie residence two months later and the assertion that "Glover was found nude, wrapped in a blanket near an alley, in much the same way Sweets was found nude in the dumpster in the alley directly behind appellant's apartment." (RB 107.) Respondent makes these bald allegations without explaining their significance in identifying Mr. Jones as the Glover perpetrator.

B.R. evidence is admissible to show intent, then virtually every prior sex crime is admissible to establish intent. (Compare *People v. Davis* (2009) 46 Cal.4th 539, 602-603 [prior crimes of obvious sexual nature against two women were sufficiently similar to charged offense to provide evidence of intent to commit sexual assault – defendant abducted female stranger in all three matters, used a weapon, assured victim he would not harm her, took her to remote location, and carried bindings with him].)

The *dissimilarities* between the uncharged B.R. offense and the charged Sweets and Glover offenses demonstrate in dramatic fashion the lack of similarity. (AOB 147-148.) Most dramatic, of course, is that B.R. lived, while the others did not. (*People v. Alcala* (1984) 36 Cal.3d 604, 633 [defendant's pattern of sexual conduct was not distinctive, "[m]ost importantly, [the last victim] was killed, while the earlier victims were not"].) Moreover, had the *same* perpetrator been responsible for all three offenses, one would expect that B.R. would not have lived given that her offense occurred two months after Glover and five months after Sweets. (38RT 4219-4220.) That B.R. lived shows the lack of a pattern and suggests that a different perpetrator was responsible for their deaths.

Nevertheless, citing *People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225, respondent makes the peculiar claim that the difference between life and death "does not establish a meaningful distinction either factually or legally." (RB 97.) *Sully*, however, made no such sweeping, illogical pronouncement. *Sully* merely implied that death in one offense and life in another may not necessarily preclude a finding of similarity depending on features the offenses share, but this striking difference remains a factor in distinguishing one offense from another and especially in determining the degree of similarity. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18

["the presence of marked dissimilarities between the charged and uncharged offenses is a factor to be considered" in determining whether the uncharged crime is admissible].) Death clearly distinguishes Sweets and Glover from B.R.

Mr. Jones will not unnecessarily repeat in further detail the dissimilarities among the offenses discussed in the opening brief, but two deserve special mention here because respondent chose not to address them despite their obvious importance.

First, both JoAnn Sweets and Sophia Glover were strangled. But a knife was used in the B.R. offense, a stark difference in the assaults. (26RT 2644.)

Second, Sophia Glover was found nude, except for a scarf around her neck, on a stretch of grass between the curb and the sidewalk. Adding an oddly discordant touch, not unlike the perpetrator in *Kipp* who appeared to show respect for the dead by putting his victims in a final resting place and covering them with bedding, Glover's perpetrator placed her clothes near her in a neat pile, about 12 inches high, and then carefully put her shoes on top of the stack. (25RT 2265.) This is quite unlike the B.R. perpetrator, described by the prosecutor as "not clean," and one with an apartment that was "disorganized or messed up." (45RT 5021.)

Lastly, respondent claims that "the distinction that [B.R.] was driven around is irrelevant," even though respondent concurs that there is no evidence that a similar m.o. existed in the Sweets and Glover cases. (RB 104.) But the distinction is relevant because driving around the city is a striking dissimilarity from the m.o. respondent attributes to the Sweets or Glover perpetrator. Furthermore, respondent tries to make much of the evidence that JoAnn Sweets and Sophia Glover were found close to

locations associated with Mr. Jones, while ignoring the sharp contrast that, unlike Sweets and Glover, B.R. was driven miles away from a location respondent associates with Mr. Jones.

Thus, the prosecution did not satisfy the two conditions required by *Soper* to admit evidence of a prior crime to establish intent. The evidence is insufficient to show that Mr. Jones probably committed the Sweets and Glover offenses and the offenses are not similar enough to satisfy *Ewoldt*. (*People v. Soper*, *supra*, 45 Cal.4th at p. 778.)

The B.R. evidence is irrelevant under *Ewoldt* for another reason. (AOB 148-149.) In comparing the use of uncharged acts to prove common plan as opposed to intent, *Ewoldt* explained: "Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] . . . [¶] Evidence of common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined. . . .' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Here, Mr. Jones denied the sex acts by pleading not guilty so the acts were not conceded or assumed. Hence, his intent was not at issue and evidence of the B.R. sex acts could not be admitted to prove an irrelevant matter. (*People v. King* (2010) 183 Cal.App.4th 1281, 1301-1302; *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 925-926 ["Because the act was not conceded or assumed, defendant's intent was not at issue"].)

Assuming for the sake of argument that this Court treats *Ewoldt's* intent/common plan comparison similar to its treatment in *Soper* of

Ewoldt's intent/identity comparison, then the B.R. evidence was still inadmissible to establish intent. First, as already shown, the factual similarities among the B.R., Sweets, and Glover charges do not tend to demonstrate the perpetrator harbored the same intent in each instance. And second, as also shown above, it is not more likely than not that Mr. Jones was the Sweets and Glover perpetrator. Furthermore, evidence of the alleged sex acts is weak. Although there was evidence that JoAnn Sweets and Sophia Glover engaged in sex acts, there was no evidence as to when the acts specifically occurred. (*People v. Soper*, *supra*, 45 Cal.4th at p. 778.)

Finally, because a jury would be tempted to employ the B.R. evidence for the improper purpose of determining identity in the Sweets and Glover cases, the probative value of the evidence in establishing intent would be outweighed by the possibility of prejudice under Evidence Code section 352. (*People v. Soper*, *supra*, 45 Cal.4th at p. 778.)

D. Conclusion

In sum, for the reasons stated here and in the opening brief, the trial court erred prejudicially in admitting evidence of the B.R. offense to prove identity, motive, and intent in the JoAnn Sweets and Sophia Glover cases.

4-9.

THE COURT ERRED IN REFUSING TO SEVER THE MURDER FROM THE ATTEMPTED MURDER COUNTS, ADMITTING THE B.R. EVIDENCE IN THE M.R. AND K.M. CASES, AND INSTRUCTING THE JURY ON THE B.R. AND OTHER COUNTS EVIDENCE.

Respondent combined its answer to arguments 3 through 9 of Mr. Jones's opening brief into a single argument. (RB 75-124.) Its answer to

Mr. Jones's argument 3 was worthy of its own reply. Below are replies that apply to respondent's answers to arguments 4 through 9.

This is a complex case with several victims and many counts, but one purported "fact" lies at the center – that all the counts' victims were prostitutes, including murder victims JoAnn Sweets and Sophia Glover. All the court's major rulings depended on the court's belief that Sweets and Glover were prostitutes, which made them "willing sexual partners" to the court.

Thus, in denying Mr. Jones's severance motion, the court referred to "the overwhelming marked distinctiveness of the M.O. in all the cases," and found that "overriding it all is the marked distinctiveness of a forceful assault used against a – what would be a willing sexual partner . . . ." (8RT 469-470.)

In admitting the B.R. uncharged offense evidence, the court stated, "the clear mark of distinction that stands out in this case, the [B.R.] case, is the force used on an otherwise willing sexual partner." (8RT 472.)

In admitting the testimony of alleged sexual homicide expert Reid Meloy, the court emphasized the importance of Sweets and Glover as prostitutes, or willing sexual partners, when the court reasoned: "And it is that one narrow issue of which I'm confident that the appellate courts would allow this in and that is to deflect what would be a common misunderstanding among jurors: that they cannot understand, a layperson, I think, would have a very difficult time understanding how you can tie up a *killing for sex* or in the course of sex when you have got a *willing prostitute*." (20RT 1221, italics added.)

And in finding the special circumstances allegations sufficient, the court relied on its "modus operandi" finding "that defendant did not wish to

avail himself of the willing sexual activity of a prostitute. He wanted unwilling sex from a prostitute. This is an unusual and highly distinctive mark I think in this series of crimes . . . ." (3RT 106.)

Sweets's and Glover's status as prostitutes was critical to the court because in the court's view, the overwhelmingly unifying aspect of all the cases was the "mark of Zorro" (26RT 2599), deemed by the court as a "clear mark of distinction" and defined as "the force used on an otherwise willing sexual partner" (8RT 472). The court's belief that Sweets and Glover were prostitutes led it to ask, "why would you kill a willing prostitute for sex?" (26RT 2599.) The prosecutor asked a similar question that became the issue about which the murder cases revolved, "why kill a willing sexual partner?" (9RT 588.)

The court's belief was clearly the result of pretrial representations by the prosecutor that Sweets and Glover were prostitutes. (6CT 762, 763, 772, 841; 25CT 4341, 4342.) And just as clearly the court made its rulings expecting that the prosecutor would present evidence *to the jury* that Sweets and Glover were prostitutes. But the prosecutor never did.

Had the trial court known in advance that the prosecutor would never introduce evidence of the decisive "fact" that Sweets and Glover were prostitutes, it would not have declined to sever the murder and attempted murder counts, and it would not have admitted the B.R. evidence because both rulings were based on the signature element of each offense – that Sweets and Glover were assaulted for sex even though each, *as a prostitute*, was a willing sexual partner in the eyes of the court. Moreover, the court would not have instructed that the jury could use the B.R. evidence and other counts in reaching verdicts in the Sweets and Glover cases.

Notwithstanding this obvious and consistent thread throughout this

case, respondent seeks to rewrite history by claiming that the mark of Zorro was not force used on an otherwise willing sexual partner such as a prostitute, but rather "the mark of distinction which the court found compelling was that Bertha [B.R.], Karen [K.M.] and Maria [M.R.]willfully accompanied appellant to the house." (RB 100.) Thus, respondent claims that "the premise of appellant's arguments – that it was pivotal to the trial court's ruling and the instruction of the jury that Glover and Sweets were prostitutes – is erroneous." (*Ibid.*) But as shown above and as proven by the court's rulings, respondent is manifestly wrong.

Respondent also seeks to rebut the assertion in the opening brief that the prosecutor had an ethical duty to disclose to the court that he failed to produce evidence that Sweets and Glover were prostitutes, so the court could have declared a mistrial, or stricken the B.R. evidence and admonished the jury to disregard it. (AOB 143, fn. 38.) Thus, respondent states: "Appellant's assertions that the *prosecutor introduced no evidence* prior to or *at trial* that Glover and Sweets were prostitutes – the prosecutor misrepresented the facts to the court – *is not accurate*." (RB 102, italics added.) But then, not only does respondent fail to show where in the record the prosecutor actually introduced evidence that Glover and Sweets were prostitutes, respondent contradicts itself in the process of trying to demonstrate Mr. Jones's purported lack of accuracy.

On the same page of the brief where respondent claims that Mr. Jones was not accurate in reporting that the prosecutor failed to introduce evidence at trial that Glover and Sweets were prostitutes, respondent not only concedes that the prosecutor introduced no evidence at trial that *Sweets* was a prostitute, respondent points to evidence in the record that fails to show that Glover was a prostitute. Respondent writes: "While *there was*

no evidence during the prosecutor's case in chief that Sweets was a prostitute, Bettie Davis testified that she did not know firsthand whether Glover was a prostitute, even though she heard she was; she only knew that Glover lived on the streets." (RB 102, italics.) It is self-evident that Davis's testimony is not evidence that Glover was a prostitute, so it is a wonder why respondent offers her testimony in support. It surely does not disprove Mr. Jones's accurate assessment of the evidence regarding Glover.

Furthermore, the prosecutor expressly admitted that Davis did not testify that Glover was a prostitute. Near *the end* of trial, the prosecutor objected to a question asking the prosecution's DNA expert whether he was aware that Glover "purportedly was a prostitute." "Mr. Dusek: Objection, your honor. I don't think there has been any evidence that Sophia Glover was a prostitute." (43RT 4851.) In chambers the prosecutor and the court discussed Davis's testimony. The prosecutor explained that when asked if she knew Glover was a prostitute, Davis "said, 'No, I have no knowledge of that. She was living on the streets.'" (43RT 4895.)

That there was no evidence by the prosecutor that Glover was a prostitute surprised the court, no doubt because of the prosecutor's repeated and consequential representations to the court that Glover and Sweets were prostitutes. The court's surprise was reflected in what it thought was the prosecutor's theory of the case: "certainly the district attorney, as I understand it anyway, your theory of the case is that there is similar M.O." (43RT 4895.) Recall the court's earlier succinct statement of the defendant's M.O. (or more accurately, motive): "He wanted unwilling sex from a prostitute." (3RT 106.) And as the court also said earlier, "the clear mark of distinction that stands out in this case . . . is the force used on an otherwise willing sexual partner." (8RT 472.) Therefore, to the court, "the

real issues that I had in mind were . . . because of that 'why would you kill a willing prostitute for sex' issue." (26RT 2599.)

During the discussion of the Davis testimony, the prosecutor assessed the state of the evidence regarding Glover: "There is no doubt that *everyone* probably has that impression [that Glover was a prostitute], either from opening statements or attorney's statements and questioning, but I don't think there is an answer that directly indicates that she was a prostitute." (43RT 4896, italics added.) A review of the record and Davis's testimony confirms the prosecutor's assessment and the truth of Mr. Jones's assertion that the prosecutor never introduced evidence at trial that Glover was a prostitute, contrary to respondent's claim that Mr. Jones was inaccurate in stating so. (RB 102; 25RT 2286-2295 [Davis testimony].)

Respondent also contradicts itself and misstates whether there was evidence presented to the jury that Sweets and Glover were prostitutes. On page 4, respondent writes, "with the exception of Glover, the evidence *definitively established* they [the murder victims] were prostitutes." (Italics added.) But on page 243, respondent refers to Glover as a "drug addicted prostitute[]." Then on page 165, respondent asserts that "the jury received evidence indicating *all four* murder victims were prostitutes." (RB 165, fn. 87, italics added.) Sweets and Glover were two of the four murder victims.

On page 121, respondent claims that "Appellant erroneously asserts there was no evidence Sweets or Glover were prostitutes . . . ." As proof of Mr. Jones's alleged error, respondent offers the following. "[A]ppellant cross-examined one of the prosecution's experts: 'Let me ask you this: in this particular case you were provided information that all the females in this case, Ms. Carpenter, Ms. Simpson, **Ms. Glover and Ms. Sweets**, were known and active prostitutes at the time of their death?,' and the expert

answered affirmatively. (29RT 3006-3007, emphasis added.)" (RB 121.) Note that while respondent quotes the question, respondent does not quote the answer, but employs the word *affirmatively* instead. This is the DNA expert's answer: "I was knowledgeable of that idea, yes." (29RT 3007.) A DNA expert's being "knowledgeable of that idea" is not a statement of fact or evidence that Glover and Sweets were prostitutes. And no reasonable person would believe that the DNA expert had personal knowledge that Glover and Sweets were prostitutes.

In any event, experts rarely testify to facts and the prosecution's expert was no different. He was there to offer his opinions regarding DNA evidence, not to offer evidence under penalty of perjury that Sweets and Glover were prostitutes. And this is how the court and jury understood his testimony. In fact, the court instructed the jury under Penal Code section 1127b that the expert was called as a witness to give "an opinion on questions in controversy at a trial" (45RT 5117), not to provide testimony as a percipient witness. Finally, the prosecutor certainly understood that his DNA expert was not providing evidence that Sweets and Glover were prostitutes because, as stated above, even *after* the DNA expert testified, the prosecutor told the court that there was no testimony during the trial that Glover was a prostitute. (43RT 4896.) Moreover, the prosecutor maintained that even the police (let alone an expert witness) could not "testify that [Glover] was a prostitute unless they saw her." (43RT 4895.)

Accordingly, as stated in the opening brief, the prosecutor presented no evidence and the record fails to show that Sweets and Glover were prostitutes, despite the prosecutor's repeated representations and the impression of "everyone," as the prosecutor put it, to the contrary.

In support of his argument in the opening brief that the prosecutor

had an ethical duty to disclose to the court his failure to offer evidence that Sweets and Glover were prostitutes, Mr. Jones cited the dissenting opinion of Judge Wallace in *Shaw v. Terhune* (9th Cir. 2003) 353 F.3d 697, 707. The dissenting opinion was withdrawn four days after Mr. Jones's opening brief was filed. (*Shaw v. Terhune* (9th Cir. 2004) 380 F.3d 473, 474.) Nevertheless, Mr. Jones holds firm in his view.

As the Ninth Circuit stated in *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, and has often stated since, "statements from the prosecutor matter a great deal." (*Id.* at p. 1323; e.g, *Shaw v. Terhune*, *supra*, 380 F.3d at p. 480.) "'The rule is that in an opening statement it is the duty of counsel to state the facts fairly and to refrain from referring to facts which he cannot or will not be permitted to prove.'" (*People v. Romero* (2007) 149 Cal.App.4th 29, 44, quoting *People v. Ney* (1965) 238 Cal.App.2d 785, 793.) The prosecutor told the jury during opening statement that Sophia Glover was a prostitute. (24RT 2020.) Because statements from a prosecutor do indeed matter, the prosecutor told the jury Glover was a prostitute, the prosecutor knew at some point before the close of evidence that he had no intention of introducing evidence that Sweets and Glover were prostitutes, and everyone – including the jurors – probably had the impression that Glover was a prostitute, the prosecutor should have told the court of his failure of proof. At that point the court could have informed the jurors that there was no evidence that Sweets and Glover were prostitutes, stricken the B.R. evidence, and told the jury to disregard it.

Finally, respondent repeats various assertions in opposing Mr. Jones's contention that the court erred in instructing the jury that it could use evidence from other counts to determine identity, motive, intent, and plan in the Glover and Sweets cases.

The first is that the lack of evidence is evidence. For example, on page 120 of its brief, respondent argues that "Simpson's remains showed no signs of sexual attack because her body was so severely burned such signs were destroyed with her body." Here, respondent contradicts itself in the very same sentence. If there were "no signs of sexual attack," then there were no "such signs" either, and it is a factual impossibility for no such signs to be destroyed.

The second is where respondent attempts to create facts out of whole cloth. On page 121, respondent claims "the sperm DNA evidence indicated Sweets and Glover had sex with appellant." As respondent well knows, the evidence is that Mr. Jones simply could not be excluded, and neither could over 15 percent of the population in the case of Glover. (43RT 4843-4846.) The sperm DNA evidence did not indicate that Sweets and Glover had sex with appellant.

And the third is a fact is irrelevant when it is plainly relevant. For example, also on page 121, respondent claims the fact that Maria and Karen did not die was irrelevant for purposes of establishing identity in distinguishing them from Sweets and Glover who did die. But because "[t]he greatest degree of similarity is required for evidence of [other] misconduct to be relevant to prove identity" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403), of course life as opposed to death is a significant distinction that may defeat the required degree of similarity.

Hence, respondent's arguments should be read with a jaundiced eye.

10.

THE TRIAL COURT ERRED PREJUDICIALLY IN ADMITTING DNA EVIDENCE.

Mr. Jones challenged the admissibility of DNA evidence under all

three prongs of the *Kelly-Frye* ["*Kelly*"] test. (*People v. Kelly* (1976) 17 Cal.3d 24; AOB 245-286.) Specifically, Mr. Jones asserted that the trial court improperly admitted the results of PCR DQ-Alpha dot-intensity analysis. He argued that such analysis constituted a materially distinct procedure that was neither generally accepted in the scientific community nor a correct use of an accepted procedure. (AOB 245-270.)[14]

Mr. Jones also argued that the court improperly permitted population frequency data that was incorrectly computed. (AOB 270-274.) Finally, Mr. Jones argued that the court erroneously admitted polymarker DNA evidence in rebuttal. (AOB 274-276.)

Respondent disagrees, but fails to refute the critical scientific and legal authority presented at the *Kelly* hearing and cited in Mr. Jones's opening brief. (RB 125.) The flaws in the dot-intensity methodology are intrinsic to the amplification effects of PCR technology, the quality of the samples, and the quantitative limitations of the particular test kits.

Because it tests only a single gene, with limited variations, the PCR DQ-Alpha test is the least discriminating and least statistically significant of the DNA forensic procedures. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 670.) The PCR DQ-Alpha test was largely supplanted by the polymarker test (six markers) during these proceedings and shortly thereafter, by the exponentially more powerful, PCR SRT (short tandem repeats [nine markers or loci]) test. (*People v. Hill* (2001) 89 Cal.App.4th

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[14] Whether dot-intensity analysis is a novel technique requiring its own proof of general acceptance has not been addressed in a California published decision. (*People v. Doolin* (2009) 45 Cal.4th 390.) While acknowledging the criticism of dot-intensity analysis, this Court in *Doolin* declined to reach the issue because the defendant had not objected to the evidence at trial. (*Id.* at p. 448, fn. 36.)

48, 53, fn. 3, 60.)

PCR DQ-Alpha typing is not a quantitative test. (See AOB 259-263.) The technique was not designed to yield quantitative conclusions from mixed samples of biological materials. (AOB 265-267.) The dot-intensity testimony presented here disregarded the inherent limitations of the DQ-Alpha methodology, substituting subjective impressions for objective test results. As a result, the testimony greatly overstated the probability that Mr. Jones was either *a* or *the* major sperm donor in the mixed test samples. The genotype frequency data magnified the error because it was calculated based on a presumptive racial sub-population when the race of the perpetrator(s) in this case was not established by independent evidence. (AOB 270-271.) Although the polymarker test results were, to some degree, corrective, they also were not reliable due to the absence of an "s" or control dot on the test strip. (AOB 274-275.) None of this evidence passed the *Kelly* test.

A. The Court Erred in Admitting Dr. Blake's Dot-Intensity Analysis to Identify the Presence of Genotypes in Mixed Sperm Samples, When this Procedure Is Not Generally Accepted by the Scientific Community.

Mr. Jones argued that determining genotypes in a mixed sperm sample based on dot-intensity alone is not a generally accepted principle of the PCR DQ-Alpha method. (AOB 258-267.) Citing the scientific literature, expert testimony and directly apposite case law, Mr. Jones contested the conclusions of the prosecution's expert, Dr. Edward Blake, that the intensity of the dots on the DQ-Alpha test strip could reliably be used to determine donors' genotypes and the proportionate contribution of each sperm source to the mixture. (See, e.g., 28RT 2915, 2921; 29RT 2978-2980, 3025-3030.)

First, respondent counters that the trial court considered a vast amount of information before ruling that PCR DQ-Alpha testimony was generally accepted in the scientific community. (RB 135.) Respondent seeks deference to the court's factual or historical findings. (RB 135 [citing *People v. Soto* (1999) 21 Cal.4th 512, 512, fn. 31].) Such deference, however, is not appropriate because the trial court did not specifically address, nor make historical findings regarding Mr. Jones's objection to quantitative inferences based on subjective impressions of dot intensities. (AOB 259, fn. 82.)[15]

Next, respondent endeavors to rebut the particular criticisms of quantitative dot-intensity analysis presented in the two National Research Council reports cited in the opening brief and by Dr. Mary King at the 402 hearing in *Paul Steven Mack*. (RB 136-137; AOB 247, 265.) The two National Research Council reports are DNA Technology in Forensic

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[15] In footnotes 82 and 83 of its brief, respondent references Dr. Blake's preliminary hearing testimony and testimony presented by Mr. Jones, by way of transcript, that explicitly discussed the criticisms of drawing quantitative inferences from dot-intensity observations. (RB 136-137.) On this basis, respondent asserts that the trial court's findings are entitled to appellate deference because "it is apparent" "the court "considered all of the evidence" and "necessarily rejected the evidence referenced by appellant." (RB 136-137, fns. 83, 84.) In actuality, it is not at all apparent from the court's statements that it gave any consideration to the separate principle of quantitative dot-intensity analysis in ruling that the general PCR DQ-Alpha testing methodology satisfied *Kelly*. (20RT 1235 [The Court: "[T]here was a clear majority of the scientific community that accept PCR as a reliable procedure."]; 20RT 1237 [The Court: "*That is all we are talking about here, to make it clear*. We are talking about PCR and the DQ Alpha locus, and [Judge Hayes] found that . . . the scientific community generally accepted as valid and reliable the statistical estimation of frequencies of the six alleles in the DQ-Alpha system in each population." (Italics added.)].)

Science (1992) (NCR I [26CT 4504-4702]) and The Evaluation of Forensic DNA Evidence (1996) (NCR II). (AOB 247, 262.) Both reports commented on the limitations of PCR DQ-Alpha analysis in computing results for mixed samples. (See, e.g., NCR I at p. 59; NCR II at p. 130.)

These criticisms were based, at least in part, on differences in PCR amplification rates and other uncontrolled variables in the testing process that limit the reliability of determining DQ-Alpha genotypes in mixed samples. (NCR I at pp. 64-66; 26CT 4504-4702; NRC II at p. 129; 22CT 3729-3730.) Respondent relies on Dr. Blake's preliminary hearing testimony that purported to clarify the negative conclusion of NCR I that, although PCR amplification yielded *qualitatively* reliable results, it could yield *quantitatively* unfaithful results. (RB 136.) Dr. Blake's proffered explanation was that this conclusion concerned PCR amplification in general and not PCR amplification involving DQ-Alpha testing. (RB 136; 11CT 1907-1908.) This explanation makes no historical or logical sense.

The quantitative skewing effects of PCR, as described in NCR I, arise from the amplification process and the properties of the test samples. (See, e.g., 15CT 2525; 18CT 3076; NCR I at pp. 59, 64.) These effects exist irrespective of the associated gene identification technique. Moreover, when NCR I was published in 1992, there were only two gene identification procedures, RLFP and DQ-Alpha, and only the latter involved PCR amplification. (*People v. Morgani*, *supra*, 43 Cal.App.4th at p. 662.) The advanced PCR Polymarker DQ-Alpha kit was not available until 1993, and PCR STR technology was not developed until the late 1990's. (Thompson, DNA Testing in 2Encyclopedia of Crime and Punishment (Levinson edit., 2002) pp. 537-544; 43RT 4779.) Therefore, contrary to Dr. Blake's testimony, NCR I's criticism was necessarily directed to the PCR DQ-

Alpha test.

Moreover, the absence of subsequent articles indicating a lack of "quantitative fidelity" with regard to the DQ-Alpha test is hardly surprising since the forensic use of DQ-Alpha has been supplemented or supplanted by the improved polymarker, STR, and mitochondrial tests. Finally, because it is the least specific of the PCR tests, DQ-Alpha would be the most affected by PCR amplification anomalies.[16]

There likewise is no merit in respondent's argument that Dr. King's opinion regarding the quantitative limitations of dot-intensity observations had become obsolete. (RB 137.) No evidence was adduced that improvements of any kind had been made to the PCR DQ-Alpha protocol since Dr. King testified.

The best rejoinder to respondent's argument on this point are Dr. Blake's errors, qualitative as well as quantitative, exposed by the subsequent polymarker retests and admitted by Dr. Blake. (43RT 4782, 4800-4804.) For example, with respect to Sophia Glover, Dr. Blake originally insisted that there was only one sperm donor with genotype 1.2, 2. (28RT 2935-2936.) But when Dr. Blake subsequently retested the same evidence using the more sensitive polymarker test, instead of one genotype, Dr. Blake determined that there were three possible genotypes on the anal swab: 1.2., 2; 1.2, 1.2; and 2,2. (43RT 4799, 4803-4804, 4856 [1.1 allele also detected on swab], 4857.) The significant disparity in test results

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[16] The DQ-Alpha population frequencies in this case were in the range of one to 15 in a hundred. (28RT 2942-2944.) The Polymarker DQ-Alpha test can produce frequencies on the order of one in tens of thousands; STR produces frequencies as low as one in millions or potentially trillions. (Thompson, DNA Testing, *supra*.)

established that the DQ-Alpha test was not sufficiently discriminating to support consistently reliable qualitative, much less quantitative, inferences from dot-intensity differentials.

Respondent ignores the blow dealt by the polymarker results not only to Dr. Blake's original conclusions but also to the assumptions and scientific principles he claimed as support. Instead, respondent continues to rely on case law approving general principles of PCR, DQ-Alpha and other DNA methodologies that are not at issue in this case. (See, e.g., *Spencer v. Commonwealth* (1990) 240 Va. 78, 84 [393 S.E.2d 609, 613] [not a mixed sample]; *State v. Lyons* (1993) 124 Or.App. 598 [863 P.2d 1303] [same]; *People v. Wright* (1998) 62 Cal.App.4th 31 [defendant identified by victims and combination of both DQ-Alpha and *polymarker* testing of a single donor sample]; RB 137-138.).

In *People v. Morganti*, *supra*, 43 Cal.App.4th at pp. 649, 652, the defendant had been identified by his co-defendant and by other witnesses. Subsequently, several bloodstains were tested by both gamma marker (GM) and PCR DQ-Alpha method. (*Id.* at pp. 653, 656.) The court in *Morganti* held that DQ-Alpha typing satisfied the *Kelly* test but only for the limited conclusion that one of the bloodstains could not have come from either the victim or the co-defendant, but could have come from the defendant. (*Id.* at p. 654.)[17]

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[17] Interestingly, Dr. Blake was also the expert witness in each of the above-cited cases, including those from other states, and in none did he advance any of the accuracy and specificity claims challenged by Mr. Jones. (See *People v. Morganti*, *supra*, 43 Cal.App.4th at p. 666; *Spencer v. Commonwealth*, *supra*, 240 Va. at p. 97; *State v. Lyons*, *supra*, 124 Or.App. at p. 502; *People v. Wright*, *supra*, 62 Cal.App.4th at p. 666.) On the one hand, Dr. Blake's appearances for the prosecution in so many cases may be

Respondent recognizes that none of the above-cited cases involved mixed test samples or dot-intensity analysis. (RB 139.) Respondent then offers several additional cases, all from other jurisdictions, arguing that those courts approved the methodology at issue here. Respondent's argument does not withstand examination.

Contrary to respondent's misleading suggestion, *Commonwealth v. Gaynor* (2005) 443 Mass. 245 [820 N.E.2d 233] did not specifically address or approve the quantitative interpretation of dot intensities based solely on the DQ-Alpha method. In fact, in *Gaynor*, three PCR DNA techniques were used to test nine, and in some instances ten, genetic loci: DQ-Alpha, five polymarker (PM) loci and three STR loci. (443 Mass. at p. 248.) The combined tests indicated a "match" to the defendant's DNA profile on the order of "one in 64 quadrillion (64×10^5)." (*Ibid.*)

In rejecting a challenge to this battery of tests, the court in *Commonwealth v. Gaynor*, *supra*, 443 Mass. 245, discussed the accepted guidelines for inferring relative contributions to a mixed sample, but then noted that "only test results based on a single source of DNA, or where there appeared to be a mixture, only test results that yielded strong evidence (dark band or dots) of a primary contributor were used." (443 Mass. at pp. 250-251.) Nowhere in *Gaynor* or any other published case has a court found general acceptance for such quantitative inferences based solely on the DQ-Alpha test. (See *United States v. Gaines* (S.D. Fla. 1997) 979 F.Supp. 1429, 1431 [PCR technique using three separate testing procedures (Polymarker (PM), DQ-Alpha1 and D1S80) to examine seven different

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viewed as a token of his eminence; on the other hand, he seems to have become a forensic scientific community of one that was self-validating and immune to outside criticism.

loci]; RB 139.)

Similarly, in *State v. Harvey* (N.J. 1997) 699 A.2d 596, 624, dot-intensity analysis was accepted as an application of the Polymarker – not the DQ-Alpha – test. In fact, the state in *Harvey* acknowledged that it was unable to use dot-intensity analysis for the DQ-Alpha test. (*Id.* at p. 626.) In *Harvey*, in addition to the polymarker test, a DQ-Alpha test was performed on a blood stain from the victim's sheet and indicated the presence of alleles 2 and 4. (*Id.* at p. 617.) The victim's genotype was 2, 4; the defendant's was 4, 4. (*Ibid.*) The court explained:

> If the blood stain on the box spring were from a single donor, defendant could have been excluded because he does not possess the 2 allele. [The victim], whose genotype matched the alleles, however, could not be excluded. If, however, the blood on the box spring is from a mixed sample, i.e., from more than one donor, then defendant cannot be excluded. . . . *Based on other evidence, the prosecution established that the box-spring blood stain was a mixed sample.*

(*Ibid.*, italics added.)

Thus, in contrast to the challenged testimony here, the defendant in *Harvey* had no reason to contest, and the court no reason to question, the admissibility of the modest DQ-Alpha evidence introduced in that case.

Dot-intensity analysis for the DQ-Alpha test also was not an issue in *Commonwealth v. McNickles* (Mass. 2001) 753 N.E.2d 131, 141, where only a single allele, i.e., 4.2/3, was found present at the DQA1 site.[18] (See

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[18] The DQA1 test involves seven alleles and 28 possible genotypes. (*Commonwealth v. McNickles*, *supra*, 753 N.E.2d at p. 143, fn. 27.) The dispute in *McNickles* focused on whether there was sufficient sample size to infer a homozygous genotype or only the presence of a single allele. (*Id.* at pp. 142-143.)

RB 140.) The results excluded the victim (1.2) and two other suspects (both 1.2/4.1) as possible contributors. (*Ibid.*) In admitting this evidence, the court stressed:

> Very general descriptive information about a perpetrator (e.g., height, weight, hair color) is routinely admissible, even though the traits described are not unique to a defendant. The limited extent of PCR-based testing in this case yielded only such descriptive information, and was not presented to the jury as a "match." At no time did the Commonwealth exaggerate the significance of having the same type at the DQA1 site or otherwise suggest that the PCR-based testing itself identified the defendant as the perpetrator.

(*Id.* at p. 143, footnote omitted.)

In short, respondent cites no case from any jurisdiction establishing the general acceptance in the scientific community of quantitative dot-intensity analysis of DQ-Alpha typing. (See, e.g., *People v. Doolin*, *supra*, 45 Cal.4th at p. 448, fn. 36 [admissibility of dot-intensity analysis under *Kelly* test undecided in California]); RB 140.) Insofar as respondent repeatedly suggests that DQ-Alpha dot-intensity typing was approved in *Gaines* and *Gaynor*, it misrepresents the holdings of those cases. (RB 143.)

Respondent argues that *People v. Pizarro* (2003) 110 Cal.App.4th 530, upon which Mr. Jones relied, is inapposite and erroneously decided. Respondent's argument lacks merit. (RB 140-141; AOB 259-263.)

First, respondent contends that because the case involved RFLP, an entirely different testing method, the factual and legal analysis in *Pizarro* does not translate to the instant case. (RB 141.) Nevertheless, as noted above, in that RLFP is a signficantly more sensitive test than PCR DQ-Alpha, the *Pizzaro* court's rationale for rejecting band-intensity analysis applies with even greater force to this case. (See *State v. Harvey*, *supra*,

699 A.2d at p.616 [referring to RLFP as DNA fingerprinting].)

Pizarro, moreover, thoroughly refutes respondent's position that quantitative inferences based on intensity analysis do not concern the first *Kelly* prong – general acceptance – but instead, only the weight to be accorded the evidence. (RB 140.) As the court reasoned in *Pizarro*:

> Similarly, the propriety of band-intensity analysis is a complicated issue beyond the understanding of laypersons. It requires an understanding of genetic principles, knowledge and experience in molecular biology methods. . . . Lacking these, jurors are not equipped to competently consider opposing scientific opinions regarding whether the procedure is scientifically grounded, reliable, and generally accepted in the scientific community. Yet, without the court's first-prong *Kelly* scrutiny, jurors are left to resolve [such questions]. . . . These are scientific questions to be considered and answered by the *scientific community*, not by jurors. . . . And it is the *court's* responsibility to . . . . screen the scientific evidence and ensure that jurors hear only reliable and trustworthy scientific evidence.

(*People v. Pizarro*, *supra*, 110 Cal.App.4th at pp. 605-606 [original italics].) Accordingly, the court found that band-intensity analysis constituted a "*materially distinct procedure*," " not merely an immaterial variation on the accepted basic [] analysis." (*Id.* at p. 609.)

Again, that reasoning is even more compelling here because RLFP bands provide substantially greater quantitative information than the uncalibrated dots on the DQ-Alpha test strip. (*Id.* at p. 608, citing *People v. Venegas* (1998) 18 Cal.4th 47, 76-77; *People v. Axell* (1991) 235 Cal.App.3d 836, 846; *People v. Barney* (1992) 8 Cal.App.4th 798, 806.)

Recognizing the import of Dr. Blake's admitted errors in identifying the alleged genotype and primary source of the sperm samples, respondent urges the Court not to consider this subsequent evidence because it was not

presented to the trial judge during the *Kelly* hearing. (RB 142 [citing *People v. Wright, supra*, 62 Cal.App.4th at p. 42.) Respondent misreads *Wright* and fails to comprehend the applicable standard of review.

The standard of appellate review for *Kelly* claims was first clearly articulated in *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1134. In *Reilly*, the court stated that the trial court's determination of "general acceptance" is "best described as a mixed question of law and fact subject to limited de novo review." (*Ibid.*) Under this standard, "[t]he reviewing court undertakes *a more searching review – one that is not confined to the record.*" (*Ibid.*, italics added.) Thus, this Court clearly may consider evidence, including trial testimony, that is outside the immediate record of the *Kelly* hearing in determining general acceptance.

People v. Wright, supra, 62 Cal.App.4th 31, did not address the standard of review, but did consider the testimony presented at trial insofar as it was relevant to the general acceptance issue. (*Id.* at p. 39.) The court, however, drew the line at trial testimony regarding careless testing. (*Id.* at pp. 41-42.) The court relied on this Court's observation in *People v. Cooper* (1991) 53 Cal.3d 771, 814 that "[such] arguments misperceive the nature of the *Kelly/Frye* rule. '[T]he *Kelly/Frye* rule tests the fundamental validity of a new scientific methodology, not the degree of professionalism with which it was applied. [Citation.] Careless testing affects the weight of the evidence and not its admissibility. . . .'" (*People v. Wright, supra*, 62 Cal.App.4th at p. 42, quoting *Cooper*.)

The extensive and unrebutted criticism of dot-intensity analysis proffered by Mr. Jones at the *Kelly* hearing was itself sufficient to show that "[no] consensus of scientific opinion [had] been achieved." (*People v. Reilly, supra*, 196 Cal.App.3d at p. 1134.) The difference in the DQ-Alpha

and polymarker test results fully validated these criticisms.

Moreover, the challenge mounted here, unlike in *Wright*, was not predicated on "'careless testing affecting the weight of the evidence and not its admissibility.'" (*People v. Venegas*, *supra*, 18 Cal.4th at p. 80, citations and brackets omitted.) The evidence adduced by Mr. Jones directly attacked the dot-intensity methodology under the first and third prongs of the *Kelly* test: "general" acceptance" and "correct scientific procedures," respectively. (*Id.* at p. 78.) In *Venegas*, this Court affirmed the continued vitality of the third prong of the *Kelly* test. (*Id.* at p. 80.) The Court then clarified the distinction between "careless testing" and prong three of *Kelly*.

Such derelictions as "mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination" are generally amenable to evaluation by jurors without the assistance of expert testimony, and thus are not subject to the *Kelly* inquiry. (*Id.* at p. 81.) In contrast, the *Kelly* third-prong inquiry focuses on misapplications of an accepted technique or methodology that cannot be evaluated by a jury without the technical interpretations of experts. (*Id.* at pp. 81-82.) Respondent fails to grasp this distinction.

The challenge to dot-intensity analysis implicates the third prong of the *Kelly* test, as well as the first. Thus, even allowing that PCR DQ-Alpha typing has generally been accepted by the courts, Dr. Blake incorrectly used the procedure in ways that fell outside the design, capacity and sensitivity of the test. There was ample evidence submitted both in connection with the *Kelly* hearing and at trial establishing that dot-intensity analysis, as carried out by Dr. Blake, was an unaccepted use of the DQ-Alpha technique and should have been excluded under *Kelly*'s third prong.

The Sophia Glover case is again instructive. From his DQ-Alpha

results, Dr. Blake originally surmised that there was only a single genotype and sperm donor, heterozygous type 1.2, 2. (28RT 2930-2930.) On this basis, Dr. Blake concluded that this genotype matched Mr. Jones's DQ-Alpha type and was found in about 6% – approximately one in 20 – African-Americans. (28RT 2941-2942.)

Dr. Blake originally rejected the alternative hypothesis that a mixture of homozygous types 1.2, 1.2 and 2, 2 could equally have accounted for the observed pattern of dots. (29RT 3033-3034.) When, however, he later conducted polymarker testing on the same sample, Dr. Blake determined that there were, in fact, three possible genotypes present on the anal swab, including the two homozygous genotypes, and at least two equally balanced sources of sperm and possibly a third. (43RT 4803-4804, 4848.) As a result, Dr. Blake adjusted his population frequency profile and opined that, rather than 6%, 15.1% – approximately one in six – African-Americans matched the possible genotypes found on the swab. (43RT 4846.) Without even accounting for the frequency of this genotype in other racial and ethnic groups, the polymarker results almost tripled the population of African-American men who could not be excluded from the test sample. The probative significance of this difference cannot be overstated. In the instant case, there were no witnesses or physical evidence, apart from Dr. Blake's shifting opinions, connecting Mr. Jones to Ms. Glover's death. (33RT 3544-3546, 3549, 3564-3566.)

The other fallibility inherent in Dr. Blake's dot-intensity extrapolations is a function of the PCR technique which, even if correctly performed, distorts the scale of the evidence.

It has been estimated that approximately 400 million sperm are normally emitted in a typical ejaculation. (See, e.g., *State v. Nevels* (Mo.

App. 1976) 537 S.W.2d 824, 825.) By comparison, it requires only a minute quantity of sperm – a few nanograms (one-billionth [10^{-9}] of a gram) of extracted DNA – to perform a PCR based test. (*Commonwealth v. McNickles*, *supra*, 753 N.E. 2d at p. 141.) This minuscule quantity of DNA is amplified exponentially by the PCR method. (*United States v. Gaines*, *supra*, 979 F.Supp. at pp.1432-1433.) Because the components of a mixed test sample may be present in different quantities and states of degradation, and because some alleles amplify more efficiently than others, the ratio of alleles in a mixture may be significantly altered by the PCR replication process. (See AOB 248; 26CT 4713, 4726 [study cited therein].)

In Ms. Glover's case, the quantity of sperm on the anal swabs was so minute that it was not detected, despite examinations by both a pathologist and a criminalist, until three years after the crime had occurred. (30RT 3235; 38RT 4244; 26RT 2471-2472, 2487, 2457, 2459, 2461, 2468-2469.) And of that minute quantity, genotype 1.2, 2 contributed some undermined fractional percentage. Thus, prior to amplification, it would have been absurd to describe any contributor to the minute sperm sample as major, and it was misleading to do so afterward.

None of the distorting effects of amplification apply to DQ-Alpha typing of a single donor specimen, but do directly affect the reliability of quantitative inferences based solely on differences in dot intensity for a mixed sample. Dr. Blake, in fact, exaggerated the reliability of dot-intensity analysis and thus strengthened an otherwise weak and largely circumstantial case against Mr. Jones. The trial court erred in admitting this testimony in the face of substantial evidence that the dot-intensity quantification was a materially distinct application of the DQ-Alpha test that was not generally accepted in the scientific community.

B. The Court Erred in Admitting Dr. Blake's Population Frequency Data.

Mr. Jones has argued that the trial court erred in admitting population frequency data that was based on incorrect scientific procedures. (AOB 270-274.) Respondent counters that this argument was not preserved for appeal and, even if it were preserved, the same argument was rejected in *People v. Wilson* (2006) 38 Cal.4th 1237. (RB 145-146.) Mr. Jones stands on the argument in his opening brief.

C. The Court Erred in Admitting Dr. Blake's Polymarker Evidence Regarding Trina Carpenter and JoAnn Sweets Because Dr. Blake Contravened the Recommendation of the Polymarker Kit Manufacturer Not to Type Samples Where a Sensitivity Dot Was Not Visible.

Mr. Jones has argued that the trial court erred in admitting Dr. Blake's PCR Polymarker testimony concerning the sperm samples associated with Trina Carpenter and JoAnn Sweets. (AOB 274-276.) Specifically, Mr. Jones maintained that the Polymarker testimony should have been excluded under the third prong of the *Kelly* test because Dr. Blake failed to follow correct scientific procedures in typing probe strips where the "s "or control dot was not visible. (43RT 4797, 4874-4875, 4880, 4926.) Respondent counters with two arguments: first, that Dr. Blake's interpretation of the strips was a question concerning the weight, not the admissibility, of his testimony; and second, that the manufacturer of the polymarker test kit has acknowledged that some laboratories may choose to type all strips on which results are observed. (RB 147-148.) Both arguments lack merit.

First, the propriety of typing polymarker test strips without an "s" or control dot is a question of technical design and scientific opinion, not a

question of weight for lay jurors. The professional consensus is that "in the absence of a readable control dot, the probe strip should not be typed." (See, e.g., *People v. McNickles*, *supra*, 753 N.E.2d at pp. 851, fn. 21 ["However, in the absence of the control dot, Cellmark would not opine as to the results, and the jury was not presented with any comparison of the defendant's OM types with the PM test results . . . ."], 853.) In short, the dispute between Dr. Blake, on the one side, and the manufacturer as well as several experts, on the other side, regarding the correct application of the polymarker test should never have gone to the jury. Indeed, bearing in mind that the polymarker test was then a new technique, the court should have required more than Dr. Blake's self-validation before admitting his highly prejudicial conclusions despite serious scientific opposition.[19]

D. The Court's Admission of Dr. Blake's Evidence Was Prejudicial Both as to Guilt and Penalty.

In his opening brief, Mr. Jones described in great detail the evidence in the Sophia Glover, JoAnn Sweets and Trina Carpenter cases. (AOB 276-286.) In actuality, these crimes had little in common except that they occurred in an area riven by prostitution, drug trafficking and violence. In the absence of significant common characteristics or connections to Mr.

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[19] In describing his experience with the polymarker test, which had become commercially available the prior November, Dr. Blake testified: "Well, what I have described are things that I would call moderately rigorous, there is just a certain amount of playing around, if you will, I mean, it's hard to think of – sometimes scientists playing around, but what that means from a scientist's perspective is that frequently when you're involved in doing new things, you will take samples from yourself, for example, some of your colleagues, and you will just familiarize yourself." (16RT 975, 979.) It would appear from his testimony that Dr. Blake may not have performed any actual forensic testing using the polymarker technique except for the samples in this case. (16RT 979.)

Jones, the prosecutor contrived commonalities in reliance, in part, on Dr. Blake's overreaching hypotheses.

As he noted, Mr. Jones had no objection to the evidence that the mixed sperm samples contained multiple alleles. (AOB 286.) Indeed, as respondent recognizes, this evidence supported Mr. Jones's defense of multiple assailants and undermined the prosecutor's modus operandi theory that a single perpetrator, acting alone, committed all the charged crimes. (AOB 286; see, e.g., RB 149.) Rather, the prejudice arises from Dr. Blake's further unsupported extrapolations of genotypes and relative contributions to the mixtures. The prosecutor seized on this testimony in closing argument to emphasize that only Mr. Jones's genotype, 1.2, 2 was identified in the Glover, Sweets and Carpenter cases. (44RT 5006-5007.)

This argument was misleading. Both the DQ-Alpha and the polymarker probes test solely for individual alleles, not paired genotypes. Thus, in erroneously admitting the challenged genotyping testimony, the court did not merely sanction the prosecutor's misleading argument; rather, it gave that argument the imprimatur of expertise and the utmost reliability.

Absent the improper DNA evidence, it is reasonably probable that Mr. Jones would not have been convicted of the Glover and Sweets murders (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93), and respondent has not shown that the death verdict was surely unattributable to the erroneous admission of this evidence. (*People v. Clair* (1992) 2 Cal.4th 629, 678.) Accordingly, the murder convictions, special circumstances and death sentence must be reversed.

11.

THE COURT ERRED IN ADMITTING IRRELEVANT, UNRELIABLE, HIGHLY INFLAMMATORY EXPERT WITNESS TESTIMONY, WHICH AMOUNTED TO NO MORE THAN IMPERMISSIBLE LEGAL CONCLUSIONS AND FORBIDDEN CHARACTER EVIDENCE, ABOUT A NON-EXISTENT SUBFIELD OF PSYCHOLOGY, "SEXUAL HOMICIDE," AND WHICH WAS BASED ON AN UNACCEPTED USE OF THE RORSCHACH TEST.

Mr. Jones has challenged the erroneous admission of the testimony of Dr. John Reid Meloy regarding the psychology of "sexual homicide" on several grounds: (1) the testimony did not fall within the exception for victim rehabilitation evidence recognized in *People v. Bledsoe* (1984) 36 Cal.3d 236; (AOB 289, 293-302); (2) the testimony was inadmissible under Evidence Code section 720 because the psychology of sexual homicide was not a qualifying field of expertise (AOB 302-306); (3) the testimony constituted inadmissible and unreliable legal conclusions under Evidence Code sections 801(a) and 801(b) (AOB 306-315); (4) the testimony was inadmissible character evidence under Evidence Code section 1101(a) (AOB 315-318); (5) the testimony was based on an unaccepted use of the Rorschach test that did not meet the *Kelly* standard for determining the admissibility of scientific evidence (AOB 318-325); (6) the testimony should have been excluded as irrelevant under Evidence Code sections 210 and 350 and as prohibited expert mental state testimony under Penal Code section 29 (AOB 325-328); (7) the testimony should have been excluded as unduly prejudicial under Evidence Code section 352 (AOB 329-331); (8) the admission of the testimony violated due process because it was inflammatory and supported no permissible inference (AOB 332-333); and

(9) the error in admitting Dr. Meloy's testimony was prejudicial under both the *Watson* and the *Chapman* standards (AOB 333-346).

Ignoring the order and logic of the arguments in the opening brief, respondent addresses Mr. Jones's principal point – that Dr. Meloy's testimony did not satisfy the requirements of *People v. Bledsoe* – as little more than a conclusory afterthought. (RB 172-179.) In reply, Mr. Jones restores the logical sequence of his arguments and demonstrates that, irrespective of their order, respondent's contentions lack merit.

A. Dr. Meloy's Testimony (1) Did Not Come Within the "*Bledsoe* Exception," and (2) His Testimony Was Factually and Logically Irrelevant.

Mr. Jones contends that the proffered "sexual homicide" testimony did not fall within the narrow admissibility exception of *People v. Bledsoe*, *supra*, 36 Cal.3d 236 and *Peoplev. Bowker* (1988) 203 Cal.App.3d 385, in that the testimony (1) did not pertain to a clinically-verified syndrome involving well-defined characteristics or stages; (2) was not targeted to a specific public myth or preconception identified by the prosecutor or suggested by the defense; (3) was not descriptive of a class of victims, generally; and (4) was not properly limited by instruction. (*People v. Bowker*, 203 Cal.App.3d at pp. 303-394.) Because the testimony did not meet these limiting criteria, the jury was free to accept the prosecutor's express invitation to make prohibited use of Dr. Meloy's testimony as evidence of motive and the mental elements of first degree murder. (45RT 4971, 5026, 5102.)

Notably, respondent cites no case in which this type of testimony has been admitted under the *Bledsoe* exception or any other rubric. Apart from the cases repeated from the opening brief, the majority of cases upon which

respondent relies involve gang or technical forensic expertise. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 630 [relative positioning]; *People v. Farnam* (2002) 28 Cal.4th 107, 162 [blood spatter]; *People v. Bolin* (1998) 18 Cal.4th 297, 321 [blood spatters and drips]; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1433-1435 [gangs]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1120-1121 [gangs]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 [gangs]; RB 160-164.) *People v. Smith* (2005) 35 Cal.4th 344 is the only case independently cited by respondent that involved remotely similar testimony. *Smith*, however, did not address the *Bledsoe* exception, at issue here, because the challenged "sadistic pedophilia" testimony was presented solely at the penalty phase. (*Id.* at pp. 350-357 [holding evidence of mental illness admissible as aggravating factor under Penal Code section 190.3].) Moreover, in *Smith*, unlike here, there was substantial evidence, viewed by the expert, that was consistent with the conduct and fantasies of a sadistic pedophile. (*Id.* at p. 351.)[20]

Respondent does not discuss the specific requirements of the *Bledsoe* exception, which has only been applied in cases involving a narrow class of misconceptions and a particular type of clinical evidence. (See, e.g., *People*

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[20] In a subsequent decision, *People v. Prince* (2007) 40 Cal.4th 1179, which involved multiple homicides and burglaries of mostly "young attractive White women," the Court upheld the admission of the testimony of an FBI Agent regarding "linkages" between the charged crimes based on his experience examining hundreds of crime scenes. (*Id.* at pp. 1190, 1219-1220.) Nonetheless, although the evidence included statements by the defendant regarding his motivation for committing the crimes, the court *excluded* all testimony regarding the psychology of serial murders. (*Id.* at p. 1220 ["The [trial] court did not believe the witnesses' training or experience qualified them to express an opinion regarding the probable state of mind of the perpetrator, and that aspect of the proposed testimony was excluded"].)

v. Bledsoe, *supra*, 36 Cal.3d at pp. 247-248 [admitting testimony regarding rape trauma syndrome to rehabilitate credibility of complaining witness when impeached for inconsistent behavior]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394 [admitting testimony regarding Child Sexual Abuse Syndrome (CSAAS) to rehabilitate credibility of complaining child witness when impeached for inconsistent behavior]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 [admitting, by analogy to CSAAS, testimony regarding common stress reactions of parents of sexually-abused children to rehabilitate their credibility as corroborating witnesses when impeached for inconsistent behavior].) All these cases involved common misconceptions regarding the reactions of victims of sexual crimes, or their families, which had been used to attack these witnesses' credibility. They also generally involved expert testimony based on clinical observations of hundreds or even thousands of victims. This case involves none of these common, indeed defining characteristics.[21]

Respondent cites no case recognizing a generic "misconception" exception that does not conform to the narrow parameters of *Bledsoe* and its progeny. No such case exists, in fact. Nor is this the appropriate case in which to extend *Bledsoe* for several reasons.[22]

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[21] The kinds of misconceptions that fall within the *Bledsoe* exception are widespread and persistent because they arise from generalized, normative expectations regarding the behavior of crime victims. *Bledsoe* evidence is correspondingly targeted to educate jurors that the reactions of victims of certain types of crimes may not conform to these expectations for psychological reasons. (See, e.g., *People v. Bledsoe*, *supra*, 36 Cal.3d at pp. 247-248 [recent findings on the reactions of victims of sexual assault to counter common misconceptions].)

[22] The main reason not to extend the *Bledsoe* exception beyond its paradigm of victim rehabilitation is that it would license the admission of

First and foremost, no analogy of any degree may be drawn between the expert evidence in the *Bledsoe* line of cases and Dr. Meloy's testimony here. (Cf. *People v. McAlpin*, *supra*, 53 Cal.3d at p. 1301 [finding a direct analogy between testimony admitted under the *Bledsoe* exception pertaining to stress reactions of molested children and testimony regarding the stress reactions of these children's parents].)

Second, the proffered misconception in this case was entirely contrived and untethered to any evidence. Sexual sadism, as the name might suggest, has been described in literature and studied scientifically for more than a century.[23] (9RT 481.) The particular species of sexual homicide, one of several, that Dr. Meloy described is an extreme form of sexual sadism, which needs no explanation. Similarly, the killing of prostitutes has been part of public consciousness since the serial murders attributed to Jack the Ripper in Victorian times. Serial killings of women, including prostitutes – such as those committed by "Dallas Ripper," the "Trailside Killer," the "Hillside Stranglers" and the "Green River Killer" – have been highly publicized. (Cf. *People v. Prince* (2007) 40 Cal.4th 1179 [pervasive publicity regarding the killing of six women in San Diego in

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all sorts of questionable quasi-profile evidence catering to public preconceptions and fostered by such popular television series as *Criminal Minds*, *Law and Order - Special Victims Unit* or any of the myriad other shows that purport to illuminate criminal psychology.

[23] The terms sadism and masochism were coined by Richard Von Krafft-Ebing in his landmark study, Psychopathia Sexualis, published in 1886. Sadism is defined as a sexual perversion in which gratification is obtained by the infliction of pain on others. (www.merriam-webster.com/dictionary.) That is precisely the condition Dr. Meloy described. Dr. Meloy did not need to use the term sadistic for the jury to understand that he was equating sexual homicide with sadistic homicide.

1990 and 1991]; see also Egger and Boyd, *Why Serial Killers Target Prostitutes* (2006) www.cbc.ca/news/background/crime/targeting-prostitutes.html [opining that there is no common profile for those who commit prostitute murders: "They are mostly like other men in the penitentiary population"].) There is thus no reason to believe that any juror would have questioned why someone would kill a *willing* sex partner, especially when there was no evidence to support this predicate assumption.

To the contrary, the three witnesses who identified Mr. Jones as their assailant, M.R., K.M. and B.R., testified that Mr. Jones only applied force to make them perform sexual acts they were ***not*** willing to perform.[24] Two of them, moreover, M.R. and K.M., were admitted prostitutes.

Both M.R. and K.M. agreed to have "straight, i.e, vaginal" sex with Mr. Jones. (24RT 2041-2053; 26RT 2523-2537.) According to both, Mr. Jones choked and threatened them when they refused to engage in oral and/or anal sex. In the case of B.R., who was not a prostitute, force and threats were used when she refused to have any type of sex with Mr. Jones. (26RT 2635-2657.) In every case, the force and threats stopped when the woman complied with the sexual demands. None of the women described the forced sexual acts as violent or sadistic. None of these women were seriously injured and all were allowed to go free when the sexual acts were completed. As significantly, all of the charged murders occurred prior to the K.M. and B.R. incidents where the victims sustained no injuries.

In short, there was no pattern of conduct consistent with serial sadistic or sexual homicides. (See, e.g., *Cook v. State* (Texas 1996) 940

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[24] This point, which – for argument's sake only – views the evidence in the light most favorable to the prosecution, is not a concession of Mr. Jones's guilt of any of the charged offenses.

S.W.2d 623, 642, fn. 5 [sexual homicide is characterized by focused attack on sexually significant organs of victim, up to and including removal of body parts, and a fantasy aspect involving rape, mutilation or sadistic acts]; *People v. Smith*, *supra*, 35 Cal.4th at pp. 350-51 [pubescent fantasy, sodomy, strangulation and disfigurement are common characteristics of sadistic homicides].)[25]

Respondent only strengthens Mr. Jones's argument when it highlights the difference between a sex-related motive, for which there was some evidence, and "sexual homicide," i.e., the phenomenon of homicidal violence motivated by sexual arousal, for which there was no evidence whatsoever. (RB 175.) Nevertheless, a generic sex-related motive did not satisfy the prosecutor because such a motive did not carry with it the prejudice, or inferences of purposefulness and intentionality inherent in Dr. Meloy's description of sexual homicide.

Respondent skips the antecedent logical step of identifying evidence

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[25] Most directly on point, in *Masters v. People* (Colo. 2002) 58 P.3d 979, after reviewing the evidence, including the defendant's writings and drawings embodying his fantasies, Dr. Meloy testified that the distinguishing features of a sexual homicide are: "(1) primary sexual activity usually involving semen or ejaculation; (2) secondary sexual activities with attention paid to the victim as a sex object, including (a) undressing of a female victim and exposure of the breasts or genitals, (b) acts of violence including mutilation of the body in the areas of the breast or vagina, (c) insertion of objects into the mouth, anus, or vagina, or (d) posing the body and displaying it in an area where it will be discovered easily. In addition, sexual homicides sometimes involve a signature – a personal, usually symbolic psychosexual act specific to the perpetrator." (*Id.* at p. 986.)

Had Dr. Meloy explained to the trial judge that these were the characteristics of sexual homicides, the judge would unquestionably have excluded his testimony as both inflammatory and irrelevant to this case.

to support the sexual homicide hypothesis – there being none – and argues instead that Dr. Meloy's testimony was appropriate to rebut the defense that one or more of the victims may have been murdered as a result of drug debts owed dealers. (RB 175.) Even if that were the defense, it would not sanction the admission of an inflammatory theory that had no foundation in the facts.

Indeed, in making this argument, respondent only underscores the lack of evidentiary support and legitimate purpose for admitting Dr. Meloy's testimony. Specifically, respondent contends that Dr. Meloy's testimony describing sexual homicide was appropriate to disabuse the jury of the idea that the murders were drug-related. (RB 176.) This idea, however, was not a misconception; but rather, a legitimate alternative inference based on substantial evidence, as opposed to the real misconception foisted on the jury – namely, that any of the charged offenses were "sexual homicides" as posited by Dr. Meloy. In short, even in hindsight, respondent can conjure no justification for suggesting to the jury that sadistic sexual gratification was a motive for the homicides in this case. Without Dr. Meloy's testimony, therefore, the prosecutor would have had no basis for arguing sadistic sexual motivation and its corollary intentionality to the jury. The court's error in admitting Dr. Meloy's testimony and the resulting prejudice, as discussed below, is thus manifest.

B. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 720 Because His Purported Field, the Psychology of Sexual Homicide, Did Not Exist.

The study of sexual murder has been and remains problematic. First, there is no generally-agreed upon definition and the distinction between a sexual homicide and a homicide associated with sexual behavior is often

blurred. (See Schlesinger, *Sex Murder and the Potential Sex Murderer* (2005) (hereafter Schlesinger) www.nasmhpd.org [classifying four types of sexual murder: catathymic (outgrowth of sexual conflicts); compulsive (fusion of sex and aggression); murder to cover up sex crime; and sex related homicide].) Second, there are no national crime statistics for sexual homicides. The base rate for sexual homicide is unknown, and the estimated rate is very low, i.e., less than one percent of homicides. (Meloy, *The Nature and Dynamics of Sexual Homicide: An Integrative Review* (2000) 5 Aggression and Violent Behavior 1, 3 (hereafter Meloy.) Overall, as Dr. Meloy acknowledged, "the extant research [on sexual homicide] is limited by very few comparative studies, repetitive use of small nonrandom samples, retrospective data, no prospective data, and the absence of any predictive, statistical analyses." (Meloy, at p. 1.)

Yet, most, if not all, of the studies of sexual homicides on which Dr. Meloy relied were based on the very type of clinical, biographical or anecdotal information he criticized.[26] (See, e.g., Meloy, at pp. 8, 14.) Dr. Meloy's own study involved only 18 subjects who were not interviewed regarding their motivation because Dr. Meloy would have expected a lot of distortions in their self-reporting.[27] (30RT 3265.)

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[26] Significantly, in both the FBI study, which Dr. Meloy cited, and in his own study, approximately 90 percent of the subject perpetrators of sexual murders were *Caucasian*. (See Ressler, Burgess and Douglas, *Sexual Homicide Patterns and Motives* (1988) at p. 6 (hereafter Ressler); 9RT 553, 579-580.) Consequently, Dr. Meloy acknowledged that he had no basis for making statistical findings as to blacks in the commission of sexual homicides. (9RT 580-581.) This critical information was not imparted to the jury.

[27] Dr. Meloy's own study, published in 1994 in the Journal of Personality Assessment, compared a small *nonrandom* sample of sexual

That is not to dispute that the study of sexual homicides has produced information regarding *possible* sociological, psychological and behavioral correlates of such crimes. Nevertheless, Dr. Meloy's testimony did not accurately present the accumulated, complicated and often contradictory information yielded by the extant studies, but rather, was grossly oversimplified and tailored to support the prosecutor's theory of first degree murder.

Thus, contrary to respondent's argument, Dr. Meloy's testimony was not validly based on any recognized field of study, however described. (RB 162-163.) Indeed, it was a disservice to the jury to permit the prosecution to inject the repugnant suggestion of sadistic or compulsive sexual homicide into this case where no evidence supported this classification.

Moreover, a review of the extended colloquies at the 402 and related hearings, in addition to the pleadings selectively cited by respondent, establishes that the court considered all foundational issues in ruling on Mr. Jones's broad objections to Dr. Meloy's testimony. (See, e.g., 9RT 591, 763-772.) As such, no claims were waived and this Court should reach the admissibility of Dr. Meloy's testimony under Evidence Code section 720, and hold that it was error to admit it.

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homicide perpetrators with a small nonrandom sample of violent, non-sexually offending violent psychopaths. (Meloy, et al., *A Rorschach investigation of sexual homicide* (hereafter Rorschach Investigation), J. Pers. Assess. (1994) 62:1, 58-67; 30RT 3264.) The study was designed to distinguish the characterological and personality traits of these two groups of violent offenders. (Abstract, *Rorschach Investigation*, *supra*, www.ncbi.nlm.nih.gov/pubmed.8138887; 28CT 5056.) Dr. Meloy's testimony clearly was not based on this particular study with its limited objectives and findings.

C. Dr. Meloy's Testimony – Amounting to Legal Conclusions – Was Inadmissible under Evidence Code Section 801(a).

Mr. Jones has argued that Dr. Meloy's testimony amounted to a legal conclusion in contravention of Evidence Code section 801, subdivision (a) in two respects: (1) in defining a particular kind of – i.e., sexual – homicide; and (2) in offering the legal conclusion that all sexual homicides are intentional, purposeful, goal-oriented and motivated by sex. (AOB 307.) Respondent counters the first point by misstating the record and the second point by asserting that the instructions on the definition of murder and expert testimony were curative. (RB 166.) Neither of respondent's arguments is well-conceived.

Respondent contends, contrary to the prosecutor's stated theory of admissibility and his closing argument, that Dr. Meloy's testimony offered no legal conclusions regarding the defining elements of and motivation for the homicides in this case. (RB 166.) Nonetheless, both in seeking the admission of Dr. Meloy's testimony and in arguing its significance, the prosecutor stressed that the testimony would instruct the jury on the motivation and intentionality of what would otherwise appear to be random, unrelated crimes of unknown motivation. (47CT 4857, 4860, 4862; 44RT 5026; AOB 317.) Implicit in these arguments is a concession by the prosecutor that, absent Dr. Meloy's testimony, there was no proof of the motivation for the homicides, much less that the killings were premeditated, deliberate and intentional. Thus, respondent cannot now contend that Dr. Meloy's opinion that all sexual homicides are intentional and goal-oriented was not tantamount to a legal conclusion that the mental elements of first degree murder were present during each of the crimes. (30RT 3259-3260.)

Moreover, the prosecutor's closing argument, in its reliance on Dr.

Meloy's testimony, itself establishes the insufficiency of the general jury instructions to cabin the doctor's opinions within the limits prescribed by section 801, subdivision (a). (See RB 308.)

D. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 801(b) Because It Was Unreliable.

Mr. Jones also asserted that Dr. Meloy's testimony did not meet the reliability threshold for expert testimony set by Evidence Code section 801, subdivision (b). (AOB 308-315.) Specifically, Mr. Jones argued that (1) there was too large an analytical gap between Dr. Meloy's study and his opinion regarding the motivation for sexual homicides; (2) his trial testimony expressed a high level of certainty that Dr. Meloy had conceded was not warranted; (3) Dr. Meloy's methodology in using the Rorschach test exclusively to project a single motive and intent for all sexual homicides was not generally accepted; (4) the purported myth targeted by Dr. Meloy's testimony – that prostitutes are not killed for sex – was not the subject of his own research or any research upon which he relied; (5) the court's assumption that Dr. Meloy had sufficient expertise because he had direct and express confirmation from sexual homicide perpetrators of their common motive was incorrect; and (6) Dr. Meloy's broad definition of sexual homicide was unreliable and unworkable.

Respondent addresses only two of Mr. Jones's "multifaceted" claims (RB 166-167.) First, respondent contends that Dr. Meloy's pretrial testimony involved a greater offer of proof that was consistent with his trial testimony. (RB 166.) Respondent is mistaken. If anything, Dr. Meloy's testimony at the 402 hearing and the studies on which he relied, particularly his own, underscored the lack of reliable support for his testimony at trial. In contrast to his trial testimony, in both his pretrial testimony and in his

study, Dr. Meloy emphasized the preliminary and tentative nature of his hypotheses regarding the psychological traits of sexual homicide perpetrators. Dr. Meloy's own study concludes:

> These *preliminary* findings lend the first empirical support to five psychodynamic factors that we propose to *partially* understand the act of sexual homicide itself: abnormal bonding, characterological anger, formal thought disorder, borderline reality testing, and pathological narcissism (entitlement). We think these factors *may* play a large role in the psychogenesis of sexual homicide when the perpetrator is in the presence of a potential victim and is sexually aroused. Although the empirical support for our factors is limited due to its *retrospective and inferential* nature, the Rorschach variables selected for study generally have good temporal reliability [citation omitted]. *We think our results, although preliminary, begin to shed light on the psychodynamic shadows that portend this low frequency but high intensity act of sexual aggression* [citation omitted].

(28CT 5068-5069 [*Rorschach Investigation*] (italics added).)

Thus, there is not a single datum in Dr. Meloy's comparative study of non-sexual violent psychopaths and sexual murderers that relates to, much less, supports the sweeping, inflammatory generalizations in his testimony. Notably, in excluding Dr. Meloy's proposed "linkage" testimony, the trial court demonstrated a good understanding of the methodological and forensic deficiencies of the extant studies, but failed to recognize that the testimony admitted was no better than an oversimplified gloss on the same inadequate study material. (12RT 769-770; see also 10CT 1731-1735 [*People v. Amundson* (April 16, 1993) San Diego Superior Ct. No. CRN-23430 (excluding Dr. Meloy's testimony on sexual homicides under *Kelly-Frye* and Evidence Code sections 1101 and 352).)

At the time of the hearing, the largest-scale study of sexual homicides, the manual published by the FBI, was based on a non-randomized survey of 36 sex offenders. (Ressler at p. 6.) The manual divided sexual homicides into four categories: organized, disorganized, mixed and sadistic – with differentiating characteristics and motivations. (9RT 488.) The court excluded Dr. Meloy's testimony based on this four-part typology; but then allowed him to make broad generalizations about the purported motivations and goals of all sexual homicides that had no reliable empirical or scientific foundation whatsoever.[28]

Although this Court has not replaced the *Kelly* rule with the federal "gatekeeper" standard announced in *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579 (1993), it has recognized the general applicability of *Daubert*'s reliability requirement to expert testimony. (See *People v. Prince, supra*, 40 Cal.4th at p. 1225, fn. 8 [citing *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 147-149].) Irrespective of the precise description of the trial judge's obligation to ensure that only reliable expert information is presented to the jury, the judge failed to fulfill that obligation here.

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[28] For instance, Dr. Meloy was allowed to testify, to the effect, that all sexual homicides are motivated by rage toward women and the heightened sexual arousal or orgasm resulting from the killing. (30RT 3259-3260.) The results of Dr. Meloy's Rorschach testing of non-sexual violent psychopaths, however, found the same characterological anger in both groups, and Dr. Meloy never questioned his study subjects regarding their motivation. (28CT 5056; 30RT 3265.)

E. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 1101(a) as Forbidden Character Evidence.

Mr. Jones argued that Dr. Meloy's testimony was inadmissible character or profile-type evidence under Evidence Code section 1101, subdivision (a). (AOB 315-318.) Separately, in challenging the admissibility of this testimony on relevancy grounds, Mr. Jones referenced the limitations on mental status evidence set forth in Penal Code section 29. (AOB 326.) Again, respondent takes the liberty to rearrange Mr. Jones's arguments for some undetermined advantage. In replying, Mr. Jones reasserts the sequence and intrinsic logic of his original arguments.

Respond first contends that Mr. Jones has forfeited his claim that Dr. Meloy's testimony should have been excluded under section 1101 because he did not make this objection below. (RB 168.) Dr. Meloy's testimony was multi-faceted and Mr. Jones's challenge to that testimony was correspondingly broad. Based on all the materials provided, as well as the nature of the proffered testimony, the trial court understood that the issue of character or profile evidence was squarely before it. In its initial ruling on the testimony, the court opined: "To the extent that any of this testimony may appear to give damaging character evidence, I believe curative instructions will suffice to allay any prejudice to the defendant." (12RT 768.) On reconsideration, the court excluded certain of Dr. Meloy's proposed testimony regarding the psychological traits of sexual murders, noting a lack of clarity as to "what is and what is not profile evidence." (20RT 1218.) Thus, the trial court both considered and had a fair opportunity to rule on the question whether Dr. Meloy's testimony, in whole or part, constituted character or profile-type evidence. The court then correctly excluded portions of Dr. Meloy's testimony. Mr. Jones maintains

that the testimony should have been excluded in its entirety under Evidence section 1101, among other grounds. On the record, this claim has not been forfeited.

On the merits, respondent argues that Dr. Meloy's testimony was neither character nor psychological profile evidence. (RB 168.) Respondent is mistaken. Testimony that the perpetrator of a sexual homicide is motivated by "his rage towards women, his violence toward women, and the woman's suffering under his domination is his biggest turn on" is plainly in the nature of character or profile-type evidence even without naming Mr. Jones. (30 RT 3259.)

Respondent relies on *People v. Smith*, *supra*, 34 Cal.4th 334, to distinguish the cases cited by Mr. Jones's in his opening brief. (RB 169.) *Smith*'s rationale for distinguishing these cases is not apposite here, however. In *Smith*, the challenged sadistic pedophile testimony was introduced at the penalty – not the guilt – phase of the trial, after the defendant had pled guilty and where he had introduced mental status testimony as mitigating evidence. (*Id.* at p. 357.) In contrast, the cases cited by Mr. Jones all involved the admission of profile-type evidence at the guilt stage where no mental status evidence had been presented by the defense. (*Id.* at pp. 357-358 [distinguishing *People v. Walkey* (1986) 177 Cal.App.3d 268, 276-277 (profile of child abuser); *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1082-1084) (scenario in which rapist might use minimal force); *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072 (drug dealer profile)].)

Because the common problem in the profile line of cases was that the evidence was insufficiently relevant in that it was as consistent with innocence as guilt, those cases were inherently inapplicable to a penalty

phase challenge. (*People v. Smith*, *supra*, 34 Cal.4th at p. 358.) Nevertheless, as the Court recognized in *Smith*, profile-type evidence may also be inadmissible on other grounds, such as lack of foundation or that it is more prejudicial than probative. (*Id.* at p. 357.) Those are the grounds for exclusion asserted by Mr. Jones.

This case is most similar to *People v. McFarland* (2000) 78 Cal.App.4th 489, in which the defendant's conviction was reversed for the erroneous admission of expert testimony regarding abnormal sexual motivation. (AOB 168-169.) Respondent argues that the instant case differs from *McFarland* because, unlike the expert in that case, Dr. Meloy did not offer the opinion that Mr. Jones fit the motivational profile of a sexual murderer. (RB 169-170.)

Respondent's argument fails in that it requires the Court to sanction a highly prejudicial fiction that the jury would not have assumed that Dr. Meloy was offering an opinion as to Mr. Jones's actual motivation for the killings of Sophia Glover and JoAnn Sweets. Indeed, that was the precise assumption the prosecutor fostered in his closing argument and the jury was not instructed otherwise. Dr. Meloy's testimony thus was tantamount to impermissible profile-type evidence and should have been excluded under Evidence Code section 1101, subdivision (a).

F. Dr. Meloy's Testimony Was Subject to *Kelly* Because It Blindsided the Jury by Claiming that the Rorschach Test Could Be Used *by Itself* to Determine the Motive and Intent for Prior Conduct.

Mr. Jones has argued that Dr. Meloy's testimony was inadmissible under the *Kelly* test because he "blindsided the jury" by making claims for the Rorschach test that had not been validated or generally accepted by the scientific community. (AOB 318-325.) Specifically, by analogy to truth

serum, hypnosis or the polygraph, Mr. Jones asserted that the use of the Rorschach test in insolation to determine a person's historical motivation was subject to *Kelly*. Respondent counters that the *Kelly* test has not been applied to expert testimony that is not based on a "new scientific technique." (RB 177.) Nonetheless, the Court is urged to consider the substantial case law and professional literature, cited in the opening brief, that criticized the novel use of the Rorschach test underpinning Dr. Meloy's testimony. (AOB 319-321.)

G. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Sections 210 and 350 Because It Was Irrelevant.

Dr. Meloy's testimony was admitted under the *Bledsoe* exception, ostensibly and solely to disabuse the jury of the misconception that the killing of a prostitute cannot be sexually motivated. (20RT 1221.) Under the controlling law – the *Bledsoe* line of cases and Penal Code section 29 – the testimony was not admissible to prove Mr. Jones's actual motive or intent. (See AOB 293-301, 326-328.) Indeed, contrary to the prosecutor's argument to both the trial judge and the jury, the one use that absolutely could not be made of Dr. Meloy's testimony was as "circumstantial evidence" of the mental states required to prove first degree murder. (9RT 589; 45RT 4971, 5026, 5102.)

Because there was no genuine misconception, as argued in the opening brief, Dr. Meloy's testimony was logically irrelevant to any "disputed fact" at Mr. Jones's trial. (AOB 325-328.) Respondent's counter-argument is fragmented and must be reconstructed from its various pieces. (See, e.g., RB 163-165, 171.) The only theory of relevancy offered by respondent is the "misconception" theory articulated by the trial court. (RB 164-165.) Respondent neither offers nor seeks to defend the

impermissible "circumstantial evidence" theory urged by the prosecutor in his closing argument. Nonetheless, respondent maintains that the prosecutor's argument was a legitimate exercise of his wide latitude to state what he believed the evidence established. (RB 171.)

In support of this argument, respondent cites *People v. Guerra* (2006) 37 Cal.4th 1067, 1153 and *People v. Thomas* (1992) 2 Cal.4th 489, 526. Both cases are distinguishable. In *Guerra*, *supra*, the prosecutor's challenged argument in the penalty phase was based on the testimony of the coroner and autopsy photographs showing multiple poke wounds and incisions in and surrounding the victim's breasts. (*Id.* at pp. 1150-1151.) In *Thomas*, *supra*, the problematic argument was based on the testimony of the prosecution's firearms expert and autopsy photographs describing the gruesome wounds to the victims. (*Id.* at p. 526 & fn. 12.) In both *Guerra* and *Thomas*, the prosecutor's inferences were based on evidence admitted without limitation. Here, in contrast, the only evidence upon which the prosecutor relied in labeling Mr. Jones a *serial sexual killer* was Dr. Meloy's testimony, which could only have been admitted for a different, necessarily limited purpose. (45 RT 5102 [The Prosecutor: "And much like Dr. Meloy told us, he [Mr. Jones] had to like it. It made him feel good. It was the type of sex he wanted, that he needed. Sexual predator, sexual killer, serial sexual killer."].)

Thus, as respondent recognizes, the prosecutor's closing argument did not furnish a permissible theory of relevancy. Since there also was no actual misconception to establish relevancy, the probative value of Dr. Meloy's testimony was illusory, at best. Accordingly, his testimony regarding, implicitly, Mr. Jones's motive and intent should have been excluded for lack of probative value.

H. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 352 Because Its Prejudicial Effect, Confusion of the Issues, and Misleading of the Jury Clearly Outweighed Its Probative Value.

Having established the negligible probative value, if any, of Dr. Meloy's testimony, Mr. Jones asserts that the testimony should have been excluded as unduly prejudicial. (AOB 329-331.) Respondent counters that it was the crimes, not the motive, that were heinous. (RB 181.) Its argument would fare better had the prosecutor not sought to inflame the jury and extract the maximum prejudice from Dr. Meloy's testimony. The prosecutor's closing argument "directly correlated" Dr. Meloy's testimony to Mr. Jones, converting Dr. Meloy's clinical hypotheses into Mr. Jones's actual thought processes. (See, e.g., 45RT 5026 [The Prosecutor (speaking as Mr. Jones): ["I want to dominate them, hurt them and that makes me feel better. That gives me a better orgasm. That is what I need. That is what I want. That is what I will get."], 5102; RB 180.) The trial court, in fact, appreciated the inflammatory potential of Dr. Meloy's testimony and both limited its scope and opined that "curative instructions will suffice to allay any prejudice to the defendant." (12RT 769.) The prosecutor, however, flouted the imposed limitations and no curative instructions were given.

Respondent contends that the evidence presented by the defense regarding the connection between drugs and prostitution was more repulsive that anything presented by Dr. Meloy. (RB 180.) This argument is essentially a non sequitur. The prosecutor did not object to the defense evidence because, among other reasons, it was highly probative and could not have been excluded under the Sixth Amendment. Trial is not an escalating "tit for tat" contest where the prosecution is permitted to present otherwise inadmissible, inflammatory evidence because the defense has

presented "graphic testimony."

Respondent further argues that the jury's failure to convict Mr. Jones of two of the murder counts establishes that Dr. Meloy's testimony was not prejudicial. (RB 181.) This argument presumes that Mr. Jones's claim is based on the bare fact of his conviction. But that is not the whole of Mr. Jones's argument. Rather, Mr. Jones maintains that Dr. Meloy's testimony was prejudicial and misled the jury by substituting irrelevant psychodynamic concepts of intentionality and purposefulness for the requisite malice and other mental states of first degree murder.

The trial court reinforced this prejudicial impact in two ways: first, by failing to instruct the jury that malice aforethought was an element of first degree murder; and second, by excluding the portion of Dr. Meloy's proffered testimony that focused on the non-volitional character of sexual homicides. (12RT 768; 20RT 1221.) Consequently, the jury heard only about the intentionality and deliberateness of sexual homicide perpetrators, not their irrationality and reactivity.[29]

The prejudicial effect of Dr. Meloy's testimony, which respondent fails to address, substantially outweighed its probative value. The trial court thus erred in not excluding the entirety of Dr. Meloy's testimony under section 352.

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[29] The trial court effectively scripted both the direct and cross-examination of Dr. Meloy, admonishing defense counsel that any broader inquiry would open the door to the entirety of Dr. Meloy's proffered testimony. (20RT 1222.)

I. The Erroneous Admission of Dr. Meloy's Testimony Violated Due Process and Was Prejudicial Under both *Chapman* and *Watson*.

The trial court's error in admitting Dr. Meloy's testimony violated federal due process and thus is subject to review under the harmlessness standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Because respondent cannot demonstrate that this error did not contribute to the first degree murder verdicts in the Sweets and Glover cases, Mr. Jones's murder convictions and death verdict must be reversed.

Mr. Jones has argued that, inasmuch as Dr. Meloy's testimony did not satisfy the *Bledsoe* exception and was not admissible for that or any other relevant purpose, it admission violated due process as there were no permissible inferences for the jury to draw from the testimony. (AOB 332.) The court gave the jury no limiting instruction to mitigate the prejudice and thereby allowed the prosecutor to invite the jury to draw the most prejudicial, proscribed inference from the testimony, i.e., that Mr. Jones's actual goal, motive and intent was sadistic sexual pleasure.

Respondent does not contend that Dr. Meloy's testimony was unimportant to the prosecution's case, that the court properly cautioned the jury regarding the limited use of the testimony, or that the prosecutor properly confined his argument to the permitted use. Instead, respondent offers a witness-count and a formulaic defense of the prosecutor's summation without disputing the centrality of Dr. Meloy's testimony. (RB 182-183.) Moreover, the only instructions respondent references are the standard specific intent and murder instructions that in no way limited the use of Dr. Meloy's testimony. (45RT 5109-5110, 5030-5081; RB 182-183.)

In *People v. Housley* (1992) 6 Cal.App.4th 947, the court held that

there is a sua sponte duty to instruct on the limited use of *Bledsoe*-type evidence, in that case, concerning CSAAS. (*Id.* at pp. 958-959 ["We thus conclude that because the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence."]; see also CALJIC No. 1064, Comment (Fall 2010 ed.).)

Dr. Meloy's testimony was admitted under the *Bledsoe* exception and the trial court acknowledged the necessity for a cautionary instruction. (12RT 769.) No such instruction was given, however. The jury thus was free to misuse the evidence and, in fact, was encouraged to do so by the prosecution.

The error in failing sua sponte to instruct the jury on the limited use of Dr. Meloy's testimony compounded the prejudice of erroneously admitting the testimony in the first place. Mr. Jones has marshaled in compelling detail the evidence that the killings of JoAnn Sweets and Sophia Glover were impulsive and unplanned, and thus supported second degree murder verdicts. (AOB 340-345.) Mr. Jones has also pointed out that Dr. Meloy's own study also supported the lesser verdict, while his testimony suggested the contrary. (AOB 289.) To the extent the non-homicide offenses presented any pattern, it was, as Mr. Jones has demonstrated, one indicative of impulsiveness and reactivity, not deliberation and premeditation. (AOB 341-343.)

Respondent does not contest the accuracy of Mr. Jones's recitation of the facts. Rather, he counters only that Mr. Jones has failed to demonstrate that the jury would have found second degree murder if Dr. Meloy's testimony were not admitted. (RB 183.) But that substantially

overstates Mr. Jones's burden, which is to establish, at most, that, absent the erroneous admission and likely misuse of Dr. Meloy's testimony, it is reasonably probable that the jury would have returned more favorable verdicts in the cases of Sweets and Glover. That burden has been met. Accordingly, the first degree murder convictions must be reversed; the special circumstances findings should be set aside; and the death verdict should be vacated.

12.

THE COURT ERRED IN EXCLUDING EVIDENCE OF M.R.'S APOLOGY TO MR. JONES FOR FALSELY ACCUSING HIM.

A. The Foundation Was Adequate for the Jury to Decide Whether the Woman at the Door Was M.R.

Mr. Jones established in his opening brief that the trial court erred when it excluded evidence that M.R. apologized for falsely accusing Mr. Jones of sexual assault and attempted murder. (AOB 346-352.) The evidence was admissible as prior inconsistent statements to impeach M.R.'s trial testimony. And as required under Evidence Code sections 1235 and 403, subdivision (a), Mr. Jones produced sufficient foundational evidence to sustain a jury finding that the woman who made the statements was in fact M.R.

Respondent does not dispute the factual basis supporting Mr. Jones's argument. As Mr. Jones showed, M.R. testified that on the morning of the alleged incident with Mr. Jones, she lived with Mr. Ramirez and had a fight. (24RT 2087-2088.) About a week after the alleged incident with Mr. Jones, M.R. returned to the Jones apartment with "church people." (24RT 2082;

2084.) M.R. claimed that she stayed in the car while the church people spoke with someone at the apartment. (24RT 2082-2084.)

Ann Jones, Mr. Jones's mother, testified that a preacher and a Mexican woman came to her apartment looking for her son. (34RT 3945-3946.) To lay a foundation for the defense assertion that the woman at the door was M.R., Ms. Jones testified that the preacher translated for the woman who was there to see the "tall man" so that she could apologize for what she did. (34RT 3959, 3967-3968.) The woman explained that she was upset, she had been beaten by her husband and did not know why she did this, but she was confused and sorry. (34RT 3959, 3967-3968.) When Ms. Jones saw M.R. walk into the courtroom, she thought she may have been the woman who came to the door, but mentioned that the woman had gained weight in the interim. (24RT 2040; 34RT 3960-3961, 3966, 3969.)

Respondent contends that the evidence was properly excluded because Mr. Jones failed to provide an adequate foundation to attribute the apology to M.R. (RB 195.) Respondent's argument is unavailing for several reasons.

First, respondent ignores Mr. Jones's argument that the trial court overstepped its role by making a credibility determination. Instead, respondent cites inapposite authority to argue that the trial court did not err because it properly required Mr. Jones to carry the burden of producing evidence as to the existence of the preliminary fact. (RB 195-196; *People v. Sanders* (1995) 11 Cal.4th 475, 514.)[30] Yet, Mr. Jones did not contest

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[30] Nor do the facts of *Sanders* aid respondent. In *Sanders*, to show bias, the defendant sought to cross-examine a prosecution witness on the theory that the witness collaborated with a prison inmate to make a false identification. (*People v. Sanders, supra*, 11 Cal.4th at pp. 513-514.) The

this requirement. Rather, Mr. Jones demonstrated that after having met this burden by producing the abovementioned evidence, the trial court exceeded the scope of its duty by making its own credibility determination and believing M.R. over Ms. Jones. (AOB 351; RT 3949.) This was an abuse of discretion because the trial court's function was to determine whether the evidence was sufficient to permit the jury to find the preliminary fact true; its duty was not to assess witness credibility. (AOB 350-351; *People v. Marshall* (1996) 13 Cal.4th 799, 832-833 ["the trial court just determines whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence [citations], even if the court personally would disagree [citations]"; see also *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1167-1168 [in the context of an Evidence Code section 403 hearing, matters affecting witness credibility are not relevant for admissibility considerations].)

Second, respondent unpersuasively relies on facts that are only relevant to witness credibility in order to support its claim that Mr. Jones failed to lay a sufficient foundation. (RB 194, 196.) These facts are: (1) Ms. Jones did not definitively identify the woman or man who came to her

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defendant, however, wholly failed to supply the trial court with any foundational evidence showing the existence of the collaboration. (*Ibid.*) This Court upheld the trial court's ruling that the defendant would not be permitted to cross-examine the witness unless it called the inmate to establish a foundation for the claim of fabrication. (*Id.* at p. 514.) Logically, without the foundational evidence, there was no basis for the defense to impeach the witness's testimony. Here, the preliminary fact was not whether the apology was made, but whether it could be attributed to M.R. And there was ample evidence presented from which a jury could make that determination, which included, among other things, the testimony of Ms. Jones offered by the defense and partially corroborated by M.R.

door; (2) Ms. Jones could not precisely recall when the encounter occurred, and; (3) M.R. claimed she never spoke to Ms. Jones. (RB 194, 196.) As shown above, witness credibility is properly reserved for the trier of fact and should not infect a trial court's determination of whether the foundational showing of a preliminary fact has been met.

People v. Rodriguez, supra, 8 Cal.4th 1060, is instructive on this point. In *Rodriguez*, the defendant argued that there was insufficient evidence of his identity as the perpetrator of an assault. (8 Cal.4th 1060 at p. 1167.) At the Evidence Code section 402 hearing, the victim testified that out of the corner of his eye, he saw that he was struck by someone wearing a glove and that the defendant was the only person in his presence wearing gloves. (*Id.* at pp. 1167-1168.) On appeal, the defendant argued a foundation had not been established showing his identity as the assailant because the victim stated he did not actually see the defendant strike him, did not tell prison officials after the incident about the gloved hand, and had only recently recalled the gloved hand detail. (*Ibid.*) This Court upheld the trial court's finding because the facts argued by the defendant affected the credibility of the victim as a witness and not the admissibility of his testimony. (*Id.* at p. 1168.) Viewing the totality of the evidence presented, the Court held a rational jury could conclude that defendant was the one who struck the victim. (*Ibid.*)

Similarly, the fact that Ms. Jones could not definitively identify the woman she spoke with or the exact time of year of the encounter – first she answered "yes" to "August," then thought it was not summertime only because "it seemed kind of cool to me;" but on the other hand, it was also "at night," "late at night," which may explain why she thought it might not have been summer (34RT 3959, 3964-3965, 3969) – were issues of

credibility and accuracy properly reserved for the jury, as was M.R.'s denial that she spoke with Ms. Jones. Moreover, in viewing the totality of the evidence presented, a rational jury could have concluded that M.R. was the woman who made the apology. M.R., who had recently accused Mr. Jones of sexual assault, admitted to returning to his apartment with church people. Ms. Jones testified that a preacher and Mexican woman came to her apartment to apologize. The woman explained that she was sorry and had been upset because she was in a fight with her husband the morning of the assault. At trial, M.R. testified that she lived with a Mr. Ramirez and had been in a fight the same morning. And Ms. Jones recognized M.R. when she saw her in court. The facts argued by respondent and relied upon by the trial court may affect witness credibility, but they do not diminish the sufficiency of the preliminary showing made by Mr. Jones.

Indeed, notwithstanding respondent's argument to the contrary, Mr. Jones established sufficient evidence from which the jury could find that the woman at the door was M.R. (See, e.g., *People v. Williams* (2007) 40 Cal.4th 287, 290-291, 314 [sufficient foundation existed to show that defendant placed phone calls to victim's residence, where evidence showed that defendant stole victim's wallet that may have contained unlisted number, and day after phone call, burglarized victim's home and murdered victim]; *People v. Hinton* (2006) 37 Cal.4th 839, 890-891 [foundation existed for admission of statement by witness to investigator that "E-Money" confessed to crimes, despite witness's in court denial of statements; relevance of statements depended on fact that defendant was E-Money and witness admitted defendant was the only Eric she knew and that she had called investigators]; *People v. Coddington* (2000) 23 Cal.4th 529, 553-554, 590-591, overruled on other grounds by *Price v. Superior Court* (2001) 25

Cal.4th 1046, 1069, fn. 13 [circumstantial evidence provided sufficient foundation under Evidence Code section 403, subdivision (a)(4), to show that defendant was the person who called the witness].)

Because Mr. Jones met the foundational requirements under Evidence Code sections 1235 and 403, subdivision (a), for the admission of M.R.'s apology, and the trial court exceeded its function in finding that he did not, the court's ruling can only fairly be characterized as an abuse of discretion. The error was of constitutional magnitude because it sabotaged Mr. Jones's defense that M.R. fabricated her story of sexual assault and attempted murder. Respondent has failed to discredit this showing.

B. Even if the Woman at the Door Was Not M.R., She and the Preacher Acted as M.R.'s Agents, a Possibility Suggested by the Prosecutor, so That any Statements by the Two Would be Imputed to M.R.

In the alternative, Mr. Jones demonstrated that the proffered statements were admissible under Evidence Code section 1222 as an authorized admission, because it could be inferred that the church people were authorized by M.R. to speak on her behalf. (AOB 353-354.) Respondent's argument disputing this showing is unpersuasive for several reasons.

First, contrary to respondent's contention, Mr. Jones did not forfeit this argument for purposes of appeal. (RB 196). At trial, the admissibility of the evidence forming the basis of this claim was extensively litigated on hearsay grounds. (34RT 3945-3970.) And the prosecution raised the specific ground of authorized admissions, which placed the issue before the trial court. (34RT 3947.) Respondent inadvertently concedes this point in arguing that Mr. Jones did not satisfy the requirements of Evidence Code section 1222, despite the "exhaustive" Evidence Code section 402 hearing.

(RB 197.) Accordingly, no unfairness or impropriety results from appellate consideration of the matter. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [defense counsel's failure to specify grounds for objection did not preclude appellate review of evidentiary issue where prosecutor's opening statement made clear the purpose for which the evidence was to be introduced]; *People v. Brenn* (2007) 152 Cal.App.4th 166, 174 [issue of admission of hearsay evidence was not waived on appeal, even though defendant did not expressly object at trial to specific ground raised on appeal, where prosecution put issue on the table in its pretrial motion, such that all parties had notice of issue, and no unfairness or impropriety would result from appellate consideration].)

Next, respondent ignores the inference that emerges from the evidence as a whole and argues conclusions unsupported by testimony. (RB 196-199.) Indeed, respondent's contention that there was no evidence of agency (RB 196-198) is refuted by the entire context of the encounter which established the foundation for the authorized admission. M.R. testified that she went with church people to the apartment of a man who had purportedly sexually assaulted her the week before. Ms. Jones testified that a preacher came to her door looking for her son in order to apologize on behalf of a woman who was confused, sorry, and did not know why she "did this." (34RT 3959.) These circumstances give rise to the inference that the preacher and the Mexican woman were acting on behalf of M.R. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579-1580 [agency relationships may be inferred or implied from the conduct of parties and circumstances surrounding the events]; see also, Cal. Law Revision Com. com., 29B Pt.4 West's Ann. Evid.Code (1995 ed.) foll. § 1222, p. 159 ["The authority of the declarant to make the statement need not be express; it may

be implied"].)

Respondent argues that the confidentiality inherent in the priest-parishioner relationship does not support an inference of agency because no one could recall who the church people were and nothing established they were acting in a clerical capacity. (RB 198.) Respondent's opinion cannot supplant the unequivocal trial testimony of Ms. Jones, who maintained that the man who came to her door was a preacher, and M.R., who testified that she was accompanied by "church people." The witness testimony supports an inference of a confidential relationship between M.R. and the priest tantamount to the one between a priest and parishioner; respondent's contention – devoid of evidentiary support – does not refute such inference.

Moreover, respondent unintentionally acknowledges the existence of such relationship by pointing to the fact that M.R. thought the church people were going to talk about her fear of Mr. Jones (RB 197; RT 2082-2083) and that the church people conveyed this to Mr. Jones. (RB 198.) Even according to respondent, an understanding clearly existed that the church people were designated to represent M.R. and make a statement to Mr. Jones pertaining to the alleged assault. And as shown above, they did just that and apologized on M.R.'s behalf.

Finally, respondent's reliance on *People v. Herman* (1945) 72 Cal.App.2d 241, 246 is misguided. (RB 197-198.) *Herman* is inapposite because there, it was established that the purported agent did not, in fact, have an agency relationship with the victim. (*Id.* at p. 246.) The purported agent was a police officer who called the defendant's family posing as the victim's attorney. (*Ibid.*) Defendant sought to admit the substance of the conversation, but because the police officer was not representing the victim, the court of appeal found that the victim was not bound by the officer's

statements. (*Ibid.*) *Herman* cannot aid this Court's analysis because, as opposed to conclusive evidence in *Herman* showing that the purported agent was not, in fact, a representative of the victim, the abovementioned facts demonstrate that the church people were authorized to make statements on M.R.'s behalf.

The entirety of the circumstances showed that the church people acted as agents for M.R. when they conveyed her apology to Ms. Jones. The evidence was admissible under Evidence Code section 1222 as an authorized admission. And the trial court committed constitutional error in excluding the evidence because the ruling wholly undermined the defense theory that M.R. manufactured the allegations of sexual assault and attempted murder.

C. The Court's Error in Excluding Evidence of M.R.'s Apology to Bryan Jones Was Reversible.

Respondent claims that any error was harmless as made "abundantly clear" by Mr. Jones's argument 13, in which he argued that the trial court erred in denying the motion to dismiss based on a seven year delay in filing the M.R. count. (RB 199.) On the contrary, what is abundantly clear is that any assumed failure to lay the appropriate foundation would be the fault of the prosecutor in waiting to file the M.R. charges. Accordingly, for the reasons stated here and in the opening brief, the judgment should be reversed.

13.

THE COURT ERRED IN DENYING MR. JONES'S MOTIONS TO DISMISS THE M.R. COUNT ON THE GROUND THAT THE PROSECUTOR VIOLATED DUE PROCESS IN DELAYING ALMOST SEVEN YEARS TO FILE THE M.R. CHARGE.

Mr. Jones demonstrated in his opening brief that the prosecution's

seven-year delay in charging Count One for the attempted murder of M.R. violated both state and federal notions of due process. (AOB 359-374.) The delay wholly prevented Mr. Jones from presenting a meaningful defense because after seven years, witnesses imperative to proving the falsity of the accusation could not be located and the memories of testifying witnesses were fundamentally diminished. At the same time, the prosecution's delay in bringing the charge was unjustifiable. The factual basis underlying Count One was known in its entirety at least five years before charges were filed, and none of the evidence gathered to support the other nine counts was admissible to prove the M.R. count. In balancing the prejudice suffered by Mr. Jones as a result of the seven-year delay against the prosecution's inadequate justification, the only reasonable conclusion is that Mr. Jones's state and federal due process rights were violated and the trial court abused its discretion in finding otherwise.

Respondent's argument to the contrary is flawed. It misconstrues governing authority and then unpersuasively sets out arguments only conceivably relevant to the nine counts that Mr. Jones does not challenge on these due process grounds. At the same time, respondent simply ignores Mr. Jones's showing of actual prejudice as well as his dismantling of the prosecution's justification for the seven-year delay in bringing charges for Count One. As a result, respondent's balancing is askew and it fails to rebut Mr. Jones's showing.

Preliminarily, respondent imposes a standard for establishing a federal due process violation from precharge delay that is greater than the law actually requires. (RB 207-208.) The authority relied upon by respondent does not support its claim that federal law requires a finding that governmental delay was a deliberate device to gain a tactical advantage.

And there is no support in the record for respondent's contention that Mr. Jones conceded the government did not act intentionally or negligently. (See RB 208; 8RT 332.)

As respondent acknowledges, the authority it relies upon to support this proposition cite two United States Supreme Court decisions, *People v. Marion* (1971) 404 U.S. 307 and *People v. Lovasco* (1977) 431 U.S. 783. But neither decision creates a requirement that the defendant prove the government's delay was a deliberate device to gain a tactical advantage in order to establish a due process violation based on pre-indictment delay. (See, e.g., *People v. Moran* (9th Cir. 1985) 759 F.2d 777, 781.) As the Ninth Circuit has recognized:

> The language from these two cases merely acknowledges governmental concessions that intentional or reckless conduct would or might be considered violations of the due process clause if actual prejudice had been shown. The *Lovasco* court did not set out intent or recklessness as required standards of fault. In fact, in both the *Marion* and *Lovasco* cases, the Court stated that it "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." [Citation].

(*People v. Moran, supra,* 759 F.2d at p. 781.) Indeed, *Marion* and *Lovasco* simply acknowledge the prosecutorial concession that deliberate delay would constitute a denial of due process, but neither case holds that a showing of deliberate delay is required before a prosecution may be dismissed. (See *People v. Boysen* (2007) 165 Cal.App.4th 761, 775.) "It is one thing to conclude, as those cases do, that delay for tactical advantage constitutes a violation of due process, it is another to conclude delay for tactical advantage must be shown before a due process violation may be found to exist." (*Ibid.*)

Respondent relies upon dictum from authorities that reference *Lovasco* and *Marion*, but they do not create the affirmative rule it urges. For example, *People v. Martinez* (2000) 22 Cal.4th 750, cited by respondent (RB 207), held that the right to a speedy trial attaches once an information is filed, but not at an earlier stage such as the issuance of an arrest warrant or the filing of a felony complaint. The Court found that the Due Process Clause of the Fifth Amendment spans any gap between protection under the statute of limitations – which terminates once an arrest warrant is issued after the filing of a felony complaint – and the Sixth Amendment's speedy trial right – which engages once an information is filed. (*Id.* at pp. 765-766.) The Court simply cited as dicta the proposition from *People v. Marion*, *supra*, 404 U.S. at p. 324, that where pre-indictment delay is a deliberate device to gain tactical advantage, the Due Process Clause of the Fifth Amendment may be violated. (*Id.* at p. 765.)

Similarly, *People v. Gouveia* (1984) 467 U.S. 180, also relied upon by respondent, cites *Lovasco* and *Marion* to show that a prison inmate suspected of a crime is protected by the Fifth Amendment Due Process Clause when the government deliberately delays filing an indictment. These decisions do not create an affirmative intent requirement as respondent contends; rather, they rely upon United States Supreme Court authority, which acknowledges that were such deliberate intent is shown, due process may be violated. Respondent's attempt to impose a heightened requirement for Mr. Jones to meet is therefore unavailing. (Cf. *People v. Cowan* (2010) 50 Cal.4th 401, 430-431 [noting a lack of clarity in federal standard].)

Next, respondent supports its argument against a finding of prejudice by repeatedly referencing an irrelevant factual background. True, as

respondent asserts, the trial court found that some misrepresentations were contained within defense counsel's affidavits in support of its motion to dismiss all ten counts of the information. (RB 202, 204, 205, 206, 208, 209; 8RT 359.) But these findings did not involve any representations relating to Count One, the alleged attempted murder of M.R., which is the only count Mr. Jones now maintains warranted dismissal as a result of the prosecution's seven-year delay in bringing the charge. Respondent's contention that the factual inaccuracies mentioned by the trial court show a lack of prejudice suffered by Mr. Jones is unpersuasive; they did not involve either evidence or witnesses relating to Count One. (RB 206.)[31]

As a result, respondent's argument boils down to a conclusory statement that Mr. Jones's showing of prejudice was speculative. (RB 209-210.) In order to make this claim, respondent ignores the facts and misuses authority. Mr. Jones showed the prejudice he suffered from the delay was in fact, very real. Evidence that would have impeached M.R.'s accusation by showing that she returned to Mr. Jones's apartment to apologize for the false allegation was foreclosed due to the prosecution's seven-year delay in bringing the charge. (AOB 362-366.) Mr. Jones demonstrated that despite scouring the neighborhood in search of material

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[31] The trial court mentioned several misrepresentations had been made: that certain school records of Mr. Jones's were unavailable (8RT 359); that Mr. Jones's sister's car was unavailable (8RT 360); that dumpster records of the pickup before the bodies were found were unavailable (8RT 361); that DMV records were unavailable (8RT 359); and that Mr. Jones's blood, which was originally taken, but "is neither here nor there" was unavailable (8RT 359). The prosecution also argued that witnesses, whom the defense contended it could not locate, had actually been found. (25CT 4301; 8RT 338). These inaccuracies did not involve any evidence or witnesses relating to the M.R. count. Moreover, the trial court also made clear that "the People are not absolutely clean." (8RT 361.)

witnesses – including the priest who accompanied M.R. to apologize – they were not traceable seven years after their last known whereabouts. In addition, the memories of Ms. Jones and M.R. had diminished. Ms. Jones stated with certainty that the woman who came to her door apologized, but could not unequivocally identify M.R. as that woman, a fact the trial court used to deny admission of the evidence. (34RT 3969.) Considering that during the encounter the women were face to face for a significant period of time, Ms. Jones would have certainly been able to identify her absent the substantial passage of time. Similarly, M.R. admitted to investigators that she could not aid in locating the witnesses because of her faded memory and she could not remember why she returned to the Jones's apartment. Absent the seven-year delay, the memories would have been intact and the material witnesses located. Indeed, Mr. Jones would have been able to show that his accuser had once apologized for making up her story.

People v. Morris (1988) 46 Cal.3d 1, relied upon by respondent, does not show that the prejudice asserted by Mr. Jones is speculative. In *Morris*, the appellant argued he was prejudiced by the precharge delay because his ability to present an alibi defense was undermined. (*Id.* at p. 37.) At trial, appellant's girlfriend could not recall whether appellant or anyone else borrowed her car, which was similar to the car in which the suspect fled. (*Id.* at pp. 11, 37.) But the girlfriend also testified pretrial that her memory was no better four years earlier when she first spoke with police than it was at the time of trial. (*Id.* at p. 37.) Thus, the witness's own testimony plainly negated any argument that the appellant was prejudiced by the four-year delay in bringing charges. The appellant also complained that during the penalty phase of trial, he could not recall his own whereabouts on the day of the murder. (*Ibid.*) The Court characterized this assertion as speculative

and affirmed the trial court's decision. (*Id.* at p. 38.)

Unlike the defendant's girlfriend in *Morris,* who actually admitted that her memory was no better four years before the trial when she first spoke with authorities, or the defendant who provided a vague statement that he could not recall his whereabouts due to the passage of time, Mr. Jones showed that he suffered actual prejudice from the seven-year delay. He identified specific witnesses who would have testified, what the testimony could have shown, how the passage of time both derailed efforts to locate the witnesses and diminished the ability of testifying witnesses to recall significant facts. Critically, Mr. Jones showed how the missing evidence would have directly impacted the trial by negating the government's theory of guilt. Respondent's attempt to brush these facts aside by labeling them as speculative is unavailing.

In light of Mr. Jones's showing of prejudice, the prosecution's proffered justification for the delay was utterly insufficient. Instead of addressing Mr. Jones's argument establishing why the prosecution's justification was unreasonable and the trial court's findings erroneous, respondent claims the seven-year delay was justified simply because M.R. stopped cooperating with authorities. (AOB 366-374; RB 210.)[32]

Respondent's proffered justification strains credulity. It is supported only by the prosecution's statement that the case was not pursued because M.R. did not appear for an interview with the District Attorney's Office. (25CT 4283-4284.) The idea that the mere failure of a witness to show up for a police interview would justify wholly halting an investigation into an

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[32] Respondent's contention that Mr. Jones conceded that the prosecution stopped investigating the incident because M.R. stopped cooperating with authorities is not supported by the record. (RB 210.)

alleged attempted murder and rape is inconceivable. This is so, particularly where there is no assertion that the prosecution was subsequently unable to locate M.R. despite efforts, that she had fled the jurisdiction, or that any attempt *at all* was made to follow up with an investigation. If anything, this fact establishes negligence because the prosecution failed to take any steps to locate the purported victim of a possible attempted murder and rape. And when weighed against the prejudice suffered by Mr. Jones as a result of the seven-year delay, it provides absolutely no justification. (See, e.g., *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1318-1323, 1332 [inability to locate victim whose testimony was vital to prosecution provided absolutely no justification for delay, where the prosecution did not attempt to show that it tried to locate victim during delay].)

Respondent's final contention that the delay was justified because the offenses were investigated as a series of crimes, so that the DNA and fingerprint evidence was integral to the M.R. count (RB 211-212), is unsupportable for several reasons.

First, respondent ignores that the prosecution actually stated it was waiting for the genetic testing technique to develop as an acceptable scientific procedure as opposed to waiting to procure such evidence. (25CT 4293.) As Mr. Jones showed in his opening brief, the prosecution's position was demonstrably untenable in light of its own prior assertions that the testing method was generally accepted and admissible in criminal courts since 1986, and also the broad usage and acceptance of the procedure years before the filing of the case. (AOB 368-370.)

Second, the fact that the DNA and fingerprint evidence relating to the other counts was not used to prove the M.R. count directly belies respondent's argument. As Mr. Jones showed in his opening brief (AOB

373; see also Argument 5), no evidence from any of the murder counts was admissible to prove the M.R. count. This includes the DNA and fingerprint evidence. Where newly obtained evidence fails to illuminate – or even relate to – the belatedly prosecuted crime, it cannot serve as a justification for the delay. (Cf. *People v. Boysen* (2007) 165 Cal.App.4th 761, 780-781 [newly generated forensic evidence that merely illuminated how murders occurred but did not point to defendant as perpetrator or establish guilt above evidence available when decision was made not to prosecute provided no justification for delay in prosecution].)

Moreover, although as respondent asserts, the prosecutor is under no obligation to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt (RB 211), Mr. Jones was arrested for the incident underlying Count One on August 15, 1985 (24RT 2100) and all of the general facts relating to the charge were known to the prosecution by 1987 at the very latest. The trial court made this finding. (8RT 335.) Thus, a timely prosecution would not have impeded further efforts to investigate the M.R. incident. Accordingly, the policy interests underlying this principle would not have been offended had the prosecution comported with state and federal due process requirements and charged the case at some point before Mr. Jones's ability to defend himself was irreversibly prejudiced. (See *People v. Lovasco, supra,* 431 U.S. at p. 792-793.) Instead, with no justification, the prosecution waited seven years to file the charge for the 1985 incident involving M.R. It is clear then, that what changed in the intervening years was not the evidence, but rather, the prosecution's willingness to proceed – an insufficient justification for denying Mr. Jones due process of law. (*People v. Boysen, supra*, 165 Cal.App.4th at p. 781.)

14.

THE COURT ERRED IN ADMITTING DIANE DONNELLY'S FINGERPRINT TESTIMONY BASED ON THE VACUUM METAL DEPOSITION CHAMBER BECAUSE SHE WAS INCOMPETENT TO TESTIFY ABOUT THE MACHINE.

Mr. Jones has argued that the trial court's erroneous admission of Diane Donnelly's testimony regarding the processing of fingerprints by a Vacuum Metal Deposition Chamber (VMDC) machine violated Mr. Jones's statutory and constitutional confrontation rights. (AOB 376-383.) Specifically, Mr. Jones objected that Ms. Donnelly lacked the expertise to lay the requisite foundation that the machine was properly operated. Respondent disagrees. (RB 184-191.) Since these arguments were made, however, the legal landscape has changed, casting doubt on respondent's authorities and strengthening Mr. Jones's confrontation claim.

In *Crawford v. Washington* (2004) 541 U.S. 36, the U.S. Supreme Court held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the Confrontation Clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination. (*Id.* at p. 59.) In rejecting a *Crawford* challenge, this Court held in *People v. Geier* (2007) 41 Cal.4th 555 that a non-testifying technician's report was not testimonial for purposes of the Confrontation Clause. (*Id.* at pp. 593-607.) Subsequently, however, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314]. (*Melendez-Diaz*) In that case, the Court held that forensic analysts and their reports were not removed from the coverage of the Confrontation Clause. (*Id.* at p. 2532.) In reaching its decision, the Court rejected much of the reasoning in *Geier*, including the linchpin

of that decision – that "near-contemporaneity" of the analyst's observations and recording of events eliminated any Sixth Amendment concerns. (129 S.Ct. at p. 2535.) This Court has granted review in several cases to examine the effect of *Melendez-Diaz* on *Geier*. (See. e.g., *People v. Rutterschmidt* [(2009) 220 P.3d 239, 102 Cal.Rptr.3d 281] review granted Dec. 2, 2009, S176213.)

Ms. Donnelly's testimony regarding the use of the VMDC machine clearly implicates the Confrontation Clause under *Melendez-Diaz*. In that case, the Court noted that "serious deficiencies have been found in the forensic evidence used in criminal trials." (129 S.Ct. at p. 2537.) Specifically, in holding that forensic analysts are covered by the Confrontation Clause, the Court affirmed the importance of confrontation in "weed[ing] out not only the fraudulent analyst, but the incompetent one as well. (*Ibid.*) Here, Mr. Jones was entitled to confront and cross-examine the officers or technicians who performed the two days of testing using the VMDC machine in order to probe their competency, as well as the machine's reliability in handling oversized, unwieldy test materials.

For example, Ms. Donnelly testified that the machine was in some way self-correcting, but could not specify why the machine stopped periodically or what were the effects of such stoppages. (28RT 2864-2865 [Witness: "I had not at that point ever worked with the machine that I would have an idea as to why that had occurred."].) As such, the concern would not be that the apparatus planted prints where none existed, but rather that potentially usable latent prints were destroyed, rendered unreadable or simply undetected in the process. (See, e.g., 28RT 2850 [Witness: "Exhibit 61 was the one final latent print. It was not a usable print."].)

The probative impact of Mr. Jones's prints derived in large part from

the fact that they were the only usable prints found. Had other persons' prints been located on the bags in a shared dumpster, the presence of Mr. Jones's prints would have been of much lesser or little significance. It would have served no purpose to press Ms. Donnelly on this point because, as she admitted, at the time she observed the VMDC process, she neither knew nor cared about the workings of the machine. (28RT 2864.) Thus, respondent's contention that Ms. Donnelly's testimony alone sufficed under the Confrontation Clause fails under *Melendez-Diaz*.

Neither *People v. Catlin* (2001) 26 Cal.4th 81 nor *People v. Webb* (1993) 6 Cal.4th 494, the two principal cases upon which respondent relies, is apposite to this case in that neither addressed a Confrontation Clause claim. Both cases, moreover, were decided prior to *Melendez-Diaz*, *supra*, 129 S.Ct. 2527. In *People v. Catlin*, the Court rejected the defendant's *hearsay* challenge to a physician's testimony that relied on the opinion of another physician. (26 Cal.4th at pp. 137-139.) Although hearsay and Confrontation Clause objections are intrinsically linked, the Court declined to reach the defendant's confrontation claim because the defendant had not objected on that ground in the trial court. (26 Cal.4th at p. 138, fn. 14.)

In *People v. Webb*, *supra*, 6 Cal.4th at pp. 523-524, the asserted error was the trial court's failure to exclude fingerprint evidence that was based in part on a chemical and laser process not generally accepted in the scientific community. (*Id.* at p. 523.) The Court found no error because the process produced an image commonly recognizable as a human fingerprint and it was undisputed that no tampering or alteration had occurred. (*Id.* at p. 524.) *Webb* did not present a Confrontation Clause issue because the witness testifying to the results of the test had personally performed the test and was knowledgeable about the process. (*Id.* at p. 539.)

Respondent seeks to distinguish the cases cited by Mr. Jones – *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133 and *People v. Williams* (2002) 28 Cal.4th 408 – because both cases involved the statutory requirements for blood-alcohol testing devices. (RB 189.) Respondent, moreover, asserts that no foundational showing of reliability is required for any forensic process, apparatus or instrument used to generate incriminatory evidence for trial. (RB 189.) Respondent overreaches.

First, although there is no authority for the universal application of the three-step test in *Williams* and *Davenport*, common sense alone suggests that test results that do not meet the minimal requirements of the test should not be admitted in criminal cases. (See *Melendez-Diaz*, *supra*, 129 S.Ct. 2537 [citing several studies critical of forensic evidence, including one study of cases in which exonerating evidence resulted in the overturning of criminal convictions that concluded that invalid forensic testimony contributed to the convictions in 60 percent of the cases].) Courts, moreover, have rejected forensic evidence due to the questionable reliability of the testing apparatus. The exclusion of polygraph results is one such obvious example. (See, e.g., *People v. Aragon* (1957) Cal.App.2d 646, 658.) In the instant case, Ms. Donnelly was, at most, an interested observer of a process with which she had no familiarity whatsoever. That process required extensive handling of the tested material and repeated passes through the machine. The large, rectangular, pleated garbage bags could not be mounted in the small, round test chamber without first cutting them, folding them and then aligning them on a rotary workholder. (28RT 2841-2842, 2844, 2866.) There would have been no point questioning Ms. Donnelly about her experience testing samples that had to be similarly manipulated to fit in the machine, or the steps taken to ensure no prints

were lost in the process.[33] She had no such experience, and the individuals who personally prepared the test material and operated the machine were not present for cross-examination. Thus, respondent is correct to assume that the trial court committed error by allowing Ms. Donnelly's testimony without adequate foundation and in violation of Mr. Jones's right to confrontation. (RB 190.)

The error was not harmless. Nevertheless, respondent contends that Mr. Jones has, in effect, conceded the point in arguing elsewhere that the fingerprint evidence did not render other asserted errors harmless. (RB 190.) Respondent claims that Mr. Jones described the evidence as "meaningless." (RB 190.) The word "meaningless" does not appear in Mr. Jones's opening brief, however. With hindsight, Mr. Jones can more clearly see the deficiencies of Ms. Donnelly's testimony. But, in considering its impact on the verdict, counsel's appellate argument is of no moment. Rather, the importance of the testimony to the prosecutor's proof in the Sweets case is underscored by his closing argument in which he profusely thanked the Royal Canadian Mountain Police and Ms. Donnelly for the fingerprint evidence: "Print number one: Bryan Jones. Print number two: Bryan Jones. Print number three: Bryan Jones. Nobody else. Nobody else." (45RT 5019.) Because the fingerprint evidence was essential to the jury's verdict in the Sweets murder case, all of the other verdicts relied on that murder charged, reversible error under *Chapman* and *Watson* must be found and the judgment must be reversed in its entirety.

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[33] Ms. Donnelly testified that the bags were examined to make sure that no latent prints of value had been cut during the process. (28RT 2844-2845.) She failed to explain, however, how this was determined when no prints were visible before processing in the VMDC machine.

15.

THE COURT ERRED IN ITS FIRST DEGREE MURDER INSTRUCTIONS BY (A) FAILING TO INSTRUCT ON MALICE AFORETHOUGHT, (B) INSTRUCTING THE JURY THAT MURDER DID NOT REQUIRE AN UNLAWFUL INTENT, AND (C) FAILING TO INSTRUCT THAT MALICE, PREMEDITATION, AND DELIBERATION MUST HAVE EXISTED JOINTLY WITH THE CONDUCT THAT CAUSED THE DEATHS OF JOANN SWEETS AND SOPHIA GLOVER.

Since 1872, murder has been defined in California as the "unlawful killing of a human being [] with malice aforethought. (Pen. Code § 187.) For as long, Penal Code section 188 has defined malice aforethought, both express and implied, for purposes of fixing the degree of murder. Following suit, California model jury instructions have always and continue to treat malice aforethought as an essential, indeed, the distinguishing element of murder. (See, e.g., CALJIC Nos. 8.10 ["Murder"-Defined]; 8.11 ["Malice Aforethought"-Defined]; 8.20 ["Deliberate and Premeditated Murder": "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." (Fall 2008 rev.)]; CALCRIM Nos. 520 ["Murder with Malice Aforethought" (January 2006)].) It is particularly noteworthy that, notwithstanding an eight-year effort to fashion jury instructions that are in plain English, the judicial task force that wrote the currently recommended instructions in CALCRIM (Judicial Council of California Criminal Jury Instructions) retained the concept of malice aforethought as an integral element of murder. (CALCRIM, Preface (2011 ed.).)

The case law similarly continues to credit the concept of "malice

murder," as distinct from other unlawful homicides. (See, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1116 ["We need not resolve, however, whether the elements of the least adjudicated form of Arizona second degree murder constitute *implied malice murder* in California"]; *People v. Collins* (2010) 49 Cal.4th 175, 214 ["This argument was relevant to defendant's state of mind in connection with the prosecutor's theory that defendant committed *first degree malice murder*"] [italics added].)

In short, neither the legislature nor the judiciary has written malice aforethought out of the definition of murder. Yet, that is precisely what the trial court did here without, as the court recognized, the slightest authority or justification. (Court: "Sort of like leaping off a tall building when you take malice aforethought out and wipe out mental state.") Mr. Jones contends that the court's unprecedented revision of the historical, statutory definition of murder constitutes prejudicial, reversible error. (AOB 384-403.)

Respondent does not dispute that the court fundamentally altered the prescribed instructions for first degree murder. Rather, respondent counters that the challenged instruction, though lacking the essential element of malice aforethought, adequately defined that concept and required the jury to find all the elements of first degree murder. (RB 213.) Respondent's argument fails, however, because malice aforethought is not an optional "phrase," but rather, it is the defining feature of malice murder, irrespective of degree.

Neither *People v. Saille* (1991) 54 Cal.3d 1103, 1114, nor *People v. Smith* (2005) 37 Cal.4th 733, upon which respondent relies, is apposite. (RB 217.) In *Saille*, this Court held that the law, following the abolition of the defense of diminished capacity, no longer permitted a reduction of what

would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication or mental disorder, or both. (54 Cal.3d at pp. 1116-1117; Pen. Code, §§ 188 [as amended in 1981], 192.) In *Smith*, the Court, in rejecting the defendant's insufficiency of the evidence claim, affirmed that the mental status required for a conviction of attempted murder is the specific intent to kill the victim. (37 Cal.4th at p. 739-740 ["Accordingly, the prosecution had only to prove that defendant purposefully shot at the baby with *express malice* in order to establish the requisite state of mind for conviction of attempted murder"] [italics added].) In short, neither *Saille* nor *Smith* considered, much less sanctioned, the excision of malice aforethought from the definition of murder.

The trial court's reductionist reading of the elements of murder also accounted for its failure to give CALJIC No. 3.31.5, which sets forth the requirement of a concurrence of all the mental elements of murder with the act of killing. (AOB 391-393.) Respondent's only rejoinder to Mr. Jones's assignment of error in this regard, is to reassert, without further analysis, the adequacy of the instructions given. (RB 220-221.)

Respondent next maintains that even if the court erred in deleting the element of malice aforethought from the first-degree-murder instruction, the error was harmless under the *Watson* or the *Chapman* standard of review. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; RB 221-226; RB 221-226.) Mr. Jones has argued that the error constituted per se federal constitutional error in light of the heightened scrutiny demanded by the Eighth Amendment in capital cases. (*Summerlin v. Stewart* (9th Cir. 2003) 341 F.3d 1082, 1118.) Nevertheless, in the alternative, Mr. Jones also has made a compelling showing of prejudice under *Chapman*, *supra,* 386 U.S. 18.

(See also *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

The circumstances surrounding the deaths, as well as Dr. Meloy's foundational testimony, strongly suggested these were impulse killings brought about by rage or loss of control. The defective instructions erroneously allowed the jury to disregard the evidence supporting a conviction of second degree murder and, instead, to convict Mr. Jones of first degree murder without finding express malice aforethought. Moreover, contrary to respondent's argument, because the historical concept of express malice requires more than the bare intent to kill, the jury's finding the sodomy special circumstance allegation true does not establish the absence of prejudice. (RB 221-222.)

The cases cited by respondent to support its prejudice argument are readily distinguished from the instant case. In *People v. Catlin* (2001) 26 Cal.4th 81, the defendant's complaint was essentially the opposite of that asserted by Mr. Jones. The defendant in *Catlin* argued that the trial judge erred by giving the standard instruction on first degree murder, which included the element of express malice aforethought. (*Id.* at pp. 147-149; CALJIC No. 8.20.) In rejecting the defendant's argument, the Court first found that the defendant had not objected to the standard instruction and had invited the very deletion of the definition of express malice of which he now complained. (*Id.* at p. 149.) The Court further concluded that, even assuming error, there was no prejudice under the *Watson* test because the prosecutor's theory of first degree murder was that the victims had been poisoned. (*Id.* at 150.) The jury's finding of the poisoning special circumstance confirmed that the verdict was based, in fact, on this theory. (*Ibid.*) Because all murder committed by means of poison is first degree murder, the Court held the verdict would be sustained irrespective of

whether the jury found express or implied malice. (*Ibid.*)

In contrast, here, Mr. Jones has complained that the court gave a non-standard first-degree-murder instruction that erroneously omitted, rather than included, the element of express malice. Moreover, in further contrast to *Catlin*, the prosecutor in this case argued a theory of deliberate and premeditated first degree murder. As such, the jury's finding of special circumstances that encompassed the narrower element of intent to kill, but not express malice aforethought, did not demonstrate that all the elements of first degree murder had been found.

Similarly, in *People v. Coffman* (2004) 34 Cal.4th 1, also cited by respondent, the prosecutor proceeded on a first-degree-felony-murder theory. (*Id.* at p. 96; RB 221.) As such, the Court found that the error, conceded by respondent, in the first-degree-murder instruction was harmless, where the special circumstances findings reflected that the first degree murder convictions were grounded in valid theories of felony murder. (*Ibid.*) Thus, neither *Coffman* nor *Catlin* speak to the manifest error and prejudice demonstrated in this case.

Finally, Mr. Jones argued that, because the court omitted express and implied malice from its murder instructions, the court effectively instructed the jury only on voluntary manslaughter, an intentional killing without malice and a retrial on any greater homicide offense is foreclosed. (AOB 397-403.) Mr. Jones has invoked established principles of double jeopardy and collateral estoppel in support of this argument.

In its opposing argument, respondent cites *People v. Mendoza* (2000) 23 Cal.4th 896. (RB 227.) *Mendoza* does not apply to this case. In *Mendoza*, the Court held that Penal Code section 1157, requiring juries to specify the degree of a crime when convicting a defendant of a crime is

distinguished into degrees, was inapplicable to a first-degree-felony-murder conviction where such murders have no degree. (*Id.* at p. 908.) Moreover, in *Mendoza,* the only degree of murder upon which the jury received instruction was first degree murder and the jury was correctly instructed thereon.

In this case, Mr. Jones maintains that, in the absence of a malice instruction, the jury was not properly charged on murder in any degree. Thus, on the presumption that jurors follow the instructions given them by the court, the jury here could not legally have found any form of homicide greater than voluntary manslaughter. (See, e.g., *People v. Gray* (2005) 37 Cal.4th 168, 217.) Accordingly, the special circumstances findings and death verdict must be set aside, and the underlying murder convictions should either be reversed or reduced to voluntary manslaughter at Mr. Jones's option.

16.

THE COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

Mr. Jones asserts that the consciousness-of-guilt instruction prejudicially violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the California Constitution. Specifically, Mr. Jones contends that instructing the jury with CALJIC Nos. 2.03 (Consciousness of Guilt – Falsehood) was unnecessary, duplicative, unfairly argumentative in favor of the prosecution and permitted the jury to draw three irrational permissive inferences regarding Mr. Jones's guilt. (AOB 404-417.) Citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1223, respondent first argues that Mr. Jones forfeited the claim because his trial counsel purportedly *joined* in the

request for the instruction. (RB 228-229.) Nevertheless, the examples of joinder respondent proffers establish, at most, passive acceptance, not active inducement or endorsement of the instruction. (Cf. *People v. Wickersham* (1982) 32 Cal.3d 307, 332-335 [finding no invited error where record did not show that appellant's counsel both induced the trial court to commit the error and did so for an express tactical reason]; 39RT 4346-4348.)

The general rule that a party, who fails to object in the trial court, forfeits any challenge to a jury instruction that was correct in law does not apply if the defendant asserts that instruction was not legally correct, or if the instructional error affected the defendant's substantial rights. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; *People v. Franco* (2010) 180 Cal.App.4th 713, 719, citing Pen. Code, § 1259; *People v.* Lawrence (2009) 177 Cal.App.4th 547, 553, fn. 11.) Mr. Jones invokes these exceptions to the waiver rule here.

Assuming arguendo that no forfeiture is found, respondent cites several decisions of this Court approving the the challenged instruction but does not refute the reasons advanced by Mr. Jones to explain why those decisions are erroneous and should be reconsidered. (RB 229.)

Respondent does not rebut Mr. Jones's contention that the holding of *People v. Nakahara* (2003) 30 Cal.4th 705, rejecting the challenge to the consciousness-of-guilt instructions based on *People v. Mincey* (1992) 2 Cal.4th 408, improperly differentiates between instructions that are identical in structure and differ only in that one *approved* instruction highlights the prosecution's version of the facts while the other *rejected* instruction highlights the defendant's version. (AOB 145-146.) Respondent does not address Mr. Jones's further argument that the opinion in *People v. Seaton*

(2001) 26 Cal.4th 598, 673, validates Mr. Jones's argument that the instruction is tilted in favor of the prosecution. Accordingly, it suffices for Mr. Jones to stand on the arguments in his opening brief. (AOB 409-417.)

17.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED ON MOTIVE ALONE.

Mr. Jones asserts that instructing the jury under CALJIC No. 2.51 on motive improperly allowed the jury to determine guilt based on the presence of an alleged motive and shifted the burden of proof to Mr. Jones to show an absence of motive to establish innocence in violation of state and federal constitutional guarantees. (AOB 418-425.) Respondent argues that Mr. Jones's claim is waived. (RB 229-231.)

Respondent is mistaken. *People v. Cleveland* (2004) 32 Cal.4th 704, establishes that no waiver occurred. In *Cleveland*, the Court affirmed that, as here, a claim that the motive instruction "shifted the burden of proof to imply that [the defendant] had to prove innocence" was cognizable despite a failure to object because "if [the defendant] were correct, the instruction would have affected his substantial rights." (*Id.* at p. 750.)

Respondent further counters by citing this Court's decisions in *People v. Guerra* (2006) 37 Cal.4th 1067, 1134 and *People v. Prieto* (2003) 30 Cal.4th 226, 254, which rejected similar claims, but fails to rebut Mr. Jones's arguments that call into question the soundness of those decisions. (RB 230-231.) The motive instruction was especially pernicious here where it built upon the court's error in admitting Dr. Meloy's prejudicial testimony. Due to the constitutional defects detailed in Mr. Jones's opening brief, this Court is urged to reconsider its prior analysis and reverse the

judgment.

18.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Mr. Jones asserts that a number of the instructions given to the jury diluted the requirement of proof beyond a reasonable doubt and violated his constitutional rights. (AOB 426-439.)

Respondent counters by citing several of this Court's decisions that rejected similar claims, and contends that this Court should do so again in this case. (RB 231-234.) Mr. Jones has previously acknowledged this Court's rejection of such claims, while urging this Court to reconsider those decisions.

Respondent fails to rebut Mr. Jones's arguments and offers no basis, aside from stare decisis, for continuing to follow precedents that are fundamentally flawed. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].) Due to the defects detailed in the opening brief, this Court should hold that the challenged instructions violated Mr. Jones's constitutional rights and reverse the judgment.

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19.

THE COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE LYING-IN-WAIT MURDER BECAUSE THE INFORMATION CHARGED MR. JONES ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

Mr. Jones asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 440-447.) Respondent asserts that this claim has been rejected by this Court in the past. (RB 235-237.)

Mr. Jones has acknowledged these cases, while urging the Court to revisit the issue. Due to the constitutional deficiency of the state's practice in pleading murder, reversal of the judgment is required.

20.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHETHER MR. JONES HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE.

Mr. Jones has argued that the trial court erred in failing to require the jury, in finding first degree murder, to determine unanimously whether the murder was premeditated and deliberate murder, or felony-murder. (AOB 448-456.) Mr. Jones has further acknowledged this Court has rejected various arguments pertaining to the relationship between malice murder and felony-murder. (See AOB 449, 451-452 and authorities cited therein.) Respondent adds no new argument to the authorities Mr. Jones previously

acknowledged.[34] (RB 238-241.) Nevertheless, Mr. Jones contends that the error violated his right to have all elements of the charged crime proved beyond a reasonable doubt and his right to a unanimous jury verdict.

As Mr. Jones argued in his opening brief, *Schad v. Arizona* (1991) 501 U.S. 624, acknowledged that due process limits a state's capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. (AOB 197-198.) Unlike Arizona, California has determined that the alternative theories of murder, malice-murder and felony-murder, are not "mere means"of committing a single offense based on different facts, but means that amount to separate elements. (See AOB 450-452.) The trial court's instructions were, therefore, error, and the convictions and judgment of death must be reversed.

21.

THE EVIDENCE WAS INSUFFICIENT THAT MR. JONES COMMITTED THE FIRST DEGREE MURDERS OF SOPHIA GLOVER, JOANN SWEETS, TARA SIMPSON, AND TRINA CARPENTER, BOTH SODOMY MURDER SPECIAL CIRCUMSTANCES, AND THE ATTEMPTED MURDER OF K.M.

Both Mr. Jones and respondent cite *Jackson v. Virginia* (1979) 443 U.S. 307, which

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[34] In that Mr. Jones's claim that the court's erroneous unanimity instruction denied him his constitutional right to have all elements of first degree murder proved beyond a reasonable doubt and his right to a unanimous verdict, it is cognizable even absent objection because if Mr. Jones were correct, the instruction would have affected his substantial rights. (Cf. *People v. Cleveland, supra*, 32 Cal.4th at p. 750; Pen. Code, § 1259.)

establishes a two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence. First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial. Rather, when "faced with a record of historical facts that supports conflicting inferences" a reviewing court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." This second step protects against rare occasions in which "a properly instructed jury may ... convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]" More than a "mere modicum" of evidence is required to support a verdict. At this second step, however, a reviewing court may not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," only whether "*any*" rational trier of fact could have made that finding.

Because the government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant's innocence, or "rule out every hypothesis except that of guilt beyond a reasonable doubt" at the first step of *Jackson*, *id.* at 326, 99 S.Ct. 2781, a reviewing court may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal. Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, *including any evidence of innocence*, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. At this second step, we must reverse the verdict if the *evidence of innocence*, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt

> fails to establish every element of the crime beyond a reasonable doubt.

(*United States v. Nevils* (9th Cir. 2010) (en banc) 598 F.3d 1158, 1164-1165, citing *Jackson v. Virginia*, *supra*, 443 U.S. 307 and *McDaniel v. Brown* (2010) 558 U.S. __ [130 S.Ct. 665, 175 L.Ed.2d 582]; italics added, footnote omitted.) As will be shown, respondent consistently ignores step two of *Jackson*. Applying *Jackson's* steps one and two, by especially taking into account evidence of innocence, compels the conclusion that respondent failed to prove beyond a reasonable doubt the first degree murders of Sophia Glover, JoAnn Sweets, Tara Simpson, and Trina Carpenter, the sodomy murder special circumstances, and the attempted murder of K.M.

A. There Was No Solid Evidence Connecting Mr. Jones to Sophia Glover.

Even assuming for the sake of argument that respondent's recitation of the facts regarding the death of Sophia Glover is entirely accurate – though it is far from that – respondent nonetheless demonstrates that the evidence was insufficient to support the Glover first degree murder verdict and sodomy-murder special circumstance finding. Respondent simply fails to show beyond a reasonable doubt that Mr. Jones had anything to do with Glover's death and that she was sexually assaulted.

Respondent makes no attempt to isolate the *specific facts* that show Mr. Jones's connection to Glover beyond a reasonable doubt. Instead respondent leaves it to the reader's speculation, or at best to the reader's trying to connect dots that do not connect. As shown by the following two paragraphs, an edited but faithful version of respondent's statement of the

facts, respondent fails to identify Mr. Jones as the Glover perpetrator, particularly in offering an unavailing sentence about sperm on an untethered anal swab:

> Glover's body was found in close proximity to the residence appellant had access to just as Sweets' body was found in close proximity to his apartment approximately three months before. Glover's nude body was found wrapped in a blanket near the Wilsie house. At this time, appellant had a key to the Wilsie house so he could stay there and watch over it. Similarly, the partially nude body of Sweets was found wrapped in bedding in the alley in a dumpster behind appellant's apartment where he was staying at the time her body was found. In an alley near where Glover's body was found, Glover's clothes were neatly piled. Glover had drugs in her system. "DNA analysis of the sperm found on the anal swab was consistent with appellant's DNA, even though there was a co-contributor of spermatozoa; appellant could not be eliminated as recently having had sex with her."
>
> Glover's body was found near the Wilsie residence on August 15, 1986. Two months later appellant committed the sexual assaults against Bertha R. at the Wilsie residence, and four days after that appellant committed the attempted murder and sex offenses against Karen M. at the Wilsie residence. Glover had drugs in her system, and both Bertha and Karen were drug users – Bertha smoked marijuana with appellant and while Karen declined appellant's offer to do drugs with him, she was using cocaine and heroin and had a bottle of whiskey with her when appellant picked her up. Both Bertha and Karen were strangled into submission, forced to orally copulate appellant, and either raped or sodomized. Similarly, Glover died of strangulation, having severe trauma to her head, neck, and chest, and there was evidence she had been sexually assaulted. "The fact Glover's clothing was neatly folded in the alley is consistent with appellant's conduct involving Maria R. and Karen M. – luring women into having consensual sex, and then violently attacking them to heighten his sexual experience."

(RB 242-245.) The last unedited sentence is all one needs to appreciate that respondent's view of the evidence is highly speculative, requiring one leap of logic after another, particularly when it comes to respondent's conjecture that Mr. Jones was Glover's killer. Thus, even accepting respondent's version of the facts, the evidence is simply insufficient for "any rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 [italics omitted].)

Furthermore, respondent's statement of facts is insubstantial because it does not inspire confidence as an accurate assessment of the evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 545 [to be sufficient, evidence must be substantial and is such only if it "'reasonably inspires confidence'"].) Respondent begins by asserting that Glover and Sweets's bodies were found in "close proximity" to the Wilsie residence and the Jones apartment, respectively. By using the identical vague language to relate different distances, respondent attempts to equate them, while providing no evidence that the distances were in fact equal. At the same time, one is left to guess what respondent means by the relative term, "close." Ten feet? A block? A few blocks? A mile? Respondent does not explain and consequently undermines any confidence that its factual exposition is true.[35]

Next, respondent wildly misstates the evidence. Glover's body was

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[35] Sophia Glover's body was found about a block from the Wilsie house located at 4659 Mississippi Street, San Diego. (25RT 2247-2249, 2264, 2308-2309, 2314; 26RT 2602; 27RT 2725, 2747; exhs. 9, 19.) JoAnn Sweets's body was found in an alley just outside the back door of the Jones apartment. (25RT 2302, 2343-2345, 2347, 2358-2359, 2362; 35RT 3978, 3980.)

found on August 15, 1986. (38RT 4220.) According to respondent, "Glover's nude body was found wrapped in a blanket near the Wilsie house. (25 RT 2248-2251, 2308-2309.) *At this time, appellant had a key* to the Wilsie house so he could stay there and watch over it following the death of Tillie Wilsie. (26 RT 2606-2607, 2621.)." (RB 243, italics added.) By using the phrase, "At this time," respondent obviously refers back to when Glover's body was found on August 15, 1986. The pages of the reporter's transcripts cited by respondent in no way support its claim that Mr. Jones had a key to the Wilsie residence on August 15, 1986; instead they show that Mr. Jones did not receive a key until months later. As Tillie Wilsie's daughter-in-law testified, Tillie Wilsie passed away in October 1986, and that was when Mr. Jones received a key to the Wilsie residence. (26RT 2602, 2606-2607.) Intentional or not, respondent misrepresents the truth and provides an insubstantial account of the evidence as a result.

Respondent continues its uninspiring path by citing four pages of the reporter's transcript, "25 RT 2302, 2362, 2367, 2398" (RB 243) to justify its claim that Mr. Jones was staying at "appellant's apartment" at the time Sweets's body was found. These pages suggest nothing of the sort.

Respondent then implies that Glover was a prostitute, writing, "Glover lived on the streets, and she was seen being beaten up to the point she was knocked out of her clothing by a man who demanded money from her – a common occurrence for drug addicted prostitutes – and Glover had drugs in her system." (RB 243.) Respondent cites to nowhere in the record showing that Glover was a prostitute. In fact, elsewhere in its brief, respondent writes, "with the *exception* of Glover, the evidence definitively established they [the murder victims] were prostitutes." (RB 4, italics added.) Furthermore, the prosecutor said there was no evidence that Glover

was a prostitute, when on the record he truthfully stated: "I don't think there has been any evidence that Sophia Glover was a prostitute." (43RT 4851.)

Respondent writes that at the time her death, Glover "recently" had sex. (RB 243.) The pages of the reporter's transcript that respondent cites, "30 RT 3244-3245, 43 RT 4810-4812," mention nothing about recent sex.

Respondent cites "30 RT 3243" to support its incorrect claim that "Glover had drugs in her system." (RB 243.) The medical examiner testified that only cocaine was found, not "drugs," plural. (30RT 3243.)

Respondent implies that drugs were used at about the time of the Glover offense, but cites to nothing in the record that supports this. The medical examiner testified that a drug screen was performed and cocaine was found, but ventured no guess as to when Glover might have used cocaine. For all the jury knew, her drug use could have been days or longer before her death and had no association with her death. (30RT 3243.) The lack of accuracy continues to undermine any confidence one should have in respondent's representation of the facts.

But then, respondent blatantly misstates the record again. Respondent claims that B.R. was "strangled into submission." (RB 244.) No, she clearly was not. B.R. testified that "he just grabbed me from behind by his right hand." The prosecutor described B.R.'s hand motion for the record: "she was moving her hand like someone would put their hand around a date's back at the theater." (26RT 2643-2644.) Grabbing is certainly not strangling.

Respondent claims that there was evidence Glover "had been sexually assaulted (30 RT 3244-3245, 26 RT 2458-2462)." (RB 244.) The reporter's transcript pages respondent identifies as supporting its claim do

not contain testimony showing a sexual assault. They merely reflect testimony by a medical examiner who conducted Glover's autopsy, determined the cause of death was by manual strangulation, and saw a few sperm on a vaginal smear (30RT 3244), as well as testimony by a criminalist who performed work on the Glover case and detected a semen stain on a rectal swab (26RT 2459). The cited pages suggest that at some unknown time Glover had sexual activity. They do nothing to establish that the semen related to Glover's cause of death beyond a reasonable doubt, or more specifically, to murder during the commission of sodomy. For all the jury knew again, the sexual activity could have been a day or longer before the assault.

Accordingly, respondent's speculative, inaccurate representation of the facts does not inspire confidence and demonstrates that the evidence was insufficient to show that Mr. Jones committed the Glover first degree murder and sodomy-murder special circumstance.

B. The Sweets Murder Conviction Was Merely the Product of Conjecture and Surmise, and Should Not Be Affirmed.

Like respondent's version of the Sophia Glover facts, its account of the JoAnn Sweets evidence falls far short of helping this Court meet the two steps demanded by *Jackson v. Virginia* in addressing a sufficiency claim. First, even respondent's one-sided exposition of the facts, with its inclusion of irrelevant evidence, fails to prove guilt beyond a reasonable doubt, if that phrase is to have any meaning. And second, respondent ignores any evidence of innocence, contradicting *Jackson* in the process, evidence that confirms Mr. Jones's conviction on the Sweets count cannot be sustained. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.)

Respondent's statement of the Sweets facts (absent record cites)

provides as follows:

> Sweets' nude body was found in a dumpster behind appellant's apartment, wrapped in bedding, similar to the way Glover's body was wrapped, placed in plastic bags which had appellant's fingerprints on them, covered with a blanket either appellant's mother or sister had made, and carpet fibers matching the carpet fibers in appellant's apartment were found on Sweets' shirt, sheet, mattress pad and the Afghan. Sweets' body was found on May 9, 1986, approximately seven months after appellant strangled, attempted to murder, and sexually assaulted Maria R. at the same apartment. Sweets suffered massive injury to her face and neck, and had been murdered by strangulation. Furthermore, the sheet in which Sweets was wrapped had semen stains with DNA consistent with appellant's DNA, even though there was evidence of a semen co-contributor.

Respondent concludes: "The evidence considered in this light supports the conviction." (RB 245-246.)

As is apparent, the evidence considered "in this light" omits any consideration of the many facts highlighted in the opening brief that point to innocence and defeat respondent's effort at showing guilt beyond a reasonable doubt. (AOB 460-466.) Thus, respondent fails to assist this Court in applying *Jackson's* step two, when the Court is required to "determine whether the evidence at trial, *including any evidence of innocence*, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." (*United States v. Nevils*, *supra*, 598 F.3d at p. 1165, citing *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319, italics added.) That respondent insists the Sweets verdict may be affirmed "[e]ven if this Court finds appellant's arguments *compelling*" (RB 246, italics added), suggests that respondent misunderstands that the prosecution's trial burden to prove guilt beyond a reasonable doubt

continues to play an important role on appeal.

But even respondent's distorted effort at identifying Mr. Jones as the Sweets perpetrator fails because respondent primarily relies on evidence that Sweets's body was wrapped in garbage that found its rightful place in an apartment dumpster used by the Jones apartment. If dumpster garbage traceable to a nearby apartment dweller is all it takes to sustain a conviction on appeal, then a perpetrator intent on murder would have discovered a readily accessible way of avoiding responsibility, while directing the finger of suspicion elsewhere, merely by wrapping the victim in garbage from an apartment complex dumpster.

Moreover, had Sweets's body been wrapped in a *new* afghan blanket or a *new* sheet or a *new* mattress pad, then this would be inconsistent with a dumpster's purpose of holding garbage. Nevertheless, the prosecution introduced no evidence to rebut the only reasonable inference from the evidence, that the blanket, sheet, and pad were garbage, properly deposited in the dumpster. In fact the sole evidence that was introduced regarding the age of the afghan blanket proved that it was indeed garbage. The person who found Sweets's body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping. (25RT 2346, 2353.) The sheet, too, was garbage. As a prosecution expert told the jury, the sheet was "heavily soiled." (28RT 2932.) If the prosecution wanted to present evidence to the jury that the sheet was other than garbage, then it was incumbent on the prosecution to preserve the sheet to show that its age or condition did not warrant discarding it into the trash. Instead the prosecution cut the sheet into pieces and made no effort to show the jury that it was not simply garbage. (26RT 2482-2485.) Thus, the single reasonable inference the jury could draw about the sheet was that it was

garbage, given its heavily soiled condition and placement in the dumpster. In any event, although the afghan may have been made by Bryan Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (25RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404; 26RT 2432, 2485; 28RT 2783-2785; 34RT 3932.)

The other evidence respondent cites does nothing to prove Mr. Jones's identity as the Sweets perpetrator, again unless garbage is enough. Respondent mentions "plastic bags," but leaves out the fact that they were "trash" bags, as the prosecutor conceded, exactly what you would expect to find in a dumpster. (45RT 5093.) The prosecutor also conceded that "yeah, you would expect the defendant's prints to be on the dumpster. Okay. Sure, we will give you that. There might be some explanation for him, because he's using it." (45RT 5094.) Likewise one would expect to find Mr. Jones's fingerprints on a trash bag found in the nearest dumpster provided by the apartment complex for use by the Jones apartment. (45RT 5002 [Prosecutor: "The dump site. You couldn't get any closer to home. In the Jones' alley, right out his sliding glass door."].) Thus, if one adds the trash bags, the heavily soiled sheet, the not-worth-keeping, unraveling afghan, and the mattress pad about which there is no evidence that it was anything but garbage given its location in a dumpster, one is left with garbage, some of which was traceable to the Jones apartment located near the dumpster.

As for the fibers, prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (29RT 3141.) As noted, the Jones apartment was located in a large apartment complex.

(24RT 2045, 2093.) According to Special Agent Malone, the police should have tested the carpet in the other apartments to determine if there was another source of the fibers found with Sweets. (29RT 3141-3142, 3159-3160.) And of course carpet fibers from the Jones apartment would be found mixed with other matter in the apartment's dumpster, described by another prosecution expert as a "cesspool" of "contamination." (29RT 3102-3103.)

Finally, note the justified lack of weight respondent attaches to the DNA evidence. Respondent writes: "the sheet in which Sweets was wrapped had semen stains with DNA consistent with appellant's DNA, even though there was evidence of a semen co-contributor." (RB 246.) As respondent's use of the word "consistent" implies, vaguely defined, non-specific DNA evidence adds nothing in identifying the perpetrator. Moreover, the existence of a co-perpetrator rebuts the prosecutor's theory that Mr. Jones acted alone and supports the evidence that two other men, not Mr. Jones, were responsible for Sweets's death. (32RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.)

Thus, at bottom respondent's evidence comes down to trash from a dumpster being used to wrap Sweets's body. If that is enough to prove guilt beyond a reasonable doubt, then the concept of reasonable doubt has lost its meaning.

Appreciating the insufficiency of this evidence, respondent attempts to save its argument first by pointing to evidence in the Sophia Glover and M.R. (Maria R.) cases, but without explaining how the evidence is applicable. The Glover and M.R. offenses would only be relevant if they constitute signature crimes and were sufficiently similar with the Sweets offense to identify Mr. Jones as the Sweets perpetrator. (*People v. Ewoldt*

(1994) 7 Cal.4th 380, 403 ["The greatest degree of similarity is required for evidence of [other crimes] to be relevant to prove identity"].) But as shown in the opening brief (AOB 179-184), evidence from the Glover and M.R. cases were not relevant to identifying the Sweets perpetrator so that respondent's references to Glover and M.R. have no value.

Furthermore, contrary to respondent's assertion, the bodies of Glover and Sweets were not similarly wrapped and the prosecutor never suggested to the jury that they were. (45RT 5002, 5019, 5021 [Sweets was "wrapped]; 45RT 5007-5008 [Glover was found "underneath a green blanket"].) The first officer on the scene found Glover lying on the grass portion between the curb and the sidewalk, rolled up in a green blanket, with her feet visible. (25RT 2248, 2309.) Sweets was wrapped in a floral print sheet, a white mattress pad, and two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. The old tattered afghan blanket covered the body. (25RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404; 26RT 2432, 2485, 2783-2785, 3932.)

Thus, using evidence from the Glover offense to identify Mr. Jones as the Sweets perpetrator was impermissible because it was not more likely than not Mr. Jones was the Sweets perpetrator (as proven by the evidence and suggested by respondent's failure in this argument to even try showing Mr. Jones was the Glover perpetrator), the offenses were not highly similar signature crimes, and the bodies were not similarly wrapped in any case. Even at step one of *Jackson v. Virginia*, the evidence is insufficient to support the jury's verdict on the Sweets count.

Complying with *Jackson's* step two requirement to examine evidence of innocence affirms this view. As noted, evidence of innocence

was shown in the opening brief at pages 460 through 466. Special emphasis should be paid to the fact that just days before Sweets's body was discovered, Ann Jones moved down the street to a new home. (29RT 3068-3069; 34RT 3932-3933, 3982.) Mr. Jones's mother was "sort of picky," "like[d] things sort of neat," and "like[d] things in place." (34RT 3984.) Like anyone who moves to a new home, Ann Jones likely tossed in the dumpster unwanted items and garbage from her old apartment. The real perpetrators, who contributed their DNA material to the discarded sheet around Sweets, used some of that garbage to wrap JoAnn Sweets. Thus, respondent fails to prove beyond a reasonable doubt that Mr. Jones was responsible for Sweets's death.

C. There Was No Substantial Evidence That Mr. Jones Committed Premeditated and Deliberate First Degree Murders of Sophia Glover and JoAnn Sweets.

Respondent disputes Mr. Jones's contention that the prosecution failed to prove the deaths of Sophia Glover and JoAnn Sweets were premeditated first degree murders but provides no real analysis of Mr. Jones's argument. Instead respondent merely resorts to claiming that the B.R., K.M., and M.R. offenses fill in for the lapses in the Glover and Sweets evidence. But as usual respondent cites no law to support its claim that these other offenses can make up for the Glover and Sweets shortcomings. Furthermore, respondent misstates the evidence. For example, respondent claims that there was ample evidence of planning the Glover and Sweets murders because Mr. Jones "picked up women – typically prostitutes . . . ." (RB 247.) As demonstrated elsewhere in this brief, there was no evidence that Glover and Sweets were prostitutes. (Arguments 4-9 at pp. 49-57.) Furthermore, while implying that B.R. was a

prostitute, though she clearly was not (26RT 2637), respondent repeats its claim that B.R. was "strangled into submission" (RB 248), though she clearly was not (26RT 2643-2644).

With respect to motive as one of the factors to consider in determining premeditation and deliberation under *People v. Anderson* (1968) 70 Cal.2d 15, 25, respondent misunderstands the meaning of motive in this context and unwittingly cites evidence that supports a finding that the Sweets and Glover offenses were not premeditated. As *Anderson* explained, "[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: . . . (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim . . . ." (*Id.* at p. 27.) Thus, *Anderson* requires a prior relationship between the perpetrator and victim. There is no evidence of a prior relationship or conduct between Mr. Jones and Sophia Glover or JoAnn Sweets. And respondent cites to no case where an appellate court has examined motive's relationship with premeditation that did not involve a prior relationship between perpetrator and victim.

Moreover, instead of referring to any evidence of a prior relationship, respondent offers as motive, testimony by prosecution expert Reid Meloy concerning sexual homicide. (RB 248.) But Dr. Meloy's testimony mentioned nothing about a prior relationship between the perpetrator and the sexual homicide victim. Furthermore, Dr. Meloy's study concluded that "sexual homicide perpetrators seem to contain, and then be overwhelmed, at times, by [primitive] impulse." (28CT 5064). Thus, assuming for the sake of argument that Dr. Meloy's study applies, it supports a finding of impulsive, not premeditated killings.

Hence, respondent fails to refute the contention that the murders were not premeditated.

D. The Evidence in Support of the Sodomy Special Circumstances Was Insubstantial.

Respondent only refers to irrelevant evidence from the K.M. and M.R. counts to rebut Mr. Jones's contention that the Sweets and Glover sodomy special circumstances were unsupported by substantial evidence. Mr. Jones stands by his argument.

E. The Court Erred in Failing to Acquit Mr. Jones of the Tara Simpson Charges Because the Record Contains No Solid, Reliable Evidence That Mr. Jones Had Any Connection to Ms. Simpson.

Respondent opposes a judgment of acquittal on the Tara Simpson count, claiming that evidence from the B.R., K.M., M.R., and Sweets counts were cross admissible. Respondent cites no law and accordingly provides no corresponding analysis. Mr. Jones stands by his argument.

F. When Discharging the Jury, the Court Erred in Failing to Enter a Judgment of Acquittal on the Trina Carpenter and Tara Simpson Charges Due to Insufficient Evidence.

Mr. Jones stands by his argument the the trial court should have entered a judgment of acquittal on the Trina Carpenter and Tara Simpson counts.

G. K.M.'s Inherently Unreliable Testimony Was Not Credible.

Respondent argues that K.M.'s credibility was left to the jury's sole determination. Nevertheless, for the reasons stated in the opening brief, her testimony was inherently unreliable such that it could not support the verdicts. Thus, there was no substantial evidence of sexual assaults or

attempted murder and the convictions should be reversed.

22.

THE COURT COMMITTED REVERSIBLE ERROR PER SE IN EXCLUDING A PROSPECTIVE JUROR BASED ONLY ON HIS QUESTIONNAIRE RESPONSES ABOUT THE DEATH PENALTY.

Mr. Jones argued in his opening brief that the trial court committed reversible error in excusing a prospective juror for cause based only on his written juror questionnaire answers about the death penalty, without benefit of any oral questioning. (AOB 485-489.)

Respondent first claims that defense counsel did not object to the court's unauthorized procedure for excusing prospective jurors based solely on their juror questionnaires, but even the trial court recognized that it was "treading on some thin ground" by excusing prospective jurors on this basis. (20RT 1247.) Nevertheless, as demonstrated in the opening brief, the record belies respondent's claim and shows that defense counsel's firm objection, which respondent nonetheless considers "equivocal" (RB 43), remained in effect throughout jury selection. (20RT 1245-1248, 1261.)

Respondent then claims that the prospective juror's discharge was appropriate because his written answers made it clear that he was unwilling to set aside his own beliefs and follow the law. While respondent focuses on the prospective juror's questionnaire answers that respondent finds disqualifying, respondent points to no answer that *clearly* indicated the juror was unwilling to temporarily set aside his own beliefs in deference to the rule of law.

Furthermore, respondent fails to devote a single word to the most critical information about the prospective juror disclosed on his

questionnaire that defeats any possible conclusion that this prospective juror would be *clearly* unwilling to temporarily set aside his beliefs and follow the law. As properly emphasized in the opening brief (AOB 487-488), the prospective juror was in the United States Navy for 10 years, and no doubt understood duty to country and his duty to follow the law. (46CT 8817.) The former Navy man needed to be informed that as a juror in a capital case, he would be required to temporarily set aside any opposition to the death penalty and perform his duty to follow the law. As a ten-year Navy veteran, it is very unlikely that he would have been unwilling to follow the law in this circumstance. At the very least, he should have been given the opportunity to express his view, rather than have anyone assume he would not do his duty and follow the law.

Accordingly, the record does not support the trial court's discharge for cause based on the unfounded accusation that someone who served this country in the armed services would refuse to follow the law – certainly not without first giving him the respect of asking whether he would be unwilling to follow the law. The court's error requires reversal of Mr. Jones's death sentence.

23.

THE COURT ERRONEOUSLY PERMITTED PREJUDICIAL VICTIM IMPACT EVIDENCE AND ARGUMENT.

Mr. Jones argued in his opening brief that the prosecution's victim impact evidence and argument violated ex post facto principles because they would not have been permissible in 1986 at the time of the deaths of JoAnn Sweets and Sophia Glover. (AOB 490-495.) Since making the argument, this Court has decided the issue adversely to Mr. Jones in *People*

v. Brown (2004) 33 Cal.4th 382, 394-395. Mr. Jones affirms his argument.

Mr. Jones further argued that the trial court was wrong to admit testimony from B.R., as victim impact evidence under Penal Code section 190.3, factor (a), because her offense was not directly related to the circumstances of the capital crimes. (AOB 495-496.) Respondent implicitly concedes this specific assertion by countering that the court properly admitted the testimony under Penal Code section 190.3, factor (b). (RB 254.)

Even assuming for the sake of argument that evidence of the B.R. offense was properly admitted as victim impact evidence, the testimony itself exceeded the bounds of permissible victim impact evidence. (AOB 496-502.) Respondent points to nothing in the record to dispel that well-founded claim. Accordingly, the court erred prejudicially in admitting the B.R. testimony.

Finally, respondent avers Mr. Jones argued that the prosecutor committed misconduct during closing arguments when commenting on victim impact evidence. (AOB 501-504.) Respondent misconstrues Mr. Jones's claim. As the pertinent argumentative heading demonstrates, Mr. Jones maintains that the court erred in *allowing* the prosecutor to argue improper victim impact. (AOB 502.) Thus, as shown in the opening brief, the fault lies with the trial court.

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24.

THE COURT ERRONEOUSLY ADMITTED PREJUDICIAL EVIDENCE THAT BRYAN JONES COMMITTED INCEST WHEN HE WAS 11 YEARS OLD.

Mr. Jones demonstrated in his opening brief that under the principles of *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821-838, the trial court should have excluded evidence of his conduct committed when he was 11 and 12 years old. (AOB 511-518.) Respondent claims that the argument is forfeited and notes that this Court has previously rejected Mr. Jones's argument in *People v. Raley* (1992) 2 Cal.4th 870, which Mr. Jones has asked the Court to reconsider. (AOB 515; RB 258-259.)

Mr. Jones renews his request for reconsideration of *Raley*, particularly in light of the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, which held that the Eighth and Fourteenth Amendments prohibit the execution of juveniles who were under 18 years of age at the time of their capital crimes. (*Id.* at pp. 570-571.) As *Simmons* observed:

> Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. . . .* The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

(*Roper v. Simmons*, *supra*, 543 U.S. 551, 568-569, citations omitted, italics added.) Without violating the teachings of *Simmons* and its forebears, a narrow and precise definition of an aggravating factor cannot include conduct, which tips the balance in favor of death, committed by a juvenile at the ages of 11 and 12.

With respect to forfeiture, while respondent cites to the reporter's transcript and acknowledges that Mr. Jones opposed the admission of his sister's testimony (RB 259, citing 49RT 5334-5338; 50RT 5379-5381), respondent ignores Mr. Jones's written motion to exclude his sister's testimony as evidence in aggravation at the penalty phase. (31CT 5774.) There Mr. Jones argued that the evidence violated the Eighth and Fourteenth Amendments, as well as parallel provisions of the state Constitution (31CT 5775), undermined the reliability of the penalty determination, contravened due process as unduly prejudicial (31CT 5780, 5787), and was irrelevant (31CT 5785). There has been no forfeiture.

Hence, Mr. Jones respectfully requests that this Court reconsider *Raley* and hold that the trial court erred in admitting his sister's testimony during the penalty phase.

25.

THE COURT ERRED IN INSTRUCTING THE JURY TO DISREGARD THE GUILT PHASE INSTRUCTIONS DURING THE PENALTY PHASE.

Mr. Jones established in his opening brief that the trial court committed a serious and reversible error in instructing the penalty phase jury to disregard all the instructions provided to the guilt phase jury – including *40 instructions* between CALCIC Nos. 1.01 and 8.88 – which the court then failed to redeliver to the jury at the end of the penalty phase.

(AOB 519-539.) Despite the trial court's plain error, respondent claims there was no error and that the jury was properly instructed. (RB 263.)

Overconfident in its view, moreover, respondent makes no effort to show that any assumed error was harmless, notwithstanding that on appeal respondent carries the burden of showing harmless error. (*People v. Wilson* (2008) 43 Cal.4th 1, 28 [prejudice test for error at capital penalty phase under state standard is effectively same as that for federal constitutional error]; *Chapman v. California* (1967) 386 U.S. 18, 24 ["requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"].) In any event, Mr. Jones explained in detail in his opening brief the prejudice he suffered as a result of the court's dereliction in not properly re-instructing the jury at penalty. (AOB 524-539.) Accordingly, Mr. Jones will reply to respondent's claim that the court did not err in failing to re-instruct the jury at the end of the penalty phase with 40 instructions the court nonetheless deemed appropriate at the end of the guilt phase.

Ignoring the oft-stated rule that during the penalty phase, as in the guilt phase, "the trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case" (*People v. Carter* (2003) 30 Cal.4th 1166, 1219), respondent asserts that a trial court need only provide a penalty phase jury with all appropriate *evidentiary* instructions beginning with CALCIC No. 1.01 and ending with CALCIC No. 8.88. (RB 264, 266.) Indeed, all 40 of the CALJIC instructions that Mr. Jones complained were missing from the court's penalty phase instructions fall between CALJIC Nos. 1.01 and 8.88, including 19 from CALJIC's "Part 2. Evidence and Guides for Its

Consideration." (AOB 519-520; CALJIC Nos. 2.01/8.83 (Sufficiency of Circumstantial Evidence – Generally), 2.02/8.83.1 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State), 2.09 (Evidence Limited as to Purpose), 2.13 (Prior Consistent or Inconsistent Statements as Evidence), 2.50 (Evidence of Other Crimes), 2.50.1 (Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence), 2.50.2 (Definition of Preponderance of the Evidence), 2.51 (Motive), 2.60 (Defendant Not Testifying – No Inference of Guilt May Be Drawn), 2.61 (Defendant May Rely on State of the Evidence), 2.71 (Admission – Defined), 2.72 (Corpus Delicti Must Be Proved Independent of Admission), 2.80 (Expert Testimony), 2.81 (Opinion Testimony of Lay Witness), 2.82 (Concerning Hypothetical Questions), 2.83 (Resolution of Conflicting Expert Testimony), 2.90 (Presumption of Innocence), 2.91 (Burden of Proving Identity Based Solely on Eyewitnesses), 2.92 (Factors to Consider in Proving Identity by Eyewitness Testimony).) And although respondent implies that some of those 40 instructions would have been relevant to Mr. Jones's penalty determination, respondent keeps it a secret as to which ones would have been relevant. (RB 267 ["*Most* of the instructions appellant enumerates *were irrelevant* to the consideration of the penalty phase of his trial"] (italics added).)

Respondent objects to any instructions that, in respondent's view, would have simply been for the purpose of re-litigating guilt, which Mr. Jones was not entitled to do. (RB 264.) Mr. Jones agrees that re-litigating his guilt during the penalty phase would have been inappropriate, as made clear in the opening brief, but re-litigating guilt was not his point. (AOB 521-532.) As the opening brief explained, a newly seated penalty phase juror did not have the benefit of deliberating with the other 11 jurors on the

issue of guilt, whether beyond a reasonable doubt, beyond any lingering doubt, or beyond all possible doubt. (AOB 520.) Although he was required to accept the guilty verdicts beyond a reasonable doubt, he was not required to accept Mr. Jones's guilt beyond all residual or lingering doubt. Thus, he and the other jurors were instructed: "If you have any residual doubts about the circumstances attending the crimes as found in the guilt phase, you may consider such doubts in mitigation under factor 'a' of the penalty phase factors. Residual doubt is defined as that state of mind between 'beyond a reasonable doubt' and 'beyond all possible doubt.'" (53RT 5982.) How was the new juror to have considered any "residual" doubt he might have had regarding the murder verdicts without the benefit of jury instructions on first and second degree murder, particularly if he thought the murders were on impulse and not the result of deliberation and premeditation?

Although the prosecutor charged Mr. Jones with committing "sexual homicide" (45RT 5026), his own expert's study concluded that "sexual homicide perpetrators seem to contain, and then be overwhelmed, at times, by [primitive] impulse." (28CT 5064.) The Glover and Sweets cases were weak, Glover especially so. (See AOB 155-165.) The considerable evidence that the Glover and Sweets murders were impulse killings, along with evidence that Mr. Jones's identification as their killer was flimsy at best, would have caused any reasonable juror to question whether the prosecutor had proven his case beyond all possible doubt.

If jury instructions are to have any purpose, if penalty jury deliberations are not simply a free-for-all but instead a guided exercise in reaching a just verdict based in reason, then Mr. Jones's jury should have been instructed on the elements of the crimes, so that the substitute juror – every juror – could have performed his duty and followed the law. That the

replacement and jurors were left without any guidance in this regard made it reasonably likely that they did not consider all constitutionally relevant mitigating evidence of lingering doubt that Mr. Jones committed the homicides for which he was convicted. (*Boyde v. California* (1990) 494 U.S. 370, 380.) Hence, error and prejudice are manifest, requiring reversal of the penalty.

26.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES MR. JONES'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Jones asserted in his opening brief that California's failure to conduct intercase proportionality review of death sentences violates the Eighth and Fourteenth Amendments. (AOB 538-546.) Respondent, in its opposition, cites cases from this Court denying this very claim. (RB 268-270.)

Mr. Jones acknowledges these cases and recognizes that these cases are in turn based upon the United States Supreme Court's holding in *Pulley v. Harris* (1984) 465 U.S. 37. (AOB539.) Nevertheless, the opinion in *Pulley v. Harris* was based on favorable assumptions regarding California's *post-Furman* [*Furman v. Georgia* (1972) 408 U.S. 238] death penalty scheme. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) As Mr. Jones contended in his opening brief, the subsequent implementation of the state's capital sentencing scheme has disclosed the inadequacy of critical safeguards such that proportionality review is required to ensure compliance with the Eighth Amendment and the Due Process Clause. This Court should revisit this issue and rule

accordingly.

27.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF.

In his opening brief, Mr. Jones set forth various deficiencies relating to the application of the California death penalty statute. (AOB 547-564.) Specifically, Mr. Jones challenges the statute and instructions for failure to assign a burden of proof regarding the aggravating factors and the overall penalty determination (AOB 547-556); failure to require the state to bear at least some burden of persuasion at the penalty phase (AOB 557-559); and failure to require juror unanimity on the aggravating factors (AOB 560-561). More particularly, Mr. Jones relies on the constitutional principles articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472, and *Ring v. Arizona* (2002) 536 U.S. 584, requiring a jury determination on proof beyond a reasonable doubt of facts necessary to increase sentencing beyond the maximum that the jury conviction itself would allow. (AOB 551-557.)

Rather than attempt to refute the arguments Mr. Jones advanced in his opening brief, respondent merely notes that this Court has previously rejected these claims.[36] (RB 270-272.) Nevertheless, such blanket reliance on prior case law does not survive the United States Supreme Court's more recent opinion in *Cunningham v. California* (2007) 549 U.S. 270, holding

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[36] Respondent concludes his argument with the "gotcha" observation that Mr. Jones's contentions in regard to allocation of the burden of proof are inconsistent. (RB 272.) Respondent fails to appreciate the distinction between alternative arguments and those that are inconsistent.

that the state's determinate sentencing scheme was unconstitutional under the Sixth Amendment, as interpreted in *Apprendi v. New Jersey*, *supra*, and *Blakely v. Washington* (2004) 542 U.S. 296, 304-305. *Cunningham v. California* strengthens Mr. Jones's contention that the state's death penalty statute, much like its former noncapital sentencing law, violates the constitutional guarantee of trial by jury.

In *People v. Jennings* (2010) 50 Cal.4th 616, 689 and *People v. Solomon* (2010) 49 Cal.4th 792, 844, this Court acknowledged the United States Supreme Court's pronouncements on the Sixth Amendment jury trial right, including *Cunningham v. California*, *supra*. Nevertheless, without engaging in any analysis, the Court affirmed its previous decisions upholding the death penalty statute. Mr. Jones urges the Court to reconsider those decisions to ensure that a defendant facing the death penalty enjoys the same Sixth Amendment rights as the most minor felon.

28.

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED MR. JONES'S CONSTITUTIONAL RIGHTS.

Mr. Jones argues that this Court should reconsider its previous rulings and hold that instructing the jury pursuant to CALJIC No. 8.88 violated his constitutional rights. (AOB 565-577.) Rather than attempt to refute the arguments Mr. Jones sets forth in his opening brief, respondent merely notes that this Court has previously rejected this claim and urges the Court to decline Mr. Jones's invitation to reconsider its prior rulings. (RB 272.) As explained at length in the opening brief, the cases relied upon by respondent were wrongly decided and contrary to federal constitutional law.

Accordingly, this Court should hold that instructing the jury pursuant to CALJIC No. 8.88 violated Mr. Jones's constitutional rights and vacate the death judgment.

29.

THE INSTRUCTIONS REGARDING THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER MR. JONES'S DEATH SENTENCE UNCONSTITUTIONAL.

In his opening brief, Mr. Jones argued that the instructions about the mitigating and aggravating factors in Penal Code section 190.3, and the application of those sentencing factors, violated his fundamental state and federal constitutional rights by inviting the jury to consider inapplicable aggravating and mitigating factors, including unadjudicated criminal activity, and by failing to require juror unanimity and written findings regarding aggravating factors. (AOB 578-603.) Mr. Jones acknowledged throughout that this Court has rejected the same or similar arguments in other cases. Respondent relies on this Court's previous rejection of these issues without any additional analysis. (RB 273-276.) Accordingly, no reply to respondent's argument is necessary.

30.

MR. JONES'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT.

Mr. Jones argues that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Mr. Jones further argues that even if capital punishment

itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (AOB 604-609.) Respondent cites the Court's cases rejecting the arguments advanced in the opening brief. (RB 278.)

As to the merits of the claim, respondent's opposition rests upon the ground that this Court has previously rejected the arguments advanced by Mr. Jones. (RB 131-132.) Mr. Jones is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Recent developments in Eighth Amendment jurisprudence further support Mr. Jones's claims. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that the execution of juvenile criminals is cruel and unusual punishment, the Court looked to standards set by international law as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop* [*v. Dulles* (1958) 356 U.S. 86], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ('The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime') . . . . (543 U.S. at p. 575.)

Respondent has not addressed the substance of Mr. Jones's argument that the use of death as a regular punishment violates international law as well as the Eighth and Fourteenth Amendments. Mr. Jones asks this Court to reconsider its position on this issue and, accordingly, to reverse the death judgment.

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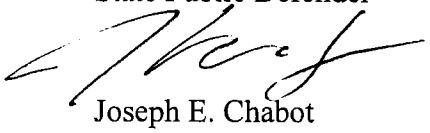
CONCLUSION

For all the reasons stated above and in the opening brief, the guilt and penalty verdicts in this case must be reversed.

Dated: June 17, 2011

Respectfully submitted,

Michael J. Hersek
State Public Defender



Joseph E. Chabot
Supervising Deputy State Public Defender

Nina Wilder
Deputy State Public Defender

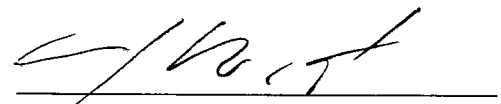
Lisa Anne D'Orazio
Legal Counsel

Attorneys for Appellant
Bryan Maurice Jones

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Joseph E. Chabot, am the Supervising Deputy State Public Defender assigned to represent appellant, Bryan Maurice Jones, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 45,397 words in length excluding the tables and certificates.

Dated: June 17, 2011



Joseph E. Chabot

DECLARATION OF SERVICE

Re: *People v. Bryan Maurice Jones* No. S042346

I, Jon Nichols, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and on June 17, 2011, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Bryan Maurice Jones
(Appellant)

Karl T. Terp
Office of the Attorney General
P. O. Box 85266
110 W. "A" Street, Ste. 1100
San Diego, CA 92186-5266

Clerk of the San Diego Superior Court
P.O. Box 120128
330 W. Broadway, Rm 225
San Diego, CA 92112-0128

Each envelope was then, on June 17, 2011, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed on June 17, 2011, at San Francisco, California.

Jon Nichols