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SUPREME COURT
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SUPREME COURT OF THE STATE OF CALIFORNIA

JUL 23 2010

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Deputy

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN HOMICK Defendant and Appellant.	S044592 (Los Angeles County Number A973541) **DEATH PENALTY**

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Honorable Florence-Marie Cooper, Trial Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

	Page
WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))	1
COMMENTS ON RESPONDENT'S STATEMENT OF THE FACTS	1
Reply to Respondent's Legal Arguments	7
I. A SUBSTANTIAL PORTION OF THE PRIOR STATEMENTS AND PRIOR TESTIMONY OF MICHAEL DOMINGUEZ DID NOT MEET THE REQUIREMENTS OF THE PRIOR INCONSISTENT STATEMENTS EXCEPTION TO THE HEARSAY RULE; INSTEAD, THE FASHION IN WHICH THEY WERE PRESENTED TO THE JURY WAS UNSANCTIONED BY ANY RULE OF EVIDENCE AND RESULTED IN VIOLATIONS OF MULTIPLE FEDERAL CONSTITUTIONAL RIGHTS	7
A. Introduction	7
B. Prosecution Witness Dominguez' Frequent Refusals to Answer Questions During Direct Examination Were Not the Equivalent of Testimony Inconsistent with Prior Statements	10
1. Overview	10
2. Issues Regarding the Trial Court's Conclusion That Silence Was Equivalent to an Insincere Failure to Recall, and That Such Silence Permitted the Introduction of Any Prior Statements That Were Inconsistent with a an Insincere Failure to Recall, Were Adequately Preserved for Appeal	15
3. Under the Circumstances of the Present Case, Dominguez' Silence Could Not Logically Be Considered to Be the Equivalent of an Insincere Failure to Recall	17

TABLE OF CONTENTS (continued)

		Page
C.	There Is No Support Whatsoever for the Trial Court's Unprecedented Decision to Consider Every Refusal to Answer As Being the Same As a Negative Response, and Permitting the Prosecutor to Then Read to the Jury Any Prior Statements Inconsistent With That Wholly Fictitious Negative Response	24
	1. Issues Regarding the Trial Court's Conclusion That Silence Was Equivalent to "No," and That Such Silence Permitted the Introduction of Any Prior Statements That Were Inconsistent with a "No" Response Were Adequately Preserved for Appeal	24
	2. Under the Circumstances of the Present Case, Dominguez' Silence Could Not Logically Be Considered to Be the Equivalent of Asserting an Insincere Failure to Recall	26
D.	Cross-Examination of Dominguez Was Woefully Inadequate As a Result of His Refusal to Respond to Most of the Questions Posed By Counsel for Steve Homick	37
E.	Repeated References to a Polygraph Examination Were Prejudicial Under the Circumstances of This Trial	44
F.	Even if Impeachment of Dominguez With His Prior Statements Was Permissible, It Was Nonetheless Prejudicial to Allow the Prosecutor to Both Read Extensively from the Prior Statements and Also Play an Entire Ninety-Five Minute Videotape, Repeating the Same Statements, and Then Replay the Entire Videotape Again During Argument	48
G.	Individually or Cumulatively, the Various Errors That Occurred in Admitting Dominguez' Prior Statements Were Prejudicial	51

TABLE OF CONTENTS (continued)

Page

II. RESPONDENT ENGAGES IN GROSS AND UNSUPPORTED SPECULATION IN ARGUING THAT THE TRIAL COURT COULD HAVE FOUND MICHAEL DOMINGUEZ UNAVAILABLE, ALLOWING USE OF DOMINGUEZ' PRIOR FIRST PRELIMINARY EXAMINATION TESTIMONY TO BE ADMITTED AS FORMER TESTIMONY; NO SUCH FINDING WAS MADE OR SOUGHT, THERE WERE MULTIPLE REASONS WHY SUCH A FINDING SHOULD NOT HAVE BEEN MADE, AND THE TRIAL COURT EXPRESSLY VOICED DOUBT THAT THE RECORD WOULD HAVE SUPPORTED SUCH A FINDING 56

III. THE PLEA AGREEMENT WITH MICHAEL DOMINGUEZ WAS RENDERED INVALID BY PROVISIONS THAT REQUIRED HIS TESTIMONY TO MATCH A PRE-ARRANGED VERSION, RATHER THAN SIMPLY REQUIRING THE TRUTH 61

A. Steven Homick's Constitutional Rights Were Violated By the Provision in Michael Dominguez' Plea Agreement That Abrogated That Agreement if Michael Dominguez Had Lied in His Statement to the Authorities, or if Michael Dominguez Committed Perjury on the Witness Stand 61

B. Steven Homick's Constitutional Rights Were Also Violated by the Understanding That the Dominguez Agreement Would Be Abrogated If Dominguez Was the Shooter in the Woodman Murders or the Tipton Murders 82

C. These Errors Went to the Heart of the Prosecution Case and Cannot Be Deemed Harmless 83

IV. EVIDENCE OF THE MISSOURI INCIDENT WAS HIGHLY RELEVANT TO STEVEN HOMICK'S DEFENSE; IF IT WAS PREJUDICIAL TO ROBERT HOMICK, THE PROPER REMEDY WAS A SEVERANCE, NOT A FAVORING OF THE DUE PROCESS RIGHTS OF ONE DEFENDANT AT THE EXPENSE OF ANOTHER 88

TABLE OF CONTENTS (continued)

		Page
V.	THE TRIAL COURT RULINGS ADMITTING EVIDENCE ON BEHALF OF ROBERT HOMICK, DESPITE PREJUDICE TO STEVEN HOMICK, WERE ERRONEOUS AND INCONSISTENT WITH RULINGS EXCLUDING EVIDENCE OFFERED BY STEVEN HOMICK	95
A.	Art Taylor's Testimony Alleging That Steven Homick Had Been a Drug Dealer	95
B.	Judge Stromwell's Testimony Regarding Max Herman	100
C.	Helen Copitka's Testimony Regarding the Relationship Between Her Brothers, Robert and Steve Homick	104
D.	Improper References to the Las Vegas Investigation of a Triple Murder	108
VI.	MULTIPLE ERRORS OCCURRED IN THE ADMISSION OF HEARSAY STATEMENTS, OSTENSIBLY MADE IN FURTHERANCE OF A CONSPIRACY	114
A.	The Alleged Death Threat Made By Robert Homick to Jack Swartz	114
B.	Statements That Steve Homick Was the Woodmans' Man in Vegas, That He Could Get Anything Done, and That He Was Tougher Than the Mafia	118
C.	The Magazine Article Regarding Hiring a Hit Man, Which Neil Woodman Showed to Gloria Karns	128
D.	Neil Woodman's Statement to Edgar Ridout That He Could Arrange to Have Ridout's Wife "Hit," and Stewart Woodman's Statement That Steve Homick Was His Collection Man for Difficult Accounts	131
E.	Neil Woodman's Request to Steve Strawn, to Destroy Cards Hidden Under a Desk	134
F.	Neil Woodman's Hearsay Reference to Steven Homick as a Heavy Guy	138

TABLE OF CONTENTS (continued)

		Page
VII.	ADDITIONAL PROSECUTION EVIDENCE WAS IMPROPERLY ADMITTED AGAINST STEVEN HOMICK	140
A.	Evidence That Steven Homick Usually Carried a Gun	140
B.	Evidence That Robert Homick Stated That His Presence, in a Parked Vehicle Outside the Woodman Residence on the Date of Their Wedding Anniversary, Was a Mere Coincidence	144
C.	FBI Agent Gersky's Testimony That He Believed Michael Dominguez	149
D.	Agent Gersky's Testimony That Steven Homick Was Notorious	155
E.	The Improper Admission of Michael Dominguez' Personal Opinion That Steven Homick Intended to Kill the Woodman Parents	157
F.	Additional Conclusions Pertaining to Prejudice	160
VIII.	THE REPEATED MOTIONS TO SEVER DEFENDANTS FOR TRIAL WERE ERRONEOUSLY DENIED	162
A.	Introduction	162
B.	The Pre-Trial Motion to Sever	163
C.	The Renewed Motions to Sever	166
1.	Respondent's Assertions of Forfeiture	166
2.	The Denials of the Renewed Motions to Sever Were an Abuse of Discretion	169
D.	The Denial of the Motion to Sever Resulted in a Trial That Was Grossly Unfair to Steven Homick	177

TABLE OF CONTENTS (continued)

	Page
IX. STEVEN HOMICK'S EARLIER FEDERAL COURT CONVICTIONS FOR OFFENSES WHICH, AS PLED AND LITIGATED, INCLUDED THE MURDERS OF THE WOODMAN PARENTS BARRED THE RE-LITIGATION OF THE WOODMAN MURDER ALLEGATIONS IN A CALIFORNIA STATE COURT	179
X. UNDER ALL OF THE PRESENT CIRCUMSTANCES, FUNDAMENTAL FAIRNESS REQUIRED SOME FORM OF RELIEF IN RESPONSE TO THE DEFENSE MOTION TO REOPEN	193
XI. THE TRIAL COURT'S INSTRUCTION PERTAINING TO PRIOR FEDERAL COURT PROCEEDINGS INCLUDED UNNECESSARY INFORMATION THAT IMPLIED STEVEN HOMICK HAD ALREADY BEEN CONVICTED OF CLOSELY RELATED CRIMES IN FEDERAL COURT	208
XII. THE CUMULATIVE IMPACT OF THE GUILT TRIAL ERRORS MUST BE DEEMED PREJUDICIAL	214
XIII. EVIDENCE REGARDING STEVEN HOMICK'S NEVADA CONVICTIONS WAS NOT PROPERLY ADMISSIBLE TO SUPPORT THE OTHER VIOLENT CRIMES AGGRAVATING FACTOR	216
A. Under the Circumstances of the Present Case, Evidence of the Nevada Conviction Was Improperly Admitted	217
B. It Is At Least Reasonably Likely That a Different Result Would Have Been Obtained If the Prosecution Had Not Been Permitted to Utilize Evidence of the Nevada Conviction	221
C. The Trial Court Failed to Adequately Instruct the Jury Regarding the Significance of the Nevada Conviction	223
D. The Trial Court Erroneously Refused to Instruct That There Were No Prior Felony Convictions	227

TABLE OF CONTENTS (continued)

	Page
XIV. HAVING DECIDED TO ALLOW EVIDENCE OF THE NEVADA CONVICTION, THE TRIAL COURT WAS OBLIGATED TO PERMIT A FULL CHALLENGE TO THE CONSTITUTIONAL VALIDITY AND THE RELIABILITY OF THAT CONVICTION	229
A. Steven Homick Was Entitled to a Full Hearing in His Challenge to the Constitutional Validity of the Nevada Prior Conviction	229
B. The Contentions Made by Steven Homick's Defense Below Were More Than Adequate to Raise a Prima Facie Showing, to Merit a Full Hearing	237
C. If the Defense Had Been Permitted to Follow Through and Offer Its Evidence of Ineffective Assistance of Counsel at the Prior Nevada Trial, It Would Very Likely Have Been Sufficient to Support an Order Granting Relief	241
D. If the Nevada Conviction Had Not Been Admitted in Evidence, There Would Have Been a Reasonable Likelihood of a More Favorable Penalty Verdict	244
E. Under the Totality of Circumstances Present Here, the Trial Court Erred in Refusing to Allow the Defense to Present Expert Testimony to Help Establish the Ineffective Assistance of the Nevada Defense Counsel	246
XV. THE DEFENSE WAS IMPROPERLY PRECLUDED FROM MAKING INQUIRIES OF PROSPECTIVE JURORS ABOUT THEIR ABILITY TO FAIRLY CONSIDER THE OPTION OF LIFE WITHOUT PAROLE IN THE CASE BEFORE THEM, AND THE PRECLUDED QUESTIONS IN NO WAY REQUIRED PROSPECTIVE JURORS TO PREJUDGE THE CASE	249
XVI. RESPONSES FROM JUROR NUMBER EIGHT DEMONSTRATED HER ABILITY TO FOLLOW HER OATH, RENDERING HER REMOVAL IMPROPER	257
A. Removal of Juror No. 8 Was Completely Unsupported	258

TABLE OF CONTENTS (continued)

	Page
B. Even If the Facts Shown By the Inquiry Below Had Been Sufficient to Support a Tentative Conclusion That the Juror Should Be Discharged, Further Inquiries Were Necessary Before Any Final Decision to Remove the Juror Could Be Made	266
C. Under the Totality of the Circumstances, the Replacement of the Lone Holdout for a Verdict Other Than Death Resulted in a Coerced Penalty Verdict	268
D. Even If No Error Occurred When the Substitution Order Was Made, the Additional Showing in Support of the Motion for a New Trial Compelled an Evidentiary Hearing	270
XVII. THE PENALTY JURORS WERE ERRONEOUSLY ALLOWED TO CONSIDER MITIGATING FACTORS ONLY IF THEY WERE "CONVINCED" THEY EXISTED	274
XVIII. CALIFORNIA'S DEATH PENALTY STATUTES ARE FUNDAMENTALLY FLAWED IN MULTIPLE RESPECTS	278
XIX. ERRORS DURING THE GUILT TRIAL WHICH MAY BE FOUND HARMLESS ON APPEAL MUST NONETHELESS BE CONSIDERED AGAIN FOR THEIR POTENTIAL IMPACT ON THE PENALTY VERDICT; THE GUILT AND PENALTY PHASE ERRORS IN THE PRESENT CASE THAT POTENTIALLY IMPACTED THE PENALTY VERDICT MUST BE CONSIDERED PREJUDICIAL UNDER THE TOTALITY OF THE CIRCUMSTANCES OF THE PRESENT TRIAL, EITHER WHEN CONSIDERED INDIVIDUALLY OR WHEN CONSIDERED CUMULATIVELY	279
CONCLUSION	283

TABLE OF AUTHORITIES

	Page
Arizona v. Fulminante (1991) 499 U.S. 279	30
Bartkus v. Illinois (1959) 359 U.S. 121	191
Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P. (2008) 44 Cal.4th 528	185
Bonner v. City of Santa Ana (1996) 45 Cal.App.4th 1465	102
Caldwell v. Mississippi (1985) 472 U.S. 320	269
Chambers v. Mississippi (1973) 410 U.S. 284	141
Chapman v. California (1967) 386 U.S. 18	51, 86, 94, 130
Custis v. United States (1994) 511 U.S. 485	230
Garcia v. Superior Court (1997) 14 Cal.4th 953	235
Gomez v. Superior Court (1958) 50 Cal.2d 640	184
Hale v. Morgan (1978) 22 Cal.3d 388	102
In re Deon D. (1989) 208 Cal.App.3d 953	18, 22
In re Miguel L. (1982) 32 Cal.3d 100	72
Jackson v. Virginia (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560	3
Lindsay v. Normet (1972) 405 U.S. 56	141
Marriage of Gray (2007) 155 Cal.App.4th 504	12
Neder v. United States (1999) 527 U.S. 1	30
People v; Hinton (2006) 37 Cal.4th 839	217
People v. *Archer* (2000) 82 Cal.App.4th 1380	143
People v. Barnwell (2007) 41 Cal.4th 1038	264
People v. Belcher (1974) 11 Cal. 3d 91	182

TABLE OF AUTHORITIES (continued)

Case	Page
People v. Benavides (2005) 35 Cal.4th 69	26
People v. Bennett (2009) 45 Ca1.4th 577	224
People v. *Bolin* (1998) 18 Cal.4th 297	211
People v. *Boyer* (2006) 38 Cal.4th 412	17, 63, 66, 77
People v. *Bradford* (1997) 15 Cal.4th 1229	217
People v. Brown (1988) 204 Cal.App.3d 1444	183
People v. Burgener (2003), 29 Cal.4th 833	253
People v. Candelaria (1956) 139 Cal.App.2d 432	180, 181
People v. Carasi (2008) 44 Cal.4th 1263	256
People v. Carpenter (1999) 21 Cal.4th 1016	142
People v. Carter (2003) 30 Cal.4th 1166	210
People v. Cash (2002) 28 Cal.4th 703	250
People v. Chavez (1980) 26 Cal.3rd 334	11
People v. Cleveland (2001) 25 Cal.4th 466	264
People v. Coffman and Marlow (2004) 34 Ca1.4th 1	115, 151
People v. *Combs* (2004) 34 Cal.4th 821	217
People v. Cox (2003) 30 Cal.4th 916	143
People v. Cummings (1993) 4 Cal.4th 1233	172
People v. *Dell* (1991) 232 Cal.App.3d 248	121
People v. Ervin (2000) 22 Cal.4th 48	168
People v. *Farnam* (2002) 28 Cal.4th 107	211
People v. Fields (1983) 35 Cal.3d 329	64, 68

TABLE OF AUTHORITIES (continued)

Case	Page
People v. *Filson* (1994) 22 Cal.App.4th 1841	92
People v. Friedman (2003) 111 Cal.App.4th 824	187
People v. Garrison (1989) 47 Cal.3d 746	66, 75, 76
People v. Gilbert (1969) 1 Cal.3d 475	35, 66, 123, 211, 231
People v. Gofman (2002) 97 Cal.App.4th 965	187
People v. Green (1971) 3 Cal.3d 981	12, 40
People v. *Greenberger* (1997) 58 Cal.App.4th 298	88
People v. Guerra (2006) 37 Ca1.4th 1067	115
People v. *Hall* (1986) 41 Cal.3d 826	143
People v. Hamilton (1989) 48 Cal.3d 1142	190
People v. Hardy (1992) 2 Cal.4th 86	168
People v. Hefner (1981) 127 Cal.App.3d 88	12
People v. *Hogan* (1982) 31 Cal.3d 815	132
People v. *Horton* (1995) 11 Cal.4th 1068	230, 231, 233, 237, 247
People v. Hovarter (2008) 44 Cal.4th 983	33
People v. Howard (1988) 44 Cal.3d 375	124, 190
People v. Jackson (1996) 13 Cal.4th 1164	211, 217
People v. Johnson (1980) 26 Cal.3d 557	3
People v. Johnson (1992) 3 Cal.4th 1183	14
People v. Jones (1995) 11 Cal.4th 118	35, 66, 123, 211, 231
People v. Jones (2003) 30 Cal.4th 1084	198
People v. *Keith* (1981) 118 Cal.App.3d 973	92

TABLE OF AUTHORITIES (continued)

Case	Page
People v. Kelley (1997) 52 Cal.App.4th 568	189
People v. *Lang* (1974) 11 Cal.3d 134	53
People v. Leonard (2007) 40 Cal.4th 1370	264
People v. *Mattson* (1990) 50 Cal.3d 826	92
People v. *McClellan* (1969) 71 Cal.2d 793	218
People v. *Medina* (1974) 41 Cal.App.3d 438	61, 63, 75
People v. Medina (1995) 11 Cal.4th 694	128
People v. Mikhail (1993) 13 Cal.App.4th 846	17, 102, 126, 149, 167
People v. Moon (2005) 37 Cal.4th 1	209
People v. Nelson (2009) ___ N.E.2d ___	262
People v. O'Quinn (1980) 109 Cal.App.3d 219	41
People v. *Ochoa* (2001) 26 Cal.4th 398	217
People v. Partida (2005) 37 Cal.4th 428	15, 101, 127, 167
People v. *Perez* (2000) 82 Cal.App.4th 760	38
People v. *Pitts* (1990) 23 Cal.App.3d 606	143
People v. Prieto (2003) 30 Cal.4th 226	26
People v. Ray (1996) 13 Cal.4th 313	217
People v. Reeder (1978) 82 Cal.App.3d 543	88
People v. Reyes (2008) 165 Cal.App.4th 426	62
People v. Richardson (2008) 43 Cal.4th 959	224
People v. Riel (2000) 22 Cal.4th 1153	137
People v. Rios (1985) 163 Cal.App.3d 852	44

Case	Page
People v. Roberto V. (2001) 93 Cal.App.4th 1350	16, 102, 126, 149, 167
People v. *Rojas* (1975) 15 Cal.3d 540	22, 32
People v. Sanders (1995) 11 Cal.4th 475	124, 130
People v. Sandoval (2001) 87 Cal.App.4th 1425	17, 102, 126, 149, 167
People v. Superior Court (Stanley) (1979) 24 Cal.3d 622	11
People v. Tafoya (2007) 42 Cal.4th 147	168
People v. Taylor (2010) 48 Cal.4th 574	155
People v. Tewksbury (1976) 15 Cal.3d 953	72
People v. Walker (2009) 232 Ill. 2d 113	197
People v. Wallin (1948) 32 Cal.2d 803	71
People v. *Webster* (1991) 54 Cal.3d 411	219
People v. Wilson (2008) 43 Cal.4th 1	36
People v. Wilson (2008) 44 Cal.4th 758	265
Pope v. Illinois (1987) 481 U.S. 497	87
Richards, Watson & Gershon v. King (1995) 39 Cal.App.4th 1176	12
Rose v. Clark (1986) 478 U.S. 570	87
Sullivan v. Louisiana (1993) 508 U.S. 275	87
Uttecht v. Brown (2007) 551 U.S. 1	155
Wardius v. Oregon (1973) 412 U.S. 470	141
Yates v. Evatt (1991) 500 U.S. 391	86

TABLE OF AUTHORITIES (continued)

United States Constitutional Provisions	Page
United States Constitution, Eighth Amendment	7, 89, 108, 121, 165
United States Constitution, Fifth Amendment	7, 89, 108,121
United States Constitution, Fourteenth Amendment	7, 89, 108, 121, 141, 165
United States Constitution, Sixth Amendment	7, 89, 121, 129

California Constitutional Provisions	Page
California Constitution, Article I, Section 15	184

California Statutory Provisions	Page
Evidence Code section 210	135
Evidence Code section 250	135
Evidence Code section 352	88, 89, 92-93, 102, 121, 126-127, 220
Evidence Code section 1101	101, 102
Evidence Code section 1105	101
Evidence Code section 1235	15, 21, 32
Penal Code section 656	179, 181, 183, 185, 189-191
Penal Code section 793	179, 185, 190
Penal Code section 1259	211
Penal Code section 1111	72, 190
Penal Code section 1259	26, 211

TABLE OF AUTHORITIES (continued)

Instructions	Page
CALJIC 2.13	25, 36
CALJIC 8.87	274

Law Review Articles	Page
Comment, Accomplice Corroboration -- Its Status in California (1962) 9 UCLA L.Rev. 190	72
Heydon, The Corroboration of Accomplices (Eng. ed. 1973) Crim.L.Rev. 264	72
Note (1954) 54 Colum.L.Rev. 219	72

Miscellaneous Reference Materials	Page
Traynor, *The Riddle of Harmless Error* (1969)	4

Internet	Page
http://en.wikipedia.org/wiki/357_Magnum.	204

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN HOMICK Defendant and Appellant.	S044592 (Los Angeles County Number A973541)

APPELLANT'S REPLY BRIEF

WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))

Pursuant to California Rules of Court, Rule 8.630 (b)(2), counsel for Steven Homick hereby certifies that this reply brief contains 68,246 words. Because this exceeds the 47,600 word limit specified in Rule 8.630 (b)(1)(B), permission to file an oversize brief is being sought pursuant to Rule 8.630 (b)(5)

COMMENTS ON RESPONDENT'S STATEMENT OF THE FACTS

For the most part, Respondent's statement of the facts does find some support in the evidentiary record. However, Respondent does more than merely summarize the facts in a manner supporting the verdict; Respondent, on occasion, entirely ignores testimony that demonstrates that Respondent's summary of the facts is improbable.

For example, in summarizing the testimony of Rodger Backman, one of the persons who was in the building next door to the scene of the shooting of the Woodmans, Respondent states flatly, "Backman was absolutely certain that there were two individuals in the ivy. (85RT8901.)" (RB 36.) Such a view of the facts is important for Respondent, because all evidence regarding the only individual who was actually seen by any witness indicated strongly that it was Michael Dominguez, not Steve Homick. But Respondent completely ignores the portion of Backman's testimony in which he acknowledged that when he talked to police officers, two days after the shooting, he told them that when he heard rustling sounds in the ivy and bushes, he thought it sounded like two people, but he could not be sure.[1] (RT 85:8878-8880.) Backman also acknowledged that the events

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[1] Indeed, Backman testified that after hearing gunshots, he jumped up, ran to the balcony of his mother's third floor apartment, leaned over the railing, looked down, heard a person running through the ivy and then saw a person jump a wall directly below him. When that person was over the wall and out of the foliage, he heard a rustling sound that seemed to be going in the opposite direction. (RT 85:8822-8826.) But he also testified that when he saw the person jump over the wall, he yelled, "Hey, fucker, I see you." Then that person took off running. The entire time he spent viewing that person was just a few seconds. (RT 85:8834, 8838, 8863.) Backman also testified that his adrenaline was flowing and he was focused very much on the person who jumped the wall, since he was concerned that person would try to hurt him. (RT 85:8862.)

Thus, during the brief second or two in which he might have heard additional rustling in the bushes, he was shouting himself, his adrenaline was flowing, and his attention was focused on the man who jumped the

were much fresher in his mind when he talked to the police than when he testified more than **seven years** later, and when he talked to the police, he tried to be complete and accurate.[2] (RT 85:8868, 8880.)

In sum, Respondent's simple claim that Backman was absolutely certain there were two persons in the ivy indisputably rests on a very shaky foundation which Respondent fails to acknowledge at all. It is true that the rules of appellate review, in the context of sufficiency of the evidence, allow for viewing the evidence in the light most favorable to the verdict reached below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560, 573.) However, this Court has recognized that this is not an absolute rule, but must instead be tempered by logic. Quoting with approval from former Chief Justice Roger Traynor's insightful volume, *The Riddle of Harmless Error*, this Court explained in *People v. Johnson* (1980) 26 Cal.3d 557, 577-578:

> A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, how-

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wall. Under such circumstances, it strains credulity to accept his belated claim that he was sure he heard a second person in the bushes and/or ivy.

2 Another discrepancy between Backman's trial testimony and his statement to the police is that he told the police that when he heard rustling noises that sounded like it might be two people running in different directions, the man who jumped the wall was not yet visible. (RT 85:8880-8881.) But the entire basis of his trial certainty that he heard a second person was his belief that he heard that person after the "other" person was already visible. (RT 85:8826-8827.)

> ever, risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained, the "seemingly sensible" substantial evidence rule may be distorted in this fashion, to take "some strange twists." "Occasionally," he observes, "an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law." (Traynor, *The Riddle of Harmless Error* (1969) p. 27.) (Fns. omitted.)

Thus, Respondent seeks to divert this Court down the erroneous path recognized by Justice Traynor. Nonetheless, it is the duty of this Court to examine the entire record, rather than isolated bits and pieces torn from their context. Such an examination should result in the rejection of Rodger Backman's belated claim of certainty about a matter that must instead remain in considerable doubt. [3]

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[3] It should be noted, however, that even to the extent there is support for the conclusion that Backman did hear two people in the bushes, not one, and even if there is substantial evidence to support the conclusion that Steven Homick was the second person, the fact remains that if Dominguez was the person seen by Backman, as seems all but certain based on a

Moreover, no issue of sufficiency of the evidence has been raised in this appeal. Instead, the summary of the facts becomes important in the assessment of the prejudicial impact of the various errors that have been shown in this appeal. In that regard, the standard is even more favorable to the appellant; instead of considering only the facts that support the verdict, this Court must consider all of the evidence produced by both the prosecution and the defense in order to determine the impact of the various errors on the verdicts that were reached. When the facts are considered for that purpose, Backman's belated claim of certainty must be placed in the full context discussed above and should therefore be entitled to very little weight.

Later in the People's Statement of the Facts, Respondent summarizes the testimony of Stewart Woodman regarding an alleged conversation between Stewart, his brother Neil, and appellant's brother, Robert Homick. This conversation was about a purported false explanation for the wire transfer of $28,000 from Neil Woodman to Robert Homick, who promptly wired $25,000 to Anthony Majoy. (RB 67, second full paragraph.) But, as

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review of all of the evidence, the prosecution is still left with a major problem. If Dominguez was the person seen by Backman, then Dominguez was blatantly lying in his prior statements about these events, in which he claimed he was seated at a bus stop across the street during these critical events. If Dominguez lied regarding that crucial matter, then there is little or no basis to trust any of his other prior statements about the relevant events.

Respondent admits in a footnote, because Stewart Woodman was uncertain whether Steven Homick was present during this purported conversation,this evidence was not admitted against him. (RB 67, footnote 41.) Respondent offers no explanation for including this paragraph at all, since it summarizes testimony that was not admitted against Steven Homick. The paragraph should be stricken from Respondent's summary of the evidence.

Reply to Respondent's Legal Arguments

I. A SUBSTANTIAL PORTION OF THE PRIOR STATEMENTS AND PRIOR TESTIMONY OF MICHAEL DOMINGUEZ DID NOT MEET THE REQUIREMENTS OF THE PRIOR INCONSISTENT STATEMENTS EXCEPTION TO THE HEARSAY RULE; INSTEAD, THE FASHION IN WHICH THEY WERE PRESENTED TO THE JURY WAS UNSANCTIONED BY ANY RULE OF EVIDENCE AND RESULTED IN VIOLATIONS OF MULTIPLE FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

In Appellant's Opening Brief (Argument I, at pp. 159-237), it was shown that the testimony of prosecution witness Michael Dominguez was riddled with errors that deprived Steven Homick of his federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury trial in accordance with Due Process of Law, to confront and cross-examine the witnesses against him, and to reliable fact-finding underlying a sentence of death. In an unprecedented ruling, the trial court concluded that a complete refusal to answer questions was somehow the same thing as giving testimony inconsistent with whatever prior statements Dominguez had ever made to the authorities. Using that ruling as a springboard, the court allowed the prosecution to present prior testimony even though Steven Homick was not a participant in the prior proceedings, as well as unsworn

statements to law enforcement and lengthy videotapes that amounted to direct examination with no benefit of cross-examination.

In a closely related bizarre ruling, the trial court instructed the jury that any refusal to answer by Dominguez should be considered the same as an answer of, "No."[4] This permitted the prosecutor to convey any "facts" he desired, simply by couching his questions in terms that allowed a "No" answer to convey the desired facts and/or serve as the predicate for introducing the desired prior "inconsistent" statement. However, when it was time for Steven Homick's counsel to ask questions, the prosecutor, who had been given free rein during his examination of Dominguez, started objecting when the defense tried to use a similar tactic, and the trial court sustained those objections, leaving the defense unable to counter the "facts" the prosecutor had "established" by innuendo.

Even after Dominguez began refusing to answer any questions from counsel for Steven Homick, the trial court erred again in refusing to strike the "testimony" that had been given. The trial court allowed Dominguez to make dozens of references to a polygraph examination he had taken, even though the court had previously ruled that the results of the examination

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4 The jury was instructed:

> The court has made a determination that a refusal to answer questions is tantamount to answering "No" to the attorney's question, and that Mr. Dominguez may be impeached, then, by his prior testimony. (RT 87:9183

were inadmissible and that the examination should not be mentioned at all in front of the jury. The trial court also permitted the prosecutor to effectively present his evidence over and over, allowing him to read extensively from a transcript of prior statements by Dominguez, and then allowing him to play the entire videotape of the same statements.

Respondent finds no problem with any of the trial court rulings and sees nothing wrong with sending Steven Homick to his death based on trial by innuendo, without meaningful confrontation or cross-examination. Perhaps all of these errors could be overlooked if Michael Dominguez had been a minor witness. But Michael Dominguez was not a minor witness. Instead, he was among the most important prosecution witnesses – the only prosecution witness with claimed direct participation in the events immediately preceding the shooting of the two murder victims.

Respondent is mistaken. Respondent does not significantly dispute the factual or procedural history underlying these issues, nor does Respondent significantly dispute the legal principles that should control the resolution of these claims. Instead, Respondent applies the same legal principles to the same facts and reaches an opposite conclusion. Respondent alternatively, and unrealistically, concludes that if there were some errors, or even if there were many errors, they were all harmless, even under the exacting standard applicable to constitutional errors.

Most of Respondent's contentions have already been answered in the opening brief. To the extent they were not answered, or when further reiteration is warranted, the answers or reiteration will be provided herein.

B. Prosecution Witness Dominguez' Frequent Refusals to Answer Questions During Direct Examination Were Not the Equivalent of Testimony Inconsistent with Prior Statements

1. Overview

Respondent urges this Court to endorse the procedure adopted by the trial court, which would equate a witness who refuses to answer questions with a witness who answers questions by claiming a failure to recall under circumstances supporting a finding that the witness is lying about the inability to recall. Such a solution may have superficial appeal, but it does not withstand critical analysis.

Initially, it must be kept in mind that the present trial was much different from a typical trial. Here, Michael Dominguez testified in late 1992, more than **seven years** after the Woodman murders. While it certainly cannot be denied that Dominguez was an extremely uncooperative witness who could not be trusted in any way, the fact remains that after seven years even a cooperative witness would likely have considerable difficulty remembering every detail about a crime or about what the witness did or did not say to an investigating officer. Thus, while Dominguez might well have

had clear recollections of some of the matters that were the subject of questions he refused to answer, it is also probable that in some of the matters he had an honest and reasonable inability to recall. In sum, even if the equivalency that Respondent proposes could ever be valid, the present circumstances required, at the very least, an individual answer-by-answer determination of whether each individual refusal to answer should be considered the same as an untrue assertion of a failure to recollect.

But the trial court made no effort to rule on a question-by-question basis, resorting instead to a blanket conclusion that may have been the most convenient procedure, but was not a fair procedure, especially under the uncommon circumstances of this trial, occurring seven years after the events in dispute.[5] This amounted to a blanket policy and/or a failure to exercise discretion, either of which is the equivalent of an abuse of discretion. (*People v. Chavez* (1980) 26 Cal.3rd 334, 344-348; *People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 627; *Richards, Watson & Gershon v.*

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5 It should also be noted that Michael Dominguez was one of the most important prosecution witnesses in this case, if not the most important, and he spent **eight days** on the witness stand (RT 85:8925-9007, 86:9038-9060, 87:9133-9243, 88:9273-9359, 89:9364-9498, 90:9501-9632, 91:9637-9748, 92:9763-9815), so the continuing errors that infected his testimony cannot be considered minor, trivial, brief, or fleeting. Instead, this permeated a critical portion of the trial.

King (1995) 39 Cal.App.4th 1176, 1180; *Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.)[6]

It is important to recall the actual circumstances that existed when this Court, in *People v. Green* (1971) 3 Cal.3d 981, 988-989, promulgated the rule that in some circumstances a trial court could conclude that a claimed failure to recall should be interpreted as being inconsistent with a prior statement. The witness at issue in *Green* had testified at a preliminary examination that the defendant had provided him with a shopping bag containing a kilo of marijuana packaged in 29 baggies, which the defendant wanted the witness to sell for the defendant. At trial, the witness testified he had agreed to sell marijuana for the defendant, but after giving some detailed testimony, the witness suddenly began expressing uncertainty about how he had obtained the kilo of marijuana, although he still admitted that he had, in fact, obtained it. (*Id*, at pp. 986-987.)

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6 The error here is also quite analogous to the error in *People v. Hefner* (1981) 127 Cal.App.3d 88, wherein a witness was impeached with portions of prior testimony that were inconsistent with trial testimony. The trial court then ordered, on its own motion, that the entire prior testimony be read to the jury. The Court of Appeal concluded it was erroneous to admit, for the truth of the matter, portions of the prior testimony that were not inconsistent with the present testimony. Similarly here, even if it could have properly been found that portions of prior testimony were impliedly inconsistent with current instances of silence, it cannot be said that all of the admitted portions were inconsistent with the highly ambiguous present silence.

This Court found that under these circumstances it was "inherently incredible" that the witness could recall every detail about the shopping bag containing precisely 29 baggies of marijuana, except for the actual transfer of possession of the contraband. (*Id.*, at p. 988.) In such circumstances, this Court concluded that the isolated failure to recall one incriminating detail could be found to be deliberately evasive, since it fell in between many other details that the witness did recall. That finding of deliberate evasiveness, in turn, supported a conclusion that the witness was really denying that he had obtained the marijuana from the defendant, allowing the admission of the prior statement inconsistent with that implied denial.

In sharp contrast, in the present case, when Dominguez started refusing to answer questions, nothing specific could be implied from the silence. Was Dominguez silent because he believed that would lead to a retraction of the plea agreement he no longer desired? Was he silent because he did not want to incriminate Steven Homick? Was he silent because he had lied in his original statements in order to obtain the plea agreement that he did desire when he made the original statements? Was he silent because he was angry at the authorities for failing to keep up their end of the plea agreement (at least in Dominguez' perception), and he no longer wanted to cooperate with them? All of these were very reasonable possibilities, and no basis existed for finding that Dominguez' silence implied one of these pos-

sibilities, rather than any of the others.[7] (See, for example, *People v. Johnson* (1992) 3 Cal.4th 1183, 1220: "The most one can say about the response she gave on redirect examination (...) is that it was somewhat ambiguous, not that it was necessarily inconsistent with her prior statement or evasive in any way.")

Furthermore, even if it were possible to make such an implied finding in regard to some particular questions, there was no basis for making a single such finding in regard to **all** of Dominguez' refusals to respond. After seven years, it was **not** inherently incredible that Dominguez would be unable to recall **some** details, and there were multiple possible motives for his not responding. That is why separate determinations were required, step-by-step, rather than one blanket conclusion that every refusal to respond, to questions that had not yet even been asked, was a deliberately evasive "denial," rather than noncooperation for personal reasons having nothing at all to do with whether the prior statements were true or false.

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7 Indeed, based on all of the circumstances, the possibility that Dominguez was silent because he did not want to incriminate Steven Homick appears to be the **least likely** of the possibilities just listed.

2. Issues Regarding the Trial Court's Conclusion That Silence Was Equivalent to an Insincere Failure to Recall, and That Such Silence Permitted the Introduction of Any Prior Statements That Were Inconsistent with a an Insincere Failure to Recall, Were Adequately Preserved for Appeal

Respondent makes a preliminary argument that counsel below failed to object on the specific ground that the requirements of Evidence Code section 1235, regarding the admission of prior inconsistent statements, had not been met. (RB 148.) However, the purpose of an objection is to put the court on notice regarding whatever defense counsel believes is erroneous. (*People v. Partida* (2005) 37 Cal.4th 428, 434-438.) Here, the trial court was obviously aware of the requirements of Evidence Code section 1235, and was familiar with the cases applying that section, when the court stated:

> I have no difficulty at all in making a finding that this witness is not being truthful when he says he doesn't remember; that he doesn't know; that he doesn't want to testify; that he has nothing to say.
>
> All of those are clearly not true so under those circumstances I don't know why "I refuse to answer" is any different from "I don't remember" when it's not truthful. (RT 87:9135-9136.)

Nothing that trial counsel could have said would have placed the trial court on any stronger notice of the concerns at issue.

Furthermore, the trial court also knew that it was stretching the limits of the principles underlying section 1235, when it decided to proceed in this fashion. The court expressly stated that by proceeding in the fashion the court had chosen, nobody was stipulating that the procedures being used were appropriate.[8] (RT 87:9130.) One defense attorney did express reservations about proceeding with a witness who was refusing to respond to questions, but the judge was determined to proceed and openly acknowledged, "This will be unique in the annals of the criminal jury trial system." (RT 87:9124-9125.) In short, it was as clear as it could be that the judge understood the applicable principles, understood that she was pushing those principles into unknown territory, and was nonetheless determined to proceed.

Thus, any objection by any of the defense attorneys on the ground that the requirements of section 1235 had not been met would have clearly been futile. Neither argument nor objection is required to preserve a point when it would have been futile to argue or object. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87

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8 This recognition by the trial court, in and of itself, should be considered sufficient to preserve for appeal the various attacks on the trial court's concocted procedures that have been set forth in the opening brief.

Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.) Furthermore, the argument on appeal is based on claims of federal constitutional error as well as the violation of section 1235. Respondent expressly recognized that fact. (RB 147-148.) As Respondent also expressly acknowledged, such constitutional objections can be raised for the first time on appeal, under the circumstances of this case. (RB 114-115, fn. 72, discussing *People* v. *Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Also, when it ultimately became clear that Dominguez intended to sit mute, counsel for Steven Homick did object, arguing that a witness's refusal to say anything was not the same as an untrue claim of an inability to recall. (RT 87:9236.) After this clear objection was made, the trial court failed to alter its position in any way. This further demonstrates that any earlier objection would have been futile. Again, in context, this clearly put the court on notice that counsel believed the requirements of section 1235 had not been met. Thus, Respondent is wrong in claiming no such objection was ever made, and in suggesting that this issue, or any facet thereof, was forfeited.

3. Under the Circumstances of the Present Case, Dominguez' Silence Could Not Logically Be Considered to Be the Equivalent of an Insincere Failure to Recall

Turning to the merits of Respondent's claim that all of Dominguez' prior statements were admissible pursuant to the Evidence Code section

1235 exception for prior inconsistent statements, appellant has no quarrel with Respondent's review of the basic principles governing the application of that section when a witness testifies that he or she has no recollection of a prior event or of prior statements regarding a prior event. (RB 148-149.) However, appellant does dispute Respondent's reliance on *In re Deon D.* (1989) 208 Cal.App.3d 953, for the proposition that those same principles govern in the present case, where Dominguez simply refused to answer many questions, including almost all questions tendered by counsel for Steven Homick. (RB 149-151.)

While *Deon D.* has some superficial similarities to the present case, it also has a number of very important differences. The crime at issue in *Deon D.* was rape in concert. The circumstances were that Deon D. and three of his friends accosted Deon D.'s former girlfriend, forced her into an abandoned house, and raped her. The victim knew Deon D. well and easily identified him and his friends.[9] Her testimony was supported by physical evidence that she had been raped, as well as blood analysis evidence consistent with her description of the individuals who had assaulted her. In sum, her well-corroborated testimony was more than sufficient, even without any additional support from any of the friends.

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9 The factual summary in *Deon D.* never expressly states that the victim testified, but many of the details set forth in the opinion could have only come from her. Thus, it is apparent that she did testify and fully describe the events at issue.

In contrast, in the present case, no percipient witness testified regarding the actual shootings. Dominguez was the only witness who even came close to being a percipient witness. Thus, the prior statement at issue in *Deon D.* was far less important than the prior statements of Dominguez were in the present case.

In *Deon D.*, one of the friends who had aided in the gang rape of the victim had given a full and detailed signed statement to a police detective. At the trial court hearing, that friend was called by the prosecutor and refused to answer most of the questions that were asked. However, he did testify that he was present during the rape, that he was involved in the rape, and that he remembered the entire incident. He also admitted that he had given a statement to the police detective, that the detective wrote it down and went over it with him, and he recognized his own signature on the written statement. (*Deon D., supra,* 208 Cal. App.3d at p. 958.) The trial court concluded that the refusals to answer were inconsistent with the prior statements, and allowed the police detective to fully describe the detailed prior statements.

In upholding the trial court's reliance on the Evidence Code section 1235 hearsay exception for prior inconsistent statements, the Court of Appeal stressed the fact that the witness at issue had answered some questions pertaining to the crime, **specifically admitting to his involvement in the rape and also specifically admitting that he remembered the entire incident**. (*Id.,* at pp. 961-962.) In the present case, there were no comparable

admissions by Dominguez. Thus, the most important factor relied on by the Court of Appeal in *Deon D.* is entirely absent in the present case.

Also, the friend in *Deon D.* testified that he had told the prosecutor that he did not want to testify because he did not want to be a "snitch." (*Id.*, at p961-962.) When a witness testifies that he does not want to be a "snitch," there is an unmistakable inference that any testimony he could give would be harmful to the person being tried, impliedly admitting the truth of the prior statements that incriminated that person. In contrast, in the present case, the strongest inference was that Dominguez refused to testify either: (1) because he was concerned, albeit without apparent justification, about the possibility that any such testimony could be used against him in a pending federal prosecution for contempt, based on refusing to testify about these events at a separate federal trial; or (2) because he was upset at the authorities for, in Dominguez' view, failing to honor some of the terms of the plea agreement pursuant to which he had agreed to testify.[10] Under these circumstances, there is no meaningful inference that Dominguez' prior statements were true, or were false, or that Dominguez did or did not recall the details regarding the crime that had occurred seven years prior to

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10 Thus, for the purpose of this aspect of the argument, it does not matter whether the authorities actually had or had not honored the terms of the plea bargain; all that matters is that Dominguez **believed** the terms had not been honored.

his testimony.[11] Thus, another factor that was stressed in the *Deon D.* analysis is entirely absent in the present case.

The Court of Appeal in *Deon D.* did not conclude that refusals to answer are **always** the equivalent of an untruthful assertion of a failure to recollect. Instead, it merely concluded that "under the circumstances of this case" the refusals to answer were "materially inconsistent" with the prior statements to the detective. (*Id.*, at p. 962.) Since the circumstances of the present case are completely different from the circumstances in *Deon D.*, in regard to every factor relied on by that court, that case should not control the present claim. Indeed, the differences between the present case and *Deon D.* point strongly toward the conclusion that Evidence Code section 1235 should **not** apply at all in the present case.

There is yet another critical difference between *Deon D.* and the present case. In *Deon D.*, after the witness testified on direct examination in the manner described above, the defense attorney chose not to even attempt

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11 In other words, the issue for the jury to resolve was whether the prior statements Dominguez had made to the authorities were true, or whether they were self-serving lies told in order to gain an unusually favorable plea bargain. Nothing in his uncooperative performance on the witness stand justified an inference that his prior statements were true, whereas in *Deon D.* the witness's performance on the stand did support a direct inference that the prior statements were true.

Indeed, as counsel for one of the co-appellants put it, "... here we have a witness God only knows what his attitude is. He has his own agenda." (RT 87:9168.)

to cross-examine the witness. (*Deon D., supra,* 208 Cal.App.3d at pp. 963-964.) Thus, the Court of Appeal did not have to determine the impact of a refusal to testify during cross-examination on an accused's right to confront and cross-examine that witness. With that issue off the table, it was much easier to conclude that the admission of the prior inconsistent statements, under the particular circumstances of that case, satisfied the requirements of section 1235, while not having to analyze the impact of related federal constitutional issues. In contrast, in the present case, Dominguez became even less cooperative when counsel for Steven Homick attempted to cross-examine him, quickly reaching a point where he refused to answer any questions. In sum, even if it were possible to conclude here that section 1235 applied during the direct examination, there are still separate federal constitutional issues, not considered in the *Deon D.* analysis, but necessarily a part of the present analysis. (See Section D, below, at pp. 36-43)

In his opening brief, appellant relied on *People* v. *Rojas* (1975) 15 Cal.3d 540, to support the claim that a refusal to testify is not the equivalent of an untruthful failure to recall, for the purpose of admissibility of a prior statement pursuant to section 1235. (AOB 211-212.) Respondent seeks to distinguish *Rojas* because the witness there refused to answer any questions, while Dominguez answered some questions on direct examination, albeit in a manner that typically provided no insight into whether the prior statements were truthful or were self-serving lies. (RB 151-152.) It is true

that the present case is not identical to *Rojas*, but it is certainly closer to *Rojas* than it is to *Deon D.*

Furthermore, even if *Deon D.* supported a finding that **some** of Dominguez' responses on the witness stand were inconsistent with **some** of his prior statements, it cannot be said that Dominguez' selective responses on the stand (usually unresponsively avoiding the question completely) were inconsistent with **all** of his prior statements. Thus, at most, *Deon D.* could only support the admission of a small portion of Dominguez' prior statements, while *Rojas* should control in regard to the great bulk of Dominguez' prior statements, which were not inconsistent with any of the responses that Dominguez did give, and which were improperly admitted after he refused to respond at all.

C. There Is No Support Whatsoever for the Trial Court's Unprecedented Decision to Consider Every Refusal to Answer As Being the Same As a Negative Response, and Permitting the Prosecutor to Then Read to the Jury Any Prior Statements Inconsistent With That Wholly Fictitious Negative Response

1. Issues Regarding the Trial Court's Conclusion That Silence Was Equivalent to "No," and That Such Silence Permitted the Introduction of Any Prior Statements That Were Inconsistent with a "No" Response Were Adequately Preserved for Appeal

In the opening brief, it was shown that after Michael Dominguez refused to answer any more questions during direct examination, the trial court invented an unprecedented and totally illogical procedure in which every refusal to answer would be considered to be an answer of "No." Following such a fictitious "answer," the prosecutor was free to "impeach" it with any prior statement that was inconsistent with the imaginary "No" response. (See AOB 213-221.)

Respondent begins by contending that no objection was made below on the precise ground now urged on appeal. (RB 153.) Once again, as demonstrated in the preceding section of this brief, it was clear that counsel for Steven Homick was opposed to the trial court's innovative solutions that

were unquestionably geared toward allowing the prosecutor to get in every bit of evidence he wanted, despite the out-of-control antics of the witness. It was clear the trial court understood the applicable principles and was determined to proceed no matter what Dominguez might do or say. It was clear any more detailed objections would have been futile.

Indeed, during the discussion of the proposed instruction, counsel for one of the co-defendants expressly argued that the jury should be told that Dominguez' refusals to answer should not be considered as any kind of testimony against the defendants. (RT 87:9168.) Counsel for Steven Homick also argued that the instruction was inadequate, and that the appropriate remedy was a mistrial. (RT 87:9169.) In any event, even if those objections were not clear enough to preserve evidentiary objections, the fact remains that the real vice occurred when the court chose to **instruct** the jury that a silent response was the same as a negative response.[12] Erroneous instructions that impact the substantial rights of a defendant may be re-

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12 See also RT 87:9236, where counsel for Steven Homick noted the difficulty with the instruction the court had fashioned. Counsel argued that CALJIC 2.13 was intended to deal with a witness who testified to a lack of recall, leaving it to the jurors to decide whether they believed the claimed lack of recall. But in the present case, the witness was not saying anything about the prior statements. Once again, counsel's concerns fell on deaf ears, as the court continued to rely on the fictional determination that silence meant "No." Also once again, this response by the court demonstrates that it would have been futile to tender this particular concern earlier.

viewed on appeal even when there has been no objection at all. (Penal Code sections 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; see *People v. Benavides* (2005) 35 Cal.4th 69, 100.)

Above all, Steven Homick's federal constitutional rights to confront and cross-examine this critical prosecution witness could not be satisfied when the prosecution was permitted to read substantial portions of prior statements that were supposedly inconsistent with "testimony" that never occurred. (See RT 87:9166, where counsel for Steven Homick expressly stated, in response to the court's proposed instruction that would treat every failure to answer as a negative answer, that he believed his client's Sixth Amendment right to confrontation was being denied.) In sum, Respondent cannot be permitted to avoid the consequences of the outrageous, illogical, and unsupported procedure utilized by the trial court to allow the prosecutor to squeeze out every bit of information he believed was required in order to prove his case against Steven Homick.

2. Under the Circumstances of the Present Case, Dominguez' Silence Could Not Logically Be Considered to Be the Equivalent of Asserting an Insincere Failure to Recall

Turning to the merits, Respondent acknowledges that the jurors were told that any refusal to answer was tantamount to answering "No" to the attorney's question, and that any such failure to answer was thus a "denial,"

entitling the attorney to "impeach" the witness with any evidence contrary to such denial. (RB 153.) From this, Respondent concludes that "the jury was informed that Dominguez's failure to respond should be treated as a denial of any incriminating answers he might be expected to give." (RB 153.)

Respondent follows this conclusion with the simple statement, "This was proper." (RB 153.) This is nonsense. Respondent offers no citation to authority. Having cited no authority, Respondent would be expected to follow with at least some explanation of the logic that led to the conclusion, but no such explanation is provided. It is simple common sense that silence does not necessarily mean "No," and is therefore not necessarily a denial of any prior statement. Respondent offers no reason whatsoever why simple common sense should be overruled in this situation.

It was explained in the opening brief precisely why it was **not** proper to instruct the jury that silence meant, "no." (See AOB 214-215.) Respondent simply ignores that explanation, while offering no counter explanation beyond "This was proper." That, in and of itself, should be sufficient to demonstrate that Respondent is unable to identify any flaw in the logic of the arguments made in the opening brief.

But, the flaw in Respondent's position runs deeper than that. As understood by Respondent, the court's instruction told the jury that a witness's refusal to answer should be treated as a denial of "any incriminating answers that he might be expected to give." (RB 153.) In effect, Respon-

dent claims that by saying that silence meant "no," the court told the jury that silence meant that the true answer would be incriminating, that silence was a denial of the incriminating answer that should have been given, and that Dominguez could then be impeached by the true prior statement that was inconsistent with the implied denial by silence.

This is classic bootstrapping. Respondent offers no basis whatsoever for presuming that Dominguez' prior statements were true, or that if Dominguez had responded to the prosecutor's questions, his responses would have been incriminating. All evidence indicates that Dominguez was constantly looking out for his own interests and that he would say anything, true or false, that would further what he perceived to be in his own interest. Thus, the only reasonable conclusion is that Dominguez would have told the truth (whatever it might have been) in his earlier statements, and/or in the trial testimony he would have given if he had chosen to respond to the questions, only if doing so served his interests. Similarly, he would have blatantly lied in his past statements, and/or in the trial testimony he chose not to give, if he believed that lies would better serve his own interests.

For example, as discussed in detail in Argument III in the opening brief and later in this brief, one requirement in the very favorable plea agreement the prosecution entered into with Dominguez was that he was not the shooter in the present case or in the Las Vegas Tipton case. If it was true that Dominguez was not the shooter in either case, then he would have told the truth when he claimed he was not the shooter, since that would

have clearly served his interest in obtaining the benefit of the very favorable plea agreement. But if Dominguez was, in fact, the shooter in either or both cases, then it would obviously **not** have been in his interest to tell the truth, and all evidence points toward the conclusion that he would have lied about who was the shooter, in order to retain the benefits of the favorable plea agreement.

Thus, there is no basis for an unexplained conclusion that Dominguez' original statements were true. Similarly, there is no basis for an unexplained conclusion that if Dominguez had responded truthfully to questions at the trial, his answers would have incriminated Steven Homick. If Dominguez was the shooter, as was strongly indicated by every bit of evidence, except for Dominguez' self-serving claims to the contrary, then true answers at the trial would have exculpated Steven Homick, at least partially.

Respondent turns the search for truth upside down, by assuming without basis that the truth could only support Respondent's position. Respondent ignores the record and makes up facts in asserting that the jury was properly told that silence was equivalent to a denial of Dominguez' expected incriminating answers. Instead, there was no basis for any assumption that any answers from Dominguez would have been incriminating, and Respondent does not explain how it could have been proper to so instruct the jury. Dominguez may well have been maintaining silence because he believed that would lead to a prosecutorial retraction of the plea

agreement that no longer satisfied him, allowing him to withdraw his plea.[13] That desire could well have motivated his silence regardless of whether his original statements were the entire truth, or a pack of lies, or somewhere in between. There is simply no basis whatsoever for reading any content at all into Dominguez' silence.

Respondent faults the opening brief for failing to identify any specific instance where any attorney manipulated the trial court's instructions in order to set up an unfair opportunity for impeachment with prior statements. (RB 153-154.) That is technically true, but the simple and undeniable fact that the trial court gave an instruction with no support in the law or in logic should have been enough to demonstrate that the court had lost control of the trial, which had been rendered fundamentally unfair. Indeed, making up unsupported and illogical rules that give meaningful content to ambiguous silence by a critical witness is so contrary to the rules of evidence that such an error should be deemed structural, requiring reversal without regard to prejudice. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *Neder v. United States* (1999) 527 U.S. 1.)

But if examples of manipulation are necessary, they are plentiful. Immediately after the trial court instructed the jury that silence means, "no," the very first question the prosecutor asked was, "After Mr. Steve

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13 See RT 89:9466, where Dominguez stated that his whole purpose on the witness stand was to get a new trial in his own case.

Homick flew back to Los Angeles on September 25th, 1985, what did you do next?" (RT 87:9185.) The prosecutor was quickly forced to admit that such a question could not be answered with a simple "yes" or "no." (RT 87:9185.) The prosecutor rephrased the question, asking instead, "Do you remember what you did next after Steve Homick flew back from Los Angeles?" (RT 87:9186.) Phrased this way, Dominguez' silent response could be, and was, treated as a "no," allowing the prosecutor to "impeach" Dominguez with his prior statement in which he explained that the next thing they did was too test some radios (walkie-talkies) to see if they would work. (RT 87:9186.) But we simply do not know whether Dominguez did or did not remember what he did next, seven years earlier. The prosecutor was able to phrase his question in a manner that assured the admission of Dominguez' prior statement regardless of whether Dominguez actually recalled what he did next, and regardless of whether a failure to recall, if Dominguez had responded that he did not recall, would have been sincere.

Next, the prosecutor impeached Dominguez in advance, reading three questions and answers from Dominguez' prior statements, and simply prefacing them with the words, "... isn't it true you gave the following answers to these questions in May of 1986?" (RT 87:9187.) Thus, it only took the prosecutor a moment to find a way to read into the record **any** prior statement Dominguez had ever made, simply by starting with "isn't it true..." Since the trial court had deemed that silence would mean "no" and

"no" would be a denial of having made the prior statement, that imaginary "denial" would always provide the foundation for the prior statement.

That alone demonstrates that the trial court's "solution" was completely contrary to this Court's analysis in *People* v. *Rojas, supra,* 15 Cal.3d 540, discussed in detail at AOB 211-212. In *Rojas*, this Court made it clear that the prior inconsistent statement hearsay exception set forth in Evidence Code section 1235 applied only when the prior statements are inconsistent with testimony actually given at the hearing at which the prior statements were offered. This analysis was a rejection of the trial court conclusion that silence by a witness constituted a denial of former testimony. It is true that in *Rojas* there was a complete refusal to testify, while in the present case Dominguez did answer some questions before deciding, while still on direct examination by the prosecutor, to stop answering questions. Nonetheless, this is not a situation where Dominguez' refusals pertained only to a few questions. Instead, once he started refusing to answer questions, he continued to do so for several days of examination by the prosecutor and by counsel for co-defendants whose interests were contrary to Steven Homick's interests. Thus, Respondent offers no persuasive reason why this case should be controlled by made-up illogical rules, rather than by *Rojas*.

Next, Respondent completely sidesteps the claim that the trial court usurped the jury's fact-finding responsibility by squarely telling the jury that the court had already determined that Dominguez' silence really meant,

"No." (RB 154; see AOB 220.) If, for the sake of argument, we accept the Alice-in-Wonderland world where silence *might* reasonably be interpreted as meaning "No," rather than "Yes," or "I don't recall," the proper procedure would be for the court to make a **preliminary** determination that silence meant "No." Then the prior statement would be read and it would be **up to the jury** to make the **ultimate** determination whether silence really did mean "No." If the jury determined that it did, then the prior statements could be considered as impeachment of that "No" answer. But if the jury disagreed with the court and concluded that Dominguez' silence did not mean "no," in a particular context, then the jury would have to set aside any prior statement that had been offered as inconsistent with the present silence.

In contrast, here the trial court made a preliminary **and** ultimate, though unsupported, factual determination that ambiguous silence necessarily meant "No." The jury was given no choice in the matter. They were told that silence meant "No" and that the prior statements were inconsistent and were admitted for the truth of the matter. (RT 87:9183-9184; 87:9240.) Respondent ignores this problem, concluding simply that the jury was still left with the responsibility for determining whether Dominguez' prior statements were true. (RB 154.)

Again there are several flaws in Respondent's position. Respondent cites only *People v. Hovarter* (2008) 44 Cal.4th 983, 1008, for the proposition that it was the trial court's responsibility to determine whether Domin-

guez was being deliberately evasive and, if so, whether that justified a finding of implied inconsistency. But in *Hovarter*, the victim of a sexual assault failed to recall one specific detail and a police detective was permitted to testify to a prior statement the witness had made regarding that detail. On appeal, the defense raised a hearsay claim, but this Court noted that no hearsay objection had been raised below. (*Id.,* at pp. 1007-1008.)

This Court next stated that even if the hearsay objection had been properly preserved, a finding could have been made that the witness was being deliberately evasive. This Court conceded that under the circumstances, there could have been other explanations for the witness's failure to recall, "[b]ut because defendant did not make a timely hearsay objection, the court was never obliged to consider this point." (*Id.,* at p. 1008.) Thus, *Hovarter* says **nothing** regarding what is the role of the judge and what is the role of the jury; instead, *Hovarter* simply concludes that when the trial court never had to consider the matter, and where the record could have supported a finding of evasiveness, no error occurred. In contrast, in the present case, the trial court clearly considered the matter and made an express finding of deliberate evasiveness. That finding was unsupported by the record. The trial court nonetheless made the finding and gave the jury no choice but to accept that finding. That was error that was never addressed at all in *Hovarter*. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones* (1995) 11

Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

The fact that the present jury was at least left with the task of determining whether Dominguez' prior statements were true or false was no solution to the erroneous ruling that precluded the jury from determining whether Dominguez' on-stand antics constituted an implied denial of his prior statements. If the jury had been allowed to make that determination, then the jury might very reasonably have concluded that Dominguez' behavior was not impliedly inconsistent with his prior statements, but was instead based on his own perceived self-interest without regard to whether his prior statements were true or false. Had the jury made that reasonable determination, there would have been no basis for giving the prior statements any further consideration at all.

Instead, however, the court usurped that critical fact-finding, instructed the jury that there had been an implied inconsistency, and admitted the prior statements for the truth of the matter. Even assuming the confused jurors realized it was still up to them to decide whether Dominguez' prior statements were true or false, that was no substitute for the finding they should have been permitted to make. Worse yet, there was simply no fair basis in the record for the jurors to make any determination whether the prior statements were true or false. It is no wonder that at least one juror was so confused that she composed a note to the court asking how the jury was supposed to consider the information read from Dominguez' prior

statements. (RT 87:9235; see also AOB 220 and RB 153, fn. 79.) In these circumstances, it is likely the jurors ultimately concluded they had no choice but to accept the prior statements as true. But even if they perceived that they did have a choice, they were still left with no proper basis for making that choice.

In *People v. Wilson* (2008) 43 Cal.4th 1, 20-21, the appellant argued that former CALJIC 2.13 unfairly told the jury it could consider prior statements for the truth, without also telling the jury that the prior statements could be considered for their falsity. This Court saw no problem, explaining:

> CALJIC No. 2.13... simply informed the jury that when a witness had spoken inconsistently in the past, it may choose to disbelieve the witness's trial testimony and accept the prior statement, while if the witness had spoken consistently in the past, the jury may consider this as evidence that the witness had spoken truthfully all along. (*People v. Wilson, supra,* 43 Cal.4th at pp. 20-21.)

That solution identified in *Wilson* was absent in the present case, because the trial court instructed the jury that it had already found that the prior statements were inconsistent with Dominguez' silence at the trial. (RT 87:9183.) Under the rationale set forth in *Wilson*, the jury was left with no basis for determining that the present silence was "true," making the prior statements false. Instead, the jury could only reach a conclusion that the present silence was "false," as the trial court had found, and that the prior

statements were inconsistent with that "false" testimony, and were therefore the truth.[14]

D. Cross-Examination of Dominguez Was Woefully Inadequate As a Result of His Refusal to Respond to Most of the Questions Posed By Counsel for Steve Homick

In the opening brief, it was shown that controlling case law is clear: once Michael Dominguez began refusing to respond to the questions asked by counsel for Steven Homick, there were only two potentially adequate remedies. Under all of the circumstances, including the long series of improprieties in the direct examination of Dominguez, already discussed, the most appropriate remedy was to grant the defense motion for a mistrial. In the alternative, if there was any justification at all for refusing to grant a mistrial, then at the very least all of the testimony of Michael Dominguez should have been stricken. (AOB 221-224.)

Respondent disagrees, making a valiant, but flawed, effort to defend the fairness of the proceedings below. Respondent concedes that Dominguez stood mute during the majority of the examination by counsel for Steven Homick. (RB 154-155.) Respondent plucks quotations out of their very

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14 It should be noted that if the present argument has become too convoluted to comprehend (*i.e.*, was silence "true" or "false"), that is a direct result of the trial court rulings that were so lacking in logic.

limited contexts and seeks the establishment of a broad rule that the federal constitutional guaranty of confrontation and cross-examination does not mean what it says, and does not really mean much of anything. Instead, Respondent appears to believe that if there is anything at all to point to that would impeach the witness in any way, then the multiple federal constitutional guaranties at issue here are all somehow satisfied. (RB 155-156.) Engaging once again in classic bootstrapping, Respondent appears to believe that if there is any way to call the end result of a trial fair, then all federal constitutional guaranties are satisfied. But worse yet, Respondent seems to believe that if the trial ended with the verdict that the People sought below, then that is all that is needed to establish that the trial was a fair one. While this is expedient, it makes a mockery of the important federal constitutional rights at issue.

Respondent relies heavily on *People* v. *Perez* (2000) 82 Cal.App.4th 760, a case which Respondent describes as "nearly identical" to the present case. (RB 156-158.) In fact, *Perez* was nothing like the present case. Instead, it was a classic example of the rule already discussed above, which allows a non-credible claim of a failure to recall to be considered a denial of prior statements, allowing the admission of such prior statements under the hearsay exception for prior inconsistent statements. The simplest answer is that it has already been shown above that, at least under the present circumstances, Dominguez' refusals to respond at all to many questions

cannot fairly be considered the equivalent of insincere assertions of a failure to recall.

In *Perez*, two defendants were convicted of first degree murder that was committed by means of a gang-related drive by shooting. A friend of the victim, who had been walking with him when the shooting occurred, got a good look at both the driver and the passenger in the vehicle from which the fatal shot had been fired. In statements to the police, that friend positively identified mug shots of the driver and the passenger, as well as photos of the car that was used and that belonged to the person identified as the driver. Soon after the shooting, the owner of the car sought to dispose of it, and the murder weapon was found in the car owner's home. (*Perez, supra,* 82 Cal.App.4th at p. 763.)

At the trial, the victim's friend was called as a prosecution witness. She "repeatedly answered 'I don't remember' or 'I don't recall' to virtually all the questions asked her about what she saw the night of the murder and what she told the police." (*Id.*) A police officer then testified that the victim's friend had stated she was afraid she would be killed if she testified, and that she would lie if she was forced to testify. With this foundation, her prior statements were read to the jury, describing the events surrounding the shooting and identifying the driver and the passenger. (*Id.*)

Under these circumstances, both the trial court and the jury could easily conclude that the victim's friend was lying when she testified at trial that she could not recall what had occurred or what she had said to the po-

lice. Similarly, since the friend's fear only made sense if she believed her prior statements and identifications had been accurate, there was a fair basis for the jurors to conclude the friend was lying when she professed an inability to recall, and that she was telling the truth when she made her prior statements to the police.

In stark contrast in the present case, there were obvious reasons to explain Dominguez' antics on the witness stand that had nothing whatsoever to do with the truth or falsity of his prior statements to the authorities. There was nothing about Dominguez' silence on the witness stand that would support a reasonable conclusion that his earlier statements must have been true. There was no basis in logic or in the law to conclude that Dominguez' silence on the witness stand was "true" or "false" or that it was consistent or inconsistent with his prior statements. The only reasonable conclusion to be drawn was that Dominguez could never be trusted, but that is not a conclusion that can fairly support an inference that the man who should never be trusted should somehow suddenly be deemed trustworthy to the extent that his prior statements supplied the prosecution with the evidence that it desired.

The main holding in *Perez* was set forth at 82 Cal.App.4th at p. 764, where the Court of Appeal concluded that the rule established in *People v. Green* (1971) 3 Cal.3d 981, 989 – that "deliberately evasive forgetfulness is an implied denial of prior statements" (*Perez, supra,* 82 Cal.App.4th at p. 764) – applies regardless of whether the forgetfulness is selective or total.

The Court of Appeal quoted from *People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225: " 'the true rule under *Green* is that a witness' prior statements are admissible so long as there is a reasonable basis in the record for concluding that the witness' "I don't remember" responses are evasive and untruthful.' " (*Perez, supra,* 82 Cal.App.4th at p. 764)

Thus, neither *Green* nor *Perez* apply at all unless there is a reasonable basis in the record to conclude that Dominguez' refusals to answer were evasive and untruthful. Absent such a basis in the record, there is no support for any inference that Dominguez' prior statements were truthful. But it has already been explained above that the present record supports no such conclusion. All that can be said here is that Dominguez chose to be uncooperative for personal reasons that had nothing whatsoever to do with whether his prior statements were true or false. Notably, Respondent has relied only on general propositions taken out of context, but has completely failed to identify any specific aspect of the present record that indicates that the reasons for Dominguez' behavior on the stand could support a reasonable inference that his prior statements were truthful, rather than a pack of lies designed to satisfy the prosecution and gain a favorable plea agreement.

The discussion in *Perez* regarding the federal constitutional right to confront and cross-examine witnesses (*Perez, supra,* 82 Cal.App.4th at pp. 763-768) was summarized concisely at the end of that discussion, where the Court of Appeal discussed the testimony of the friend of the victim who

professed an inability to recall, and the court explained that "her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements." (*Id*, at p. 766.) Once again, as explained above, under the totality of the circumstances in *Perez,* the jury had a reasonable basis to conclude that the witness claimed she could not recall because her prior statements were true and she feared she would become the next victim of the gang responsible for the killing she witnessed. In sharp contrast, in the present case, there is no reasonable basis to conclude that Dominguez was silent because his prior statements were true. There is no reasonable basis here for the jury to make any fair determination whether any credibility should be given to Dominguez' prior statements. That crucial element is simply absent from the present case, and Respondent offers no contrary argument. Instead, Respondent seeks to gloss over this glaring omission by relying on general rules that have been taken out of context and have no application in the actual circumstances of the present case.

Respondent's next point is even more bizarre. Respondent sets forth an unusually long list of reasons why Dominguez was a thoroughly untrustworthy individual, all to make the point that the defense here had a remarkable amount of impeaching evidence. (RB 158-159.) In Respondent's distorted view, this somehow compensates for the inability to cross-examine a witness who simply refuses to answer most of the questions tendered by counsel for Steven Homick. Apparently Respondent favors a rule

that the less trustworthy a witness is, the less important it becomes to protect the defendant's federal constitutional rights to confront and cross-examine, or to a fundamentally fair trial by jury or to reliable fact-finding supporting a sentence of death. This, of course, stands the search for truth on its head: fundamental rights become less important when the prosecution chooses to rely on witnesses with little or no credibility.

Put differently, Respondent has set forth a long list of reasons why Dominguez' testimony should have been received with considerable skepticism even if he had been responsive on the witness stand and had reiterated everything he had said in his prior statements. The fact that Dominguez was unresponsive on the stand did nothing to increase the credibility of his prior statements; instead it only added to the long list of reasons why he should never be trusted by anybody. When there are so many reasons to distrust an individual, the proper response is **not** to conclude that constitutional protections afforded to criminal defendants are somehow less important. Instead, the proper response is to conclude that such a witness is wholly unreliable, whether we are viewing his testimony on the stand or his prior statements. It is simply unconscionable for the government to seek to execute a man based on the present or prior statements of such an unreliable witness. Fairness is not satisfied by dispensing with constitutional protections for the sake of expediency. Instead, fairness required the striking of all of Dominguez' testimony when the government was unable to make him available for actual cross-examination.

Next, Respondent again seeks to distinguish *People v. Rios, supra,* 163 Cal.App.3d 852, because that case dealt with witnesses who refused to answer any questions after giving their name and age. (RB 159.) But Respondent's own description of the present case demonstrates the bankruptcy of Respondent's attempted distinction: "In contrast, here, Dominguez provided extensive testimony on direct examination and on cross-examination by counsel for Robert Homick and also answered some questions from appellant's counsel." (RB 159.) But Robert Homick's interests were very different from Steven Homick's differences. Respondent fails to explain how examination by opposing counsel – either the prosecutor or the attorney representing a co-defendant - can somehow obviate the need for cross-examination by an attorney whose responsible for protecting the interests of Steven Homick. That latter examination is what the constitution requires and what was absent here.

E. Repeated References to a Polygraph Examination Were Prejudicial Under the Circumstances of This Trial

In the opening brief, it was shown that prosecution witness Dominguez made approximately one hundred separate references to polygraph examinations he asserted he had taken. It was also shown that the trial court knew in advance that Dominguez would do this, and openly conceded it would be impossible to control him. Further, it was shown that this Court has recognized that polygraph examinations are unreliable, and that even

mere references to polygraph examinations can be very prejudicial. (AOB 228-233.) Despite all of this, the trial court allowed the out-of-control witness to continue, over multiple defense objections.

Respondent does not even attempt to defend the trial court's decision to proceed with this uncontrollable witness. Instead, Respondent simply asserts that it must be presumed that the admonition to the jury to disregard these numerous references to polygraph examinations was effective and rendered any error harmless. (RB 161-164.)

In light of the totality of the circumstances, Respondent's reliance on admonitions to erase all harm is untenable. This was not a single, isolated and unexpected reference to inadmissible evidence; instead, this went on and on for a considerable period of time, repeating the references over and over again, all after the trial court had been fully warned and had conceded the witness was not controllable. Moreover, this must be considered together with the previous sections of this argument, pertaining to Dominguez' repeated refusals to answer questions. Viewed as a whole, the various problems pertaining to witness Dominguez, who was on the witness stand for eight days, cumulatively demonstrate that the trial court chose to allow a virtual circus rather than deprive the prosecution of its opportunity to present the prior statements of a witness who had no credibility whatsoever, either at the time the prior statements were made or at the time he took the witness stand.

Most importantly, as shown in the preceding sections of this argument, the present jury received a considerable amount of information from Dominguez' prior statements. At the same time, Dominguez' performance on the witness stand demonstrated to the jury that he was little more than a clown, but left the jury with no meaningful bases for assessing the credibility of the prior statements. In such circumstances, it would be expected that jurors would be eager to embrace anything at all that was perceived as providing a basis for determining whether to believe the prior statements. The jurors knew on the one hand that there were many reasons to conclude that no reasonable person should ever believe anything that came from the mouth of Michael Dominguez. At the same time, the jurors knew that the prosecution obviously believed every word of Dominguez' prior statements. This dichotomy again left the jurors in a dilemma, with strong forces pulling in opposite directions. Again, it would be expected that the jurors would look for anything at all to use as a basis to choose whether to credit Dominguez' prior statements.

In such circumstances, once jurors learned that Dominguez had taken numerous polygraph examinations and that the prosecution still believed his prior statements were true, jurors would be hard-pressed to ignore this information even after the court's admonitions. Also, while the admonitions said that polygraph examinations were considered unreliable, the simple truth is that the reliability of polygraph examinations is a matter of considerable controversy. References to polygraph examinations as a

valuable tool are not uncommon in popular entertainment, such as movies and television shows. Many businesses use polygraph examinations as a tool to resolve a variety of personnel issues. In sum, out of twelve jurors, it is very probable that at least several would have personal opinions in favor of the reliability of polygraph examinations, and would have considerable difficulty disregarding the references to the polygraph exams just because the judge gave an admonition.

Other factors that should be considered is that Dominguez was a very important prosecution witness, and the stakes are very high, since the trial resulted in a death sentence. The judge was warned in advance that Dominguez would do exactly what he proceeded to do, and conceded that Dominguez could not be controlled. The proper course would have been to disallow his testimony. The judge chose instead to go out on a limb. This Court should cut off that limb. Under the totality of the circumstances, if there is any doubt about whether Steven Homick was prejudiced, that doubt should be resolved in favor of the defense, which made timely objections that sought to prevent this problem from occurring in the presence of the jury in the first place.

F. Even if Impeachment of Dominguez With His Prior Statements Was Permissible, It Was Nonetheless Prejudicial to Allow the Prosecutor to Both Read Extensively from the Prior Statements and Also Play an Entire Ninety-Five Minute Videotape, Repeating the Same Statements, and Then Replay the Entire Videotape Again During Argument

In the opening brief it was shown that it was prejudicial to allow the prosecution to give undue emphasis to the prior statements of Dominguez, by reading extensively from them while ostensibly impeaching Dominguez' silence and other misbehavior on the witness stand, then repeating them by playing an entire ninety-five minute videotape of the same statements, then repeating them yet again when the entire videotape was replayed during the prosecutor's argument. While the defense failed to object to the playing of the videotape below, this undue emphasis should still be considered as an addition to the errors that occurred in allowing Dominguez to testify at all, and allowing "impeachment" of his silence. (AOB 233-237.)

Respondent argues that it was necessary to play the **entire** videotape in order to rebut Dominguez' claim that he had been coerced into making the statement, and to impeach Dominguez' denial of going to Los Angeles at all – a denial that Respondent claims constituted a denial of nearly everything on the tape. (RB 164-165.) There are multiple flaws in Respondent's reasoning.

First, Respondent's reliance on Dominguez' testimony that he had been coerced into making the earlier statements is a red herring. Respondent has previously argued that the defense was not prejudiced by its inability to cross-examine a silent witness because "there was a wealth of information that got before the jury to impeach Dominguez." (RB 158.) If Respondent's long list of impeaching information (RB 158-159) was enough to negate the harm caused by the inability to exercise the federal constitutional rights to confront and cross-examine the witness, then it was also enough to negate Dominguez' claim he had been coerced into making the previous statements. Similarly, Respondent argues that Dominguez' ninety-five or more references to an inadmissible polygraph examination were harmless because they did nothing more than inform the jurors that Dominguez was a difficult witness. (RB 163.) If there is any validity to that claim, then by the same token, Dominguez' fewer claims that he had been coerced into making the earlier statements can be dismissed in the same manner – this did nothing more than inform the jury that Dominguez was a difficult witness.[15]

In any event, Respondent ignores an obvious and crucial point in arguing that the videotape was necessary because the prosecutor's reading of

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15 These points are made with tongue in cheek – these are not really answers to Respondent's claims, just as they were not legitimate answers when offered by Respondent.

Dominguez' prior statements could not overcome the coercion claim as well as the actual videotape. Assuming arguendo that might be true, than the solution was to simply play the videotape to impeach Dominguez, without first reading extensively from the same statements. Respondent has offered no reason why the prosecutor needed to read from the prior statement in addition to playing the videotape.

Also, any legitimate need to dispel the coercion claim could have been satisfied by playing portions of the videotape. Respondent has not explained why it was necessary to play the entire ninety-five minute videotape.

Similarly, Respondent greatly exaggerates in claiming that Dominguez' denial of having traveled to Los Angeles effectively denied everything on the videotape. Again, any need for impeachment would have been satisfied by playing limited portions of the videotape, in which Dominguez specifically described his travels to Los Angeles. It was superfluous to also play the much more extensive portions in which he described various events that occurred while he was in Los Angeles.

In a footnote, Respondent brushes aside any undue emphasis that occurred when the entire ninety-five minute videotape was played all over again during the prosecutor's argument. Respondent simply contends that if that undue emphasis was improper, then no counsel could ever refer to any evidence during closing argument. (RB 165, fn. 82.) But there is a great difference between briefly summarizing key points shown by the evidence

and replaying an entire ninety-five minute videotape during argument, after it had already been played in its entirety during the trial. To turn Respondent's argument on its head, Respondent's rationale would mean that it would be proper for a prosecutor, during argument, to reread, word-for-word, all of the direct testimony given by every prosecution witness during the trial. Indeed, it would mean counsel for either side (or all sides) could read the entire testimony of every witness. Thus, while it may have been appropriate to replay limited excerpts of the videotape during argument, to highlight certain key points, that does not mean it was proper to simply replay the entire tape, unduly emphasizing what had already been emphasized during trial.

G. Individually or Cumulatively, the Various Errors That Occurred in Admitting Dominguez' Prior Statements Were Prejudicial

Respondent argues that no matter how many errors occurred in regard to the admission of Dominguez' prior statements, they were all harmless, even under the exacting standard of *Chapman v. California* (1967) 386 U.S. 18, 24, simply because another witness of dubious credibility also gave testimony that incriminated Steven Homick. (RB 166-167.)

It was shown in the opening brief that there were as many reasons to distrust anything Stewart Woodman ever said, as there were to distrust Michael Dominguez. (AOB 536.) Most significantly, it was shown that the

very same jury that convicted Steven Homick and chose a sentence of death must have disbelieved substantial and crucial portions of Stewart Woodman's testimony, because that jury was not able to convict Stewart's brother, Neil Woodman, of any crime. Respondent dismisses this point as rank speculation, but fails to explain why it should be considered speculation at all; Respondent offers no explanation whatsoever regarding how a jury that found Stewart Woodman to be credible could have failed to convict Neil Woodman.

Simply put, there is no way to explain the failure to convict Neil Woodman, unless the jurors had considerable doubts about the credibility of Stewart Woodman. If the jurors believed Stewart Woodman, they would necessarily have convicted Neil. If they disbelieved Stewart Woodman, they must have relied on Dominguez' prior statements to convict Steven Homick. It is Respondent who speculates that the jury accepted what Stewart Woodman said about Steven Homick, in the face of clear evidence the jury distrusted Stewart Woodman. It is Respondent who builds on sand in relying on Stewart Woodman to render harmless any error in regard to the prior statements of Michael Dominguez.

Respondent strains reality even further by describing Stewart Woodman's testimony against Steven Homick as "solid, undeniable evidence ..." (RB 167.) In fact, it is clearly neither solid nor undeniable. Stewart Woodman did not choose to cooperate with the authorities until he was convicted by a separate jury of the same murders – of his own mother and

father - alleged against Steven Homick. Once Stewart Woodman was facing the reality of a possible death sentence, he chose to testify not only against Steven Homick, but also against his own brother, all in a desperate attempt to save his own life. The evidence at trial showed beyond doubt that Stewart Woodman was a despicable human being in every possible fashion – conducting a hate campaign against his own father for years, systematically looting his company for his personal benefit while defrauding banks that loaned him money under false pretenses, installing bugging devices to eavesdrop on bank examiners in order to falsify documents to meet their concerns, arranging the theft of his own Rolls Royce so he could fraudulently gain insurance proceeds simply so he could buy a different model, lying to his own rabbi, and much more.

"Solid" evidence is evidence that "inspires confidence." (*People v. Lang* (1974) 11 Cal.3d 134, 139.) It can hardly be said that testimony from a man convicted of arranging the murders of his own parents and then testifying against his own brother only to save his own life, inspires confidence. Stewart Woodman's testimony may have been true, but it is also quite reasonable to dismiss it as a desperate effort by a man who should never be trusted. Such evidence cannot be considered solid, and certainly cannot be called "undeniable."

Respondent points to other bits of evidence against Steven Homick (RB 167) but most of these bits have little meaning without the prior statements made by Michael Dominguez. Most importantly, in regard to preju-

dicial impact at the penalty trial, Respondent points to no other evidence, aside from Dominguez' prior statements, that established that Steven Homick was an actual shooter of the murder victims.

Finally, Respondent makes a belated claim that even if Dominguez' prior unsworn statements, and prior testimony from a preliminary examination in which Steven Homick did not participate, had all been disallowed, then Michael Dominguez would have been found to be an unavailable witness and his testimony from the prior preliminary examination in which Steven Homick did participate would have been admitted and would have been ample evidence to support Stewart Woodman's testimony and surely convict Steven Homick. (RB 167.) Respondent's first premise – that Dominguez would have been found unavailable as a witness – is fully rebutted in the next argument. Respondent's second premise – that former testimony from one preliminary examination would have sufficed to convict Steven Homick – ignores the fact that the prosecutor below believed Dominguez' unsworn statements were so important that he presented them three times – reading them to "impeach" Michael Dominguez' silence, then repeating them by playing an entire ninety-fine minute videotape, then repeating them a third time by playing the entire videotape once again during argument. Also, the impact of seeing Michael Dominguez on the lengthy videotape giving a detailed statement was undoubtedly far more impressive to the jury than a simple read-back of prior testimony from a preliminary ex-

amination. Thus, the errors set forth in the present argument cannot be dismissed as harmless.

II. RESPONDENT ENGAGES IN GROSS AND UNSUPPORTED SPECULATION IN ARGUING THAT THE TRIAL COURT COULD HAVE FOUND MICHAEL DOMINGUEZ UNAVAILABLE, ALLOWING USE OF DOMINGUEZ' PRIOR FIRST PRELIMINARY EXAMINATION TESTIMONY TO BE ADMITTED AS FORMER TESTIMONY; NO SUCH FINDING WAS MADE OR SOUGHT, THERE WERE MULTIPLE REASONS WHY SUCH A FINDING SHOULD NOT HAVE BEEN MADE, AND THE TRIAL COURT EXPRESSLY VOICED DOUBT THAT THE RECORD WOULD HAVE SUPPORTED SUCH A FINDING

In the opening brief, it was shown that Dominguez' refusal to give responsive answers during his trial testimony was a direct result of the failure by the authorities to keep the promises that had been made to Dominguez in order to secure his guilty plea, his statements to the authorities, and his preliminary hearing testimony against Steven Homick. (AOB 238-247.) It was also shown that even if the testimony from the first preliminary examination could have been admitted as prior testimony, Steven Homick was nonetheless prejudiced because the former testimony exception to the hearsay rule still could not have been used to support admission of the former testimony given at preliminary examinations at which Steven Homick was not a party, nor could it have been used to support admission of the prior statements Dominguez had made to the authorities or the ninety-five

minute videotape which the prosecution played for the jurors twice. (AOB 248-252.)

Respondent once again offers obfuscation instead of solid arguments. First, Respondent ignores the portions of the record that demonstrate that Dominguez' dissatisfaction stemmed directly from the failure by the authorities to keep their rash and unwise promise to house Dominguez in the institution of his choice. Instead, Respondent contends that Dominguez' only concern was in regard to pending federal court contempt proceedings. (RB 169-171.)

Even if we put aside the multiple references in the record to Dominguez' dissatisfaction with the failure of the authorities to keep their promise to house him at the institution of his choice, Respondent's argument merely goes in circles. The federal contempt proceedings that Dominguez was concerned about stemmed from his refusal to testify in federal proceedings that involved these same parties and offenses. (See RB 170, where Respondent expressly recognizes that the attorney appointed to advise Dominguez about whether he should testify in the present trial reported that "Dominguez had two pending federal cases in Nevada, stemming from his refusal to testify against the defendants in federal court.") Respondent fails to offer any alternative reason why it was that Dominguez refused to testify in the federal proceedings. The obvious answer is that he refused to testify in the federal proceedings because he was upset with the authorities for failing to honor their promise to house him in the institution of his choice.

Indeed, at the very hearing that Respondent relies on, Dominguez expressly testified that the reason he had refused to testify in the past was "absolutely" because the authorities had not lived up to their end of the plea bargain. (RT 87:9096.) He affirmed that he continued to be concerned about the failure to keep the terms of his plea agreement. (RT 87:9104.) In sum, Respondent's argument merely brings us full circle. Once again, Dominguez' refusal to testify, even if it resulted from the federal contempt proceedings, can still be traced back to the failure of the authorities to live up to the terms of the plea agreement.

Furthermore, even if there is a basis to conclude that there is ambiguity about the precise reasons for Dominguez' failure to testify, that ambiguity is a direct result of the failure to ever hold any hearing to determine whether Dominguez was unavailable as a witness. The defense made clear that if an evidentiary hearing was held on that issue, it had more evidence to present. Thus, if the record is ambiguous, it is not the fault of the defense. The present state of the record simply does not support any conclusion that the trial court could have, or necessarily would have, found Dominguez unavailable as a witness.

Respondent notes that at one point the trial court stated that it had reviewed allegations in Dominguez' motion to withdraw his guilty plea, and had found no credible basis to find that the People had failed to live up to their end of the plea bargain. (RB 171.) But Respondent ignores the fact that immediately before the court had made that statement, counsel for Ste-

ven Homick had asked the court to conduct an evidentiary hearing on that very point. (RT 87:9166.) Immediately after the trial court expressed her unexplained conclusion, the court denied the request for an evidentiary hearing. Counsel for Steven Homick then reiterated that if a hearing were permitted, the defense would present more evidence than the judge had seen so far. (RT 87:9167.) Once again, the present record is simply inadequate to support the finding that Respondent speculates could and would have been made.

Turning to the issue of prejudice, Respondent once again offers a totally unrealistic comparison of the evidence that was presented to the jury in the present trial, and the evidence that would have been presented if Dominguez had been found unavailable and the People had relied only on the former testimony exception to the hearsay rule. (RB 171-173.) It has already been shown, both in the opening brief and in the previous argument in this brief, that Respondent is wrong, and that Steven Homick was seriously prejudiced by the admission of the prior statements and testimony that even Respondent concedes could never have been admitted as former testimony.

Respondent dismisses the videotape of Dominguez' prior statement to the police as inarticulate, incoherent, and merely repetitive of the statements that would have been admitted as former testimony. (RB 172.) But this contention flies in the face of the prosecutor's position below. The prosecutor knew he was going out on a limb by presenting prior unsworn

statements in addition to prior testimony, but the prosecutor insisted on going there anyway. The prosecutor not only read the prior statements, but also insisted on repeating them by playing the entire ninety-five minute videotape for the jurors, not just once, but twice. Clearly, the position of the People below was the direct opposite of the position Respondent now seeks to take. Such a complete turnabout should not be permitted to support a finding of harmless error, in order to affirm a sentence of death. The People chose their gamble below and should be required to live with the consequences.

III. THE PLEA AGREEMENT WITH MICHAEL DOMINGUEZ WAS RENDERED INVALID BY PROVISIONS THAT REQUIRED HIS TESTIMONY TO MATCH A PRE-ARRANGED VERSION, RATHER THAN SIMPLY REQUIRING THE TRUTH

A. Steven Homick's Constitutional Rights Were Violated By the Provision in Michael Dominguez' Plea Agreement That Abrogated That Agreement if Michael Dominguez Had Lied in His Statement to the Authorities, or if Michael Dominguez Committed Perjury on the Witness Stand

Appellant and Respondent agree that the principles set forth in *People* v. *Medina* (1974) 41 Cal.App.3d 438 do not permit an immunity or plea agreement that "places the witness under a 'strong compulsion' to testify in a particular fashion, ..." (RB 179.) In the opening brief, it was shown that the agreement made between Michael Dominguez and the authorities did, in fact, place him under a strong compulsion to testify in accordance with the statements he had already made to the authorities. That is, his agreement could be abrogated if he **either** had already lied in his statement, **or** he committed perjury in courtroom testimony. If Dominguez' courtroom testimony deviated materially from his earlier statements, then one or the other of the provisions abrogating the agreement was necessarily satisfied. Thus, Dominguez was under a strong compulsion to testify in a particular fashion - one that did not materially deviate from the statements he had already made. (AOB 253-266.)

Respondent disagrees, relying heavily on a Court of Appeal opinion, *People v. Reyes* (2008) 165 Cal.App.4th 426. (RB 182-184.) In that case, co-defendants Reyes and Vidales were tried together for murder twice, with both trials resulting in hung juries. After the second trial, Vidales approached the prosecution and then had three meetings with police detectives. In the first meeting, the facts of the case were not discussed at all. In the second meeting, Vidales stated that Reyes was the murderer. In the third meeting, Vidales repeated his statements that Reyes was responsible for the murder, but added that two others, Caldera and Ponce, were also involved. This was the version the prosecution believed to be truthful, although the opinion fails to explain the basis for this belief. (*Id.,* at pp. 429, 432.)

No plea agreement was reached at that point. A third trial against both Reyes and Vidales began, with the prosecution relying heavily on another witness. However, after that witness testified, the prosecutor concluded his demeanor had been poor. To strengthen the case against Reyes, who was believed to be more culpable than Vidales, the prosecution finally entered into a plea agreement with Vidales, wherein he would plead guilty to second degree murder and testify against Reyes. The agreement required him to testify truthfully and completely. If Vidales performed fully, then he would later be permitted to withdraw his guilty plea and enter a new plea to manslaughter and receive a mid-term sentence of six years. (*Id.,* at p. 432.)

The prosecutor added another term to the agreement, stating that if Vidales had not already told the truth in his third interview with the police detectives, then he would be in breach of his agreement and would receive a sentence of fifteen years to life for the second degree murder to which he had already pled guilty. (*Id.*, at pp. 432-433.) It was this provision which Respondent believes rendered Vidales' plea agreement comparable to the one reached with Dominguez in the present case.

In *Reyes*, no *Medina* claim was made in the trial court, so the claim was *Medina* claim was waived. (*Reyes, supra,* at p. 433.) However, the *Reyes* court decided to discuss the issue in order to forestall a habeas corpus petition alleging ineffective assistance of counsel.

Turning to the merits, the *Reyes* court engaged in a discussion that fails to withstand critical analysis. The Court of Appeal began by narrowly focusing on the fact that the plea agreement at issue there was not identical to the one in *Medina*. That is, the agreement did not expressly require Vidales to testify to specific facts. That may be true, but it is a classic distinction without a difference. Respondent has already agreed that the real issue is whether the plea agreement placed the witness under a "strong compulsion" to testify in a particular fashion. (See RB 179, citing *People* v. *Boyer, supra,* 38 Cal.4th at p. 455, citing *People v. Medina, supra,* 41 Cal.App.3d at p. 455.) If that element is met, the *Medina* rationale fully controls, regardless of whether the terms of the plea agreement are identical to the agreement in *Medina*.

Reyes did expressly recognize the crux of the appellant's argument – that "even though the interview provision did not direct Vidales's testimony, its threat to undo his plea bargain, if his third interview were found to have been materially untruthful, effectively coerced him to testify in accordance with the interview." (*Reyes, supra,* at p. 434.) But the *Reyes* court dismissed this claim in an astonishingly brief superficial discussion: "This claim is hypothetical and unverifiable. Practically, it is far more likely that Vidales entered into the interview provision because he, like the prosecution, believed his interview was truthful. If that is so, the provision posed no improper compulsion. (See *People v. Fields* (1983) 35 Cal.3d 329, 361.)" (*Reyes, supra,* at p. 434.)

The first problem with the *Reyes* statement that Vidales' claim was hypothetical and unverifiable is that there is no support whatsoever for that conclusion. The claim is not at all hypothetical. It is very real. It is also patently verifiable. Just as in the present case, the provision in *Reyes* undeniably allowed the prosecutor to undo the bargain in the event the testimony deviated materially from the earlier statement. It may be hypothetical to conclude that such a deviation would, in actuality, lead to abrogation of the bargain, but that is entirely beside the point. What matters is the state of mind of the witness. If the witness was led to believe that any material deviation could result in the loss of a very favorable plea bargain, then there was strong compulsion, forbidden by *Medina*, regardless of whether the prosecutor actually would nullify the plea agreement.

Surprisingly, the very next sentence in the brief *Reyes* discussion quoted above is itself entirely hypothetical and unverifiable: "Practically, it is far more likely that Vidales entered into the interview provision because he, like the prosecution, believed his interview was truthful." (*Reyes, supra,* at p. 434.) The opinion cites no source for this bald speculation. There was simply no support whatsoever for any conclusion that Vidales agreed to the interview provision because he believed his interview was truthful. This glaring flaw in the *Reyes* reasoning becomes especially clear when we try to apply this language to the present case, as Respondent has done. (See RB 184.)

That is, we have no basis whatsoever for concluding that Dominguez entered into his plea agreement because he believed he had already told the officers the truth. As shown earlier in this brief and in the opening brief, there are many reasons to believe that Dominguez is an utterly amoral individual who will say anything, without regard to its truthfulness, as long as he perceives that it would further his own benefit. There was simply no way for the prosecution to "know" that Dominguez was telling the truth. When Dominguez told the authorities that Steven Homick was the shooter, he provided a specific fact that was not corroborated in any meaningful way by any other evidence. All that can be said is that Dominguez provided facts consistent with the theory that the prosecution hoped to sell to a jury. Despite that hope, there was simply no foundation to support any conclusion that Dominguez really had told the truth.

Thus, the *Reyes* analysis speculates without any basis. We do not know whether Dominguez did tell the officers the truth, so we have **no basis whatsoever** to conclude he entered into the plea agreement because he believed he had told the truth. It is just as likely, if not much more likely, that Dominguez knew he was lying and believed he could get away with it and retain the benefits of his very attractive plea agreement. Thus, *Reyes* engages in classic bootstrapping, upholding the plea agreement by starting from an unfounded assumption that the witness told the truth in the earlier statement. Once that unsupported assumption is removed from the picture, everything else falls into place in the precise manner set forth in the opening brief.

Reyes next seizes on several cases in which this Court concluded that *Medina* applies only when the plea agreement is "expressly contingent" on the witness testifying in accordance with a particular statement. (*Reyes, supra,* at pp. 434-435, citing *People v. Garrison* (1989) 47 Cal.3d 746, 771, and *People v. Boyer* (2006) 38 Cal.4th 412, 456.) But neither *Garrison* nor *Boyer* concerned a plea agreement that expressly allowed the prosecutor to abrogate the agreement in the event that **either** the prior statement was untrue **or** perjury was committed in the bargained-for testimony. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) *Reyes* fails to

come to grips with this crucial distinction and thereby rests on a conclusion without analysis, citing only cases that never considered this issue at all.

In any event, this is really nothing more than a matter of semantics. The present agreement may not have expressly stated that Dominguez must testify in accordance with his prior statements, but it did expressly state that Dominguez would lose the benefit of the agreement if he had lied in his earlier statement or if he committed perjury in his testimony. That is indistinguishable from an express statement that Dominguez would lose the benefit of the agreement if he testified to a version that differed from his prior statements.[16] Thus, the present circumstances do come within the "expressly contingent" language from this Court's prior cases. The agreement was clear. Both Dominguez' prior statements and his testimony had to be truthful. Assuming his testimony addressed the same criminal events as his prior statements -- and they surely would -- there was no way to satisfy the terms of the agreement unless his testimony was consistent with his prior statements. To hold that *Medina* is violated where the witness is told "your testimony must be consistent with your prior statements," but not where the same message is communicated in other equally clear language would be to elevate form over substance.

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16 That is, if he testified to a different version, then either his testimony would constitute perjury, or his testimony would be true, but his prior statement was a lie. Either way, Dominguez could lose the benefit of the plea agreement.

Appellant submits that the Reyes court construed language from *Boyer* and *Garrison* in an overly rigid manner inconsistent with *Medina*. Further, there are important factual differences between the present case and *Boyer* and *Garrison*, differences which Respondent ignores in arguing that they bar relief on appellant's claim.

In *Garrison*, co-defendant Roelle made an agreement with the prosecutor in the middle of the preliminary examination. The written agreement stated only that Roelle had agreed to plead guilty to lesser crimes because the prosecutor agreed to dismiss murder charges. However, more understandings were set forth in the reporter's transcript of the preliminary examination. There, the prosecutor stated that Roelle would be called as a witness at Garrison's trial, and would testify fully and truthfully. The prosecutor also stated that, as part of the plea agreement, Roelle had already truthfully told the detectives what had occurred. (*Garrison, supra,* at pp. 767-768.) On the surface, this appears arguably similar to the present case in that the plea agreement could, possibly, be abrogated if Roelle testified truthfully at trial, but the truth was that the prior statement was false.

Garrison then discussed and quoted at length from *People v. Fields* (1989) 35 Cal.3d 329, 359-361. In *Fields*, the agreement itself simply permitted the witness to plead guilty to a lesser charge in return for agreeing to testify against Fields. There simply were no other terms to this bargain, so the *Medina* rationale had no application in *Fields*, and *Fields* should have no application to the present case. But things took a turn during the wit-

ness's trial testimony. On cross-examination, the witness was asked in a leading question whether the plea agreement required her to testify in accordance with her prior statement. She responded affirmatively. This was followed by another leading question asking whether she believed that her deal would fall through if she testified differently than what she had said previously. Again, she responded affirmatively. However, on redirect examination by the prosecutor, she affirmed that her prior statement had been true, that she had been told to testify truthfully at the trial, and that she had never been told that she had to testify to a specific version.

Thus, *Fields* is not at all like the present case or like *Reyes*. In *Fields*, nobody could fault the actual agreement, which required only that the witness testify at trial. If the witness testified truthfully at trial, but the truth was different from her prior statement, the prosecutor still had no basis for abrogating the plea agreement. Thus, the agreement in *Fields* itself provided no strong compulsion to testify to any particular version of the facts. *Fields* did not involve a bargain in which a witness could testify truthfully at the trial, but still lose the benefit of the bargain if that truthful testimony differed from the prior statement. Therefore, no language used in the *Fields* decision can be considered controlling here.

It is not at all surprising that this Court in *Fields* found no *Medina* violation. *Fields* did recognize that the prosecutor obviously believed that

the statement the witness had given to the authorities was the truth.[17] As shown in the footnote to the last sentence, what the prosecutor really obviously believed was that the witness would testify in accordance with her prior statements. This Court in *Fields* next stated if the witness deviated materially from her prior statement, the prosecutor "might take the position that she had breached the bargain, and could be prosecuted as a principal to murder." (*Fields, supra,* at p. 361.) But, while the prosecutor might take that position, he would fail. If the witness had lied in her prior statement, but testified differently and truthfully at the trial, there would be no breach

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17 It should be noted, however, that what this Court described as obvious was not, in fact, so obvious. While we should hope that prosecutors bargain only for testimony they believe to be truthful, the simple reality is that in many cases the prosecutor has no way of knowing what, precisely, was the truth. But even when the prosecutor has no way of knowing what is really the truth, the prosecutor might nonetheless see a need for stronger testimony against a defendant whom the prosecutor thinks is more culpable, and may bargain for that testimony regardless of the prosecutor's ability to know whether the witness's prior statements were true or not.

Prosecutors often cannot know what is the truth and must rely on juries to determine what the evidence does or does not prove. Prosecutors seek convictions. If two defendants are on trial and the prosecutor fears that the evidence might not be sufficient to convince a jury that either defendant is guilty, then there might not be any convictions at all. On the other hand, if the prosecutor has the opportunity to allow one defendant plead guilty to a lesser crime in return for testimony likely to result in the conviction of the other defendant, then the prosecutor has the opportunity to get two convictions instead of none, leaving it to the jury to sort out where the truth lies.

of the plea agreement. Again, *Fields* is nothing like the present case or like *Reyes*.

Fields next stated that "an agreement which requires only that the witness testify fully and truthfully is valid,..." (*Fields, supra,* at p. 361.) Nobody could quarrel with that proposition. That sentence was completed with the words, "...and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain." (*Id.*) This last concept bears closer examination. While it may be legitimate for a prosecutor to take some steps to decrease the probability that the witness will sabotage the bargain, the rationale of *Medina* cannot permit an agreement that precludes any possibility of sabotaging the bargain, because in some cases the bargain may be based on expected testimony which, unknown to the prosecutor, is not the truth. In other words, witnesses must always retain the option of testifying truthfully at the trial, even if that truth differs from earlier statements made by the witness. But if the plea agreement operates to strongly coerce the witness into repeating prior statements, even if they are false, then the rationale of *Medina* is violated.

It is well-recognized that bargained-for testimony is not always true:

> Evidence from an accomplice is regarded as untrustworthy because it is likely to have been influenced by the self-serving motives of the witness. (Ibid.) Accomplice testimony is "often given in the hope or expectation of leniency or immunity." (*People v. Wallin, supra*, 32 Cal.2d at p. 808; see also *Comment, Accomplice Corroboration -- Its Status in Cali-*

> *fornia* (1962) 9 UCLA L.Rev. 190, 192.) As a result, an accomplice has a strong motive to fabricate testimony which incriminates innocent persons or minimizes his participation in the offense and transfers responsibility for the crime to others. (Heydon, *The Corroboration of Accomplices* (Eng. ed.) 1973 Crim. L.Rev. 264, 265.)
>
> It is not unusual for an accomplice to falsely incriminate innocent persons to seek revenge or to protect friends who actually committed the crime with him. (*Ibid.*; see also Note (1954) 54 Colum.L.Rev. 219, 234.) (*In re Miguel L.* (1982) 32 Cal.3d 100, 108-109.)

Also, as this Court explained in *People v. Tewksbury* (1976) 15 Cal.3d 953, 967:

> " '[A]n accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth.' "(Heydon, The Corroboration of Accomplices (Eng. ed. 1973) Crim.L.Rev. 264, 266; see also Note, 54 Colum.L.Rev. 219, 234.)

Indeed, Penal Code section 1111 constitutes an express legislative recognition of the fact that accomplice testimony may not be trustworthy.[18] Fur-

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18 Penal Code section 1111 states, part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense;..." That corroboration requirement is an obvious recognition of the untrustworthy nature of accomplice testimony.

thermore, California juries are routinely instructed that accomplice testimony should be viewed with caution.

Since it is well-recognized that accomplice testimony is inherently untrustworthy, public policy cannot permit a plea agreement which absolutely shields the prosecutor from any adverse impact in the event a witness makes a false statement to the authorities and then gives testimony at trial that is both different from the prior statement and is truthful. When a prosecutor chooses to bargain with an accomplice, he or she necessarily assumes some risk. Prosecutors may reduce that risk by having the witness take a polygraph examination, or by requiring truthful testimony as a condition of an agreement, so that there is a remedy when the prior statement was, in fact, truthful, and the trial testimony recanting the prior statement is perjurious. But if the prior statement was false, the witness must remain free to testify truthfully at trial, rather than be coerced to repeat prior false statements. That is the essence of *Medina*, and that is the essential ingredient that was absent in the present case. If the prosecution was wrong in believing the prior statement, and the witness is willing to testify truthfully at trial, the prosecutor's desire to punish the nefarious witness cannot trump the due process rights of the defendant.

With all that in mind, we can return to *Garrison*. There, after discussing *Fields* at some length, this Court explained:

"We cannot accept defendant's premise that Roelle's bargain was 'conditioned' upon the truth of his prior statements. When we consider the context of the comments made by the district attorney and by Roelle's counsel and the absence of any request that Roelle confirm the accuracy of those assertions, we do not find that the plea agreement was based upon such a 'condition' as defendant describes. Rather, . . . as in the *Fields* case (*supra*, 35 Cal.3d 329), the record does not demonstrate either that the plea bargain required Roelle to testify in accord with his statement regardless of its truth, or that Roelle so understood the agreement. Rather the record reflects that the district attorney and Roelle's counsel sought to ensure that the record reflected the factual basis for their belief that permitting Roelle to plead guilty to the lesser charges would be appropriate in light of their understanding of his actual involvement in the offenses.

... Although the district attorney did initially state that the truthfulness of the statements was 'part of this plea agreement,' it was not among the 'terms' of the deal he outlined when questioning Roelle on his understanding of the plea agreement. Nor did the judge mention the alleged 'condition' in his voir dire of Roelle.

Roelle was never told that he had to testify to the same story he had already told police and he never agreed to so testify. Nor was he told that the deal would be off if his trial testimony differed from the prior story. It is apparent that the district attorney expected Roelle to testify to the same story at trial. It is a rare case indeed in which the prosecutor does not discuss

> the witness's testimony with him beforehand and is assured that it is the truth. However, unless the bargain is expressly contingent on the witness sticking to a particular version, the principles of *Medina*, *supra*, 41 Cal.3d 438 ... are not violated.' (*Garrison, supra*, at pp. 770-771.)

The Court's characterization of the facts in *Garrison* and the ensuing rationale for the decision in that case are clearly inapplicable in the present case. Here, at the outset, Dominguez was told by the police that he would forfeit his unusually generous plea agreement if it turned out he was the actual shooter in the Tipton murders or in the Woodman murders. (Supp. CT 9-2:447-448.) Even more importantly, when he entered his guilty pleas to second degree murder, the actual terms of the plea agreement were placed on the record: "If the District Attorney's Office or myself find out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void." (CT 22:6097.)

Thus, in *Garrison*, there was a written plea agreement that said only that the witness agreed to plead guilty to a lesser charge in return for the prosecutor's agreement to dismiss the greater charge. Then, at the preliminary examination, the prosecutor set forth his understanding that the witness had already given a statement to the authorities that was truthful. While the prosecutor described that as part of the agreement, this Court concluded that the plea bargain itself did not require testimony in accordance with the prior statement, and that the prosecutor had only been trying

to ensure that the record reflected the factual basis for the prosecutor's belief that the plea agreement was an appropriate one. In contrast, in the present case there was no written plea agreement. The colloquy - during which Dominguez was told that the bargain would be lost if the prior statement was untrue or if he committed perjury in his testimony – **was** the plea agreement.

It is true that during this colloquy Dominguez was also told that the prosecutor expected him to give truthful, honest, and accurate testimony. (CT 22:6097.) However, there is simply no basis for concluding that those words constituted the entire agreement, and the words that immediately followed were somehow not part of that agreement. Thus, the distinctions made in *Garrison* simply cannot be made in the present case. *Garrison* specifically noted that the prosecutor's understanding of the truthfulness was not among the terms of the bargain outlined when he queried the witness regarding his understanding of the terms of the bargain. (*Garrison*, at 47 Cal.3d at pp. 770-771.) In contrast, in the present case, the statement that the bargain would be null and void if Dominguez had lied or committed perjury, clearly was set forth in the prosecutor's questioning of Dominguez about his understanding of the terms of the bargain, and that statement was a part of the actual bargain itself.

Garrison also noted that the witness was not told he had to testify to the same story he had given previously, nor did he ever agree to so testify. (*Id.*, at p. 771) Clearly the same cannot be said as to the present agreement.

Here, Dominguez was expressly told that the agreement would be null and void unless he testified truthfully **and** unless that truthful testimony did not reject the prior statements as false. As shown earlier, there is no principled way to distinguish that from an express declaration that the agreement would be null and void unless Dominguez gave testimony that was not materially different from the prior statement.

Turning next to *Boyer*, the agreement in that case gave the witness immunity for any act or fact about which he would be testifying. An additional provision stated the immunity would not apply to any false testimony given by the witness. Further, the agreement stated that the witness had represented that his testimony would be in substance consistent with a series of facts set forth in the agreement. Also, at the preliminary examination, the magistrate told the witness he could be prosecuted: "The District Attorney can prosecute you if they find that you have lied, prosecute you for perjury." (*Boyer, supra,* at p. 455.)

During cross-examination of the witness at trial, the witness was asked in a leading question whether it had been explained to him that he could be prosecuted if his testimony was different from what he had previously told the prosecutor, and the witness responded affirmatively. However, on redirect examination, he was asked if any member of the District Attorney's Office had ever told him to testify other than truthfully, or had ever told him how to testify. Both questions were answered negatively. (*Id.*)

This Court then discussed *Fields* and *Garrison* and concluded they were applicable to the circumstances in *Boyer*. This Court found no impropriety, relying in part on *Garrison*'s language indicating that a *Medina* is violated by an agreement that is "expressly contingent" upon adherence to a particular version of facts. The Court explained:

> The grant of immunity to Kennedy, by its terms, was based on his truthful testimony, which Kennedy himself "represented" would be in accordance with his prior statements. Thus, the agreement simply reflected the parties' mutual understanding that the prior statements were the truth, not that Kennedy must testify consistently with those statements regardless of their truth.

(*Boyer, supra,* at p. 456.)Once again, the present case differs in crucial aspects. This was not a case in which Dominguez merely "represented" that he would testify in accordance with prior statements. Instead, as explained earlier, this was a case in which the immunity agreement itself made clear that Dominguez would lose the benefits of his bargain if his testimony differed from his prior statements. That is, if his testimony differed from his statements, then he either lied in his statements or his testimony would be perjurious. Since the agreement covered both of those options, it would not be necessary to determine whether the prior statements were false or the inconsistent testimony was false. If Dominguez' trial testimony differed materially from his prior statements, the express terms of the agreement al-

lowed the prosecutor to declare it null and void, without ever having to prove that the trial testimony was untruthful.

Thus, *Boyer* is not like the present case and cannot be considered as controlling here. While the magistrate in *Boyer* had stated that the witness could be prosecuted if the District Attorney found that he had lied, that was immediately qualified by the words "prosecute you for perjury" -- language which was almost certainly intended and understood as referring to lies on the witness stand. As such, the magistrate described an agreement that does not violate the *Medina* rationale. In contrast, the present agreement itself expressly permitted the prosecutor to declare the agreement null and void if Dominguez' trial testimony differed from his prior statements, **even if the trial testimony was the truth.**[19]

In sum, neither *Fields*, nor *Garrison*, nor *Boyer* provide any basis for rejecting appellant's claim of *Medina* error. Instead, those were cases

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19 At this point, it should be acknowledged that Dominguez' actual trial testimony was not very helpful to either side, indicating that Dominguez was not then intimidated by the terms of the agreement. Indeed, it appears clear that by the time of the trial, Dominguez **wanted** the plea agreement to be abrogated. But that does not detract at all from this argument. Here, the taint occurred years earlier, when Dominguez testified at various preliminary examinations, consistently with the statements he had given prior to the plea agreement. That tainted testimony was then admitted at the trial, in the guise of statements supposedly inconsistent with Dominguez' trial testimony, and became the heart of the prosecution case against Steven Homick. (See Arguments I and II earlier in this brief, and in the opening brief.)

where the agreement itself called only for truthful testimony. In sharp contrast, the present agreement did not simply call for truthful testimony. By the express terms of the plea agreement, Dominguez was subject to the loss of the benefits of his bargain if his testimony differed from his prior statements, even if the testimony was truthful. Thus, the present agreement should be construed as one that **was** "expressly contingent" on Dominguez testifying in accordance with a very specific version of the facts. Further, this Court should make clear that the *Reyes* court's construction of the "expressly contingent" language utilized by this Court in *Garrison* and *Boyer* is overly rigid and narrow, and inconsistent with the rationale of *Medina*. As long as it is conveyed to the witness that he cannot materially deviate from his prior statements without triggering the prosecutor's right to void the agreement, the impermissible contingency should be deemed "express" and in violation of *Medina*.

By the end of its discussion, the *Reyes* court concluded that the plea agreement in that case did not require that Vidales testify in accordance with his interview; instead, it required only that he testify truthfully. Whatever the merits of that conclusion in the circumstances set forth in *Reyes*, no such conclusion can be reached here. As shown earlier, the present agreement did not simply call for truthful testimony. Here, the express terms of the only portion of the record that constitutes a plea agreement directly and unequivocally called for abrogation of the agreement even if

Dominguez were to testify truthfully, as long as that truthful testimony differed materially from the prior statements.

The only way to escape this conclusion, would be to declare that the present plea agreement somehow ended when Dominguez said that he understood that the People expected his testimony to be truthful, and did not include the immediately following colloquy:

> **"If the District Attorney's Office or myself find out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void.** That means your plea agreement that you've worked out would be set aside and you would be brought back to Municipal Court to have a preliminary hearing on these charges. Do you understand that?
>
> A Right." (CT 22:6097-6098; emphasis added.)

There is obviously no basis for such a conclusion. Even if attorneys could technically parse the colloquy between Dominguez and the prosecutor and conclude that the actual plea agreement ended just before the portion quoted above, that would still not be enough to fairly justify affirming the present conviction and death sentence. Dominguez was not an attorney. There is simply no basis whatsoever to conclude that he understood the bargain to call for only truthful testimony, and that the dire language used by the prosecutor in the very next sentence, expressly asserted as a term of the bargain, was somehow superfluous and unenforceable. Instead, there is

no basis whatsoever to conclude that Dominguez interpreted the prosecutor's words to mean anything less than what the prosecutor clearly stated.

In sum, no matter how Respondent may try to parse these words, they necessarily provided "strong compulsion" for Dominguez to avoid testifying in any manner that differed materially from the prior detailed version Dominguez had given, regardless of whether that prior version was true or false. In other words, if the prior version was false, Dominguez knew that if he continued to testify in the same manner, he was safe unless the prosecutor could somehow prove that perjury occurred in testimony helpful to the prosecution. That danger would seem remote. On the other hand, if the prior statements were false and Dominguez testified differently and truthfully at trial, then Dominguez would know that the prosecutor was all but certain to declare the plea agreement null and void. When Dominguez was put in that position, he was under a "strong compulsion" to stick to the version he had already given, regardless of whether it was true or false.

A. Steven Homick's Constitutional Rights Were Also Violated by the Understanding That the Dominguez Agreement Would Be Abrogated If Dominguez Was the Shooter in the Woodman Murders or the Tipton Murders

Respondent next contends that Dominguez was not actually subject to the loss of the benefits of his plea bargain if it turned out that he was the

actual shooter in the Tipton or Woodman murders. Alternatively, Respondent contends that even if the plea agreement did include the understanding that Dominguez was not the actual shooter, there is still no problem because this Court has previously upheld plea agreements with such terms. (RB 186-188.)

The principles upon which Respondent relies were already fully discussed in the opening brief. (AOB 267-273.)

B. These Errors Went to the Heart of the Prosecution Case and Cannot Be Deemed Harmless

Respondent concludes with a brief discussion contending that even if Steven Homick's federal constitutional rights were violated by the plea agreement, any such error was harmless beyond a reasonable doubt. (RB 188-190.) Once again, Respondent is wrong.

First, Respondent sets forth a brief summary of Stewart Woodman's testimony. (RT 188-189.) That might help Respondent if there was any reason to be confident that the jury found Stewart Woodman to be a credible witness, but it has already been shown that there is no basis whatsoever for such a presumption; to the contrary, there were a great many reasons to disbelieve every word ever uttered by Stewart Woodman. (See Argument I, Section G, pp. 50-52, earlier in this brief.) Indeed, it appears certain that this jury did disbelieve substantial portions of Stewart Woodman's testimony, since the jury was unable to reach a unanimous verdict in regard to

Neil Woodman, who was certainly guilty if Stewart Woodman was believed. Thus, there is no reason to conclude beyond a reasonable doubt that Stewart Woodman's testimony was believed at all. Therefore, his testimony merits little weight in the context of determining whether the error in admitting Michael Dominguez' prior testimony was harmless.

Next, Respondent sets forth several fragments of circumstantial evidence that appear to support a conclusion that Steven Homick was involved in some surveillance of the Woodman parents, but falls far short of proving him guilty of murder. (RB 189.) Furthermore, some of those fragments have little or no meaning absent direction from the dubious testimony of Stewart Woodman or the inadmissible prior testimony by Dominguez.

Next, Respondent asserts that Dominguez' testimony did nothing more than "supply the details". (RB 189-190.) But Respondent fails to recognize that those details were the heart of the prosecution case against Steven Homick. Respondent asserts, without explanation, that even without these details, the case against Steven Homick was overwhelming. Once again, since we have every reason to believe the jury did not find Stewart Woodman to be a credible witness, it is impossible to conclude that the evidence against Steve Homick was overwhelming.

Finally, Respondent tosses out a *non sequitur*, stating that, after all, counsel for Steven Homick knew about the plea agreement and was able to argue Dominguez' credibility to the jury. (RB 189.) But no case has ever

held that to be an adequate remedy for *Medina* error; instead, the remedy is to disallow the admission of evidence tainted by the invalid plea agreement.

In sum, it is possible that the jury realized the plea agreement was improper and therefore gave little or no weight to Dominguez' prior testimony, but such a mere speculative possibility cannot be transmuted into proof beyond a reasonable doubt that the error was harmless. Since it is also reasonably possible that the jury did choose to rely on the prior testimony of Dominguez despite the information the jury received about the plea agreement, the error cannot be deemed harmless.

Also, Respondent ignores the impact that Dominguez' prior testimony could have had on the penalty verdict. Dominguez was the only witness who supplied significant evidence that Steven Homick was the actual shooter. Absent that evidence, the remaining evidence points overwhelmingly toward the conclusion that Dominguez was the actual shooter. The jury that returned a death verdict against Steven Homick knew that Dominguez would be likely to spend less than two decades in a prison, that Stewart Woodman would serve life without parole, that Neil Woodman would get another trial, and that Robert Homick would serve life without parole. Absent the present error, the jury would have been far more likely to conclude that Steven Homick was not the actual shooter. Such a conclusion, in turn, would have greatly reduced the probability of a death verdict for Steven Homick. Thus, even if it were possible to declare the error harmless in regard to the guilt verdicts, it would still be necessary to conclude that the

error was not harmless beyond a reasonable doubt in regard to the penalty verdict.

Aside from all of these flaws in Respondent's analysis, there is a more fundamental flaw in Respondent's overall analysis. Respondent fails to address the impact that the error actually had in the trial that occurred; instead, Respondent argues that in another trial, without the error occurring at all, a jury would have probably convicted Steven Homick. But *Chapman v. California* (1967) 386 U.S. 18, 24 requires a different analysis:

> Consistent with the jury trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See *Chapman, supra*, 386 U.S. at 24 (analyzing effect of error on "verdict obtained"). Harmless error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt,* 500 U.S. 391, 404 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee. See *Rose v. Clark*, 478 U.S. 570, 578 (1986); id. at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-510 (1987) (STEVENS, J., dissenting).

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280.) In other words, Respondent cannot simply disregard the error and look at the remaining evidence to see if it was sufficient to uphold a conviction. Instead, Respondent must establish, beyond a reasonable doubt, that the *Medina* error had no substantial impact on the present verdict, so that the error could be deemed harmless beyond a reasonable doubt. Respondent has failed in the effort, so the error must be deemed prejudicial.

IV. EVIDENCE OF THE MISSOURI INCIDENT WAS HIGHLY RELEVANT TO STEVEN HOMICK'S DEFENSE; IF IT WAS PREJUDICIAL TO ROBERT HOMICK, THE PROPER REMEDY WAS A SEVERANCE, NOT A FAVORING OF THE DUE PROCESS RIGHTS OF ONE DEFENDANT AT THE EXPENSE OF ANOTHER

Respondent begins by citing authority for the application of Evidence Code section 352 in a multi-defendant case, when one defendant seeks the admission of evidence to which another defendant objects. (RB 199.) Respondent then openly acknowledges authority that explains that the application of section 352 in such circumstances must include additional factors not present when the evidentiary dispute is between the prosecution on one side and one or more defendants on the other side. (RB 200, citing *People v. Reeder (1978) 82 Cal.App.3d 543, 553* and *People* v. *Greenberger* (1997) 58 Cal.App.4th 298, 351.) The difference, as explained in *Reed* and *Greenberger*, is that another alternative is available in the former circumstance, but is unavailable in the latter. That alternative is the option to grant a severance, thereby allowing one defendant to utilize the evidence available in his behalf, while the other defendant suffers no prejudice at all.

The clear teaching of *Reed* and *Greenberger* is that any section 352 analysis between defendants in a multi-defendant case must utilize the severance alternative whenever evidence of "significant probative value" to one party is "substantially prejudicial" to a co-defendant. Yet Respondent

appears to believe that the section 352 analysis in the defendant versus defendant context is no different than it would be in the more common defendant versus prosecution context. If that is Respondent's position, then it fails to respect the authority of *Reed* and *Greenberger* without providing any analysis.

Respondent also simply ignores another aspect of the issue raised in the opening brief. (AOB 284-286.) Whenever there was a section 352 dispute that involved Steve Homick objecting to evidence offered by a co-defendant, the trial court took the position that the evidence must be admitted even when the probative value for the co-defendant was minimal and the potential prejudice to Steve Homick was high. Yet when, as in the present circumstance, Steve Homick sought the admission of evidence and a co-defendant objected, a very different standard was applied. While it may be true that a trial court has wide discretion in making section 352 rulings, that does not mean that discretion can be utilized in a manner that violates the federal Fifth, Sixth, and Eighth, and Fourteenth Amendment rights to equal protection of the law, to a fundamentally fair jury trial, and to a penalty verdict supported by reliable fact determinations.[20]

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20 A closely related point is also appropriate here. In the argument that follows the present argument, it will be seen that Respondent repeatedly defends the admission of evidence that was claimed to be helpful to Robert Homick, despite the fact that Steve Homick was seriously prejudiced. Respondent repeatedly argues that any harm to Steve Homick was cured by admonitions to the jury. If such admonitions really cure any

Turning to the heart of the issue, Respondent maintains that the excluded evidence regarding the Missouri incident had only slight probative value. (RB 201.) While it is true that the trial court reached such a conclusion, the real problem is that the evidentiary record did not support that conclusion. As shown in the opening brief, the trial court was simply wrong in concluding that the Missouri incident added nothing significant to other evidence regarding Stewart Woodman's custom of turning to Robert Homick, rather than Steven Homick, when Stewart wanted to intimidate persons perceived as threats to the well-being of Manchester Products. (See AOB 290-291.)

Respondent insists that the Soft-Lite incident was every bit as strong in Steven Homick's favor as the Missouri incident. (RB 202.) Respondent claims that Tracey Hebard's testimony that Robert Homick threatened her father with bodily harm "was not impeached at trial." (RB 202.) But Respondent completely ignores the testimony by police officials that when Tracey Hubbard initially called the police about the incident, she made no mention of any threat of violence. After police responded to the Soft-Lite scene, no official report was written, even though a report would have been written if the officer had concluded that criminal activity had occurred.

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prejudice, then why wasn't that alternative employed here? Why didn't the court admit this evidence on behalf of Steve Homick and simply admonish the jury not to use it as evidence of Robert Homick's bad character or propensity to commit crimes?

(See RT 72:6117-6118, 6123-6127, discussed at AOB 48, fn. 41, and at AOB 290.) This cannot be dismissed as meaningless; it constituted substantial impeachment of Tracey Hubbard, clearly implying that her testimony greatly exaggerated what had actually occurred.

In contrast, the evidence of the Missouri threat was far stronger. That incident went well beyond a threat, and included throwing a can of oil through the window of a residence, coupled with the threat that the next time, it would be a bomb that would be thrown through the window. That incident also included a police officer who listened in during the threatening telephone call. Most importantly, that threatening call was tape-recorded, and Steven Homick was prepared to call an investigating officer in the present case who would have testified that he listened to the tape recorded threat and recognized the voice of the caller as Robert Homick's voice and was able to identify the voice of the caller as being the same as Robert Homick's voice. (AOB 275-276.) Thus, the evidence of a threat of physical violence was virtually undisputable in regard to the Missouri incident. Equally indisputable was the identity of Robert Homick as the person who made the threat.

Respondent points to testimony by an officer who was not present when Tracey Hebard was interviewed, but who opined that the failure of the interviewing officer to file a written report did not necessarily mean that no threat had occurred. (RB 203.) Be that as it may, that does nothing more than create an equivocal situation. In contrast, the evidence regarding the

Missouri incident was unequivocal. The broken window, the can of oil inside the home, and the tape-recorded phone call established unequivocally that a threat of great violence did occur, and that the person responsible was Robert Homick. Respondent's attempts to paint the Missouri incident as insignificant must fail. As explained in the opening brief, "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." (*People* v. *Mattson* (1990) 50 Cal.3d 826, 871; see also *People* v. *Filson* (1994) 22 Cal.App.4th 1841, 1851. See also *People* v. *Keith* (1981) 118 Cal.App.3d 973, 980, finding an abuse of discretion in using Evidence Code section 352 to keep out defense evidence that "... would not have been cumulative since it would have emanated from somewhat less suspect sources.")

Respondent goes further, contending that claims tendered below by counsel for Robert Homick would have reduced the impact of evidence of the Missouri incident and would have inevitably led to a time-consuming mini-trial. (RB 203.) However, it was clear that counsel for Robert Homick was "blowing smoke," making a variety of wild threat of time-consuming rebuttal evidence. (See RB 193-194.) But the bottom line is that it made no difference how many other people had a motive to threaten Richardson, or what those motives were. The tape-recorded telephone threat would have established beyond realistic dispute that the caller was Robert Homick, not some other person with a grudge against Richardson. Furthermore, the recorded phone threat expressly included a demand that Richardson stop cre-

ating problems for Manchester. (RT 75:6892.) This also made it indisputable that any persons who had an unrelated grudge against Richardson were not involved.

Thus, an appropriate use of Evidence Code section 352 would have barred any evidence offered to prove that the threat against Richardson had nothing to do with Stewart Woodman or Robert Homick. Indeed, there is no reasonable basis to conclude that such witnesses would have even been offered; counsel for Robert Homick was simply trying to intimidate the court into a ruling in Robert Homick's favor, and that tactic worked. But if the court had ruled otherwise, Robert Homick's threatened mini-trial would have quickly evaporated.

Respondent closes the argument with the unsupported claim, made over and over by Respondent, that even if error occurred, it was harmless. (RB 204-206.) But it has been shown earlier in this brief and in the opening brief that the evidence against Steven Homick was not overwhelming, as Respondent contends. Indeed, on a single page (RB 205), Respondent concedes that there were many reasons not to believe Stewart Woodman's testimony, then goes on to rely heavily on Stewart's testimony to establish what Respondent describes as overwhelming evidence of Steven Homick's guilt. In reality, the evidence of Steven Homick's guilt was far from overwhelming, and any evidence that further persuaded the jury that Stewart was still lying while on the witness stand, and/or that Robert Homick, not Steven Homick, was the man Stewart repeatedly turned to when he wanted

to use intimidation to advance the interests of Manchester Products, could have resulted in a verdict more favorable to Steven Homick. There is no basis for concluding beyond a reasonable doubt that the jury's verdict would have been the same had appellant been permitted to present evidence of the Missouri incident. (*Chapman v. California*, *supra*, 386 U.S. at 24.)

V. THE TRIAL COURT RULINGS ADMITTING EVIDENCE ON BEHALF OF ROBERT HOMICK, DESPITE PREJUDICE TO STEVEN HOMICK, WERE ERRONEOUS AND INCONSISTENT WITH RULINGS EXCLUDING EVIDENCE OFFERED BY STEVEN HOMICK

A. Art Taylor's Testimony Alleging That Steven Homick Had Been a Drug Dealer

In the Opening Brief, it was shown that any need for Robert Homick to impeach the testimony of Art Taylor would have been fully satisfied by restricting the impeachment to evidence that Taylor had been a paid FBI informant for a number of years and that he had become an informant after learning that a person who used Taylor's address to mail and receive packages had duped Taylor by mailing drugs in these packages, which greatly offended Taylor. It was shown that there was no legitimate reason to identify that alleged drug dealer as Steven Homick. (AOB 295-305.) Once again, Respondent does not quarrel significantly with the discussion of the applicable law set forth in the Opening Brief. Instead, Respondent differs mainly in the manner in which the applicable law should be applied to the facts of this case.

Respondent now argues that "[t]he evidence act issue had significant probative value to Robert Homick's defense." (RB 211.) However, like Robert Homick's counsel, and like the trial court, Respondent fails to even attempt to explain why it was necessary to identify Steven Homick as the

alleged drug dealer. Respondent reiterates the claim of the prosecutor below that "it would mislead the jury to allow Taylor to be cross-examined about his paid informant status without telling the whole story - that it was appellant's activities that caused Taylor to go to the FBI." (RB 211.) The prosecutor below never explained the basis for his conclusion that the jury would be misled if Steven Homick was not named as the drug dealer. Once again, Respondent also fails to even attempt to make such an explanation. The reason for these glaring omissions is obvious – there is no legitimate explanation for this unsupported conclusion.

To reiterate, it does appear that it was appropriate for Robert Homick to elicit the fact that this significant prosecution witness was not simply a good citizen testifying to his knowledge of relevant facts, but was, instead, a long-term paid FBI informant. It also appears that if such information was brought out, it was legitimate for the prosecution to want to elicit the fact that Taylor claimed to have a very good reason for becoming an FBI informant. But Taylor could have simply explained that he had become an informant when he discovered that a friend who used Taylor's shop as an address to send and receive packages for a vitamin business was, in fact, sending out illegal drugs in some of the packages, and that Taylor had been greatly offended because he had three daughters and one of them had unwittingly carried one of the packages containing drugs.

Such testimony would have fairly apprised the jury of Taylor's claimed reason for becoming an FBI informant. The name of the alleged

drug dealer would not strengthen or weaken the legitimate evidentiary force contained in such testimony. Had there been any legitimate reason why the name of the alleged drug dealer was significant to Robert Homick's desire to impeach Art Taylor, then we would expect that such a reason would have been identified by Robert Homick's very capable counsel, or by the highly experienced prosecutor, or by the judge, or by Respondent who was put on notice, in the opening brief, that Steven Homick strongly believed there was no legitimate need for identifying the alleged drug dealer. Nonetheless, none of the participants in this litigation has offered the slightest clue why the jury would be misled if the alleged drug dealer had not been named.

The only effort made by anybody in this direction was Robert Homick's claim below that he also wanted to impeach Art Taylor by showing that his claim that he had been motivated to become an FBI informant by the activities of an alleged drug dealer was not true; instead, Taylor had other reasons for becoming an FBI informant. But Robert Homick did eventually impeach Taylor's explanation, by showing that there had been tax liens on Taylor's property and that Taylor hoped to get those liens removed in return for providing information to the FBI. (See RB 212.) Whatever impeaching value this evidence had was not strengthened in any way by naming Steven Homick as the alleged drug dealer.

Respondent then goes on to claim that the evidence was "minimally prejudicial to appellant." (RB 212.) This claim is preposterous. Naming

Steven Homick as a long-time drug dealer whose operation was so significant that it led to a lengthy investigation by the FBI could not be negated simply by telling the jury that this evidence was not to be used as proof that Steven Homick had bad character or a disposition to commit crimes. Just as Art Taylor was offended at drug dealing activities because he had three daughters about whom he was concerned, some or all of the jurors, especially those with children, would have been similarly offended.

Respondent first claims any prejudice was minimal because evidence that Steve Homick was a drug dealer was not particularly inflammatory in comparison to the murder and conspiracy charges. (RB 212.) Respondent's reasoning appears to be classic bootstrapping. The task of the jury below was to determine whether Steven Homick was guilty of the murder and conspiracy charges. While the crimes may have been inflammatory, Steve Homick was entitled to a presumption of innocence. As explained earlier in this brief, the prosecution evidence against Steve Homick suffered from a variety of shortcomings. But when the jury heard uncontradicted allegations from Art Taylor that Steve Homick had carried on a mail-order drug business for a number of years, corroborated by an FBI agent verifying that Steve Homick had been under investigation for a number of years, the jurors were undoubtedly influenced against Steve Homick. This improper evidence would have made it much easier for jurors to overlook flaws in the case against Steve Homick, and to be more receptive to a conclusion that he was probably also guilty of the murder and conspiracy

charges, and to be more likely to feel that they wanted to see him remain in custody regardless of any weaknesses in the current case.

Next, Respondent contends that this evidence actually helped Steve Homick because it impeached a witness against him. (RB 212.) That may be true to some extent, but any benefit to Steve Homick has to be balanced against the detriment caused by exposing the jurors to uncontradicted allegations that Steve Homick was a drug dealer. Certainly counsel for Steve Homick was in a far better position to balance the benefits and detriments to Steve Homick than is Respondent or the court below. Steve Homick's counsel objected strenuously to this evidence. Respondent's attempts to second-guess Steve Homick's own counsel, in regard to what was best for Steve Homick, must fail.

Next, Respondent points to various admonitions given to the jury. (RB 212.) While these admonitions may have been better than nothing, it has been shown in the opening brief that they were inadequate to negate the harm caused by the evidence regarding drug dealing. It has been shown above that it was entirely unnecessary to connect Steve Homick's name to Art Taylor's story about a drug dealer motivating Taylor to become an FBI informant. This was a glaring error committed by a trial court that had already recognized the minimal value of this evidence to Robert Homick, and had also recognized the great danger of prejudice to Steve Homick. This completely unnecessary error could well cost Steve Homick his life. Respondent's attempts to sweep this under the rug must fail. Furthermore, as

shown in the opening brief, if this evidence really was critical to Robert Homick's defense, then the proper remedy was to grant a severance, not to sacrifice one defendant in order to protect another.

In addition, if Respondent and the court below are so confident that an admonition can cure any harm whatsoever, then why wasn't that the proper approach to the Missouri incident, discussed in the preceding argument? The Missouri incident was at least as important, if not far more important, to Steve Homick's defense than the identification of Steve Homick as the alleged drug dealer was to Robert Homick's defense. The prejudice flowing from labeling Steve Homick as a drug dealer was at least as prejudicial to Steve Homick, if not more prejudicial, than the Missouri incident was to Robert Homick. But if admonitions really cure any harm from prejudicial evidence, then why didn't the court below allow the evidence of the Missouri incident and protect Robert Homick by admonishing the jury that the evidence was not to be used to conclude that Robert Homick was a person of bad character who was likely to commit crimes? The employment of a double-standard by the court below and by Respondent on appeal is glaring, but Respondent simply refuses to discuss that issue.

B. Judge Stromwell's Testimony Regarding Max Herman

In the Opening Brief, it was shown that Judge Stromwell's testimony about Max Herman had little or no relevance to the present case.

(AOB 305-313, esp. at pp. 308-312.) Furthermore, the evidence improperly sought to show that Steve Homick was a person of bad character – that he was a deceitful manipulator who would even take advantage of his own brother. Thus, Steve Homick was seriously prejudiced by this evidence, far outweighing any probative value. Furthermore, the admission of this evidence, while excluding the evidence of the Missouri incident discussed in the preceding argument in this brief, further demonstrated a double standard that deprived Steve Homick of equal protection of the laws, as well as other constitutional rights.

Respondent begins by contending that any complaint that Judge Stromwell's testimony was inadmissible pursuant to Evidence Code section 1101 was waived by the failure to adequately raise this ground in the court below. (RB 216-217, fn. 90.) This contention is puzzling for several reasons. First, it was Robert Homick below who sought to use this evidence to prove conduct in conformity with habit or custom, apparently relying on Evidence Code section 1105 as an exception to section 1101. Thus, all parties and the court below must have been mindful of the interplay between these sections when debating the admissibility of Judge Stromwell's testimony. The purpose of an objection is to put the court on notice regarding whatever defense counsel believes is erroneous. (*People v. Partida* (2005) 37 Cal.4th 428, 434-438.) Even if the circumstances themselves were not sufficient to put the court on such notice, Respondent forgets that counsel for Steve Homick did expressly object on the ground that the testimony

would constitute improper character evidence. (See RT 116:13968-13969, summarized at AOB 305-306 and by Respondent at RB 214.) Any more specific reference to Evidence Code section 1101 by number would have made no difference whatsoever. No more detailed objection is required to preserve a point when it would have been futile. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.)

In addition, even if any objection specifically under Evidence Code section 1101 was somehow waived, that would not impact the objection based on Evidence Code section 352, or the appellate claims on federal constitutional grounds. As explained in *Hale v. Morgan* (1978) 22 Cal.3d 388, 394, "... a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (See also *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476-1477.) Also, the principles set forth in section 1101 are relevant in assessing the probative value of the testimony – an essential step in the section 352 analysis.

In the same footnote, Respondent also contends that section 1101 was not applicable here, because "[t]he testimony at issue here was not offered to show Herman's conduct, i.e., that he provided appellant a gun." (RB 217, fn. 90.) This is a *non sequitur*. The evidence was in fact offered to prove character and conduct of both Max Herman and Steve Homick. It was offered to show that Herman gave Steve Homick the gun innocently,

that is, without awareness that it would be used in criminal activity. That purported fact was used to prove Steve Homick's character – that he was deceitful and manipulative and could get people, even street-wise people, to do whatever he wanted without them even realizing the purpose Steve Homick sought to achieve. And that alleged character trait was offered to prove that he manipulated his own brother into participating in the Woodman murders without realizing that was the purpose of the activities Robert performed at the direction of Steve. Respondent even agrees with this purpose at RB 217. Thus, sections 1101 and 1105 were at issue; Respondent offers no counter-explanation of the purpose of Judge Stromwell's testimony.

Respondent not only agrees that this was the purpose of the testimony, but also fails to offer any other argument in support of the relevance off the testimony. (RB 217.) In the Opening Brief, appellant offered eight different reasons why this evidence had little or no legitimate probative value for Robert Homick. (AOB 308-313.) Respondent does not even attempt to counter these points.

Respondent closes with the usual claim that any prejudice to Steve Homick was minimal. (RB 217-218.) Once again, Respondent argues that Judge Stromwell's testimony actually implied that Steve Homick did not manipulate Max Herman. Respondent's logic appears bizarre at best, but if Respondent is somehow correct, that only goes to add further weight to the argument that the evidence had minimal probative value. Furthermore, Re-

spondent has nothing to say about the prejudice Steve Homick suffered when counsel for Robert Homick argued to the jury that Judge Stromwell's testimony proved Steve Homick had manipulated Max Herman into supplying him with the murder weapon, and then manipulated Robert Homick into assisting in the Woodman murders without knowledge of his brother's purpose.

Respondent adds, almost as an afterthought, an apparent attempt to rebut the claim that a double standard was employed in disallowing evidence of the Missouri incident while allowing the testimony by Judge Stromwell. (RB 218.) But Respondent simply repeats the unsupported assertion that the Missouri incident was not comparable because it was cumulative. It was shown in the Opening Brief and in the preceding argument in this brief that the Missouri incident was not cumulative. Most conspicuously, Respondent makes no attempt to explain how the present testimony had more relevance than the Missouri incident, or how the Missouri incident would have prejudiced Robert Homick more than this testimony prejudiced Steve Homick. Thus, the claim that a double standard was employed remains effectively unrebutted.

C. Helen Copitka's Testimony Regarding the Relationship Between Her Brothers, Robert and Steve Homick

In another example of the trial court's willingness to lean over backward and allow evidence that had minimal probative benefit for Robert

Homick, but great potential for prejudice against Steve Homick, the trial court permitted Helen Copitka, the sister of the Homick brothers, to testify that Robert idolized Steve during their youth, twenty years before the present crimes, and that it was common for Steve to issue orders that Robert would eagerly follow. This was somehow supposed to demonstrate that any role Robert played in the present murder conspiracy was to follow directions from Steve without even knowing the true purpose. Of course, there was no actual evidence to that effect. Robert gave no testimony himself. Neither Stewart Woodman nor Michael Dominguez provided any evidence that Robert was simply following Steve's directions without understanding their intent. In sum, this theory was a figment of the imagination of Robert Homick's counsel.[21] On the other hand, the danger of prejudice to Steve Homick was great, since his own sister made clear that in her (uninformed) opinion, Steve was undoubtedly more to blame for the Woodman murders than was Robert. (AOB 313-316.)

Respondent simply reiterates the comments made by the prosecutor and the trial court, without any attempt to directly address the problems with the analysis below, set forth point-by-point in the opening brief. Respondent asserts that the weaknesses in the asserted probative value of the

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21 Indeed, Robert was a graduate of the UCLA Law School and a member of the State Bar of California, putting him in a far better position than most people to understand when he was involved in a conspiracy to commit murder. (RT 117:14224.)

evidence went to its weight, not its admissibility. (RB 221-222.) But that is no answer at all to the actual issues raised. The argument in the opening brief clearly challenged the correctness of the trial court's ruling in response to the objection that the testimony by Ms Copitka was nothing more than improper character assassination. Trial counsel's arguments and the court's responses clearly involved the balancing of probative value against prejudice. Thus, the limited probative value of Ms. Copitka's testimony did not simply go to weight; it was instead a crucial component of the trial court's analysis regarding whether her testimony retained probative value despite Ms. Copitka's limited contacts with her brothers as adults. The opening brief demonstrated that any probative value was minuscule at best, and nothing in Respondent's brief rebuts that analysis. Because probative value was so minimal, trial counsel was correct in asserting this was improper character assassination rather than a meaningful description of the relationship between the Homick brothers as adults.

Respondent states only that the claim of prejudicial impact is absurd because Ms. Copitka "portrayed appellant as a loving human being, overcoming sad family circumstances." (RB 222.) But Respondent neglects to consider the context, which was obvious to the jury. Robert and Steve were co-defendants, both on trial for murder with special circumstances. Ms. Copitka, the sister of both of these men, made unmistakably clear her belief that whatever had occurred was undoubtedly Steve's idea, with Robert dutifully following any direction he gave. This opinion was based on the way

these brothers related to each other twenty years before the present crimes, when Robert was a teenager and Steve, eleven years older, acted as a father toward Robert. This had little probative value in regard to the relationship between these brothers twenty years later, when both were adults and Robert was a graduate of UCLA Law School and a member of the State Bar of California. Nonetheless, this opinion constituted virtually all of the evidence the jurors possessed in regard to the relationship between these brothers. As such, it served to fill an evidentiary void and was used by Robert's attorney to argue to the jury his otherwise unsupported theory that Robert was manipulated by Steve to engage in acts in furtherance of a conspiracy to commit murder, without even understanding the purpose of any acts he performed. This was necessarily prejudicial to Steve Homick.

Respondent similarly dismisses the claim that counsel for Steve Homick should have been permitted to ask Ms. Copitka if Robert's participation in the Missouri incident (see Argument IV), for which there was no evidence whatsoever of any involvement by Steve Homick, would change her opinion. (RB 222.) Respondent simply echoes the trial court rationale that incidents involving other people would not impact Ms. Copitka's opinion about the relationship between Robert and Steve. But this misses the point entirely. If Ms. Copitka was presented with the provable facts showing that Robert had engaged in a very serious crime of violence, while knowing full well what he was doing, and without any involvement whatsoever by Steve, that might very well have given her pause in regard to her

obvious belief that any role Robert may have played in the present crimes was limited to following directions from Steve Homick. Thus, the prohibited cross-examination deprived Steven Homick of any meaningful cross-examination of this witness, depriving him of his federal Sixth and Fourteenth Amendment right to confront and cross-examine the witnesses against him, as well as his federal Fifth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury trial in accordance with Due Process of Law, and to a reliable verdict supporting a sentence of death.

Once again, Respondent does not even attempt to address the other part of the claim regarding the Missouri incident – that this was one more demonstration of the double-standard employed by the trial court in repeatedly letting in evidence offered by Robert, despite minimal probative value and a great danger of prejudice to Steve, while simultaneously precluding evidence offered by Steve Homick, that was far more probative and had far less potential for prejudice to Robert.

D. Improper References to the Las Vegas Investigation of a Triple Murder

In the opening brief, it was shown that counsel for Robert Homick played a portion of a tape-recorded police interview of Michael Dominguez, and that he improperly and unnecessarily included a portion that made reference to a triple-murder investigation in Las Vegas, the city

where both Steve Homick and Michael Dominguez lived.[22] Then, in cross-examining an officer about the contents of the tape recording, the prosecutor made an additional reference to the triple murder investigation in Las Vegas, violating a directive from the trial court to refer only to an investigation of other crimes, rather than mentioning more specific details about the Las Vegas crime.[23] It was also demonstrated that under the totality of the circumstances known to the jurors, the inference was very strong that the suspected actual shooter in the Las Vegas triple-murder investigation

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22 Before the tape was played, the trial court had expressly asked counsel for Robert Homick whether the portion to be played included any reference to the triple-murder investigation in Las Vegas. Counsel assured the court it did not. Nonetheless, when the recording was played, it did include an express reference to a triple-murder being investigated by the Las Vegas police. (RT 119:14602-14603; RT 120:14839.)

23 Respondent also contends that the prosecutor was not expressly told to avoid any reference to the words "triple-murder." (RB 228, fn. 95.) Respondent views the matter too narrowly. First, the court had already instructed counsel for Robert Homick to avoid playing the portion that referred to the triple murder investigation. Second, the court did expressly instruct the prosecutor to refer simply to another crime in Las Vegas, rather than make any reference to Steve Homick or to Tipton, who was the principal victim of the triple murder. Obviously, in telling the prosecutor not to refer to the name "Tipton," the court was not giving the prosecutor license to use the words triple-murder. **What possible reason would there be for telling the prosecutor not to refer to the name "Tipton," if the trial court somehow meant to imply it was okay to refer to the words "triple-murder."** Thus, the court and all counsel must have understood the court's only logical meaning – that references to the Las Vegas investigation should be couched in terms such as "investigation of another crime," rather than identifying the victim by name or mentioning the sensation fact that the Las Vegas crime was a triple-murder.

was Steve Homick. Despite this seriously prejudicial development, Steve Homick's motion for a mistrial was denied. That ruling was erroneous and implicated several of Steve Homick's federal constitutional rights. (AOB 317-325.)

Respondent notes that when these events initially occurred, no objection was made by counsel for Steve Homick, and Respondent argues this forfeited the present claim. (RB 225, 227-228.) However, it was already explained in the opening brief that no such objection was needed before each of the references to the triple murder, because the trial court had already made it clear to counsel for Robert Homick and to the prosecutor that no reference to the triple murder should be made. Why should an attorney make an objection to evidence that was not supposed to be presented?

Once the impermissible references did occur, the damage was done and any objection would have only drawn even more attention to the references; indeed, an objection in front of the jury by counsel for Steven Homick would have increased the likelihood that the jurors would conclude that Steve Homick was the suspect in the Las Vegas triple homicide from high to certain. Instead of acting in a way that would increase the already high likelihood of prejudice to Steve Homick, counsel waited until the next day, when he had an opportunity to express his concerns, and move for a mistrial. (See AOB 324.)

Respondent also argues that no prejudice occurred, since Steve Homick's name was never mentioned in connection with the triple murder

investigation. (RB 228-230.) Respondent attempts a point-by-point rebuttal of Steve Homick's line of reasoning that the jurors would all but certainly conclude that Steve Homick was the suspected shooter in the Las Vegas triple homicide. First, Respondent concludes without explanation that involvement in the triple murder does not follow logically from the fact that the Los Angeles officers investigating the Woodman murders sat in on the Las Vegas interview of Dominguez about the triple murder. (RB 228.) It may be true that this point, in isolation, does not point directly to Steve Homick's involvement in the Las Vegas triple homicide, but it is one factor among many which, taken cumulatively, does point strongly to the conclusion that Steve Homick was suspected of being the actual shooter in the triple murder. Certainly, the fact that the Los Angeles officers remained for the interview would suggest strongly that they believed there was a direct connection to the Los Angeles murders.

Respondent contends that Appellant is simply mistaken in asserting that the jurors already knew that the Las Vegas police were investigating him for other crimes. (RB 229.) It is Respondent who is mistaken. The jury had already heard the testimony of Art Taylor, who had lived and worked in Las Vegas for many years and who had been permitted to testify that he had been supplying information about Steven Homick to the FBI for a number of years. (See Section A, earlier in this argument; see also RT 82:8361-8368.)

Next, Respondent asserts the jurors had not been informed that Steve Homick had been sent to Las Vegas to stand trial for other charges. (RB 229.) When the opening brief was prepared, it was believed that Michael Dominguez had been impeached with testimony he had given in Steve Homick's Nevada trial. But even if the jury was not aware, during the guilt trial, of the fact that Steve Homick had stood trial in a Nevada state court, that is a minor component in the list of reasons set forth in the opening brief to establish the strong likelihood that the jury would connect Steve Homick to the improper references to the triple murder investigation. Even if this component is removed, that likelihood remains strong.

Indeed, Respondent makes no effort to refute the strongest components in the list set forth in the opening brief. These unchallenged strong components include the fact that the jurors knew that Steve Homick had lived in Las Vegas for many years. The jury had also heard much prosecution evidence that sought to connect Steve Homick and Dominguez as recurring crime partners. The jury knew that the plea bargain with Dominguez was conditioned on him not being the shooter in any of the crimes for which he was under investigation. That clearly included the triple murder investigation, so the jury knew that the police must have suspected some other person was the actual shooter in the triple homicide case. Under all of the circumstances, there was more than enough to cause the jurors to conclude it was very likely that Steve Homick was the suspected shooter in the Las Vegas triple murder case.

Respondent closes with a brief reiteration of the claim that there could be no prejudice from any of these evidentiary errors because the evidence of Steve Homick's guilt was overwhelming. However, as usual, Respondent relies almost entirely on the testimony by Stewart Woodman and Michael Dominguez. (RB 230.) But it has already been shown, both in the opening brief and earlier in this brief, that these were two of the least credible witnesses ever to give sworn testimony. Even if testimony from such witnesses can serve to support the sufficiency of the evidence to uphold a conviction on appeal, it certainly cannot be said that testimony from such despicable, untrustworthy witnesses could ever be considered overwhelming evidence.

VI. MULTIPLE ERRORS OCCURRED IN THE ADMISSION OF HEARSAY STATEMENTS, OSTENSIBLY MADE IN FURTHERANCE OF A CONSPIRACY

A. The Alleged Death Threat Made By Robert Homick to Jack Swartz

Over defense objection, evidence was admitted to prove that Robert Homick made statements to Tracey Hebard in which Robert threatened to "snuff out" the life of Ms. Hebard's father, Jack Swartz, if Swartz failed to repay a debt he owed to the Woodman brothers. This evidence constituted hearsay to the extent it was offered against Steven Homick. The prosecution sought to utilize the hearsay exception for statements made by a co-conspirator, in furtherance of a conspiracy. (AOB 345-349.)

However, the prosecution never proved that **anybody** conspired with Robert Homick to commit any criminal act. Aside from Tracey Hebard's testimony about the statement itself, the only evidence on the point was that Stewart Woodman had sent Robert to collect a debt, but there was no evidence that Stewart instructed Robert to use violence or to make threats or to do anything illegal. There was no evidence that this had anything at all to do with the alleged conspiracy to murder the Woodman parents. There was no evidence that Steven Homick had anything whatsoever to do with this incident.

Respondent first argues that evidence of this threat was relevant to prove the nature of the relationship between Robert Homick and Stewart

Woodman – that Robert acted as Stewart's "muscle," and made threats of violence for Stewart. (RB 233-234.) However, Respondent mentions, but then completely disregards, the fact that the trial court expressly concluded that the statement was not at all prejudicial because it constituted mere "puffing," of the sort commonly used by effective debt collectors. (RT 68:5564, summarized at RB 232.) Respondent ignores the clear tension between the court's express finding and the prosecution theory that this proved Robert Homick was actually ready to commit violent criminal acts, if necessary to carry out the desires of Stewart Woodman. If this incident actually proved what the prosecution claimed, then it was highly prejudicial other crimes evidence – a conclusion completely at odds with the trial court's conclusion that this was nothing more than routine "puffing," and not a serious threat of violence.

Respondent relies on *People v. Coffman* (2004) 34 Cal.4th 1, 75, and *People v. Guerra* (2006) 37 Cal.4th 1067, 1117-1118 for the proposition that evidence is relevant if it proves the nature of the relationship between crime partners, or between a defendant and a victim. (RB 234.) But in both of those cases the evidence at issue showed only a relationship and did not constitute evidence of uncharged crimes. In *Coffman* the evidence was offered to prove the romantic relationship between the co-defendants, and in *Guerra* the evidence was offered to show that the victim's love for her native country motivated her to form a relationship with the defendant. Thus, these cases say nothing about the admission of other crimes evidence

to prove a relationship, or about prosecution reliance on a theory that is entirely incompatible with the express finding of the court.

Moreover, Respondent fails to explain how this evidence was relevant against Steven Homick, even if it was relevant against Robert Homick. Respondent fails to explain many other things, such as how this evidence proved the relationship between Robert Homick and Stewart Woodman when there was no evidence that Stewart authorized Robert to threaten violence or to commit any unlawful act in collecting the debt from Jack Swartz.

Apparently recognizing the weakness of this theory, Respondent simply proceeds directly to the claim that Steve Homick suffered no prejudice, despite the failure of the trial court to deliver the limiting instruction it had promised to give. (RB 234-235.) Respondent claims that since Steve Homick's name was never mentioned, he suffered no prejudice. But Steve and Robert Homick were brothers and there was always a grave danger that evidence detrimental to one would be considered by the jury against the other.

Next, Respondent claims the argument benefitted Steve Homick by showing that Stewart was more likely to turn to Robert Homick, rather than Steve Homick, to solve the problems the Woodman brothers had with their parents. (RB 234.) Respondent reminds the Court that in a separate appellate claim Steve Homick has argued in favor of the admission of testimony about Robert's alleged threats made during the Missouri incident, discussed

in Argument IV. But it is the job of the defense, not Respondent (who seeks the death of Steve Homick), to balance the benefits and detriments to Steve Homick of each item of evidence. If there is any inconsistency in the two arguments by Steve Homick, there is equal inconsistency in the position of Respondent, who has argued that the Missouri incident had little or no probative value for Steve Homick, while arguing this incident benefited Steve Homick. The bottom line is that no rule precludes Steve Homick from making inconsistent arguments on appeal. Appellant will be ahead if he wins either one of these argument, even if he loses the other. Respondent, however, takes the inconsistent position that Steve Homick should lose both arguments.

Respondent's third reason why the error was harmless is that the evidence was not inflammatory. (RB 234-235.) That is not so clear; a threat to kill a businessman if he fails to pay a disputed debt should be considered inflammatory. To the extent it might be less inflammatory than other crimes Respondent might imagine, that only goes to reduce prejudice, not eliminate it.

Repeating the trial court conclusion discussed above, Respondent also contends the evidence was not inflammatory because the threat was mere "puffing" that would be expected from a debt collector. (RB 235.) But this only traps Respondent further in inconsistencies. If the threat was serious, it was inflammatory. If the threat was mere puffing, it had little or no probative value. Either way, the admission of this evidence was error that

must be considered cumulatively with all of the other errors, in assessing prejudice. Also, this error further demonstrates the double-standard employed by the trial court, which strictly limited every attempt by Steve Homick to offer evidence in his own behalf, while expansively allowing almost every attempt by the prosecution or co-defendants to offer evidence harmful to Steve Homick.[24]

B. Statements That Steve Homick Was the Woodmans' Man in Vegas, That He Could Get Anything Done, and That He Was Tougher Than the Mafia

Prosecution witness Catherine Clement, who had worked for the Woodman brothers as a receptionist until she was fired in April 1983, testified that on one occasion a man came to visit Stewart Woodman and after the man had left, Stewart commented that the man was Stewart's man in Vegas, and that if you wanted anything done, he was the man to do it. Neil Woodman added that the man who had just departed was tougher than the Mafia. The evidence was in great dispute about exactly when this occurred

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24 Respondent adds a puzzling footnote, claiming that Robert Homick's alleged threat was not hearsay at all, since it was not admitted for the truth of the matter asserted. (RB 235, fn. 96.) Apparently this is a restatement of the mere "puffing" theory. Once again, if this constituted run-of-the-mill debt collection, then it is impossible to conclude that it proved that the relationship between the Woodman brothers and Robert Homick was such that Robert would be the man they would turn to when they decided they wanted their parents murdered.

or whether the man was, in fact, Steve Homick. Furthermore, there was never any evidence at all that Steve Homick was involved in any conspiracy to murder prior to the date of Ms. Clemente's firing. There was never any explanation at all as to how such a statement to a receptionist could further any conspiracy to murder, even if one had existed. Despite all these problems, Rick Wilson, another Manchester Products employee was allowed to testify to similar comments that Stewart made to him, which added the fact that if you wanted anything illegal done, that was the man to do it. (See AOB 349-369.)

Respondent apparently recognizes the hopelessness of the trial court's repeated unexplained claims that these statements were somehow in furtherance of whatever conspiracy might or might not have existed whenever these statements were made. Instead, Respondent invents a different theory that was considered and squarely rejected by the trial court – that the statements were not admitted for the truth of the matter, so they were not hearsay at all. Instead, Respondent argues the statements were admitted to show Stewart and Neil's state of mind. (RB 241-242.) Respondent's imaginary theory is riddled with numerous flaws.

First, Respondent argues that the comments made by Neil and Stewart Woodman were not offered to prove that any of the things they said were true, but were offered merely to prove their state of mind. (RB 242.) But if Neil and/or Stewart did not believe these claims were true, then what was it that these claims tell us about their state of mind? Respondent claims

this shows that Neil and Stewart believed Steve Homick was a problem solver, and that supposedly prove they later entered into a conspiracy with Steve Homick to kill their parents. But if Stewart and Neil did not believe that Steve Homick was tougher than the Mafia, or that he could do anything of an illegal nature that the brothers wanted done, then how would these statements tend to prove that they later chose Steve Homick as the person with whom to conspire to commit murder?

Though not clearly spelled out, apparently Respondent believes that the mere fact that the statements were made tends to prove that Stewart and Neil did believe the claims were true and the statements were offered only for that purpose, but they were not offered to prove that the statements actually were true. This is a convoluted theory that no jurors would ever understand even if they had been fully instructed about these fine distinctions. Here, they were not instructed at all about these distinctions. Here, the trial court believed incorrectly that these statements were admissible as statements by a co-conspirator, so they could be used for the truth of the matter. Neither argument nor instructions enlightened the jurors on the fine distinction underlying Respondent's theory. Respondent cites no case that permits reliance on such a convoluted theory that was never understood by the trial court or counsel or the jurors, and for which no instructions were ever given.

Indeed, if the trial court had ever understood that this was the theory for which the statements were being offered, then it is not clear the state-

ments would have been admitted at all. Even if the statements were not being offered for their truth, the mere fact that the Woodman brother believed these were accurate descriptions of Steve Homick was still highly prejudicial to Steve Homick. At the same time, the probative value of the evidence was minimal. There was no need to prove Stewart's state of mind; Stewart was a prosecution witness who had already been found guilty of murder and conspiracy to murder and who testified to the stand that he conspired with Steve Homick to murder his parents. There is no conceivable reason for the jurors to disbelieve all of Stewart's testimony, but to believe that the offhand comments he made to a receptionist he fired a month later did prove his state of mind.

To sum up the problems with this aspect of Respondent's argument, it is fundamentally unfair (in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law, and to reliable fact-finding underlying a verdict of death) to uphold the admission of these statements based on this new theory because if this theory had been utilized below it would have greatly changed the nature of the Evidence Code section 352 balancing process and it would have required limiting instructions that were never given. *People* v. *Dell* (1991) 232 Cal.App.3d 248, 258 is relied on by Respondent for the proposition that "[i]t is immaterial if the ground relied on below was erroneous if the action taken . . . was otherwise proper." But in *Dell*, the defendant was convicted of pimping and pandering. The defen-

dant ran an escort service. Undercover officers called a phone number in response to advertisements, and requested that escorts be sent to their hotel rooms, at an agreed price of $200-$300 per hour. The escorts arrived, collected their fee, and then completely undressed, offered condoms to the officers, and explained the kinds of sexual acts they would perform. Other evidence proved that the defendant hired and trained the escorts, placed the advertisements, maintained the phone lines, and regularly collected the receipts. (*Id.*, at p. 252.)

The issue in *Dell* was whether statements made by the escorts about the sexual acts they would perform for their fee were admissible against the defendant under the co-conspirator exception to the hearsay rule. But the defense pointed to case law holding that a prostitute could not be charged with conspiring with her pimp. The Court of Appeal sidestepped the issue of whether the co-conspirator hearsay exception could be used in such circumstances, concluding instead that that the statements were admissible as "verbal acts" or "operative facts" of the crime of prostitution. (*Id.*, at p. 258.) The officers' testimony about the statements of the escorts proved that the escorts were offering to engage in lewd acts for money. This, in turn, proved that the defendant's business involved prostitution. (*Id.*, at p. 262.)

Under these circumstances, the evidence was admissible against the defendant to the same extent it would have been admissible under the co-conspirator hearsay exception utilized by the trial court. No issue was

raised in the Court of Appeal regarding any change in the legal analysis that would have been performed, or any need for limiting instructions. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' " (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) Respondent offers no other authority that allows the use of a new theory on appeal when that theory would have drastically changed the legal analysis below, or the arguments of counsel below, or when that new theory would have required limiting instructions that were never given below.

Furthermore, even if these statements could have been properly admitted against the Woodman brothers to prove their state of mind, that still does not make the statements relevant when offered against Steve Homick. These statements prove nothing whatsoever about Steve Homick's state of mind, or about the likelihood that he would later join a conspiracy with the Woodman brothers especially if the statements were offered to prove only what the Woodman brothers thought, and not that Steve Homick actually was worse than the Mafia, or actually was the man to go to in order to accomplish any illegal purpose. Thus, the statements, admitted without any limiting instruction except for one that told the jury that the statements were made in regard to Steve Homick, and could not be used against Robert Homick. (RT 73:6461A-6461B.) Thus, the jury was effectively told the statements could be used against Steve Homick, but Respondent offers no authority for such usage.

The authority Respondent does offer is inapposite. In *People v. Sanders* (1995) 11 Cal.4th 475, 517-518 (discussed at RB 242), the witness testified to a statement that was made by the defendant's co-conspirator, inviting the witness to join the declarant in committing a robbery. Although the defendant was apparently not yet a member of the conspiracy, this Court upheld admission of the statement to prove that the co-conspirator intended to form a conspiracy to rob the business in question, and that was relevant to prove that the co-conspirator subsequently entered into a conspiracy with the defendant to rob that business. This Court added that the evidence did not prejudice the defendant because he was not yet a member of the conspiracy. (*People v. Sanders, supra*, 11 Cal.4th at p. 518, fn. 9.) Here, in contrast, the statements did not concern any plan by anybody to actually engage in the commission of a crime. Thus, the probative value here was slight, at best, and certainly far lower than in *Sanders*. Here, also, the prejudice to Steve Homick was far greater, since the statements attributed to Steve Homick a readiness to commit acts of criminal violence and the jury was expressly instructed that the statements were about him, in contrast to *Sanders*, where the statement suggested nothing about the defendant's character, and, indeed, had nothing at all to do with the defendant.

In *People* v. *Howard* (1988) 44 Cal.3d 375 (discussed at RB 243), the statements at issue were made by a co-conspirator expressing his desire to kill the person he later conspired with the defendant to have killed. This

provides no authority for the admission of one person's "puffing" statements that pertained to no actual desire to commit any crime, and therefore had little or no probative value. Also, as in the *Sanders* case, there was little prejudice to the defendant in *Howard*, since the statement at issue had nothing to do with him. In contrast, here the jury was expressly instructed that the inflammatory statements pertained to Steve Homick.

Respondent goes on to argue that the prosecutor below did not utilize these statements for any hearsay purpose, but instead simply argued that the statements were reflective of Neil and Stewart's state of mind. (RB 243-244.) But the portion of the prosecutor's argument quoted by Respondent does not make clear what point or points were on the mind of the prosecutor. When the prosecutor argued that the words spoken by the Woodman brothers proved that Steve Homick was the man they went to in order to have their parents killed, there was nothing that would convey to the jury that this testimony was relevant only to the charges against the Woodman brothers, and not to Steve Homick. Indeed, as noted above, the trial court had already effectively told the jury that the evidence could be used against Steve Homick. Clearly, the prosecutor, in his argument, was implying that Steve Homick actually was the man to go to in order to accomplish any illegal purpose. Thus, the testimony was argued for the truth of the matter.

Respondent argues that no objection was made to the "limiting" instruction that was given, so any claim regarding that instruction was

waived. (RB 244.) But the court had just ruled (erroneously) that the conspiracy to murder had begun in early 1983, and that the statements were in furtherance of the conspiracy and admissible against Steve Homick, but not against Robert Homick. . (RT 73:6416-6417.) In light of these rulings, any objection to the limiting instruction would have been futile. Futile objections are not required in order to preserve a claim for appeal. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.) This is an excellent example of the problem with Respondent's new theory on appeal; if the court below had chosen to rely on the theory Respondent now proposes, then the erroneous limiting instruction would not have been given.

In a footnote, Respondent claims that the disputed evidence regarding whether the person who Cathy Clement saw meeting with Neil and Stewart Woodman, just before they made the comments at issue here, was Steve Homick or not, goes only to the weight of the evidence, not its admissibility. (RB 244, fn. 99.) But one objection that was clearly made and fully preserved for appeal was the Evidence Code section 352 objection. (RT 73:6279-6283.) One side of the balance that must be made in ruling on an Evidence Code section 352 objection is the probative value, or the weight, of the evidence. Thus, factors that pertain to the weight of the evidence do, in fact, concern the admissibility of the evidence.

Respondent moves on to Neil Woodman's comment that Steve Homick was worse than the Mafia, but once again misunderstands Evidence Code section 352. Respondent expressly acknowledges that the comment was objected to pursuant to section 352, but in the very next sentence contends that there was no specific argument that the Mafia comment was unduly inflammatory. (RB 245.) When the prosecution offers evidence of one person's statement that the defendant is worse than the Mafia, and that defendant objects, contending that the probative value of the evidence is outweighed by its **prejudicial** impact, the court and all parties on certainly on notice that the defendant is arguing that the comment is inflammatory. That is sufficient to preserve the claim. (*People v. Partida* (2005) 37 Cal.4th 428, 434-438.)

In any event, Respondent does discuss the merits of that claim. Respondent contends the statement was not inflammatory because Neil Woodman did not say that Steve Homick actually was a member of the Mafia. Respondent's position is puzzling. The statement at issue was that Steve Homick was even **worse** than the Mafia. If evidence of membership in the Mafia is inflammatory, then evidence that a defendant is even worse than the Mafia is, necessarily, even more inflammatory.

Respondent also contends that the jury would have understood that the evidence of Neil Woodman's comment that Steve Homick was worse than the Mafia was only introduced to establish Neil Woodman's state of mind. (RB 245.) Respondent does not explain how the jury could have un-

derstood that, when even the court below did not understand that. Indeed, the court effectively instructed the jury that the evidence was to be used against Steve Homick. Respondent cites only *People v. Medina* (1995) 11 Cal.4th 694, 749, but that case sheds no light on the present situation. In *Medina*, the witness who identified the defendant as the perpetrator of the crimes at issue had relied in part on his tattoos of a Nazi Swastika and the grim reaper. Thus, the probative value of the evidence in strengthening the identification of the defendant outweighed any prejudicial impact. But in the present case Neil Woodman's comment had little or no probative value in regard to Steve Homick, and could not have outweighed the great prejudicial impact.

C. The Magazine Article Regarding Hiring a Hit Man, Which Neil Woodman Showed to Gloria Karns

Gloria Karns, an aunt of the Woodman brothers, testified that when she attended a deposition in a civil lawsuit that also involved Neil Woodman, Neil opened a magazine in her view, referred to an article entitled "This Gun for Hire," and said, "When somebody annoys you, you can look in a magazine and find someone to stop them annoying you." (RT 72:6161-6166, 6183.) Counsel for Steve Homick objected and requested a limiting instruction to protect Steve Homick. (RT 72:6032-6037; see AOB 369-371.) Apparently finding that the statement was admissible as a statement made by a co-conspirator, in furtherance of the conspiracy and made during

the course of the conspiracy, the trial court refused to give an instruction limiting the testimony to Neil Woodman. (RT 72:6032-6037.)

Respondent makes no effort to contend that this statement was made in furtherance of the conspiracy. Instead, Respondent first notes that the jury was instructed not to consider this statement against the alleged co-conspirators unless the jury found that the statement was made in furtherance of the conspiracy. (RB 247.) Once again, there are multiple flaws with Respondent's position.

First, Respondent conveniently forgets that the highly experienced prosecutor and the highly experienced trial judge both concluded that this statement was made in furtherance of the conspiracy. While they were both wrong, there is simply no basis whatsoever for Respondent's speculation that it is likely that the jurors understood what the judge and prosecutor did not understand. Respondent, apparently recognizing the weakness in this argument, offers no explanation why it is "likely" that the jurors understood they should not consider this statement against Steve Homick.

Moreover, the trial court erred in allowing the jurors to even consider whether this statement should have been used against Steve Homick. The simple fact is we have no way of knowing whether they did or did not consider it. If the jury did consider this rank hearsay against Steve Homick, then the error violated Steve Homick's federal Sixth Amendment right of confrontation. (*Crawford v. Washington* (2004) 541 U.S. 36.) Neil Woodman never testified, there was never an opportunity for Steve Homick to

cross-examine him. Because this is clear constitutional error, the standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. It cannot be said, and Respondent does not even attempt to claim, that beyond a reasonable doubt the jury did not consider and rely on this evidence.

As a fallback position, Respondent argues that the statement was admissible against Steve Homick for a different reason. Respondent argues that the statement showed Neil Woodman's then-existing state of mind, and that state of mind constituted circumstantial evidence that Neil Woodman did, in fact, enter into a conspiracy with Steve Homick to kill Neil's parents. (RB 247-248.)

Once again, Respondent relies on *People v. Sanders, supra,* 11 Cal.4th 475, 517-518.) First, if *Sanders* goes as far as Respondent claims, then it should be reconsidered. While evidence of one conspirator's state of mind may constitute reliable circumstantial evidence against the declarant, there is no basis in logic or reason to leap from that to the conclusion one conspirator's state of mind, revealed to other persons but **not** to co-conspirators, somehow constitutes reliable evidence of the guilt of other alleged conspirators. That is, even if it is fair to conclude that this was reliable circumstantial evidence that Neil Woodman intended to enter into a conspiracy to murder, nothing about the incident indicates that the Woodman parents would be the victim of any such conspiracy to murder. More importantly, the incident does nothing whatsoever to tend to prove that Neil Woodman intended to enter into such a conspiracy with Steve Homick.

Furthermore, *Sanders* should not be extended as far as Respondent seeks. In *Sanders*, the statement in question directly referenced the specific target crime of the eventual conspiracy – to rob a specific Bob's Big Boy restaurant. The actual robbery occurred just a month after the statement was made. Here, in contrast, the statement was made more than a year and a half before the Woodman parents were murdered, and the statement did not reference the Woodman parents at all. Thus, even if the statement at issue in *Sanders* constituted relevant evidence against the defendant in that case, *Sanders* should not be read support a conclusion that one conspirator's statement disclosing that conspirator's state of mind **always** tends to prove something relevant about every other future co-conspirator. More specifically, *Sanders* should not be read to support a conclusion that Neil's statement, made a year-and-a-half before the murder and making no mention of Neil's parents, was somehow relevant to prove Steve Homick's guilt.

D. Neil Woodman's Statement to Edgar Ridout That He Could Arrange to Have Ridout's Wife "Hit," and Stewart Woodman's Statement That Steve Homick Was His Collection Man for Difficult Accounts

As set forth in the opening brief, Jack Ridout was permitted to testify, over objection, that he was friendly with the Woodman brothers, that on one occasion Neil Woodman suggested he could solve problems Ridout was having with his ex-wife by arranging to have her "hit," and on another

occasion Stewart Woodman said that Steve Homick was his collections man. (See AOB 371-378.) Respondent sees no errors. (RB 248-253.)

Little more need be added to the arguments set forth in the opening brief. In regard to Neil Woodman's comment that he could arrange to have Ridout's wife "hit," Respondent sees no problem for Steve Homick because the jurors were eventually instructed that the statement was not admitted against Steve Homick and could not be considered against him. (RB 251-252.) Although the trial court refused to give such a limiting instruction when defense counsel requested it immediately after the offending testimony, and did not give any limiting instruction until later in the day, after 50 additional transcript pages of testimony, Respondent argues only that trial courts possess discretion regarding the timing of limiting instructions. (RB 252.)

However, while courts may have discretion, that discretion is not unlimited. As explained in the opening brief, this Court has recognized that in many instances limiting admonitions lose their effectiveness if they are not given promptly. (*People* v. *Hogan* (1982) 31 Cal.3d 815, 847.) Here, Respondent fails to offer any rationale supporting the trial court's refusal to give a prompt admonition. It is not sufficient to simply respond that courts have some discretion, so any amount of delay for any reason, or for no reason, is always error-free. If that were the rule, then the reasoning in *Hogan*

would be rendered meaningless. Respondent offers no reason for rejecting what was said in *Hogan*.[25]

In regard to Stewart's statement that Steve Homick was his collections man, Respondent makes no effort to argue the statement was admissible against Steve Homick. Instead, Respondent argues only that the error was harmless {because the comment was not accompanied by any words or gestures indicating violence was used to collect the debts.} (RB 253.) Nonetheless, this error must still be considered along with all of the other errors that combined together to unfairly convey the notion that Steve Homick was willing to do anything to solve a problem, and that he was a hit man just waiting for people to call and hire him to kill someone else to solve a problem.

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25 In a footnote, Respondent argues the evidence was properly admitted against Neil Woodman to prove his willingness to hire hit men to solve problems. (RB 252-253, fn. 101.) Strangely, in the very next sentence, Respondent claims this was **not** admitted as propensity evidence, but only as evidence of opportunity. Respondent does not explain what "evidence of opportunity" means in this context. Also, Respondent does not explain how Neil's alleged willingness to hire hit men to solve problems could be considered anything other than propensity evidence.

E. Neil Woodman's Request to Steve Strawn, to Destroy Cards Hidden Under a Desk

In yet another example of the prosecutor's frequently broken promise (made in a successful effort to avoid a complete severance of parties) to forego the use of any hearsay evidence that was admissible against one or more defendants, but inadmissible against others, Steve Strawn was permitted to testify that Neil Woodman called him after Neil had been arrested, and asked him to destroy business cards that Neil had hidden under a leg of Neil's desk. Strawn did as Neil asked, and also testified hat the cards he destroyed were business cards containing Steven Homick's name. (RT 77:7175-7181, 7262, see AOB 379-381.)

Respondent contends that no hearsay statement at all was made by Neil Woodman, nor did the cards provide any information regarding the crimes for which Steve Homick and Neil Woodman were on trial. Moreover, Respondent argues that if there was any deficiency in the limiting instruction that was given, it was the fault of Steven Homick's trial counsel, who failed to seek different language. (RB 253-257, esp. at pp. 256-257.) Once again, there are multiple flaws in Respondent's position.

First, it was clearly the position of the People below that Neil Woodman not only made a statement, but that statement constituted an admission of guilt. Thus, it is Respondent, not Appellant, who is taking a different position on appeal. The position of the People below was that Neil Woodman's request to Steve Strawn to destroy the cards was a demonstra-

tion of a consciousness of guilt. Coupled with the fact that this request was made very soon after Neil had been arrested for the murders of his parents, the People's position below was that Neil's call to Strawn demonstrated consciousness of his guilt in the murders of his parents.

But any fair analysis must go even further than this. If all that was known was that Neil asked Strawn to destroy cards hidden under his desk, with no information regarding the content of the cards, then Neil's request would have been highly ambiguous and would have carried little or no evidentiary value. The People below obviously recognized that and sought to fill the gap by having Strawn explain that the destroyed cards were business cards with Steve Homick's name on them. This, of course, constituted a second level of hearsay, since the cards constituted writings and their contents were therefore hearsay, separate from the hearsay statements allegedly made by Neil and described by Strawn. (Evid. Code §§ 210, 250.)

In sum, combining two levels of hearsay, the People below presented evidence that Neil Woodman made an admission of his guilt in crimes charged against him and that the admission of guilt was made by his act of seeking to hide evidence that connected him to Steven Homick, who was also charged with the same crimes. If this was not the purpose of the evidence offered below, then what was its purpose? Respondent provides no clue. Furthermore, since the evidence gains meaning only if one infers that Neil Woodman was engaging in criminal activities with Steve Homick, the evidence necessarily constitutes evidence that Steve Homick, as well as

Neil Woodman, was engaged in criminal activities related to the charges for which Neil had just been arrested. But that evidence could not be used against Steven Homick because of the two levels of hearsay required to make the inference, with no hearsay exception available to cover either level.

In any event, Respondent's main position below is that the admonition – that the evidence of Neil's instructions to Strawn could be considered only against Neil, and not against any other defendant – negated any damage to the interests of Steven Homick. It was explained in the opening brief that no admonition could cure the harm, especially when this inadmissible hearsay evidence is considered in combination with the other evidentiary errors that occurred below. It was also shown that the admonition that was given forbid the use against Steve Homick of only the telephoned instructions, leaving the jury free to use against Steve Homick the hearsay evidence that a business card with Steven Homick's name had been hidden under a leg of Neil's desk, separate from and preceding Neil's telephonic instructions to Strawn.

Respondent makes no effort to argue that the business card, hidden under a leg of Neil's desk, could properly be used as evidence against Steven Homick. Nor does Respondent make any attempt to argue that the admonition was adequate to preclude the jury from making use of this aspect of the evidence against Steve Homick. Instead, Respondent argues only that it is too late for Steven Homick to complain, since counsel below failed to

seek a different limiting instruction. (RB 257.) But Respondent forgets that the clear position of the defense below was that **no** admonition could cure the harm. (RT 77:7149.) When the defense takes such a position at trial, and the trial court rejects that contention, the trial court has been fairly warned that it takes full responsibility for whatever limiting instruction it believes will cure the harm. It would be logically inconsistent for counsel to take the position that no instruction could cure the harm, while also shouldering the responsibility for crafting an instruction that would cure the harm.

The only authority cited by Respondent for this claim of waiver is *People v. Riel* (2000) 22 Cal.4th 1153, 1207. (RB 257.) But in *Riel*, counsel failed to make any objection at all in the trial court, to the evidence or the instruction. Under those circumstances, it may be fair to disallow appellate claims regarding the adequacy of a limiting instruction. But here counsel did object to the evidence and also contended that no limiting instruction could cure the harm. The present issue is not that the instruction that was given was erroneous; rather, the issue is that error occurred in allowing this evidence to be admitted at all. It is Respondent who raises the limiting instruction as a claimed cure for the erroneous admission of the evidence, and if Respondent wants to rely on the limiting instruction as a cure, then Appellant surely has the right to argue that it is not a cure. Respondent offers no authority or rationale for finding a waiver in such circumstances. The scope and effectiveness, and hence any inadequacy of, the limiting instruc-

tion is an inherent part of any appraisal of the prejudicial impact of the trial court's error in admitting the evidence, an error clearly preserved for review.

F. Neil Woodman's Hearsay Reference to Steven Homick as a Heavy Guy

Another matter discussed before Steve Strawn's testimony was his anticipated description of conversations in which Neil Woodman purportedly referred to Steve Homick as a "heavy guy." Steven Homick's objection was rendered moot when the prosecutor agreed to instruct the witness not to mention this statement. Nonetheless, the witness did describe this statement in response to a prosecution question. In the opening brief, it was conceded this error was minor in comparison to many other errors, but should still be considered in combination with those other errors. (See AOB 381-382.)

Respondent simply argues the statement was innocuous and unexpected, so there was no prejudice. (RB 257-259.) Clearly this was **not** unexpected, since defense counsel had warned the court prior to the testimony, and the prosecutor had expressly agreed to instruct the witness not to mention this statement. In any event, the fact remains that even if this was not sufficiently prejudicial, standing alone, to merit appellate relief, it is nonetheless an additional error that must be considered in combination with

all of the other errors, in assessing cumulative prejudice. (See Argument XII in the opening brief and later in this brief.)

VII. ADDITIONAL PROSECUTION EVIDENCE WAS IMPROPERLY ADMITTED AGAINST STEVEN HOMICK

A. Evidence That Steven Homick Usually Carried a Gun

As explained in the opening brief, Art Taylor was permitted to testify, over objection, that Steve Homick usually carried a revolver. This was apparently admitted on the theory that this revolver might possibly have been the gun used in the murder of the Woodmans, since one non-expert witness who heard gunshots the night of the murders testified that the gun he heard sounded like it could have been a revolver. This was admitted despite the absence of any other evidence that the gun allegedly carried by Steven Homick actually was the murder weapon. Indeed, the prosecutor's own theory of the case was that a completely different gun was the murder weapon. (AOB 384-390.)

Respondent contends that evidence that Steve Homick usually carried a revolver was properly admitted since that revolver "might have been" the murder weapon. (RB 260-263.) Respondent completely ignores the fact that the prosecution theory at trial was that a completely different gun was the murder weapon. Respondent also completely ignores the fact that cases precluding various types of defense evidence have made it clear that mere possibilities are not sufficient to render evidence probative; instead, there must be something more solid to connect proffered evidence to the case at hand. In light of this Court's decisions holding defendants to a much more

stringent standard when offering evidence to raise a reasonable doubt as to guilt (see cases discussed in AOB at pp. 388-389), this Court's acceptance of Respondent's theory as governing the prosecution's proffers of evidence would violate defendants' Fourteenth Amendment rights to due process and equal protection of the law by unjustifiably creating an imbalance between the prosecution and defense. "[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Appellant and Respondent agree that evidence that the defendant possessed or had access to a weapon is not admissible if that weapon could not have been involved in the charged crimes. A disagreement arises in determining how strong a preliminary showing must be made, that the weapon at issue may have been the weapon involved in the charged crimes. Respondent would lower that bar as far as possible, apparently allowing evidence of any weapon in any way connected to the defendant, as long as the defendant cannot prove that the weapon was not involved in the crime. As will be seen, this is not the proper standard, but even if it were, that standard was met here.

Respondent relies on *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047, 1052. (RB 262.) However, in *Carpenter*, *supra,* the witness testified that the defendant had shown her a gun that " 'looks like' " the murder weapon. While it is difficult to quantify how far "looks like" goes toward supporting an inference that it was the murder weapon, such testimony certainly goes farther than merely showing that a revolver might have been the murder weapon and the defendant carries a revolver. Indeed, many defendants are found guilty because a witness testifies that the defendant "looks like" the person who committed the crime. Thus, however far along the continuum "looks like" stands, it must be significantly stronger than a mere possibility.

In the present case, no witness testified that the revolver Steve Homick allegedly carried "looks like" the murder weapon. Here we have no evidence at all regarding the appearance of the murder weapon. All we know is that one witness who heard it fired thought it sounded like a revolver. This, of course, includes the vast majority of all guns used by all perpetrators of all crimes. If Respondent's theory were correct, then it would be the height of hypocrisy to limit it to prosecution evidence regarding weapons connected to a suspect. Instead, there would be no principled basis for failing to extend this theory to all evidence. That would mean any evidence would be admissible upon the slightest showing that it might possibly be connected to the crime at issue. But it has already been shown in the opening brief that the correct standard is necessarily higher than that.

(See *People* v. *Pitts* (1990) 23 Cal.App.3d 606, 835-837; *People* v. *Archer* (2000) 82 Cal.App.4th 1380, 1392-1392; and *People* v. *Hall* (1986) 41 Cal.3d 826, 833, all discussed at AOB 387-389. Notably, despite the fact these cases were all discussed in the opening brief, Respondent has simply ignored them, rather than attempting to criticize their rationales.[26]

Furthermore, the prosecution also introduced evidence, through the former statements of Michael Dominguez, regarding a revolver that Steve Homick allegedly obtained from Max Herman the day before the Woodmans were killed. The prosecutor, in closing argument to the jury, stated unequivocally that the gun that Steven Homick received from Max Herman was used to commit the Woodman murders. (RT 127:15730.) Thus, the prosecution's own theory was that the murder weapon was **not** the revolver that Art Taylor claimed he had seen in Steve Homick's briefcase. Since the prosecution's own theory of the case was that any revolver seen by Art

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26 Respondent also relies on *People v. Cox* (2003) 30 Cal.4th 916, 955-957. That case does appear to support Respondent's theory, but the discussion in *Cox* is superficial, relying strongly on *Carpenter*. However, as shown above, *Carpenter* does not go as far as either Respondent or this Court in *Cox* assumed. Furthermore, if the *Cox* holding were to continue to be accepted, then we are left with the problem just discussed – that if evidence is considered relevant and admissible solely because there is the slightest possibility that it might be connected to the present crime, then many other cases – setting forth long-standing rules that require a stronger showing than the remotest possibility of a speculative connection – would be left unsupportable. Thus, *Cox* should be reconsidered and rejected in favor of a more limiting rule.

Taylor was not the murder weapon, even Respondent's reading of the *Riser* rule would lead to the conclusion that it was error to allow Art Taylor to testify about any handgun that he may have seen in Steve Homick's possession.

B. Evidence That Robert Homick Stated That His Presence, in a Parked Vehicle Outside the Woodman Residence on the Date of Their Wedding Anniversary, Was a Mere Coincidence

In the opening brief, it was shown that the evidence conclusively demonstrated that on Gerald and Vera Woodman's forty-fifth wedding anniversary (a day on which they would have been expected to leave their apartment and go out to dinner), Robert Homick spent several hours parked in front of the Woodman's apartment building, for no discernible reason. Steven Homick planned to argue to the jury that other evidence indicated he was not even in California on that date, and that Robert Homick apparently planned to murder the Woodman parents on that date, but for some reason was unable to carry out that plan. This would support the inference that it was Robert Homick, rather than Steven Homick, who was hired by the Woodman brothers to kill their parents. However, the prosecutor wanted the jury to hear testimony from Stewart Woodman that he had heard Robert Homick state that his presence in front of the Woodman apartment on the date of their anniversary was simply a coincidence. Steve Homick's counsel argued this was inadmissible hearsay that could not be

used against Steven Homick. The court refused to preclude this evidence or grant a severance of parties. Thus, once again, evidence clearly inadmissible against Steven Homick was nonetheless heard by his jury, only because it was arguably admissible (although completely unnecessary) against Robert Homick. (AOB 390-396.)

Respondent starts by contending the evidence was "highly probative" to the People's case and was "tantamount to a confession" of Robert's surveillance activities regarding the Woodman parents. (RB 265.) This is a major exaggeration. The evidence of Robert's activities on June 22, 1985 was very strong and completely without rebuttal. That is, one witness testified to his observations, describing both Robert and his very distinctive automobile, and a police officer verified he was called to the scene and spoke to Robert. Thus, even without Robert's statement, the evidence was very strong that Robert was conducting surveillance of the Woodmans on June 22, 1985.

What did Robert's statement add? The statement added Robert's admission that he had been to the location before and after June 22, 1985. With no other details, that statement was woefully insufficient to establish surveillance activities on those other occasions. The statement contained no information regarding when those other instances occurred or how long they lasted or what it was Robert was doing. Did he just drive by that location on other dates? Did he park in the area and remain there for any substantial period of time? Nobody knows, and certainly the prosecution never

suggested it had any other evidence to add, in regard to Robert's presence in the area on other dates.

Respondent next tries to deflate the importance of the incident to Steven Homick, arguing that there was no evidence of a murder plot on June 22, 1985. (RB 265.) But from all of the other evidence, we know that the Woodman parents did not venture out of their apartment often, and the Woodman brothers knew little about their activities when the parents did venture outside. All the brothers really knew was that the parents had a custom of going out for dinner at a restaurant, or at the home of a relative, on major occasions, such as anniversaries and on the most important Jewish holidays.(RT 79:7547-7548, 7551; 102:11690.)The actual murders occurred when the Woodmans were returning from just such an outing on Yom Kippur, the most important Jewish holiday. Thus, the Woodman parents' forty-fifth wedding anniversary was a very logical date to plan a murder.

Robert's unexplained presence parked outside the apartment for hours on that date was very suspicious. In addition, Steven Homick's offer of proof included the fact that there were many phone calls between Robert Homick and Stewart Woodman on that date. This may not be the strongest evidence that a murder was planned on June 22, 1985, but it certainly supports an inference far stronger than most of the inferences relied on by Re-

spondent to defend the many evidentiary rulings discussed in this argument and the preceding two arguments.[27]

Respondent also argues that even if there was an unfinished murder plan on June 22, 1985, a date when Steven Homick was not even in Los Angeles, that would not preclude Steven Homick's involvement in the murder plan that was carried out three months later. That may be true, but it is beside the point. The point made by Steven Homick's counsel was that evidence of a murder plot headed by Robert Homick on a date when Steven Homick was not even in the Los Angeles area certainly supported an inference that Robert, rather than Steven, was the leader of any murder plot.

The simple reality is that this was an unusually complex trial and the prosecution, as well as each of the various defendants, relied on many small bits of circumstantial evidence to weave an overall version of the events most favorable to the end result being sought by that party. Respondent

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[27] Robert's unexplained presence in front of the Woodman residence for several hours on their anniversary, and the numerous phone calls that day between Robert and Stewart Woodman is even more ominous when considered together with the fact that after the Woodman's collected the insurance money for the death of Vera Woodman, Neil Woodman arranged for a wire transfer of $28,000 to Robert Homick. Also, there is no proof that Steven Homick was present when the Woodmans were murdered, except for the prior statements of Michael Dominguez, whose credibility should have been at or near zero. In contrast, Robert Homick's auto accident around the corner from the Woodman residence and very close in time to the murders constituted fully corroborated evidence of his presence at the crime scene.

seeks to beat down one point after another by arguing that it was a small part of a big picture. But there could be no big picture without a conglomeration of small parts. These small parts must be assessed one-by-one for errors and/or unfairness, and if the totality of the errors resulted in a fundamentally unfair trial, then Steven Homick's federal constitutional rights were violated and appellate relief is warranted.

Notably, Respondent does not even address the fact that Steve Homick's defense offered to stipulate that Robert had stated that he had been in the area of the Woodman apartment before and after June 22, 1985, leaving out only the claim that it was a mere coincidence that he was there on the Woodmans' anniversary. The trial court did not explore whether such a stipulation would have resulted in greater fairness to all parties. The fact that the prosecutor did not bother to argue in favor of the proffered stipulation shows that his true desire was to unfairly harm Steven Homick, not to harm Robert Homick.

Also notable is Respondent's failure to even discuss the fact that this evidence was clearly not admissible at all against Steven Homick. How many times must the prosecutor blatantly violate his promise to forego any hearsay evidence admissible against one defendant, but not against others, as a means of avoiding the severance that clearly should have occurred, before appellate relief is granted?

Respondent closes by faulting Steven Homick for not requesting a limiting instruction. (RB 265.) But such a request would have been futile

since the trial court had just cut short counsel's efforts to seek a fair compromise, refusing to even talk about the proffered stipulation because the trial court had erroneously concluded that Robert's statement had no negative impact on Steven Homick. If the trial court believed that, then there was no reason to give a limiting instruction. As noted previously, no such request is required of trial counsel when it would have been futile. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.) The defense clearly notified the trial court of its concerns and gave the trial court every opportunity to avoid error. Nothing more was appropriate or necessary.

C. FBI Agent Gersky's Testimony That He Believed Michael Dominguez

As set forth fully in the opening brief, Michael Dominguez was interviewed by Joseph Gersky a Special Agent of the Federal Bureau of Investigation (hereafter "FBI") who was also a polygraph examiner. Agent Gersky did not believe Dominguez during that interview, so he conducted a second interview during which Dominguez added a number of purported facts that had not been mentioned during the first interview.[28] Because

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28 During the first interview, Dominguez had maintained that he did not know who was involved in the conspiracy to murder the Woodman

polygraph evidence is considered inherently unreliable (Evid. Code § 351.1), Agent Gersky was not permitted to refer to that examination; instead, he simply testified to statements made by Dominguez. As far as the jury knew, Agent Gersky was simply another professional interrogator who had questioned Dominguez in the course of the investigation of the murder of the Woodman parents. Agent Gersky had called as a witness by Robert Homick, who was apparently pleased with the fact that Dominguez had not mentioned Robert Homick during his initial statement to Gersky. In the course of his direct examination testimony, this twenty year veteran of the FBI gratuitously stated, in an unresponsive answer, that he did not believe Dominguez' first statement and, as a result, he conducted the second interview. Over a strong objection by counsel for Steven Homick, the prosecutor, on cross-examination was allowed to elicit the fact that Agent Gersky did believe Dominguez' second statement, which occurred shortly before Dominguez was given a very favorable plea agreement in return for his cooperation with the authorities. As demonstrated thoroughly in the opening brief, courts have consistently recognized the impropriety of a police officer's testimony that he believed a witness. Furthermore, under the particular circumstances of this case, there were a number of additional well-

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parents, other than Steven Homick. During the second interview, he added descriptions of alleged activities involving Robert Homick.

recognized reasons why it was grossly improper to allow the prosecution to elicit this witness-vouching testimony. (AOB 396-411.)

Respondent does not even attempt to defend the propriety of allowing the witness to testify that, after Dominguez' second statement, he believed what Dominguez had said. Instead, Respondent argues only that any error was harmless. (RB 266-269, esp. p. 268.)

Respondent cites *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83, as though it stood for the proposition that such an error is always, or generally, considered harmless. (RB 268.) But *Coffman* was very different from the present case. First, the witness whose veracity was improperly supported had been fully and fairly cross-examined by the defendant, so the jury had a very ample opportunity to assess credibility and demeanor apart from the improper opinion. In contrast, in the present case, Dominguez' in-court testimony was almost entirely a useless farce. The real prosecution case rested in the prior statements of Dominguez that were read or described by police officers or the prosecutor, with no opportunity for the jurors to assess Dominguez' demeanor. While some of the prior statements were video-taped, and the videos were shown to the jury (repeatedly), that was essentially equivalent to direct-examination without cross-examination, severely limiting the ability of the jurors to properly assess Dominguez' credibility. Furthermore, in *Coffman*, the jury was fully instructed that the opinions expressed by the witness in issue were received only for limited purposes pertaining to Coffman's own defense, and were

not to be used against defendant Marlow. No comparable instruction was given here. Finally, as set forth in detail in the opening brief, Dominguez was the most important prosecution witness against Steven Homick, and he presented unusually difficult credibility issues for the jurors to resolve. The jurors had a great many reasons to distrust Dominguez, and the only rational basis for their reliance on his testimony to send Steven Homick to his death was the obvious fact that the prosecution believed the prior statements of Dominguez. It is more than reasonably likely that the testimony of a twenty-year veteran Special Agent of the FBI that he believed Dominguez was an important factor in the jurors' decision to accept the incriminating aspects of Dominguez' prior statements.

Next, Respondent seeks to minimize the importance of the testimony vouching for Dominguez because the difference between Dominguez' two statements pertained only to who else was involved in the conspiracy, not to Steven Homick. (RB 268.) But Respondent, intentionally or carelessly, misses the point. The jury knew that the first statement was considered incomplete, and that the second and more detailed statement occurred shortly before the prosecution offered Dominguez his highly favorable plea agreement. The testimony of an FBI Special Agent that he believed Dominguez' second statement clearly incorporated much or all of the information from Dominguez that was the heart of the prosecution case against Steven Homick. The fact that the differences between the two statements may not have been especially harmful to Steven Homick does not detract from the

fact that Dominguez' ultimate statements to the authorities were very harmful to Steven Homick, and testimony from a twenty-year Special Agent of the FBI vouching for those statements clearly prejudiced Steven Homick. Furthermore, since Dominguez' first and second statements both ascribed a major leadership role to Steve Homick in the murders (and conspiracy to murder), Agent Gersky's testimony that he believed the second statement necessarily conveyed that he believed Dominguez was telling the truth on both occasions when he described Steven Homick's involvement.

Moreover, the fact that Dominguez' initial statement failed to mention Robert Homick **was** helpful to Steven Homick, in that it cast doubt on the credibility of all of Dominguez' statements. Improper testimony from Agent Gersky that he believed the latter statements undercut the value of this important impeaching evidence. Once again, Steven Homick was clearly harmed by this unfair rebuttal of valuable impeachment of the credibility of Dominguez' statements to the police.

Next, Respondent echoes the trial court's unsupported conclusion that the jurors' decision whether to believe Dominguez' prior statements or not would not have been impacted by Agent Gersky's testimony that he believed Dominguez, because there were many other facts known to the jury regarding Dominguez' credibility. (RB 269.) Respondent's point is mystifying, as Respondent lists several very powerful factors that should have caused the jurors to distrust anything Dominguez ever said. But Respondent ignores a simple fact that remains – despite all the reasons to distrust

Dominguez, **something** caused the jury to accept much of what he told the authorities in his prior statements. Once again, we know that this very jury disbelieved important aspects of Stewart Woodman's testimony, since the jury was unable to agree on Neil Woodman's guilt – an issue that would have been clear and simple if the jury did believe Stewart Woodman. With that in mind, the jury's acceptance of Dominguez' prior statements was very important to a successful prosecution of Steven Homick. Respondent offers no alternative explanation for the jury's apparent acceptance of the prior statements of a witness who should have never been trusted no matter whose side he was supporting. What did cause the jury to disregard all of the powerful reasons for distrusting any words ever uttered by Dominguez? We can never know the answer, but we can certainly conclude it is at least reasonably likely that Agent Gersky's testimony that he believed Dominguez' second statement was a factor in the jury's resolution of the Dominguez credibility issue.

Respondent continues with more arguments that make little or no sense. Respondent contends there could have been no reliance on Agent Gersky's belief that Dominguez told the truth because the jurors were instructed that they were the sole judges of credibility. (RB 269.) That is a clear *non sequitur*; the jury remained free to rely on Agent Gersky's improper opinion as part or all of their basis for carrying out their duty of judging the credibility of Dominguez' prior statements.

Finally, Respondent concludes that Agent Gersky's belief in the truth of Dominguez' prior statements was of " 'extremely minor significance.' " (RB 269.) If that was true, then why did the prosecutor argue so strongly in favor of the admission of this testimony? It seems beyond dispute that the prosecutor believed this was important, and it is the height of hypocrisy for the People to change course 180 degrees on appeal and argue that this error was harmless because the evidence wasn't important after all. (See *People v. Taylor* (2010) 48 Cal.4th 574 [trial counsel's failure to ask judge to ask follow-up questions of seven jurors who indicated some degree of racial bias in their questionnaire responses indicated that counsel did not believe the jurors were biased]; *Uttecht v. Brown* (2007) 551 U.S. 1, 18-20 [although there was no need to object to preserve *Witt/Witherspoon* error, Court relies on counsel's acquiescence, in upholding trial court's excusal of the juror].)

D. Agent Gersky's Testimony That Steven Homick Was Notorious

As shown in the preceding argument, Agent Gersky, a twenty-year veteran of the FBI, answered a question posed by counsel for Robert Homick in an unresponsive manner, expressing his personal opinion about the credibility of Michael Dominguez. One would think that an FBI agent with twenty years of experience would know better. But that was not Agent Gersky's only transgression. On redirect examination by counsel for Robert

Homick, Agent Gersky again inserted unresponsive information into an answer, this time referring to Steven Homick as a "notorious person." (RT 116:14116, ll. 24-28.) As shown in the opening brief, this was a highly prejudicial attack on the character of Steven Homick. Although a defense objection was sustained and the jury was instructed to disregard the comment, defense counsel believed that was an insufficient remedy since, "You can't call somebody notorious ... and then just tell the jury, forget about it." (RT 116:14146-14147.) Defense counsel moved for a mistrial. The trial court readily agreed that Agent Gersky had acted in a manner that was "at the very least, irresponsible if not outrageous ..." (RT 118:14450, l. 3.) Nonetheless, the trial court did not view the error as sufficiently prejudicial to warrant a mistrial. On appeal, Steven Homick contends this was an important matter and even if it was not sufficient standing alone to merit relief on appeal, such relief is appropriate when this error is considered in combination with all of the other improper attacks on Steven Homick's character, and all of the other errors that occurred. (See AOB412-415.)

As usual, Respondent sees no prejudice and urges this Court to send Mr. Homick to his death despite a trial marred by such irresponsible behavior by an FBI veteran who clearly should have known better. (RB 270-272.) Notably, Respondent limits its argument to the impact of this single error, in isolation. Steven Homick urges this Court to do more, and consider the full cumulative impact of all of the many errors that occurred during this trial.

E. The Improper Admission of Michael Dominguez' Personal Opinion That Steven Homick Intended to Kill the Woodman Parents

Unlike Agent Gersky's spontaneous and unresponsive comments, the last in this series of improper character attacks could have been easily prevented. Before the prosecution played a tape recording of Dominguez' prior statements, counsel for Steven Homick clearly warned the court that two portions of the tape recording contained improper expressions of personal opinion by Dominguez which, in context, carried the clear implication that Dominguez knew Steve Homick well, and from that knowledge Dominguez had concluded before the murders occurred that Steven Homick intended to kill the victims. Once again, the trial court used convoluted reasoning to come to an unsupported conclusion, and refused to stop the prosecution from presenting these clearly improper expressions of speculative personal opinion. Once again, Steven Homick on appeal has argued that these additional errors, taken in combination with all the other errors, justifies relief. (AOB 415-418.)

This time Respondent tries to defend the admissibility of the evidence of what Dominguez thought that Steven Homick intended. (RB 272-277.) Respondent argues that Dominguez was being evasive and untruthful in his trial testimony that he had no recollection of his prior statement about whether he knew in advance that there was going to be a killing, not just a robbery. From this dubious beginning, Respondent leaps to the unsupported

conclusion that the portions of Dominguez' statement to which the defense objected were not evidence of Steven Homick's intent; instead, they were simply evidence of Dominguez' own beliefs about the conspiracy. (RB 276.) Even if that was correct, Respondent never explains why that would make the statements relevant. Michael Dominguez had already pled guilty to first degree murder. His guilt was not an issue at the present trial; he had already admitted he was guilty and the jurors knew that.

Thus, Respondent fails to offer any supportable basis for the admission of evidence of Michael Dominguez' own thoughts about what was going to happen. In any event, Respondent is simply wrong in claiming that Dominguez' statements carried no suggestion that Dominguez expected a killing based on prior knowledge that Steven Homick was a violent man who had killed before. (See RB 277.) Dominguez testified that he expected the victims were to be killed, "based on being with Steve and what Steve had done," (RT 86:9028-9029) and because "**I just know Steve.** ... I thought the people were going to get shot and killed." (RT 88:9269; emphasis added.) Dominguez had also said that when Steve Homick had told him that he had "been after" the Woodman parents, that meant Steve had been trying to catch up to them in order to kill them. (RT 86:9019-9023)

Thus, in the first statement, Dominguez had clearly based his opinion on his prior knowledge of Steve Homick. While the basis for the subsequent opinion was less clear, what else would have caused him to reach such a conclusion other than his prior experiences with Steven Homick? In

sum, these were not mere expressions of Dominguez' own understanding of the goals of the conspiracy; instead, they clearly conveyed a purported personal knowledge of Steven Homick's past behavior that convinced Dominguez that Steve Homick had an intent to kill well before the shooting occurred. Admission of this evidence was clear error that should be considered along with all of the other errors that occurred.

Even if we ignore the emphasized portion of Dominguez' statements, Respondent's claim that Dominguez was basing his opinion only on the evidence of Steven Homick's advance preparations for the confrontation with the Woodman parents was still unsupported. Nothing about those preparations supported a conclusion that what was planned was a murder, rather than a lesser crime, such as a robbery, or a lesser assault, or an effort at intimidation. Thus, if Respondent's interpretation were correct, then this would have been unimportant evidence on a collateral matter. Indeed, the asserted acts of preparation were already known to the jurors, and there was no need to repeat them along with an expression of Dominguez' personal opinions. Clearly, the prosecution below treated this as a far more important matter, and Respondent should not be permitted to change course and trivialize this on appeal.

F. Additional Conclusions Pertaining to Prejudice

Respondent concludes with another claim that the evidence adduced as a result of the evidentiary errors was only a small portion of the case against Steven Homick. (RB 277.) But there have been many errors and they add up to a significant impact on issues that went to the heart of Steven Homick's defense – errors that unfairly bolstered the credibility of Michael Dominguez' prior statements, errors that bolstered Robert Homick's defense while shifting all the blame to Steven Homick, and errors that undercut Steven Homick's defense that Robert was the person the Woodman brothers turned to when they wanted their problems to disappear.

Also, once again, Respondent claims the other evidence against Steven Homick was overwhelming, but, as explained earlier, that purported overwhelming evidence consists mainly of the testimony of Stewart Woodman and the prior statements of Michael Dominguez. (RB 277.) As thoroughly demonstrated earlier in this brief and in the opening brief, and as recognized by Respondent, there were many reasons for the jurors to distrust Michael Dominguez' prior statements (see, for example, RB 269), and we know for certain that the jurors disbelieved major portions of Stewart Woodman's testimony.[29] Respondent also refers to evidence of stalking by

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29 Had Stewart Woodman's testimony been fully accepted by the jurors, there would be no rational explanation for the failure to convict Neil Woodman.

Steven Homick and of preparatory acts by him, but much of that evidence would also have little or no meaning absent direction from Dominguez and Stewart Woodman. Thus, Respondent's "overwhelming evidence" is actually a very fragile house of cards that could very well have collapsed completely if the jurors had not been exposed to so many evidentiary errors.

VIII. THE REPEATED MOTIONS TO SEVER DEFENDANTS FOR TRIAL WERE ERRONEOUSLY DENIED

A. Introduction

In the opening brief, it was shown that there were many strong reasons for granting Steven Homick's motions to be severed for trial from each of his co-defendants. It was clear that there would be antagonistic defenses and that a great number of statements would be at issue that were admissible against one defendant but not against others. It was also shown that California law and the particular circumstances of this very complex case resulted in a serious dilemma: the statements made by various parties, and others, that were admissible against one or more defendants but were also inadmissible against other defendants, were so numerous that it was unrealistic to specify each one and litigate their admissibility prior to trial. The prosecution was never willing to undertake such a specification, and the defense could not realistically do it alone. Indeed, there was no point in trying to litigate every individual statement, since most of them would never be offered at all. The prosecution and the trial court repeatedly offered a solution to the problem: whenever the prosecution offered a statement that the trial court found inadmissible against any defendants, the statement would not be introduced at all. That solution sounded reasonable, but the prosecution and trial court reneged. Instead of following the promised solution, virtually every single time the prosecution offered a state-

ment inadmissible against one or more defendants, the statement was admitted anyway and the trial court either gave an ineffective limiting instruction, or the court simply dismissed any harm as insignificant. As shown in the opening brief, the trial court's assessment of potential harm was frequently very wrong. (See AOB 420-475.)

In such circumstances, meaningful appellate review and fundamental fairness demand that the reviewing court should resolve any uncertainties against the People. It was the People who strongly resisted severance, even though that was the only way to assure that each defendant would be tried fairly. It was the People who avoided pre-trial litigation of individual statements by refusing to ever specify which ones, among the thousands of possibilities they would offer at trial. It was the People who promised that any statement ruled inadmissible against any co-defendant would be withdrawn. It was the People who broke that promise even though there was no good reason for not holding them to their promise. It was the People who successfully sought the condemnation to death of Steven Homick – a result that demands the closest appellate scrutiny and the most reliable fact-finding supporting the verdicts.

B. The Pre-Trial Motion to Sever

Respondent begins by trying to cast the pretrial motion to sever as one presenting a classic case for joinder, rather than severance. Respondent then sets forth specific factors purportedly favoring joinder, but Respondent

ignores or distorts the actual circumstances of this case. For example, Respondent first claims that the three defendants were charged with the same crimes, involving the same events and victims. (RB 287.) It is true that the crimes and victims were the same, but that is true in the vast majority of cases and tells us little or nothing about whether joinder would preserve or compromise fairness. While Respondent might value efficiency at the expense of fairness, that is not a reasonable basis for defending a death verdict.

At any rate, Respondent is simply wrong in stating that the same **events** would have been involved. In a separate trial for Steven Homick, Stewart Woodman would have testified that he desired the death of his parents and hired Steven Homick to achieve that goal. There would have been no need for the vast amount of detailed testimony about the history of the Woodman family and their family business. There would have been no need for most of the evidence that pertained only to Neil Woodman. The jury would have had a far easier job of focusing on the credibility of Stewart Woodman's testimony and Michael Dominguez' prior statements, as it related to the guilt or innocence of Steven Homick.

Respondent next simply states, without explanation, that the nearly identical charges meant there was no danger of juror confusion or prejudicial association. (RB 288.) This hyperbole ignores the fact that it was clear to the parties and the court, at the time of the pretrial motion to sever, that the prosecution theories against each of these three defendants were quite

different. The case against Neil Woodman required a detailed recital of the family history, much of which would have been irrelevant if Steve Homick had been tried alone. Indeed, the simple fact that the jury was unable to agree on the guilt of Neil Woodman amply demonstrates that the case against him was very different than the case against Steven Homick, even though the charges were the same.

Respondent next relies heavily on deeply flawed logic. Respondent asserts that, at the time of the pretrial motion to sever, there was no issue of statements admissible against one party but not against others, since the prosecutor promised that no such statements would be introduced, and the trial court was entitled to rely on that representation. (RB 288-289.) That may be arguably correct in regards to the position of the trial court, but it should be flatly rejected in regard to appellate review. We now know that the prosecutor's promise, relied on by the trial court, was a hypocritical sham. We now know that the prosecutor repeatedly urged the admission of evidence even after it was found inadmissible against Steven Homick. If this Court ignores that demonstrable reality and instead relies on the false promises of the prosecutor below, then Steven Homick cannot receive the meaningful appellate review required by the federal Fifth and Fourteenth Amendment guaranties of fundamental fairness, and by the Eighth Amendment requirement of reliability in the fact-finding supporting a death verdict.

Instead of relying on the fantasy of false and broken promises below, fundamental fairness and reliability requires the consideration of the reality of the ensuing events. Even assuming the trial court could not foresee what might come later, this Court can now see what did come later. There is no principled basis for not considering the actual trial events in appellate review of the denial of the motion to sever. Any caselaw that would support appellate review based on fantasy rather than reality should be reconsidered and rejected, at least under the unique circumstances presented in this case.

C. The Renewed Motions to Sever

1. Respondent's Assertions of Forfeiture

Respondent contends that many of the specific points raised on appeal in support of the claim of error in denials of the subsequent motions to sever were forfeited because there was no immediate new severance motion after every individual statement was admitted. (RB 289-294.) The first answer to this contention was set forth in the preceding subdivision of this argument. Under the particular circumstances of this case it is unfair to claim any such forfeiture because the root of the problem was the prosecution's false promise.

In any event, Steven Homick did renew his motion to sever on numerous occasions during the trial, and in every instance the trial court gave

the motion short shrift. It quickly became obvious that the trial court was utterly unconcerned with the prosecutor's repeated acts of reneging on the promise it had utilized to defeat the pretrial motion to sever. It quickly became obvious that it was futile to make a motion to sever on every occasion when yet another statement was admitted against one defendant even though it was inadmissible against Steven Homick. It is not necessary to make futile objections or motions in order to preserve a claim of error for appeal. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.)

Furthermore, each time a motion to sever was made, it should be judged on the basis of everything that had preceded it, not just the one statement offered just before the motion was made. Each time the motion was made, the court and opposing counsel were fully informed about each of the contested statements that had been permitted in evidence over the objection of Steven Homick. (Compare *People v. Partida* (2005) 37 Cal.4th 428, 434-438.) Each time the motion was made, the trial court had the opportunity to reflect on all of the contested statements that had preceded the motion, and on the overall fairness of the trial up to that point. Respondent offers no basis for ignoring what had preceded each motion, just because every objection was not coupled with a futile renewing of the motion to sever. Respondent relies only on a single case that found a waiver when **no** renewed motion to sever was made during trial. (*People v. Ervin* (2000) 22

Cal.4th 48, 68, cited at RB 290.) This rationale has no application when a motion to sever is repeatedly renewed.[30] Indeed, here, every time another motion to sever was denied, it became even clearer that it would have been futile to have made even more earlier motions to sever than had already been made.

In any event, after the **last** of the twelve statements that Respondent argues were forfeited as bases for error in the denials of the motions to sever, Respondent concedes that Steven Homick sought a mistrial, noting in argument that he was " 'taking the short end of it' " because of the joint nature of the trial. (RB 294.) Respondent fails to explain how this differed functionally from a renewed motion to sever. If a motion to sever had been granted at this late stage of the trial, on the ground that Steven Homick had

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30 Respondent adds a citation to *People v. Tafoya* (2007) 42 Cal.4th 147, 163, for the proposition that "[D]efendant has forfeited this issue on appeal because he failed to assert this ground at the time his severance motion was heard by the trial court." But *Tafoya* was another case where there was one motion to sever that was never renewed. As just shown, that is very different from the present case where the motion to sever was repeatedly renewed, and the claim on appeal rests on what occurred before each renewed motion, not on what occurred afterward.

Tafoya cites only two cases: *Ervin*, which has just been shown to be inapplicable to the present circumstances, and *People v. Hardy* (1992) 2 Cal.4th 86, 167. *Hardy* said only that "whether a trial court's denial of a severance motion constitutes an abuse of that discretion is judged on the facts as they appeared at the time the court ruled on the motion." But that says nothing inconsistent with the notion that "the facts as they appeared at the time the court ruled on the motion" should include **all** of the facts that preceded the ruling, not just those which immediately preceded the ruling.

been prejudiced by the admission of evidence that would not have been admitted in a separate trial, then the only relief that could have been granted was the very mistrial that was sought here, on the asserted basis that Steven Homick had been unfairly harmed because of the joint nature of the trial. This fully demonstrates that the trial court was on complete notice of all the concerns, and the denial of the motion for mistrial demonstrates the complete futility of adding the words "severance and/or" before the word "mistrial" when the motion was made.[31]

2. The Denials of the Renewed Motions to Sever Were an Abuse of Discretion

Respondent repeats the contention that many of the points listed in the opening brief in favor of severance were forfeited because no new motion to sever was made immediately after various statements were admitted into evidence over defense objection. (RB 295.) That contention was fully rebutted in the preceding subdivision of this argument.

Next, Respondent argues that each of the items was either properly admitted or was not prejudicial. (RB 295.) Those points are rebutted in the

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31 Furthermore, even if any of the evidence erroneously admitted as a result of the joinder could be deemed irrelevant to appraising whether the trial judge erred in denying a severance, it would nonetheless be relevant to this Court's determination whether the joinder resulted in a gross unfairness depriving appellant of due process and a fair, reliable trial.

preceding three arguments in this brief and the opening brief. Also, Respondent ignores the fact that even properly admitted evidence can still be relied on to establish the existence of conflicting defenses, a significant factor in the weighing process.

Respondent follows with a mystifying claim regarding evidence that the trial court ruled was admissible against some, but not all, defendants. (RB 295.) Respondent claims that the prosecutor's pretrial promise to exclude all such items was not violated because limiting instructions were given. The inadequacy of those limiting instructions was fully demonstrated in the opening brief. Aside from that, Respondent does not explain how a limiting instruction means the prosecutor kept his promise not to offer such statements at all. The promise was that such statements would not be offered. Nonetheless, they were offered. Thus, the promise was broken, after it accomplished its purpose of defeating the pretrial severance motion. Respondent can argue that limiting instructions mitigated the harm (an argument that was rebutted in the opening brief), but limiting instructions did not change the fact that the promise – a clearly important factor in the denial of the pretrial motion to sever – was broken.

Continuing to detour from reality, Respondent claims that the differences in the verdicts reached in regard to the three co-defendants demonstrates that the jurors were able to independently assess the culpability of each defendant, and that the jurors were not confused. (RB 296.) In fact, these verdicts do demonstrate confusion. How could the jury have found

Robert Homick guilty of first degree murder, while being unable to reach a unanimous verdict on the conspiracy charge, the financial gain special circumstance, or the lying-in-wait special circumstance? How could the jury believe Stewart Woodman, but not convict Neil Woodman? If the jury disbelieved Stewart Woodman enough to fail to convict Neil Woodman, then why did they convict Steven Homick and render a penalty verdict of death? The point is, the conflicting verdicts do indicate some degree of confusion. More importantly, the fact that harsher verdicts were reached against Steven Homick cannot logically be used to demonstrate that the jury did not improperly rely on the character assassination factors that prejudiced Steven Homick. In other words, if Steven Homick was prejudiced in the manner claimed in the opening brief, then we would expect the jury to reach harsher verdicts against him than against his co-defendants, and that was precisely what occurred.

Respondent repeats a point made earlier, that any unfair impairment of appellant's effort to show that Robert Homick may have planned to kill the Woodman parents on June 22, 1985 was harmless, since any such earlier murder plan would not have precluded the theory that Steven Homick was the leader of the successful plan to kill the Woodman parents on September 25, 1985. (RB 297.) Respondent's conclusion does not follow. The issue is not whether there was sufficient evidence to uphold the jury's verdicts against Steven Homick. Instead, the issue is whether unfair impairment of his effort to present his defense might have impacted the result.

Steven Homick was precluded from presenting evidence that, taken together with other evidence, could well have caused the jurors to have greater doubts about whether Steven Homick or Robert Homick was the ringleader of the murder plot. Such doubts could very well have led to more favorable guilt phase verdicts. Even if the precluded evidence had been allowed, but did not change the guilt phase verdicts, it certainly could have had a major impact on the jurors' penalty phase verdict.

Having just stressed the differences in the verdicts reached against the three co-defendants, Respondent argues there could have been no danger of prejudicial association because the charges against the three were nearly identical. (RB 297.) Respondent fails to explain how this conclusion follows from its premise. Respondent cites *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 for the proposition: "Since defendants were crime partners in several of the robberies and the murder, prejudicial association with a codefendant is not a factor." (RB 297.) But in *Cummings*, "That each was involved in the incident was undisputed, ..." (*Cummings, supra,* at p. 1287.) Here, in contrast, Steven Homick never conceded any involvement in the murder conspiracy. True, the prosecution **theory** was that all three co-defendants tried together were crime partners, but to use the prosecution theory as a basis for rebutting the claim of prejudicial association would be classic bootstrapping.

Respondent disagrees with Steven Homick's claim that the evidence against Robert Homick was stronger than the evidence against Steven

Homick. (RB 298.) But Respondent relies on the testimony of Stewart Woodman and Michael Dominguez to support the claim that the evidence against Steven Homick was overwhelming. It has been explained repeatedly why both of these witnesses should have been considered with extreme skepticism. In contrast, the evidence that Robert Homick was at the murder scene very close to the time of the murders, and that he received a $28,000 wire transfer from Neil Woodman soon after the Woodman brothers collected the proceeds of their mother's insurance, was virtually incontrovertible. Any evidence that Steven Homick stalked the victims was highly ambiguous, and any evidence that he prepared for the murders was also either ambiguous or dependent on the unsound word of Stewart Woodman or Michael Dominguez. Thus, none of the evidence against Steven Homick was of comparable strength to the evidence that Robert Homick was at the crime scene when the crime occurred, and was paid a large sum of money by the Woodman brothers.

Completely abandoning logic, Respondent makes the remarkable contention that the jury's verdicts demonstrate that the case against Steven Homick must have been stronger than the case against Robert Homick. (RB 298.) Respondent apparently forgets the actual issue: was Steven Homick prejudiced by being forced to be tried along with two co-defendants determined to shift the blame to him? Thus, the harsher verdicts against Steven Homick are fully consistent with the defense claim that Steven Homick was unfairly prejudiced, and cannot be considered proof of the opposite.

Respondent argues that the defense has not identified any portion of the record to establish that the jurors were confused about how to independently evaluate each defendant's guilt or innocence. (RB 298.) But the unprecedented length of the trial and voluminous evidence in and of itself is enough to demonstrate a high probability that one or more jurors would have been confused about which pieces of evidence applied to which defendants. Also, the failure to convict Neil Woodman, even though his guilt was clearly shown by the testimony of the prosecution's star witness is evidence of confusion about the evidence. Additionally, the jury's uncertainty about several of the allegations against Robert Homick establishes a high likelihood of confusion. Most importantly, the harsher verdicts against Steven Homick, whose guilt depended almost entirely on the dubious word of heavily impeached witnesses is further evidence that the verdicts were tainted by confusion or by reliance on the character assassination contained in evidence that was improperly admitted, or that was not supposed to be used against Steven Homick.

Respondent starts with brief and unclear comments regarding the claim of conflicting defenses. (RB 299.) Whatever Respondent is trying to say, it cannot be denied that conflicting defenses was a major defense claim raised on multiple occasions. Indeed, the trial court sought to limit debate on this topic, expressly agreeing, for the sake of argument, that the defenses would be "inconsistent and intensely in conflict. [§] I will assume for purposes of any ruling I must make that it is the heart of the defense case is ef-

fort to establish that the guilt, if any, attaches to a co-defendant." (RT 9-10:414, ll. 3-12.) Thus, it cannot be disputed that this factor was fully preserved below and must be considered by this Court to be a strong factor pointing toward severance.

Respondent follows with a puzzling claim that the opening statement by Robert Homick did not demonstrate conflicting defenses, but the next thing Respondent states is that Robert Homick's counsel said that the evidence would incriminate only Steven Homick and not Robert Homick. (RB 299.) Respondent fails to explain why this does not demonstrate that the defenses below were in conflict. When one defendant says the evidence will prove that he is innocent and the other defendant is guilty, it seems to follow that the defenses are in conflict. Respondent goes on to discuss other aspects of the conflicting defense claim that have been fully rebutted in the three arguments that precede this one. (RB 299-305.)

In further rebuttal of the conflicting defenses claim, Respondent once again relies heavily on purported strong evidence of Steven Homick's guilt. (RB 302-303.) Once again, while the testimony of Stewart Woodman and the prior statements of Michael Dominguez might constitute evidence sufficient to uphold a verdict on appeal, that, in and of itself, does not make such evidence "strong." Otherwise, every case strong enough to avoid a claim of insufficient evidence would fall into the strong evidence category, and there would never be a close case. Evidence that comes from heavily impeached witnesses who are not substantially corroborated cannot be con-

sidered strong. The other evidence relied on by Respondent was ambiguous, and some of it was dependent on Michael Dominguez to give it meaning.

Respondent concludes that "... demonstration of appellant's guilt was not dependent on Robert Homick's defense." (RB 303.) But that is true only if the jury relied on the heavily impeached testimony of Stewart Woodman and prior statements of Michael Dominguez. It is just as likely that the jury distrusted these two witnesses and instead convicted Steven Homick because of improper reliance on the evidence that suggested Steven Homick was a notorious drug dealer and contract killer who was suspected of three more murders in Las Vegas, and who could accomplish any unlawful goal better than the mafia could.

In regard to Steven Homick's claim that scarce judicial resources were wasted when the trial court repeatedly had to dismiss the jurors during lengthy debates about the admissibility of various items of evidence, Respondent makes the astounding claim that the trial court encouraged counsel to litigate these matters during pretrial in limine motions, but counsel failed to do so. (RB 306.) This contention can only be labeled outrageous. As thoroughly demonstrated in the opening brief, the defense repeatedly asked the prosecution to identify the specific statements it would offer at trial (out of thousands of possibilities), so they could be litigated before the trial. The prosecution repeatedly stalled and eventually simply refused, all

with the encouragement of the trial court. Respondent fails to explain what more the defense should have done.

Respondent contends that the claim that unusually lengthy pretrial delays could have been avoided by separate trials is based on the benefit of hindsight. (RB 306.) This is another outrageous contention. It took six-and-one-half years to get from Steven Homick's first Municipal Court appearance to the start of his trial. It was clear in the early stages that so many of Los Angeles County's best and busiest capital case defense attorneys were involved in this case, that it was nearly impossible to get all of them into court at the same time. It was clear years before the trial began that some defendants who were ready for trial were suffering unusually long delays because of the scheduling problems of counsel for other defendants. It was entirely foreseeable that the conflicting schedules of counsel would cause unprecedented delays in getting this case to trial. Steven Homick is not relying on the benefit of hindsight; rather, he is relying on the trial court's failure to display reasonable foresight.

D. The Denial of the Motion to Sever Resulted in a Trial That Was Grossly Unfair to Steven Homick

Respondent makes an unusually brief and conclusory argument that reargues many of the evidentiary points that have been discussed in the preceding three arguments. Respondent concludes that the defense was mistaken on almost every point, so the trial was not unfair. However, if this

Court disagrees and concludes that Steven Homick's position is correct on some or all of these points, then Respondent is left with no argument at all against the claim that the resulting trial was grossly unfair. (See especially AOB 472-475.)

IX. STEVEN HOMICK'S EARLIER FEDERAL COURT CONVICTIONS FOR OFFENSES WHICH, AS PLED AND LITIGATED, INCLUDED THE MURDERS OF THE WOODMAN PARENTS BARRED THE RE-LITIGATION OF THE WOODMAN MURDER ALLEGATIONS IN A CALIFORNIA STATE COURT

In California, Steven Homick was prosecuted for, and convicted of, the murders of the Woodman parents. Prior to the California trial, he had been tried and convicted in federal court for the crime of travelling across a state line with the intent to murder the Woodman parents, resulting in the deaths of the Woodman parents. Thus, both crimes required proof of the murder of the Woodman parents. The federal crime, however, had the additional jurisdictional element of travelling across a state line.

In the opening brief, it was shown that while the federal constitutional protection against double jeopardy does not bar trial and conviction in both a state court and a federal court for the very same acts, states are free to provide greater protection than the federal constitution provides. California has chosen to do just that, with Penal Code sections 656 and 793. However, the very few California cases that have construed these sections have resulted in confusing and contradictory interpretations of these sections, leaving great uncertainty regarding what should happen when the prior federal conviction offense included a technical jurisdictional element not included in the California crime. The discussion in the opening brief demonstrated that the better-reasoned cases support the conclusion that an

additional federal jurisdictional element does not preclude the use of Penal Code section 656 to bar the state prosecution. (AOB 476-502.)

Respondent reviews the same cases and comes to the opposite conclusion – that section 656 does not apply to the present case because the federal offense required the additional technical jurisdictional element of travelling across a state line before committing the crime. (RB 307-329, esp. at pp. 322-329.) Respondent starts with an analysis of *People v. Candelaria* (1956) 139 Cal.App.2d 432 (Candelaria I). Respondent takes a sentence out of context, and then dissects it, seeking to find a hidden meaning, and turns it into a two-pronged test that was never intended by the authors of the opinion. The actual sentence, which explained the applicability of the section 656 bar, stated, "All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense." (*Candelaria I, supra,* 139 Cal.App.2d at p. 440.) That sentence appeared in the middle of a paragraph (quoted at AOB 481) which unambiguously concluded that additional federal elements that merely supplied federal jurisdiction did not prevent a federal conviction from barring a subsequent California prosecution.

Nonetheless, Respondent concludes that the Court of Appeal must have been thinking more broadly, and must have meant something entirely different by the phrases "included in the federal offense," and "necessary to constitute the federal offense" than those phrases ordinarily mean and might be suggested by the court's actual holding. Respondent then goes

further and supplies a definition for "necessary to constitute," concluding, in effect, that it means "**everything** necessary to constitute."(RB 323.) Following up on this dubious reasoning, Respondent concludes that the holding of *Candelaria I* was, "section 656 does not bar the current conviction when the prior conviction requires proof of an act not at issue in the current conviction." (RB 323.)

Respondent goes too far. The issue in *Candelaria I* pertained to a federal offense and a California offense that were identical except for the fact that the federal statute also required proof of a jurisdictional element – that the funds stolen in the robbery were federally insured national bank funds. The Court of Appeal assumed that this difference "did not pertain to any activity on the part of the defendant in committing the robbery."[32] (*Candelaria I, supra,* 139 Cal.App.2d at p. 440.) The *Candelaria I* court then reached its actual holding – that the additional federal jurisdictional element did **not** preclude a California defendant from relying on Penal Code section 656 to bar state prosecution after the federal conviction. The

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[32] As will be addressed more fully below, the Court of Appeal's assumption that this jurisdictional element involved no activity on defendant's part is somewhat questionable since the defendant had to *choose* as his robbery target a building that possessed federally insured national bank funds, had to *enter* that building to commit the robbery, and had to *take* federally insured national bank funds. Further, and more importantly, the distinction between status-based and activity-based jurisdictional elements is largely semantic and has no real bearing on the goals and values section 656 is intended to serve. See discussion, below, at pp. 184-186.

Candelaria I court had no reason to even consider, let alone resolve, what should happen if the additional federal jurisdictional element did pertain to **activity** by the defendant in committing the crime in question. That situation was defined out of the court's consideration by its assumption that the difference in that case did not involve any activity.

Next, Respondent analyzes *People v. Belcher* (1974) 11 Cal. 3d 91. *Belcher*, like *Candelaria I*, involved state and federal offenses that were identical except that the federal offense had an additional jurisdictional element – that the felonious assault at issue was made upon a federal officer. Like the court in *Candelaria I*, this Court in *Belcher* assumed without discussion that no *act* was involved in the distinction between the California and the federal offense; instead, the difference was seen as only a matter of *status*.[33]As explained at AOB 484, *Belcher* clearly concluded that section 656 operated as a bar to the California prosecution when the acts necessary for the California offense were all included within the acts necessary to prove the federal offense, but not when California required an additional act, not required in the federal prosecution. *Belcher*, like *Candelaria*

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[33] As in *Candelaria I*, this assumption is somewhat questionable in that the defendant did choose to point his weapon at a federal officer, and hence, as in that case, the distinction between a status-based and an activity-based jurisdictional element is more semantic than substantive. (See footnote 32, above, and the discussion below, at pp. 184-186, concerning the distinction between status-based and activity-based jurisdictional elements.)

I, also concluded that the added federal jurisdictional element did **not** preclude section 656 from barring the federal prosecution.

Respondent, however, relies on the analysis contained in *People v. Brown* (1988) 204 Cal.App.3d 1444, to conclude that *Belcher*, like *Candelaria I*, contained a further hidden conclusion – that if the federal offense contained additional acts not included in the California offense, then the federal conviction would not bar the California prosecution. (RB 323-324.) Once again, however, such a conclusion simply goes beyond the issue, as defined by this Court in *Belcher*. *Belcher* did **not** decide whether an additional act in the federal statute would preclude a defendant from relying on section 656 to bar the California prosecution. *Belcher* did not go down the path that would make such a decision necessary. Instead, *Belcher* left that issue for a future case and made it unnecessary to decide, in view of the *Belcher* assumption that there was no additional **act** in the federal offense, only an additional **status** element.

In any event, the *Brown* analysis of *Belcher*, upon which Respondent relies so heavily, was seriously flawed, as explained in detail at AOB 487-492. Respondent simply ignores the criticisms of *Brown* that were set forth in the discussion in the opening brief. Respondent contends that the *Brown* interpretation of *Belcher* and section 656 is just because it provides slightly more protection for California defendants than does the federal constitution. (RB 324-325.) But Respondent's interpretation remains the kind of grudging application of California's double jeopardy protections

that was criticized in *Gomez v. Superior Court* (1958) 50 Cal.2d 640, 649. (See AOB 500.)

Indeed, Respondent's interpretation is anything but just. No case has challenged the notion that section 656 and the California double jeopardy clause (Calif. Const., Article I, Section 15) were designed to protect defendants from serial prosecution for what were essentially the same acts. Clearly in the circumstances of the present case, the prosecution produced a vast amount of evidence in its attempt to prove Steven Homick's guilt of the present offenses – the very same guilt determination that was at issue in the federal prosecution. The only added aspect of the federal prosecution was the technical jurisdictional element of crossing a state line. Proof of that element was *de minimis* in comparison to the rest of the case. Indeed, the evidence of that element was fully presented during the California prosecution as an incidental matter.

Furthermore, the entire purpose of the protection against serial prosecution is to protect defendants from being prosecuted repeatedly for the same conduct, while the prosecutors present the same case over and over, determining which parts worked best and which did not, honing their presentation to assure eventual conviction and in this case, a death sentence. (See discussion at AOB 499.) But if the federal prosecution comes first, as it did here, and includes proof of every single element necessary for the later state prosecution, then the California defendant is disadvantaged every bit as much as he or she would have been if the federal prosecution

had not required the additional jurisdictional element and had instead been based on elements identical to the California elements. In other words, the added technical element in the federal prosecution has **nothing whatsoever** to do with the interests being protected by a prohibition against double jeopardy or by section 656.

Additionally, Respondent's interpretation sets up a serious equal protection problem. The California cases are clear that a federal conviction bars a subsequent California conviction if the only difference is an additional federal technical jurisdictional element that is based on status, rather than being based on activity. But the distinction between a status-based jurisdictional element and an activity-based jurisdictional element has nothing at all to do with the interests that are protected by prohibitions against double jeopardy or by statutes such as sections 656 and 793. Thus, for all purposes of the California double jeopardy clause and Penal Code section 656, persons charged with crimes where the added federal jurisdictional element is activity-based are similarly situated with persons charged with crimes where the added federal jurisdictional element is status-based. To treat these similarly situated classes of California defendants differently based on distinctions that are not relevant to the interests at issue would violate both the California and federal constitutional guarantees of equal protection under the law. An interpretation that would raise new constitutional issues is to be avoided. (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 538.)

That equal protection point is made even clearer by the fact that the entire distinction between status-based jurisdictional elements and activity-based jurisdictional elements is nothing more than a matter of semantics. A federal jurisdictional element such as a requirement that the target of a theft be federally insured national bank funds can be called status-based – based on the status of the funds – or can be considered activity-based – requiring the acts of *choosing* such a target and *taking* from such a target. Similarly, it was noted that when the added federal jurisdictional element is a requirement that the target of an assault be a federal official, that can be considered status-based – based on the federal status of the targeted victim – or it can be considered activity-based – requiring the acts of *choosing* such a victim and *assaulting* such a victim.

Similarly in the present case, the federal jurisdictional element of crossing a state line appears on the surface to be activity-based, but it could just as easily be considered status-based in that it simply requires that the *location* of the victim be in a different state than the defendant is in when he or she first forms the intent to kill that victim. In sum, there is really no legitimate point in trying to make distinctions as to whether the additional federal jurisdictional element is an activity or a status. The difference is entirely a matter of semantics. Even more importantly, if there was a real difference between an activity-based federal jurisdictional element and a status-based jurisdictional element, any such difference would still have

nothing at all to do with the interests protected by California's double jeopardy protection or by section 656.

Returning to Respondent's flawed analysis, once Respondent chooses to rely on *Brown* and the similarly-flawed analysis in *People v. Friedman* (2003) 111 Cal.App.4th 824 (see discussion at AOB 495-498), then Respondent has no problem concluding that the federal prosecution against Steven Homick involved the added interstate travel element not required in the present California prosecution, and that added element is sufficient to defeat the claim that section 656 barred the California prosecution. (RB 326.) But Respondent's position is based entirely on the bare conclusion that an activity-based federal jurisdictional element is somehow different from a status-based federal jurisdictional element. (RB 326.) The hollowness of Respondent's position is made clear by Respondent's complete failure to explain why such a difference, standing alone, should mean that some California defendants are protected from serial prosecutions while others are not.

Respondent seeks to superficially reject *People v. Gofman* (2002) 97 Cal.App.4th 965 (discussed is depth at AOB 492-495) even though *Gofman* applied *Candelaria I* and *Belcher* and upheld the use of section 656 as a bar in circumstances where the additional federal jurisdictional element was described as the **act** of using the mail to effectuate the fraud that was the basis of the California charges. Thus, *Gofman* strongly supports Steven Homick's position. While federal jurisdiction was based on the *activity* of

using the mails, Respondent simply tries to brush that aside by describing using the mail as **not** an additional act, but instead as simply the **means** of committing the crime of presenting false insurance claims. (RB 327.) But even if this distinction made any real difference, the same could be said in the present case: travel across a state line was not an additional act – it was merely the **means** by which a person in Nevada intending to murder a person in California could commit that murder. Once again, all this proves is that the attempted distinction is not a real one, for the purpose of determining whether section 656 does or does not operate as a bar.

Respondent adds the puzzling contention that, "the prosecution here was not required to show, nor were the jurors here required to find, that appellant crossed state lines with the intent to commit murder." (RB 327.) That may be true, but the same can be said in all the other cases where section 656 was applied as a bar: the state prosecution in *Gofman* was not required to prove that the defendant used the mails. The state prosecution in *Belcher* was not required to prove that the victim of the assault was a federal official. The state prosecution in *Candelaria I* was not required to prove that the stolen funds were federally insured national bank funds. Once again, Respondent simply offers a meaningless conclusory point without explaining how it impacts the analysis upon which Steven Homick has relied.

Respondent adds an entirely new point, but fails to support it with any citation to law or logic. Respondent simply notes in three sentences

that Steven Homick's state prosecution also included a special circumstance allegation of lying in wait that was not required in the federal prosecution. Since that element was not required in the federal prosecution, Respondent sees that as another reason why section 656 should not operate as a bar. But Respondent offers no legal authority or any other reason why an added state element contained in a separate sentencing provision should have anything at all to do with the section 656 analysis. The crime for which Steven Homick was prosecuted in California was murder. Steven Homick's guilt or innocence of murder did not depend in any way on whether the additional special circumstance of lying in wait was true or not true. The only impact of that special circumstance allegation was to change the punishment for murder from a term of twenty-five years to life, to a term of life without possibility of parole or to death.

Notably, in the closely analogous context of comparing two state penal statutes for the purpose of determining whether the federal prohibition against double jeopardy is applicable, this issue has been squarely resolved against Respondent's position. In *People v. Kelley* (1997) 52 Cal.App.4th 568, the appellant was the one seeking to combine a crime with a sentencing enhancement when comparing two statutory provisions. The Court of Appeal rejected that, explaining that a punishment enhancement that does not define a crime is "not to be considered in the double jeopardy analysis." (*People v. Kelley, supra,* 42 Cal.App.4th at p. 576.) No basis has

been offered for treating Penal Code section 656 any differently. Thus, the special circumstance punishment enhancement is not to be considered here.

Indeed, if Respondent's unsupported contention were accepted, then what would happen if the jury had found Steven Homick guilty of murder, but also found the lying in wait special circumstance was not true. Would that mean the state prosecution was proper when it began, but that only after it was over would we learn that the properly-begun prosecution was barred by section 656's sister-provision, Penal Code section 793? Thus, Respondent opens up a conceptual trap that only leads to further confusion. The bottom line is that the application of section 656 (or section 793) should depend on the substantive criminal charge, without regard to separate allegations that effect only the penalty to be imposed if the defendant is convicted of the substantive charge. (Compare *People v. Howard* (1988) 44 Cal. 3d 375, 413-415 [corpus delicti rule applies only to substantive crimes and not to special circumstance allegations that do not require proof of another crime]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1176-1177 [Penal Code section 1111 requirement of corroboration for accomplice testimony applies only to substantive crimes and not to special circumstance allegations that do not require proof of another crime].)

Finally, Respondent recognizes that Steven Homick has made an argument regarding the policy rationales pertaining to the application of a prohibition against double jeopardy – avoiding serial prosecution for what are essentially the same acts. (RB 328.) But Respondent's only answer is to

repeat the flawed contention that the acts punished by the state and federal prosecutions were not exactly the same. Respondent makes the irrelevant point that the present state and federal offenses were committed against the "peace and dignity" of two separate sovereigns. (RB 328.) But that will **always** be true when a claim is made that a conviction in one jurisdiction is a bar to prosecution in another jurisdiction. Thus, that point has nothing at all to do with whether the claimed bar should be upheld or not.

Respondent ends with an even more puzzling and irrelevant claim. Respondent cites language in *Bartkus v. Illinois (1959)* 359 U.S. 121, 137 for the claim that it would shock the conscience if a federal conviction for a crime that carried a sentence of two years served as a bar to a state prosecution that carried a potential sentence of death. (RB 328-329.) Respondent concedes that is not the present situation. Indeed, here Steven Homick was sentenced in federal court to a term of life imprisonment. (See RB 310, fn. 125, summarizing CT 14:3821-3852.) Nonetheless, Respondent believes it would shock the conscience if a federal sentence of life imprisonment were to bar the state from seeking a sentence of death. (RB 329.)

Once again, Respondent's point proves too much. If this argument were accepted, then section 656 could never operate as a bar in any case where the potential sentence in the state prosecution exceeded the sentence in the federal case. No case has ever reached such a conclusion, and for good reason. There is no principled basis for construing section 656 in this manner, and nothing in the language or history of this section supports such

a construction. Respondent's contention should be dismissed in as few words as Respondent used to support it.

X. UNDER ALL OF THE PRESENT CIRCUMSTANCES, FUNDAMENTAL FAIRNESS REQUIRED SOME FORM OF RELIEF IN RESPONSE TO THE DEFENSE MOTION TO REOPEN

In the Opening Brief, it was shown that after all parties had rested, but before the jurors had heard any argument or instructions, Steven Homick's counsel realized that the gun which Michael Dominguez claimed Steven Homick obtained from Max Herman the day before the present killings was almost certainly the same gun that had been seized during a search of Robert Homick's apartment. The fact that a gun was found in Robert Homick's apartment was never mentioned in front of the jury, apparently because ballistics tests had eliminated that gun as a possible murder weapon.[34] Counsel for Steven Homick expected the prosecutor or other defense attorneys to argue that the gun obtained from Max Herman was the murder weapon.

As a result, counsel for Steven Homick wanted to blunt the impact of any such argument by reopening the defense case in order to further examine the investigating officers on two key points: 1) although the officers

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34 Initially, there was some uncertainty whether the serial number of the gun retrieved from Robert Homick's home matched the serial number of the gun that was eliminated as a possible murder weapon, but that uncertainty was soon resolved and Respondent agrees that the gun from Robert Homick's home was the same gun that was eliminated as a possible murder weapon. (RB 335, fn. 137.)

knew that Max Herman had obtained a serial number from Steven Homick and matched it to the serial number of the gun he supplied to Steven Homick, when the officers interviewed Mr. Herman before his death they did not bother to ask whether Mr. Herman still had any record of that serial number; and 2) when the gun was found in the search of Robert Homick's home was tested and determined **not** to be the murder weapon, just two days after the officers had interviewed Max Herman, the police never bothered to show that gun to Mr. Herman to determine whether he could identify it as the gun he had given to Steven Homick, even though the seized gun was nearly identical to the description that Max Herman had supplied. The trial court denied the request to reopen, or, in the alternative, to grant other effective relief. As predicted, the prosecutor and counsel for Robert Homick then argued to the jury that the gun Steven Homick obtained from Max Herman was the murder weapon. Despite the fact that it was highly probable that these arguments were completely false, the Steven Homick defense was left with no way to respond to the arguments. (AOB 503-529.)

Respondent finds nothing unfair about these circumstances and sees no error in the rulings denying any relief. (RB 329-346.)

Respondent concedes that the motion to reopen was made before any argument or instructions, but Respondent then notes that it was soon realized that there was a discrepancy between the serial number of the

seized gun and the serial number of the tested gun, so it was unclear whether they were the same gun.[35] That discrepancy was cleared up the following day, but Respondent argues that by that time, the jury had heard instructions and a portion of the prosecutor's argument, so any reopening would have been disruptive. (RB 339.) However, Respondent neglects to note that when the discrepancy was first discovered, counsel for Steve Homick requested a brief continuance in order to resolve the discrepancy. That completely reasonable request was unfairly denied. (RT 126:15531-15532.) Had that request been granted, the delay would have been short and the defense would have been able to clear up the discrepancy before any instructions or argument were heard by the jurors.

All equities favored granting the defense request for a brief continuance. Before the discrepancy had been discovered, the trial court had readily agreed that the new information was important, and was strongly urging the prosecution to agree to a stipulation proposed by defense counsel. After the discrepancy was discovered, even though it was minor, the trial court suddenly proclaimed that the discrepancy rendered the new information unimportant, so no relief was appropriate. (See AOB 506-510 for a detailed summary.) Under these circumstances, the need to resolve the discrepancy

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35 One gun was listed in a report as serial number K-83811A and the other was listed as K-318119. (RT 126:15526-15527; 12 Supp.CT 4:857, 859.)

was paramount. Any delay to resolve the discrepancy would have been brief. Indeed, the discrepancy was resolved by the very next day. A one-day continuance to resolve a very important point in a capital trial that had lasted many months would have caused no significant disruption, and no good reason existed for denying the requested continuance. Thus, Respondent should not now be allowed to complain that the discrepancy was not resolved until after the jury heard instructions and a portion of argument.

Analogous circumstances existed in an Illinois capital case, People v. Lovejoy, 235 Ill. 97, 919 N.E.2d 843. In that case, tardy discovery from the prosecution resulted in misleading defense counsel regarding the significance of an expert's conclusions about the results of DNA tests. When the defense was surprised by the expert's trial testimony, the defense sought a one-day continuance to consult its own expert. After that was denied, the defense consulted its own expert anyway, and then moved to reopen its case to present evidence rebutting the testimony of the prosecution expert. That was also denied, and the defense argued on appeal that the request for a continuance should have been granted. While the present case differs in that the prosecution here was not at all to blame for the belated realization that the significance of a piece of evidence had been misunderstood, the end result was comparable unless our criminal justice system demands the execution of a defendant for his counsel's misunderstanding

of the significance of one item of evidence among thousands in a complex case. Thus, the language used by the Illinois Supreme Court, in reversing the conviction and death sentence, applies here:

> "In this case, defendant sought a continuance to find an expert to refute [the expert's] surprise testimony. Even when that request was denied, defendant obtained an expert for the next court date and sought to reopen his case to include the expert's testimony. ... [D]efendant here made reasonable efforts to alleviate the prejudice ..., and his attempts were wrongfully thwarted by the trial court. Recently, in *People v. Walker*, 232 Ill. 2d 113, 125-26 (2009), we discussed factors a trial court should consider when entertaining a request for a continuance, including the movant's diligence, the defendant's right to a speedy, fair and impartial trial, the interests of justice, the history of the case, the complexity of the matter, the seriousness of the charges, docket management, judicial economy, and inconvenience to the parties and witnesses. ... [W]e feel compelled to note that there is no good reason why the trial court denied defendant's request for a continuance after [the expert]'s testimony in light of the seriousness of the charge, the complexity of the evidence at issue, and the fact that a short continuance would not have created any hardship to the court, the parties, or the witnesses in this case."

Next, Respondent faults defense counsel for his delay in discovering the significance of the gun seized from Robert Homick's apartment, and cites this delay as a further factor supporting the denial of any relief. (RB 339-340.) However, defense counsel readily admitted his own negligence

in not realizing sooner that the seized gun was important. (See AOB 507-508, 514.) Respondent has identified no conceivable tactical reason for not investigating the potential importance of the seized gun, or for failing to realize how perfectly it matched the description of the gun obtained from Max Herman. Respondent offers no authority or rationale for affirming a death verdict that may have been based on defense counsel's negligence.

Respondent concedes that the trial court never identified this delay by defense counsel as a basis for her ruling against Steven Homick. Nonetheless, Respondent argues that it is appropriate for this Court to rely on this delay as a basis for sending Steven Homick to his death without any relief from counsel's possible negligence. (RB 340.) Respondent relies on only a single case (*People v. Jones* (2003) 30 Cal.4th 1084, 1110-1111), which Respondent apparently failed to actually read. *Jones* was another capital case in which the defense argued on appeal that there was an abuse of discretion in refusing to reopen when defense counsel realized he had inadvertently failed to lay a foundation for the introduction of a photograph that could have been used to impeach a prosecution witness's identification of a co-perpetrator. As an alternative to reopening, defense counsel in *Jones* had also moved for a mistrial based on his own ineffective assistance. Thus, *Jones* does appear very similar to the present case.

However, the similarities end at this point. Contrary to Respondent's implication, the People in *Jones* did **not** argue on appeal that defense counsel's inadvertence should be considered as a factor against the defense ar-

gument. Instead, the Attorney General **conceded** that the motion was made at an early stage after the close of evidence, and that the failure to lay a foundation during the presentation of evidence was inadvertent. Instead, the Attorney General relied solely on other factors in arguing that the trial court had ruled correctly. (*People v. Jones, supra,* 30 Cal.4th at p. 1111.) More importantly, this Court did not rely in any way on counsel's inadvertent failure. Quite to the contrary, this Court concluded "that the court abused its discretion in refusing to reopen the case to permit the defense to lay a foundation for the identification..." (*Id.*)[37] Thus, *Jones* offers **no support whatsoever** for Respondent's callous argument.

Respondent's next argument is almost as puzzling. Respondent argues that the evidence the defense sought to introduce here was so insignificant that it would have been given undue emphasis if it were introduced in the middle of the prosecution argument. (RB 340-341.) This contention has multiple flaws. First, it is not at all clear why assertedly insignificant evidence would have received undue emphasis, or any emphasis at all, even if it were introduced belatedly. The prosecutor would have still had a full opportunity to argue the evidence was insignificant, and if the insignifi-

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37 Later in the opinion, this Court in *Jones* found the failure to reopen and one other error were not prejudicial under the circumstances of that trial. (*People v. Jones, supra,* 30 Cal.4th at p. 1116-1117.) Nothing about that brief discussion of prejudice appears applicable to the very different present trial.

cance of the evidence was as clear as Respondent claims, the prosecutor would have easily been able to persuade the jury.

Of course, the defense believes this evidence was very significant, and even the trial court agreed that it was important as long as it could be established that the gun from Robert Homick's apartment was the same gun that had been ruled out as a possible murder weapon – a point that Respondent now concedes. (See AOB 509-510, RB 135, fn. 137.) As far as any disruption that might be caused by such a late introduction of significant evidence, Respondent again ignores the fact that the original defense proposal had been to handle the matter before any argument (even if a brief continuance was necessary to resolve one discrepancy), and to reach agreement on a very reasonable proposed stipulation that could have been read to the jury along with other stipulations that were read after the close of evidence, but before instructions and argument. Had the matter been handled in such a fashion, there would have been no danger of undue emphasis.

Next, Respondent questions how the defense could have possibly produced evidence of the deceased Max Herman's description of the gun he gave to Steven Homick, in order to show how closely this description matched the gun seized from Robert Homick's apartment. (RB 341, fn. 139.) But the defense below readily conceded that hearsay problem. Instead, the defense offer was that it could be properly proved that police officers **who possessed the matching descriptions** were negligent in failing

to determine whether Max Herman could have produced the serial number of the gun at the time he was interviewed prior to his death, and in failing to show Mr. Herman the gun seized from Robert Homick's apartment, in order to see if Max Herman could identify it. The investigating officers could have been asked to explain these failures, and would have apparently had no satisfactory explanation, which would have raised legitimate questions about whether their negligence had deprived Steve Homick of any opportunity to prove that the guns in question were one and the same, and hence that the gun allegedly given him by Max Herman was not the murder weapon. (See AOB 509-510.)

This very legitimate inference did not depend at all on the truth (or accuracy) of the description the police had received from Max Herman. Instead, it depended only on the easily provable fact that the officers who interviewed Max Herman put a description in their report, but failed to take appropriate action when they learned two days later that an identically described gun had been ruled out as a possible murder weapon. Thus, no hearsay was involved in the limited evidence the defense sought to elicit.[38]

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38 It is true that what the defense sought to elicit would have revealed to the jury that Max Herman had supplied the description in question. However, that is no different from what commonly occurs every time one party offers a statement for a legitimate non-hearsay purpose that does not depend on the truth of the matter asserted in the statement. Respondent has regularly argued that a limiting instruction easily takes care of any such problem. (See Arguments V, VI, and VII in Respondent's Brief.) If such limiting instructions actually are effective, then Respondent offers no rea-

Respondent reiterates the contention that the evidence in issue was "simply not significant." (RB 341.) Respondent reasons that even if the defense had shown everything it could have shown without violating hearsay rules, that still would not have proved that the gun obtained from Max Herman and the gun found in Robert Homick's apartment were the same gun. (RB 341-342.) But if the defense had been able to show the deficiencies in the police investigation, the defense could have legitimately argued that this showed bias in the way the investigation was conducted. The argument that the police negligence had deprived Steve Homick of the opportunity to establish that the guns were one and the same, and therefore not the murder weapon, would have greatly blunted the force of the argument made against Steven Homick – that the gun he obtained from Max Herman was the murder weapon.

This was a critical point. If any of the jurors accepted the argument that the gun Steve Homick obtained from Max Herman was the murder weapon, that would have gone a long way toward persuading such jurors that Steven Homick intended in advance to use the gun against the Woodman parents, and would have also supported the inference that Steve Homick was not only involved in the conspiracy, but was the actual triggerman, an important point on the issue of penalty.

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son why a limiting instruction would not have solved any problem in this situation.

In any event, if the evidence really was not significant, then there would have been no harm to the People's case in agreeing to the stipulation proposed by the defense. Instead, it is abundantly clear that the prosecution below opposed the stipulation simply because it believed the evidence was significant, and it wanted very much to deprive the defense of any possible benefit.

Respondent also questions whether it really was clear, as the defense has contended, that the detectives, if questioned further, would have acknowledged that they failed to ask Max Herman if he still had a record of the serial number of the gun Herman had supplied to Steve Homick. (RB 341-342, fn. 140.) Instead, Respondent speculates, as the trial court did below, that the officers did ask, received a negative answer, and simply neglected to mention that in their reports. But Respondent forgets a crucial fact: the police interview of Max Herman was tape-recorded, and that recording was received in evidence in support of the defense motion to reopen, even though it was never heard by the jury. (Exhibit M19, submitted March 17, 1993, at RT 129:15965-15966.) That tape recording establishes with near certainty that Max Herman was not asked about the serial number during that interview.[39]

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39 It is possible that the officers could have asked Max Herman about the serial number before or after the tape recording was made. However, in view of the fact that the officers did tape record the interview, it is quite unlikely that they would have asked such an important question out-

Respondent also claims to find significance in the fact that the gun seized from Robert Homick's apartment was described in the property list as having wood grips, while Max Herman believed the gun he had given Steve Homick seven months earlier had plastic grips. (RB 342.) But there is no inconsistency. Aside from the fact that either description could have been mistaken in this one minor detail, it is entirely likely that the gun had plastic grips with a grain pattern that simulated wood. Indeed, at the very Wikipedia entry that Respondent cites, there is a photograph depicting such plastic grips with a wood-like appearance.[40] Once again, if the officers had bothered to show the gun seized from Robert Homick's apartment to Max Herman, he might well have been able to identify it as the gun he gave Steve Homick. If there was any uncertainty, it was the agents of the prosecution who were to blame for not clarifying the matter.[41]

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side of the taped interview. To the extent there was any uncertainty, it could have been resolved by agreeing to the defense request to have the prosecutor ask the officers about the matter. Furthermore, even if an officer would have testified that they did ask about the serial number before or after the taped portion of the interview, such testimony would have called into question the veracity of the officer, which would have still been valuable defense evidence to blunt the impact of the prosecutor's claim that the gun obtained from Max Herman was the murder weapon.

40 See http://en.wikipedia.org/wiki/357_Magnum. The photo in question is on the right side of the page, just over half-way down.

41 Respondent contends that if the seized gun had been shown to Max Herman, the most that he could have said was that it resembled the gun he gave to Steve Homick, which still would not have precluded the possibility that it was a different gun. (RB 342, fn. 140.) Respondent is

Respondent attempts to refute the contention that both the prosecutor and counsel for Robert Homick argued that the gun Max Herman gave to Steve Homick was the murder weapon. (RB 342-344.) Respondent grasps at semantic straws. When the prosecutor argued that Max Herman would not have intentionally given a gun to Steve Homick knowing it was going to be used in a crime, he certainly implied that the gun Max Herman supplied was the murder weapon. His point was simply that Steve Homick must have been very manipulative to get Max Herman to give him the gun. Also, the prosecutor quickly followed by stating, "So, clearly, Max Herman did not know he would be supplying a gun that would be used for a murder but it's not at all unreasonable that he may have provided a gun just as Mike Dominguez described for us." (RT 127:15729-15730.) Again, the implication is crystal clear that the prosecutor was asking the jurors to conclude that the gun obtained from Max Herman was the murder weapon.

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mistaken. The most Max Herman could have said was that the seized gun looks identical to the gun he gave Steve Homick, which would have greatly reduced the significance of the fact that he gave Steve Homick a gun. (Compare Respondent's reliance on airline passengers who testified that they could positively identify Steve Homick and/or Michael Dominguez as passengers on airplane trips they took years before they were interviewed. (See RB 29, 33, 43-44.))

In any event, the point at the time of the defense motion to reopen was **not** that the guns were necessarily the same. Instead, the point was that they could well have been the same, but the officers did not even bother to show the seized gun to Max Herman.

Similarly, when counsel for Robert Homick argued the matter, he initially stated unequivocally, "Max Herman gave [appellant] the murder weapon." (RT 129:16060.) It is true that the judge interrupted and stated that it had not been proven that any particular gun was the murder weapon, but she immediately added that the jury was free to draw any reasonable inference. Counsel for Robert Homick then argued that the jury should draw the "reasonable" inference that the gun from Max Herman was the murder weapon. (RT 129:16060-16061.) If that was a reasonable inference, then the damage to Steve Homick was fully accomplished.

While it might have been permissible for the prosecutor and for counsel for Robert Homick to make the same arguments even if the stipulation proposed by the defense had been accepted, the important point is that counsel for Steve Homick would have been able to make a strong counter-argument that was not available after the trial court denied any relief. Instead, the prosecutor and Robert Homick were both able to unfairly exploit this point, while Steve Homick was left with nothing helpful to say in response.

Respondent adds that all this would have made no difference because this was not a close case. (RB 344.) That argument has been rebutted repeatedly in this brief and in Appellant's Opening Brief. The prosecutor's two main witnesses were fully discredited in many ways, as Respondent readily admits in other portions of its brief. The remaining evidence that

did not depend on either of these witnesses for direction was largely ambiguous, and certainly was not overwhelming.

Respondent closes by repeating the claim that the stipulation proposed by the defense contained inadmissible hearsay. (RB 345.) That contention was fully rebutted earlier in this argument – the references in the proposed stipulation to statements made by Max Herman were made for legitimate non-hearsay purposes and did not depend on the truth of the matter stated by Max Herman.

XI. THE TRIAL COURT'S INSTRUCTION PERTAINING TO PRIOR FEDERAL COURT PROCEEDINGS INCLUDED UNNECESSARY INFORMATION THAT IMPLIED STEVEN HOMICK HAD ALREADY BEEN CONVICTED OF CLOSELY RELATED CRIMES IN FEDERAL COURT

In the opening brief, it was shown that the court and all parties initially agreed that no reference was to be made to the fact that the present defendants had previously been tried on related charges in a federal court. This would not interfere with any legitimate effort to impeach a witness with prior testimony, since any prior testimony could simply be referred to as "prior testimony" or "testimony in prior proceedings." Nonetheless, when Art Taylor was being cross-examined by counsel for Robert Homick, counsel made two references to Taylor's prior federal court testimony. Counsel for Steven Homick moved for a mistrial, but that was denied. Subsequently, the court fashioned an instruction that provided the jurors with some general information about prior proceedings, specifically including a reference to the fact that the present defendants had already been tried in federal court for the crime of interstate transportation to commit the present murders, and that Stewart Woodman had pled guilty in federal court and had agreed to (and did) testify against the other defendants in federal court. (AOB 530-533.)

Respondent sees nothing improper about the instruction, and believes that if there was any possibility of prejudice the issue was either

waived or the error invited. In so arguing, Respondent seeks to expand the concepts of waiver and invited error far beyond the reach of the authorities upon which Respondent relies. (RB 346-349.)

It should be remembered that it was fully understood from the outset that references to the prior federal trial carried a great potential for prejudice. That is why the court and all parties agreed that no such references were to be made. (RT 68:5523-5524; RT78:7365-7366.) Robert Homick's counsel violated this agreement. Counsel for Steven Homick recognized that any admonition would simply draw more attention to the matter and would do more harm than good. That is why he sought a mistrial, which was denied. (RT 82:8447-8448.)

In arguing that any error was invited by counsel for **Steven Homick,** Respondent points to a comment by counsel for **Neil Woodman,** speculating that jurors might conclude the defendants were acquitted in federal court, which might inure to the benefit of the defendants. (RB 348-349.) But counsel for Steven Homick neither joined in this comment, nor endorsed it in any way. Indeed, **he had already expressed precisely the opposite view**, seeking a mistrial because of the great potential for prejudice caused by the comments. Respondent fails to explain how this supports the contention that counsel for Steven Homick invited any error contained in the instruction he never sought, and had already argued was pointless.

Strangely, Respondent cites *People v. Moon* (2005) 37 Cal.4th 1, 37 for the contention that the invited error doctrine applies to the present con-

text. But *Moon* was not a case where counsel for one party expressed a tactical thought that was used to apply the doctrine against a different party. Indeed, *Moon* did not involve any co-defendant at all. Even more importantly, *Moon* was a case that concluded **no invited error occurred** in the circumstances of that case:

> "Because counsel did not specifically ask the trial court to refrain from reinstructing the jury with the applicable guilt phase instructions, counsel's actions did not absolve the trial court of its obligation under the law to instruct the jury on the 'general principles of law that [were] closely and openly connected to the facts and that [were] necessary for the jury's understanding of the case.' (*People v. Carter, supra*, 30 Cal.4th at p. 1219.) Accordingly, we reject respondent's contention that the invited error doctrine precludes our consideration of the issue on appeal." (*People v. Moon, supra,* 37 Cal.4th at p. 37.)

Thus, *Moon* provides no support for Respondent's position, leaving no support at all for the novel proposition that invited error can be applied against one defendant based on the strategic musings of counsel for another defendant, who has distinctly different interests.

In regard to waiver, it was argued in the opening brief that no waiver occurred by counsel's failure to object to the instruction which counsel had already indicated could not cure the harm, because the trial court has a responsibility to instruct correctly of the general principles openly connected to the facts necessary for the jury to understand the case. Indeed, that re-

sponsibility was summarized nicely in the excerpt just quoted from *Moon*. Paraphrasing *Moon*, counsel for Steven Homick did not ask for the instruction that was given, and had already indicated that no instruction could cure the harm, so counsel's actions did not absolve the trial court from its responsibility to instruct correctly.

Respondent initially agreed, for the sake of argument, that there was no waiver, but Respondent instead argued for application of the invited error doctrine, discussed above. Respondent then simply states that, aside from inviting the error, Steven Homick forfeited it by not objecting below on the ground argued on appeal. (RB 349.) But Respondent offers no rebuttal whatsoever to Steven Homick's claim that Penal Code section 1259 precludes application of a waiver argument. Respondent cites *People* v. *Farnam* (2002) 28 Cal.4th 107, 165 and *People* v. *Bolin* (1998) 18 Cal.4th 297, 326, but neither of those cases discusses whether Penal Code section 1259 would trump a waiver claim in the context of those cases. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

Thus, neither case helps Respondent. Indeed, *Farnam* relied only on *Bolin*, and *Bolin* relied only on *People v. Jackson* (1996) 13 Cal.4th 1164, 1223. But *Jackson* was a case where the defendant had joined at trial in requesting the instruction that was in question on appeal. Here, counsel for Steven Homick never requested the instruction that is the subject of this

appellate argument. Thus, Respondent is left with no argument at all against the application of Penal Code section 1259 to counter any notion of waiver in the present context.

Finally, Respondent argues there was no reasonable reading of the instruction that implied Steven Homick or anybody else had been convicted in federal court. (RB 349.) Respondent follows this immediately with the completely inconsistent argument that the instruction allowed the jurors to infer the defendants had been acquitted in federal court. Respondent offers no explanation why this instruction left no reasonable possibility the jurors would infer the defendants had been convicted, while simultaneously leaving open the possibility the jurors would infer they had been acquitted.

Even putting aside this internal inconsistency, Respondent's contention makes no sense. The jury was told that Stewart Woodman had pled guilty to the closely related crimes in federal court and had testified against the present defendants in that court. As explained in the opening brief, and not rebutted in any way by Respondent, reasonable jurors were very likely to have concluded it would have made little sense for the State to use Stewart Woodman as its key witness against the other defendants if Stewart Woodman was the only one convicted in federal court, and the remaining defendant had been acquitted. Instead, it remains far more likely for jurors to conclude that Stewart Woodman's testimony had been used successfully against the other defendants in the federal court proceedings. Thus, the potential for prejudice was high and remains effectively unrebutted by Re-

spondent. Any contrary belief expressed by counsel for a conflicting defendant was not logical, and cannot in any way be attributed to Steven Homick.

XII. THE CUMULATIVE IMPACT OF THE GUILT TRIAL ERRORS MUST BE DEEMED PREJUDICIAL

In the opening brief, it was shown that there were many reasons for the jurors to be skeptical about the testimony of prosecution witnesses Stewart Woodman and Michael Dominguez. Thus, in assessing the strength of the prosecution case, it cannot be assumed that the jurors believed either of those witnesses. Indeed, as shown in the opening brief, it is clear that the jurors did disbelieve important portions of Stewart Woodman's testimony; otherwise, Neil Woodman would surely have been found guilty. It was also shown in the opening brief that the remaining evidence against Steven Homick was circumstantial and highly ambiguous. Under these circumstances, a number of well-accepted principles of judicial review point to the need for very careful consideration by this Court, and lead to a conclusion that the serious errors that occurred during the guilt trial cannot be dismissed as harmless. (AOB 534-544.)

Respondent nonetheless maintains that the case was not close and that any and all errors were harmless. (RB 349-350.) Respondent's basic point is that there were no errors during the guilt trial. Beyond that, Respondent has nothing at all to say except that the trial was fair even if there were errors.

Thus, the detailed explanation of why the present case was close stands unanswered. The multiple principles that call for close scrutiny here have not been disputed. In the event this Court disagrees with Respondent

and does find that errors occurred here that impacted the guilt verdict, then the principles set forth in the opening brief should lead to the conclusions that the case was close and the errors cannot be deemed harmless.

XIII. EVIDENCE REGARDING STEVEN HOMICK'S NEVADA CONVICTIONS WAS NOT PROPERLY ADMISSIBLE TO SUPPORT THE OTHER VIOLENT CRIMES AGGRAVATING FACTOR

The murders of the Woodman parents occurred in September 1985, but no arrests were made until six months later. In the interim, in December 1985, the Tipton murders occurred in Nevada. Although that crime occurred after the present one, Steven Homick was convicted of the Tipton murders in Nevada prior to the present trial. Under well-established California principles, the conviction for the Tipton murders could not be considered under the statutory aggravating factor of prior felony convictions, since the convictions did not occur prior to the commission of the present crime. However, the facts underlying the Nevada convictions were admissible to prove the California aggravating factor of other violent criminality. In support of its effort to prove that latter aggravating factor, the People were not content to rely solely on the evidence pertaining to the facts of the Nevada murders. Instead, the People persuaded the trial court to also allow the presentation of evidence that the Nevada convictions occurred, as circumstantial evidence that the Steven Homick had, in fact, committed the Tipton murders. As shown in the opening brief, such evidence constituted rank hearsay with no established hearsay exception to render it admissible. Multiple additional errors occurred in the manner in which this evidence was presented and in the lack of guidance given to the jurors in regard to

how they should assess the significance of the Nevada convictions. (AOB 545-591.)

A. Under the Circumstances of the Present Case, Evidence of the Nevada Conviction Was Improperly Admitted

Respondent relies heavily on the concurring opinion in *People v. Ray* (1996) 13 Cal.4th 313 to support the admissibility of evidence of a conviction in order to prove the truth of the facts underlying the conviction. (RB 357-364.) However, almost every point made by Respondent in that discussion of *Ray* was thoroughly rebutted in the opening brief. (AOB 560-585.) Only the aspects of Respondent's argument that were not fully addressed in the opening brief will be discussed here.

Respondent opens with a list of California decisions since *Ray* which Respondent asserts have already adopted the analysis set forth in the concurring opinion in *Ray*: *People* v. *Jackson* (1996) 13 Cal.4th 1164, 1234; *People v. Scott* (1997) 15 Cal.4th 1188, 1222; *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1374; *People* v. *Ochoa* (2001) 26 Cal.4th 398, 457; *People* v. *Combs* (2004) 34 Cal.4th 821, 859-860; and *People v; Hinton* (2006) 37 Cal.4th 839, 910. (RB358-359.) None of these cases adds anything that was not fully discussed in the opening brief.

Jackson contains no analysis whatsoever, and simply cites *Ray*. Moreover, the prior conviction at issue in *Jackson* was based on a guilty plea. As fully explained in the opening brief, a guilty plea constitutes an

admission by the defendant, providing a hearsay exception that is unavailable in the present case, where the prior conviction occurred only after a contested trial. *Scott* contains no analysis, and simply cites *Jackson* and *Ray*. *Bradford* contains no analysis. It first cites pre-*Ray* cases that were also fully discussed in the opening brief, and then cites only *Jackson*. *Ochoa* cites only *Melton*, a pre-*Ray* case discussed at AOB 573, wherein it was shown that it actually supported the contrary view urged in the opening brief: " '[w]hen dealing with violent conduct **it is not the fact of conviction which is probative** in the penalty phase, but rather the conduct of the defendant which gave rise to the offense.'" (*Melton, supra*, 44 Cal.3d at 754.) *Combs* contains no analysis and simply cites *Scott, Jackson,* and *Ray*. *Hinton* contained no analysis and cited only *Bradford*. Thus, not one of these cases is any stronger than the *Ray* concurrence, which has been fully rebutted in the opening brief.

Respondent then proceeds to restate the same points made in *Ray*, without bothering to respond to the criticisms of *Ray* set forth in the opening brief. (RB 359-364.) In a footnote, Respondent cites the dissent in *People* v. *McClellan* (1969) 71 Cal.2d 793, 818, wherein Justice Mosk stated that the rules of evidence should be less stringent at a penalty trial than at a guilt trial. (RB 360, fn. 143.) Whatever the merits of Justice Mosk's comments were in 1969, Respondent neglects to acknowledge that those comments were made in regard to a completely different death penalty law than the one under which Steven Homick was tried. It is indisputably true under

the newer death penalty law that the rules of evidence at a penalty trial are the same as they are at a guilt trial. Thus, hearsay remains inadmissible at a penalty trial unless it comes within a recognized hearsay exception.

After concluding its discussion of *Ray*, Respondent does finally acknowledge one argument made in the opening brief. Noting that the present trial court relied on *People* v. *Webster* (1991) 54 Cal.3d 411, 454, the opening brief noted that the prior conviction utilized in *Webster* was based on a guilty plea, so no hearsay issue was involved. (AOB 557.) Respondent simply asserts, without explanation, that the fact that the prior conviction in *Webster* was based on a guilty plea was simply an additional factor in *Webster*, not the only factor. (RB 364-365.) Furthermore, Respondent simply ignores the additional criticisms and distinctions of the *Webster* analysis, set forth at AOB 557-558.

Respondent recognizes that an additional argument was made in the opening brief – that when a jury is told of the fact that another jury hearing different evidence convicted the defendant, that evidence has no tendency to prove the underlying conduct when the jury has no idea what evidence was or was not presented to the prior jury. (RB 365, referring to AOB 575-578.) However, rather than answering any of the points set forth in the opening brief, Respondent simply asserts without explanation that the evidence did have a tendency to prove the underlying facts. Once again, this is not a response to an argument; it is simply an unexplained denial of the validity of the argument.

Similarly, Respondent rejects the Evidence Code section 352 argument set forth at AOB 586-587, simply by stating, with little or no explanation, that the evidence was probative and not prejudicial. (RB 365.) Respondent asserts that the Nevada conviction "was probative on the issue of appellant's propensity for violence ..." (*ibid.*) But Respondent fails to acknowledg, or attempt to dispute, the actual issue: in a trial proceeding where the question of a defendant's involvement in a crime is the subject of conflicting evidence, jurors would have no way of rationally determining what weight, if any, to give a prior jury's determination of that question unless they knew what evidence and argument had been presented to that jury. Without such knowledge, the prior jury's determination would have no probative value, or, if it had any such value, it would surely be minimal. On the issue of prejudice, Respondent asserts that the prejudicial impact of the Nevada conviction was slight "compared to the impact of live testimony regarding the brutal and senseless killings of Mrs. Tipton, Ms. Bullock, and Mr. Meyers." (*Ibid.*) Respondent appears to think that the only way improperly admitted evidence can be prejudicial is by virtue of its inflammatory nature. But Appellant is not arguing that the fact of the Nevada conviction was somehow inflammatory. Rather, appellant's contention, never refuted by respondent, is that in the context of this trial proceeding, the Nevada conviction, while having little or no probative significance, was likely to have been accepted by one or more of appellant's jurors as decisive evidence of appellant's guilt of the Tipton murders. Here the prejudice was not

the inflammatory nature of the evidence, but its spurious persuasive force as seeming evidence of guilt.

B. It Is At Least Reasonably Likely That a Different Result Would Have Been Obtained If the Prosecution Had Not Been Permitted to Utilize Evidence of the Nevada Conviction

In the opening brief, it was shown that the erroneous admission of the Nevada conviction was devastatingly prejudicial. While the prosecution also presented witnesses to prove the facts underlying the conviction, defense cross-examination of those witnesses and additional defense evidence resulted in a very close case in which the evidence of the conviction was very likely to be the deciding factor. (AOB 584-585.) It must be kept in mind that evidence of the Tipton murders constituted the **only** evidence in aggravation offered by the prosecution during the penalty trial. While the jury was also free to consider the circumstances of the Woodman murders as a factor in aggravation, the jury knew that not one of the other defendants received a death sentence. Stewart Woodman, who openly admitted that he paid to have his parents killed was sentenced to life in prison. Michael Dominguez, who openly admitted he had been convicted of many serious felonies and that he happily took part in the Woodman murders in order to earn $5,000, and who was very likely the actual triggerman in the Woodman murders, was given a plea bargain that permitted him to be released on parole after serving as little as twelve years in a prison of his

choosing. Thus, a death sentence for Steven Homick, who had no history of criminal convictions, was not a foregone conclusion.

Respondent chooses to ignore all of this and to review the Tipton evidence in the light most favorable to the prosecution side, without regard to weaknesses or contrary evidence. (RB 366-367.) Such a review of disputed evidence may be permissible when the issue on appeal is sufficiency of the evidence to convict, but such a review has no place in a discussion of the prejudicial impact of a serious error. While Respondent does follow with a summary of the defense evidence (RB 367-368), that portion of Respondent's discussion completely misses the point.

Respondent apparently seeks to make the point that the jury was presented with both sides of the Tipton issue, and was apparently persuaded by the prosecution side. But there is simply no basis whatsoever for concluding the jury, absent evidence of the Nevada conviction, would have found the prosecution evidence more persuasive than the defense evidence. Instead, the jury may very well have found the evidence too close to constitute proof beyond a reasonable doubt, but when the added fact of the Nevada conviction was also considered, that may very well have tipped the scale and caused the jurors to believe Steven Homick must be guilty of the Tipton murders. While it is true the jury **might** have reached the same conclusion even without evidence of the Nevada conviction, it simply cannot be said there was no reasonable possibility of a contrary decision.

In sum, the defense had the right to submit evidence disproving Steven Homick's guilt of the Tipton murders. A strong defense case was presented, but how could the defense ever convince jurors to disregard the Nevada conviction? Thus, in terms of the real issue, the Nevada conviction was a major piece of prosecution evidence, not a minimal piece. That evidence was massively prejudicial.

C. The Trial Court Failed to Adequately Instruct the Jury Regarding the Significance of the Nevada Conviction

In the next section of this argument in the opening brief, it was shown that even if the evidence of the Nevada conviction was properly admitted, the trial court nonetheless prejudicially erred by failing to give the jury any instructions regarding how to assess the significance of the evidence of the Nevada conviction. (AOB 587-590.)

Respondent ignores the rationale set forth in the opening brief, regarding why the trial court had a *sua sponte* duty to provide guidance to the jury, rather than leave it with seemingly dispositive information but no clue as to how it should be utilized. Instead Respondent argues only that this Court has never expressly held that a trial court is obligated to provide guidance to a jury in this precise situation. (RB 368.) Of course, it is equally true that this Court has never held that trial courts have no such duty. It is also indisputable that this Court has imposed such a duty in other

contexts even where no such duty had previously been expressly set forth in any prior published opinion.

Respondent then goes on to fault defense counsel for failing to request a special instruction to do what counsel had argued was impossible: provide meaningful guidance. (RB 368.) Respondent acknowledges that defense counsel had warned the court that the jury would not have sufficient information to determine how much weight to give to the evidence of the Nevada conviction, but Respondent argues that once the court ruled against the defense, counsel was obligated to somehow request a special instruction. This makes no sense.

In other words, the defense took a clear position that that the jury could not know how to weigh the evidence of the Nevada conviction without being fully informed as to the actual evidence that the Nevada jury did or did not receive. The prosecutor and the trial court apparently thought otherwise. If they believed there was a sensible answer to this knotty problem, then the burden should have been on them to provide it.

Respondent cites *People v. Bennett* (2009) 45 Cal.4th 577, 612, and *People v. Richardson* (2008) 43 Cal.4th 959 1022-1023, for the proposition that the burden was on defense counsel. But the situations in those cases were not at all comparable to the present case. In *Bennett*, the defense argued that the prosecutor had improperly elicited evidence that implied that the defendant had committed other crimes. After the defense motion for a mistrial was denied, the defense asked the trial court to admonish the

jury that there was no other relevant criminal activity. The trial court invited the defense to submit a special instruction, but the defense failed to do so. But unlike the present case, the defense would have had no problem crafting a special instruction that said that there had been no evidence of other relevant criminal activity. Here, in contrast, the defense had already declared its position – that there was no intelligible way to determine what weight to give to the evidence of the Nevada conviction.

In *Richardson*, this Court considered a defense claim that the standard instruction on aiding and abetting put an impossible burden on a person desiring to withdraw from criminal activity – to notify accomplices of his intent to withdraw and to do everything in his power to prevent the commission of the crime. This Court first soundly rejected the claim on the merits, concluding the standard instruction was correct. The opinion fails to disclose what the defense thought was impossible about the burden placed on an accomplice desiring to withdraw. In that context, this Court concluded that if the defense sought a modification of the standard instruction, the defense was obligated to request clarification. Thus, it appears in *Richardson* that the defense had some clear idea of what it believed was a correct instruction, and failed to share that with anybody else. In that context, it may be reasonable to conclude the defense never provided the trial court with a basis for acting differently, and therefore waived the issue.

In contrast, here the defense unequivocally notified the trial court of the problem that would result from giving the jury seemingly dispositive

evidence with no guidance how to assess its true probative value. Here, it was the prosecutor and the trial court who apparently believed the jury would have adequate guidance, but who failed to share that information with the defense. Thus, *Richardson* is the complete opposite of the present situation. If anything, *Richardson* supports the contention that it is the party who claims to have knowledge of the proper instruction who should have the burden to propose it.

Respondent goes on to reject the merits of the present contention. (RB 369-370.) But Respondent does nothing more than review the instructions actually given and declare them sufficient, without ever addressing most of the problems identified in the opening brief. Respondent does contend that the jurors would have understood that the Nevada conviction was not determinative on the issue of whether the underlying facts had been proved beyond a reasonable doubt. But even if we assume for the sake of argument that Respondent is correct on this point, we are still left with the contention made in the opening brief that the jury was given no clue regarding how much weight (on the scale from zero to something less than determinative) should be given to the evidence of the conviction. That is the crux of the problem, and Respondent has failed to address it at all.

D. The Trial Court Erroneously Refused to Instruct That There Were No Prior Felony Convictions

In the final section of this argument in the opening brief it was shown that under the circumstances of this trial, the defense was correct in arguing that it was necessary to instruct the jury that the evidence had not shown that Steven Homick had any prior felony convictions. The prosecutor even agreed with this, but the trial court still refused to give the requested instruction, setting forth reasons that make no sense, but that demonstrated a confusion that was likely shared by the jurors. (AOB 590-591.)

Respondent argues there was no duty to make it clear that the "presence or absence of prior felony convictions" factor could only be seen as mitigating in the present case. (RB 370-371.) But the cases Respondent cites are all cases where the evidence made the aggravating or mitigating nature of the evidence clear. None of those cases were comparable to the present case, where the jury received evidence of a Nevada conviction that clearly did not qualify as a prior felony conviction for the purpose of aggravation of the penalty, or for the purpose of negating the mitigating impact of the lack of any other prior felony convictions. Here, only a lawyer would have understood the aggravating or mitigating nature of the evidence, absent additional instructions that were proposed by the defense and accepted by the prosecutor, who also recognized the need for clarification for the jurors.

Here, the only reason given by the trial court for rejecting the proposed instruction was a reason that makes no sense, and that demonstrates that even the trial court was confused. Indeed, Respondent makes no effort to defend the trial court's rationale. The trial court's own confusion demonstrates why it was necessary to give the requested instruction and preclude any danger that jurors would be just as confused as the trial court was.

XIV. HAVING DECIDED TO ALLOW EVIDENCE OF THE NEVADA CONVICTION, THE TRIAL COURT WAS OBLIGATED TO PERMIT A FULL CHALLENGE TO THE CONSTITUTIONAL VALIDITY AND THE RELIABILITY OF THAT CONVICTION

In the opening brief, it was shown that well-established California case law gave the defense the right to a full hearing to challenge the constitutional validity of any prior conviction that was to be offered in evidence. Applicable cases also permitted the defense to place the issue of the reliability of a prior conviction before the jury, including a full showing of available evidence that would support the attack on the validity of the prior conviction. However, the trial court refused to permit a full hearing, either before the court or the jury. That refusal constituted prejudicial constitutional error. (AOB 592-630.)

A. Steven Homick Was Entitled to a Full Hearing in His Challenge to the Constitutional Validity of the Nevada Prior Conviction

Respondent apparently has no disagreement with the argument set forth in the opening brief, showing that California cases have long upheld the right to the kind of challenge to the constitutional validity of a prior conviction that was sought be Steven Homick below. (RB 382-385.) Instead, Respondent relies on a United States Supreme Court case decided nearly a year after Steven Homick's penalty trial had concluded. (RB 385,

citing *Custis v. United States* (1994) 511 U.S. 485.) Respondent fails to set forth any basis for applying the rationale in *Custis* retroactively, in order to preclude a hearing that should have been held well before *Custis* was decided.

Putting aside that problem, Respondent does recognize that *Custis* dealt only with the procedures to be utilized in federal trials, and that states remained free to provide their citizens with greater protection than the United States Supreme Court provided to federal defendants. Respondent also recognizes that *Custis* was not a capital case. (RB 385-388.) Respondent was not able to cite to any decision that has applied *Custis* in the context of a California capital case.

Indeed, as Respondent concedes, *People* v. *Horton* (1995) 11 Cal.4th 1068 expressly found *Custis* inapplicable to California capital cases, at least under the circumstances at issue in that case. Respondent, however, seeks to find great meaning in the fact that *Horton* did not go further than it was required to go, and settle questions outside the context needed to resolve the case before this Court; Respondent infers from this failure that this Court had an opportunity to say something that would have also covered the present context, but this Court refrained from doing so. (RB 387-389; 391, fn. 151.) To the extent Respondent seeks to infer any significance from that "omission," Respondent ignores a well-established principle: "'It is axiomatic,' of course, 'that cases are not authority for

propositions not considered.'" (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

In any event, the rationale set forth in *Horton* should include the present context. In *Horton*, as set forth in Respondent's Brief, the defendant sought to strike a special circumstance allegation – that the defendant had previously been convicted of murder in 1973. The motion to strike argued there were five different categories of errors that rendered the prior conviction constitutionally invalid. This Court found it necessary to discuss only one of the five categories, since that alone was enough to result in an appellate ruling in favor of the defendant. The opinion describes a variety of transcripts and other documents from the prior proceeding that were submitted in support of the motion to strike, and that were fully considered by this Court. (*People v. Horton, supra,* 11 Cal.4th at p. 1127-1128.) Much like the present trial court, the trial court in *Horton* denied the motion to strike simply because the claims had been, or could have been, raised on the direct appeal of the prior Illinois murder conviction. (*Horton, supra,* at p. 1129.)

This Court explained that the motion to strike had been based on the same *Coffey/Sumstine* procedure relied on in the present case. This Court explained that such a procedure, even if successful, does not result in vacating the prior conviction or relieving the defendant from the sentence or any other disabilities. Instead, the impact of a successful motion to strike is to

prevent the use of the prior conviction to enhance the punishment for the current offense. (*Id.*)

After summarizing *Custis*, this Court set forth its own view:

> "Upon a close review of the *Custis* decision and the parties' supplemental briefing, we agree with defendant that *Custis* neither compels nor justifies a modification of existing California law governing a collateral attack, in a capital proceeding, upon a prior conviction that the prosecution has alleged as a special circumstance rendering the defendant eligible for the death penalty." (*People v. Horton, supra,* 11 Cal.4th at p. 1134.)

This Court next stressed the heightened need for reliability in capital cases:

> "Because the Constitution places special emphasis upon the need for reliability in the capital context, it is particularly important to assure that a prior conviction that is sought to be used as a basis or justification for the imposition of the death penalty is not tainted by a fundamental constitutional flaw. (*Id.*)

This Court added:

> "Accordingly, we conclude that, in the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance may not properly be confined to a claim of *Gideon* error, but may be based upon at least some other types of fundamental constitutional flaws. (*People v. Horton, supra,* 11 Cal.4th at p. 1135.)

Turning to the specific contention made in *Horton*, this Court explained that when the defendant had been tried for the prior Illinois murder,

he and a co-defendant were represented by different attorneys because the two defendants had a conflict of interest. While the jury was deliberating, Horton agreed to allow his attorney to leave and agreed to be represented by the co-defendant's attorney solely for the purpose of receiving a jury verdict and polling the jurors. But when the jury announced that it was deadlocked, the Illinois trial court proceeded with the co-defendant's attorney representing both defendants. The trial court was prepared to declare a mistrial, but the sole defense attorney present urged further deliberations, and the court acquiesced. This Court noted that the records submitted in support of the motion to strike showed that the evidence against the two co-defendants was disparate, being stronger against Horton in important respects. Thus, a mistrial would have been more in the interest of Horton than the co-defendant. Under these detailed circumstances, this Court concluded that it was improper to proceed with Horton not represented by conflict-free counsel, when his only waiver had been limited to circumstances that did not include a jury deadlock. (*People v. Horton, supra,* 11 Cal.4th at pp. 1135-1137.)

Most notably, the very same issue was raised and rejected on the very same record on direct appeal to the Illinois intermediate appellate court. That court's opinion indicated that counsel for Horton had delegated full responsibility for the case to counsel for the co-defendant, while the jury was deliberating. It was only after a full review of the pertinent trial transcripts that this Court concluded the Illinois court was mistaken, and

that relief in the California case was appropriate since it would not affect the validity of the Illinois judgment itself. (*People v. Horton, supra,* 11 Cal.4th at pp. 1138-1139.)

In sum, Respondent's carefully limited summary of *Horton* seriously misstates its significance. Respondent argues that *Horton* should be limited to cases of the same magnitude, which Respondent defines as the complete denial of counsel at a critical stage of the proceedings. (RB 390-391.) While it is technically true that such language was used in *Horton*, the fuller discussion of that case set forth above makes it clear that in the prior Illinois case, Horton was represented by his own counsel at all stages of the trial except for the single brief hearing where the jury reported a deadlock. Even then, Horton was represented by counsel for the co-defendant, with the real problem being the conflict of interest that counsel had. Notably, there is no way to know whether Horton's own counsel would have made the same decision made by co-counsel – to urge further deliberations rather than a mistrial – if Horton's own counsel had been present. Similarly, there is no way to know whether Horton would have been better off if there had been a mistrial and a retrial.

Comparing the totality of the defect in Horton's prior Illinois case with the allegations made in the present case against the representation Steven Homick received in his prior Nevada trial, where numerous important witnesses were not presented and important discovery was withheld by the prosecution until after the trial, it cannot be concluded that the presently

alleged constitutional defects were any less fundamental than the defects at issue in *Horton.* Indeed, it would appear that ineffective assistance throughout a trial would be a more fundamental defect than a conflict of interest that impacted only a single decision that may or may not have harmed the defendant.

Continuing to distort the significance of *Horton*, Respondent goes on to rely on an opinion in a non-capital case (*Garcia v. Superior Court* (1997) 14 Cal.4th 953) to attempt to further limit what *Horton* clearly requires in a capital case, having repeatedly stressed the need for more stringent rules than would apply in a non-capital case. (RB 389-392.) Respondent argues that *Garcia* should be applied to limit *Horton* to cases where it is unnecessary to review the transcript of a prior trial in order to resolve an attack on the validity of the prior conviction. (RB 392.) But Respondent ignores the fact that such a review of the prior transcript was precisely what this Court did do in Horton, as summarized above. Thus, *Garcia* must be limited to the non-capital context and cannot be relied on to limit *Horton.* Indeed, the very same expense and efficiency claims made by Respondent and accepted in *Garcia* were expressly raised in Justice Baxter's concurring and dissenting opinion in *Horton,* and were rejected by the majority there

because of the special reliability requirements in capital cases.[42] (*Garcia v. Superior Court, supra,* 14 Cal.4th 953, at p. 965.)

Respondent also ignores language in *Horton* that explained that, in the capital context, the very kind of hearing that Respondent seeks to preclude would often be more efficient and cost-effective:

> "Finally, we observe that in capital cases, considerations of judicial economy - one of the underpinnings of *Coffey* - strongly support a procedure that permits a defendant to raise, at a pretrial stage, this type of collateral challenge to a prior murder conviction alleged as the basis for a special circumstance. A death sentence premised upon a prior murder conviction that is, in fact, tainted by a fundamental constitutional flaw inevitably will give rise to one or more exhaustive habeas corpus petitions in this court and possibly in federal tribunals, probably requiring, ultimately, that the death penalty judgment be set aside under the principles articulated in *Johnson v. Mississippi, supra,* 486 U.S. 578. If a constitutionally defec-

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42 It should also be noted that a major efficiency concern set forth in *Garcia* is completely absent in the present case. *Garcia* raised the specter of reviewing judgments that occurred many years earlier, requiring new evidence from far-away witnesses who may no longer be alive or if alive, may no longer recall the events. (*Garcia v. Superior Court, supra,* 14 Cal.4th 953, at pp. 961-962.) But in the present case, the Nevada judgment was quite recent and pertained to events that were no older than the events relied on by the prosecution in the guilt trial. It was Respondent who brought in numerous witnesses from another state to present an entire case that should have made it unnecessary to rely on the questioned Nevada judgment at all.

> tive prior murder conviction alleged as the basis of a special circumstance is stricken prior to trial, the defense, the People, and the judicial system all may be spared the time, expense, and effort of prosecuting a capital case through trial, automatic appeal, and habeas corpus proceedings, only to have the death penalty judgment ultimately set aside. (See also *People v. Fosselman* (1983) 33 Cal.3d 572, 582 [189 Cal.Rptr. 855, 659 P.2d 1144] ['[I]n appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial.'].)" (*People v. Horton, supra,* 11 Cal.4th at p. 1139.)

Indeed, it was the prosecution below that made the decision to seek the use of the Nevada conviction rather than to simply rely on the full parade of witnesses that were also presented in the effort to prove the facts underlying the prior conviction. If the People want to rely on such evidence, then they must be prepared to defend it even if that requires a substantial examination by the trial court.

B. The Contentions Made by Steven Homick's Defense Below Were More Than Adequate to Raise a Prima Facie Showing, to Merit a Full Hearing

Respondent argues that even if a claim of ineffective assistance of counsel can properly be raised in the *Coffey/Sumstine* context, the prima facie showing required to merit a full hearing was not made here. (RB 393-397; but see AOB 618-627.) Respondent is wrong.

Here, the defense alleged that the Nevada defense failed to present at least four key witnesses who could have provided Steven Homick with a strong alibi, while simultaneously demonstrating that it was more likely that Michael Dominguez and Kelly Danielson committed the crime instead of Steven Homick. Indeed, one of the missing witnesses would have testified that Michael Dominguez confessed to him that Dominguez and Danielson, rather than Steven Homick, were responsible for the Tipton murders. That alone was sufficient to raise a prima facie case.

Respondent argues it was not clear that Steven Homick's Nevada defense counsel were even aware of the information supplied at the present penalty trial by Manuel Correira. (RB 395-396.) But one of the allegations below was that the Nevada defense conducted an inadequate investigation. In any event, even if the information from Correira constituted newly discovered evidence, that was a valid separate ground for a collateral attack on the validity of the Nevada judgment.

Respondent contends that some of the materials relied on in the opening brief were part of Steven Homick's new trial motion below, and were not a part of his prima facie showing in support of the motion to strike. (RB 395, fn. 154.) But it was fully explained in the opening brief that it was the trial judge who rushed the defense to make its showing before the defense was ready to do so. (AOB 592-595.) The trial court insisted that a barebones presentation was all that it needed – only enough to provide some focus. The materials added at the new trial motion simply il-

lustrate what the defense would have been able to show earlier if the trial court had permitted adequate time to prepare.[43] Notably, Respondent argues that the trial court's clearly erroneous belief – that no attack should be permitted because the Nevada conviction had been upheld on appeal to the Nevada Supreme Court – was harmless since the court reached the right result for the wrong reasons. (RB 393, fn. 152.) But if the trial court had not been operating under this faulty belief, it would have likely given the defense sufficient time to make a fuller presentation of a prima facie case. Thus, the trial court's legal mistakes greatly tainted the ruling denying the defense request for a brief and reasonable continuance in order to make a better prima facie showing.

Respondent continues in the same vein, faulting the defense below for failing to present a declaration from the Nevada defense attorney setting forth the reasons why witness Jackson had not been called in the Nevada trial. (RB 396.) Respondent speculates that there may have been a tactical reason for not calling Jackson. But even if the lack of such a declaration

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43 It must be kept in mind that the defense below knew that the Nevada conviction could not be admitted in the penalty trial in support of a prior murder special circumstance, or a prior felony conviction aggravating factor. Also, the defense was entirely reasonable in assuming that the Nevada conviction would not be admitted as part of the prosecution effort to prove the truth of the facts underlying that conviction. It was not until after the trial court's questionable ruling that the prior conviction would be admitted that the defense had good reason for a full investigation into the validity of that conviction.

could ever be considered a defect, it should not be so considered here. This was also directly attributable to the trial court's failure to allow sufficient time for anything more than a bare-bones showing that would provide minimal focus. Furthermore, the addition of any such declaration would have been a futile effort. At the motion for a new trial, the defense made an offer of proof that included declarations from Nevada appellate counsel regarding Nevada trial counsel's inability to obtain necessary evidence in time for the Nevada trial. The present trial court dismissed the significance of such evidence, again because the present trial court mistakenly believed it was simply improper to question the validity of a judgment that had been upheld by the Nevada Supreme Court. (AOB 597-600.)

Respondent also argues that there was no need for the Nevada defense attorneys to present the testimony of Art Taylor and FBI Agent Livingston that would have supplied Steven Homick with a strong alibi, because similar testimony was presented by Susan Ettinger. (RB 397.) But Susan Ettinger's testimony could have been dismissed because she was a close friend of Steven Homick's and had previously had a romantic relationship with him. In contrast, Art Taylor was a prosecution witness and FBI informant, and Agent Livingston was an FBI agent. Their testimony could not have been dismissed. Susan Ettinger's testimony may have been better than nothing, but was no substitute for Taylor and Livingston.

C. If the Defense Had Been Permitted to Follow Through and Offer Its Evidence of Ineffective Assistance of Counsel at the Prior Nevada Trial, It Would Very Likely Have Been Sufficient to Support an Order Granting Relief

Respondent takes an unusually speculative detour and argues that if the hearing that was never held had been held, then whatever evidence the defense might have been able to produce at that hearing would have been insufficient, as a matter of law, to support any relief. (RB 397-399.) At the outset, it should be noted it is difficult to know precisely how strong the defense effort would have been if a full hearing had been held. Respondent looks to the evidence that the defense presented during the penalty trial. That is a good starting point, but there are many tactical decisions pertaining to the presentation of evidence which would differ significantly if the evidence was being presented to a judge at a hearing outside the presence of the jury, where the issue was the constitutional validity of the prior conviction, as opposed to being presented to a jury where the issue was whether the sentence for the present crime should be death or life without parole. In sum, there is no basis for Respondent's assumption that the presentation at the hearing that was precluded would have been identical to the presentation made during the penalty trial.

In any event, Respondent dismisses the testimony of Manuel Correira, who described Michael Dominguez' in-prison boasting that it was he

and Kelly Danielson who committed the Tipton murders, and not Steven Homick. (RB 398-399.) Not surprisingly, Correira – a fellow inmate who apparently gained the trust of Michael Dominguez – had a resume comparable to Dominguez' own criminal history. Respondent may be technically correct in stating that such a background detracted from Correira's credibility, but Respondent ignores the fact that Dominguez' credibility had the very same problems, with the added fact that Dominguez had much to gain from the statements he originally gave that incriminated Steven Homick, while Correira had nothing to gain from the statements he gave about Dominguez' boasting. Respondent has had no problem claiming that Dominguez' prior statements constituted overwhelming proof of Steven Homick's guilt of the Woodman murders. Against that backdrop, it is highly hypocritical for Respondent to claim that no judge would have possibly found Correira believable.

In sum, the issue is not as simple as determining whether Correira was the best possible defense witness. Instead, the issue was whether a trier of fact would have found Correira believable enough to increase the suspicion that Michael Dominguez was responsible for the Tipton killings and thereby raise a reasonable doubt whether Steven Homick was guilty. Indeed, Correira was in a position to describe statements made by Dominguez outside of a context where Dominguez was carefully calculating what was or was not to his benefit. A witness in that position was exactly what the

defense needed, but where would such a witness ever be found who did not have a background that would earn trust from a man like Dominguez?

Respondent also seeks to minimize the testimony from Art Taylor and Agent Livingston, because they would have also supplied extremely vague additional evidence that might be deemed harmful to Steven Homick. (RB 399.) While the problem raised by Respondent cannot be entirely dismissed, it falls far short of supporting a conclusion that no reasonable jury could have been persuaded that there was a reasonable doubt regarding whether Steven Homick was guilty of the Tipton murders.

Respondent minimizes the testimony from witness Hampton because it did not unequivocally prove that Dominguez' friend Kelly Danielson was the person seen near the Tipton residence around the time of the murders. (RB 399.) But this was strong circumstantial evidence which, together with the other evidence, formed a compelling basis for finding a reasonable doubt regarding Steven Homick's guilt. Similarly, the testimony by witness Jackson, in and of itself (RB 399), did not prove Steven Homick's innocence, but it was one more piece of circumstantial evidence which, combined with all of the other defense evidence, did support a finding of a reasonable doubt that Steven Homick was guilty.

Notably, Respondent simply ignores the remaining evidence the defense would have presented if it had been afforded a full hearing. (See summaries at AOB 595, 597-605, 624.)

In sum, if the defense had been permitted to fully flesh out all of the pieces, it would have been clear that Steven Homick's Nevada trial attorneys failed to provide effective assistance, either because of their own shortcomings, or because the prosecution withheld needed discovery, or because the state of Nevada would not fund an adequate defense investigation, or because the Nevada trial judge would not allow the defense sufficient time to conduct a full investigation and secure all the needed discovery. Furthermore, the failure to provide effective assistance would have been found prejudicial, because it would have been clear that a fully effective defense would have been likely to produce a more favorable verdict at the Nevada trial. Indeed, the present jury may well have had a reasonable doubt whether the prosecution witnesses established Steven Homick's guilt of the Tipton murders, but put that doubt aside in favor of the knowledge that a Nevada jury had already convicted Steven Homick of those murders.

D. If the Nevada Conviction Had Not Been Admitted in Evidence, There Would Have Been a Reasonable Likelihood of a More Favorable Penalty Verdict

Next, Respondent claims that even if the Nevada conviction had not been admitted in evidence, there still would have been no reasonable possibility that the present penalty jury would have returned a verdict of life without parole. (RB 400-401.) Respondent relies on the extensive evidence the prosecution presented regarding the facts underlying the Nevada con-

viction. But the mere fact that the prosecution presented a lot of evidence does not establish, as a matter of law, that the jury believed that evidence proved Steven Homick's guilt beyond a reasonable doubt. Without the evidence of the Nevada conviction, the penalty jury might very well have considered all of the prosecution and defense evidence, and concluded that there was a reasonable doubt whether Steven Homick was guilty of the Tipton murders. (See AOB 575-576, 584-585, 702-704.) We simply have no way to determine whether the present jury found that the factual evidence established guilt, or whether they had some doubts, but deferred to the Nevada judgment.

Respondent even goes so far as to argue that the present defense claim was "diminished by the fact that the penalty jury here was presented with the very evidence that Nevada counsel did not present at the Nevada trial..." (RB 400.) But Respondent makes an important assumption that has no basis whatsoever; Respondent assumes that the present jury was persuaded that the defense evidence failed to raise a reasonable doubt. We do not know that, and Respondent points to nothing that would establish that. We do know that the present jury returned a death verdict. If we assume that verdict was based in part on consideration of the Tipton murders as a factor in aggravation, we still do not know whether that was due solely to the jury's assessment of the factual evidence, or whether it was influenced by the additional evidence of the Nevada judgment of conviction. Respondent engages in blatant bootstrapping, while failing to respond at all to the

reasons set forth in the opening brief establishing uncertainty as to just what caused the present jury to opt for a sentence of death.

E. Under the Totality of Circumstances Present Here, the Trial Court Erred in Refusing to Allow the Defense to Present Expert Testimony to Help Establish the Ineffective Assistance of the Nevada Defense Counsel

Finally, Respondent argues that there was no error in precluding defense expert testimony regarding the adequacy of the defense provided to Steven Homick during his prior Nevada trial. (RB 401-403.) However, while it is true that juries decide facts and judges decide law, the present trial court rulings forced the defense into the position of having to persuade the jury to disregard the prior Nevada conviction. That is, even if the defense prevailed on the factual issues, the jury would have still been left with a Nevada conviction and no reason to simply disregard it. But in order to persuade the jury to disregard the Nevada conviction, the defense had to make a strong showing why that conviction resulted from an unfair trial. The proffered expert testimony would have been valuable defense evidence to establish that unfairness.

That is, the defense was not seeking an opportunity to have the present jury declare the Nevada conviction null and void. Instead, the defense was seeking an opportunity to allow the present jury to place the fact of the Nevada conviction in a proper perspective, so that the probative value of

the fact of the conviction could be rationally assessed. Without that opportunity, the defense was left with a jury that knew a Nevada jury had found Steven Homick guilty, and no other evidence to allow an assessment of just what that meant. (See AOB 613-618.)

In sum, it is entirely possible that without evidence of the prior conviction, the defense might well have prevailed on the facts at the present penalty trial. If so, then Steven Homick would have been in the same position as the defendant in *People v. Horton, supra,* 11 Cal.4th at p. 1140, relied on by Respondent at RB 400 and 402. That is, we would have been left with no evidence in aggravation other than the facts of the present crime. While those facts were aggravating, the jury knew that all five of the other suspects escaped death verdicts, and that Steven Homick had no prior criminal history. Just as in *Horton*, we cannot say beyond a reasonable doubt that the jury would have nonetheless returned a death verdict.

Respondent next argues that the defense had no need to present expert testimony to show that the Nevada conviction was unreliable because it presented other evidence to prove that point. (RB 402.) Respondent offers no authority for the novel proposition that once some evidence is presented to prove a point, there is no reason to present more evidence of an entirely different nature to further help to prove that point. Indeed, if Respondent's logic makes any sense, then why wasn't the prosecutor below satisfied with his "extensive" factual evidence? Why did the People below

also think it was important to present the jury with a legal document (the judgment of conviction) to also prove that same point?

Respondent closes with another totally unsupported argument – that if the defense had been allowed to present the proffered expert testimony, the prosecution would have countered with its own expert testimony that Steven Homick was not denied effective assistance of counsel at his Nevada trial. (RB 403.) But no offer of proof was ever made below that such evidence existed, and Respondent fails to provide any clue as to what a prosecution expert would have been able to say to counter the defense presentation.

XV. THE DEFENSE WAS IMPROPERLY PRECLUDED FROM MAKING INQUIRIES OF PROSPECTIVE JURORS ABOUT THEIR ABILITY TO FAIRLY CONSIDER THE OPTION OF LIFE WITHOUT PAROLE IN THE CASE BEFORE THEM, AND THE PRECLUDED QUESTIONS IN NO WAY REQUIRED PROSPECTIVE JURORS TO PREJUDGE THE CASE

In the opening brief, it was shown that this Court has recognized the tension that exists during voir dire in a capital case, between the need to determine whether jurors can fairly consider both penalty options in the case before them, and the need to avoid asking prospective jurors to prejudge the case and commit to one penalty or the other before the evidence has been presented. In a series of cases, this Court has set forth guidelines that do allow questions pertaining to the specific facts that will be shown. The present trial court had its own ideas of what should or should not be permitted, and those ideas were far more restrictive than the guidelines this Court has provided. As a result, the defense here was precluded from asking questions that clearly come well within this Court's guidelines for permissible questions. As this Court has expressly recognized, once the trial court restricts such questions during voir dire of one prospective juror, the error infects the entire voir dire process, since it cannot be determined how many other jurors would have been asked similar questions if the trial court had not precluded them during voir dire of an earlier prospective juror. As a re-

sult, the penalty verdict in the present case must be set aside. (AOB 631-647.)

Respondent begins with a footnote that is utterly inconsistent with this Court's prior decisions. Respondent notes that the opening brief failed to cite any portion of the record pertaining to jurors other than a single particular juror. From that Respondent infers that it would therefore be improper to contend that the defense below was precluded from asking similar questions of other jurors. (RB 403, fn. 156.) But this precise point was discussed and fully rebutted in the opening brief. (AOB 644, 647.) Respondent offers no rebuttal to the specific point made in the opening brief. Respondent also cites no authority for the proposition that after defense counsel is improperly precluded from asking legitimate questions of one prospective juror, and the matter is fully discussed and the trial court's erroneous view of the law is made clear, defense counsel is nonetheless required to ask the same questions of each following prospective juror so the trial court can make the same erroneous ruling over and over. Indeed, in a complex capital case, this could easily involve hundreds of prospective jurors, wasting a substantial amount of time and leaving every prospective juror wondering why the defense seems intent on asking questions the trial court deems improper.

Respondent fairly summarizes the case most clearly relied on in the opening brief, *People v. Cash* (2002) 28 Cal.4th 703, 718-723 (see RB 406-408), but then seeks to apply the principles set forth in that case in an inap-

propriate and thoroughly unfair manner. Respondent goes back to a question pertaining to guilt phase evidence only, which the defense asked and the juror answered, without any objection by the prosecution.[44] (RB 408.) After that question was asked and answered without objection, defense counsel tried twice to add a reference to the expected penalty phase evidence, pertaining to the commission of a number of additional murders on a separate occasion. Twice the prosecutor interrupted before the question was completed, and in both instances the objections were sustained, without the trial court ever ascertaining just what the rest of the interrupted questions would have contained. As a result, we are left with no record of the precise questions the defense sought to ask, but in the ensuing discussion counsel

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[44] That question and the juror's response were as follows:

> "[DEFENSE COUNSEL]: Now, let me give you a hypothetical situation. Say you're a juror on a case and you find beyond a reasonable doubt that the prosecution has proved to you that a person conspires with other people to plan and carry out a murder; that they do this for money; that they take steps to commit it, to do the murder over a period of several months; and that they, in fact, enlist the aid of others, go ahead and carry out the killings and there are killings of more than one person. It's all done for money.
>
> In that type of situation, can you ever conceive of yourself voting for any punishment other than the death penalty?
>
> [PROSPECTIVE JUROR J.R.]: Yeah, I could see voting for life without possibility of parole." (RT 56:3301-3302.)

did make it as clear as possible that his effort was not directed toward seeking a commitment in advance to vote one way or the other, but was instead properly directed toward determining whether the juror could keep an open mind and consider both penalty options in the case before the juror – a case that necessarily involved the proof of two murders during the guilt phase, and three or four more murders during the penalty phase. (See summary at AOB 642-643.)

In contrast, Respondent's summary of the same exchange quotes the interrupted questions, then refers only to the prosecutor's self-serving claim that the defense was asking the juror to prejudge the case, but never mentions the defense response that made clear the defense intended only to determine whether, in a case involving additional murders beyond those shown in the guilt trial, the prospective juror would still be able to consider any penalty other than death. (RB 405; see RT 56:3302-3304, summarized at AOB 643.) Against Respondent's incomplete backdrop, Respondent unfairly argues that the defense "did not attempt" to ask if the juror could consider both penalty options in a case where the defendant had been convicted of other murders, or whether there were any facts or circumstances that would cause the juror to automatically vote for death. (RB 408.) Respondent is mistaken because defense counsel was never allowed to complete his question, so we do not know for certain whether he attempted to ask something very close to what Respondent contends was never attempted. What we do know is that the defense attorney explained to the

court below what he was attempting to do and that explanation, ignored by Respondent, fell well within the descriptions of permissible questions according to this Court's decisions, but was declared out of bounds by the trial judge.

Indeed, Respondent repeats the detailed question that was asked and answered without objection, and then adds the fact that the defendant had additionally committed other murders, as if it was all one question. (RB 408.) That is clearly not what actually occurred. All but the reference to other murders had already been asked and answered, and the answer showed that the juror believed he would be able to consider both penalty options in such a case. Then defense counsel started to ask an additional question that added only one new factor – that the defendant had committed a number of additional murders. (RT 56:3301-3302, set forth at RB 404-405.)

When viewed in the context of what really occurred here, and the discussion that followed below, it is clear that the trial court was determined to preclude questions that would refer to any of the specific evidence expected at the penalty trial. Thus, this case is indistinguishable from *Cash*. Respondent is mistaken in claiming this case is closer to *People v. Burgener* (2003), 29 Cal.4th 833, 865. (RB 408-409.) The problem in *Burgener* was that the question was worded in a way that asked the jurors whether they would vote for death in a case with evidence comparable to the evidence that was expected. Here, in contrast, counsel explained that he

wanted only to ask whether the juror could still consider both penalty options. Also, the defense here was not trying to summarize a list of aggravating and mitigating factors; instead, the defense sought only to ask a very general question about one aggravating factor that was expected to be the focus of the prosecution presentation at the penalty phase. That one factor, as in *Cash*, was that the defendant had allegedly committed murders in addition to the charged offenses. It is difficult to imagine how any case could be closer to *Cash* than the present case, as fully explained in the opening brief.

Respondent continues in the same fashion, insisting that the defense was trying to put a laundry list of aggravating factors into a single question. (RB 409.) As shown above, that is simply not true. Instead, the defense here first asked one question that listed a number of factors that would be shown by the guilt phase evidence. The prosecutor did not object and the juror answered that he could still consider life without parole despite all the factors that had been listed. It was only when the defense sought to add, for the first time, evidence that would be shown at the penalty phase that the prosecutor objected. Indeed, the defense clearly only wanted to ask about a single penalty phase factor, and was precluded from addressing that critical factor in any manner. The defense was not permitted to ascertain whether the jurors could consider both penalty options in the case before them.

Respondent closes by noting that defense counsel later asked some other jurors very broad questions referring to serial killers. (RB 410.) Those

questions were very different from the question that was precluded.[45] Respondent simply fails to deal with the real issue – the need to determine whether a juror could consider both penalties in the case before her or him. That is, if the case that will be presented to the jurors expected to contain aggravating evidence that is the type that could convert an otherwise open-minded juror into one who would invariably vote for a death sentence, the defense is nonetheless entitled to determine whether jurors could hear evidence supporting the aggravating factors and still keep an open mind until hearing all of the evidence the defense has to offer, plus instructions, argument by counsel, and the views of all of the other jurors. In other words, jurors who say they can still consider both penalties if they hear a description of the expected circumstances of the charged crime may not be able to consider both penalties after hearing additional evidence of a penalty phase aggravating factor that is of the kind that could convert an otherwise fair-minded juror into one who would invariably vote for a death sentence. The

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45 For example, Respondent first points to a question asked about a prospective juror's questionnaire comment that life without parole for not an appropriate penalty for a serial killer or mass murderer. (RT 56:3354-3355; see RB 409-410.) That example has no bearing on the voir dire of a juror who did not volunteer such a belief in the questionnaire. Respondent's next example involved asking a prospective juror whether there were situations where the juror would feel that the only appropriate punishment was death. (RT 57:3467, 3470; see RB 410.) But the utility of such a question is limited by whatever examples might enter the mind of the prospective juror, and is of no help if the juror is unable to think of an example or if the juror responds with examples unrelated to other murders.

defense is entitled to that ultimate determination, as that is the only way to know if jurors can consider both penalties in the case before them.

Perhaps the clearest summary of the proper applicable rule was set forth in a concurring and dissenting opinion of Justice Werdegar, joined by Justice Kennard, in *People v. Carasi* (2008) 44 Cal.4th 1263, 1328:

> "In sum, in order to ensure the state fulfills its constitutional mandate to provide a capital defendant with a fair and impartial jury, questioning on voir dire should include mention of case-specific facts and circumstances if they are such as could convert an otherwise fair and reasonable juror into one who would invariably vote for the death penalty regardless of the mitigating circumstances."

The questioning by defense counsel here sought to do nothing more. Each of the facts listed by counsel was such as could convert jurors who could be fair in other cases into jurors who would always vote for death without regard to the mitigating factors. More specifically, the expected aggravating factor of a separate triple-murder was certainly one that could potentially convert a juror who could be fair and reasonable into one who would invariably vote for a death sentence. Counsel was entitled to identify any such jurors and to seek their removal for cause.

XVI. RESPONSES FROM JUROR NUMBER EIGHT DEMONSTRATED HER ABILITY TO FOLLOW HER OATH, RENDERING HER REMOVAL IMPROPER

In the opening brief, it was shown that when the jury appeared to be deadlocked during penalty phase deliberations, a note from the lone hold-out indicated, standing alone, that the juror could not consider imposing a death sentence in a case that did not involve murder of a child or the rape or torture of an adult. That position was inconsistent with the juror's responses during voir dire. The court conducted a brief inquiry in which the juror unequivocally responded that her voir dire statements – that she could consider both penalty options in a case such as the present one – were true and that nothing in her note was meant to be inconsistent with that. It became apparent that the circumstances set forth in her note were simply examples of cases where she felt death could be an appropriate sentence. She explained that there were several factors that caused her to be unable to vote for death in the present case, but the trial court interrupted her and precluded any explanation of what those other factors might be. The court saw no basis to disbelieve the juror, and recessed for the weekend, telling the prosecutor he had a substantial burden to overcome. But after the weekend, with no new facts or evidence to consider, the court did a complete about-face and concluded the juror had an agenda and was trying to reconcile her note with what she had said during voir dire. The judge refused defense counsel's requests to question the juror further. The judge readily acknowl-

edged that replacing the juror would all but certainly lead to a prompt death verdict against Steven Homick, but the judge did so anyway. Later, in a motion for a new trial, a declaration by the holdout juror made it even clearer that the juror has simply concluded, for indisputably proper reasons, that death was not the appropriate verdict under the totality of the evidence that had been presented, but that the juror did believe that Stewart Woodman deserved a death sentence for his role in these very same crimes. Unmoved, the trial court denied the motion for a new trial. Under well-established decisions by this Court, it was clear that the removal of this juror was improper and that the penalty verdict must be reversed. (AOB 648-677.)

Respondent sees no problem whatsoever. (RB 410-437.)

A. Removal of Juror No. 8 Was Completely Unsupported

Respondent prefers to view the note received from Juror No. 8 during penalty deliberations in complete isolation – divorced from any statements made during voir dire, or any subsequent attempts by the juror to verbally explain what she meant when she wrote her note. Viewed in such a manner, Respondent sees an unambiguous inability to perform the duties of a juror. (RB 426.) But such an unrealistically narrow view ignores the clear and obvious fact that once the note was received, there was an undeniable ambiguity, since the note appeared inconsistent with the responses the juror

had given during voir dire. Indeed, the trial court expressly recognized this inconsistency at the outset, and saw the need to resolve it. Thus, there is no basis in the record or in the law to seize on the note and nothing else, and declare that a demonstrable reality of an inability to perform the duties of a juror has been established.

Respondent then does consider the juror's subsequent responses to the trial court's tightly limited questions. Respondent cherry-picks the responses, takes them out of context, and concludes that they represent a "clear" showing that the juror was biased. (RB 427.) Respondent's myopic characterization of the record is unsupportable.

When the juror verbally stated that she believed death was an appropriate punishment in cases where a child was murdered, or an adult was raped or tortured, she did not say that those were the **only** circumstances under which she would vote for death. (RT 146:18487.) These were simply illustrations of the kind of aggravating facts that might make the crime bad enough for her to deem death the appropriate sentence. She had just explained to the judge that "one of the instructions was that if I didn't feel that the crime was bad enough to merit the death penalty, then I could vote for life imprisonment." (*Id.*) She then uttered the words that Respondent apparently relies upon:" So I could still find the death penalty as far as an adult is concerned – I lost my train of thought – if an adult was tortured, if an adult was raped, I could find the death sentence for that." (*Id.*) But these were just examples of facts that might make the crime bad enough. Further,

the absence of sufficiently aggravating facts was not the only reason for her opting for a life sentence. Indeed, **immediately** after setting forth these examples, the juror said, "But -- and it's not just this factor, your Honor. There are several other factors involved." (*Id.*) That was the point where the judge cut off the juror and refused to ever attempt to find out what the juror meant by her reference to "several other factors ..." All that was said by the juror after this point was the unequivocal statement that her voir dire answers were true and that she still could consider death in the present case. Having considered it, she had concluded that a death verdict was not appropriate in this case. (RT 146:18488.)

Nonetheless, Respondent looks at this same record and concludes that the juror affirmed that she could vote for death **only** in a case where a child was murdered or an adult was raped or tortured. (RB 427.) This conclusion is simply false, as shown by Respondent's own full quotation from relevant portions of the record, contained at RB 418. The juror **never** affirmed such a position. The language set forth by Respondent at RB 427 was not the language of the juror; instead it was simply the trial court's characterization of what the court thought had been expressed in the juror's note. The court set forth its characterization, then said it seemed different from what the juror had said during voir dire, and then added that, perhaps, it was not different. The juror immediately stated that she did not believe it was different, that her voir dire statements had been true, that she could consider death, that she had considered death, and that she had ultimately

concluded that she did not find death to be an appropriate punishment in this case. (RT 146:18487-18488.)

Respondent fails to provide any explanation how such a record leads to a conclusion that the juror affirmed that she could only vote for death in cases involving a child or rape or torture. The record establishes quite the opposite. When given an opportunity, the juror repeatedly made clear that she had not changed her position since her voir dire responses regarding her ability to consider death in other types of cases, including the present case. Instead, she had simply listened to the evidence, the instructions, the arguments of counsel, and the views of other jurors during deliberations, and she had come to the conclusion that death was not appropriate here. To the extent any lack of clarity remained, it was due solely to the trial court's determination not to let the juror explain herself more fully. Respondent ignores this clear record and seeks to re-characterize it in a manner that fits more neatly into the cases upon which Respondent relies. That re-characterization is unfair and unsupported.

Indeed, we need only consider a hypothetical case that is the exact opposite of the present case, to see the error in Respondent's thinking. Suppose a juror stated during voir dire that he believed life without parole was appropriate in cases where the killing had not been planned in advance, but after further questioning he stated that he could consider life without parole even in a case where the defendant had been hired by two brothers to kill their parents. Suppose during penalty deliberations that juror took the posi-

tion that he was unwilling to vote for a verdict other than death. Suppose that juror wrote a note that stated that he believed life without parole was appropriate for unplanned murders, but since this was not such a case, he could not vote for life without parole. Suppose the court then questioned this juror and he said he did not believe he had said anything inconsistent, and then added, "Once I heard that he had killed two innocent victims, as a hired contract killer, and had also killed three other people in a separate robbery, I knew death was the only appropriate punishment." If the trial court had then denied a defense motion to have the juror replaced, would Respondent or this Court have any problem whatsoever upholding the refusal to replace the juror? Of course not. But nothing in the present record establishes any stronger basis for the removal of Juror No. 8.

The remainder of Respondent's argument in this subdivision of Respondent's Brief proceeds from this unsupported conclusion that the present record clearly established the juror could only vote for death in cases involving rape, torture, or children. Since this premise is wholly unsupported, the argument based on it must fail, no matter how well the cited cases might mesh with this imagined version of the facts. (RB 428-430.) Each of the cases cited by Respondent in these pages bears no resemblance to the present case.

After the filing of the opening brief, the Supreme Court of Illinois issued an opinion in a case with some striking parallels to the present case. In *People v. Nelson* (2009) ___ N.E.2d ___ [slip op. at pp. 39-50; 2009 WL

4843879] (Ill.S.Ct., December 17, 2009, Docket #105340), during penalty phase deliberations, the foreperson informed the court that it appeared that the lone holdout opposing a death verdict had decided, before deliberations had even begun, that he did not agree with the death penalty. The trial court questioned the holdout and two other jurors. The holdout juror readily admitted that, after the guilt trial, he told other jurors he could not vote for death, and may have indicated that his conclusion was based on his upbringing and beliefs. But he explained to the trial court that at the time of voir dire he did not know he would feel that way. Although he started with some opposition to a death sentence, he believed he listened to the penalty phase evidence with an open mind, and simply concluded that a death sentence was not appropriate in the case before him. The trial court had made no finding that the juror's voir dire answers had been untrue. As in the present case, it was undisputed that the holdout juror did actively participate in the penalty deliberations.

After the trial court questioned the holdout juror several times, the court excused him, replacing him with an alternate juror. The trial court believed some of the juror's responses appeared inconsistent – indicating on the one hand that he kept an open mind throughout the process, but also admitting he made statements to other jurors indicating he had already made up his mind before the penalty trial had begun. The Illinois Supreme Court noted that the qualitative difference between death and imprisonment "calls for ... less deference than usual to the trial court's findings." (Slip

op. at p. 46.) In light of these facts, the court concluded that discharge of the holdout juror was an abuse of discretion, since it appeared that the juror's opposition to the death penalty had been based on the evidence that had been presented. The same result should be reached in the present case.

Some final comments should be made regarding the standard of review. Respondent acknowledges the use of the "demonstrable reality" standard, but seems to apply it as if it were interchangeable with an abuse of discretion standard. Although the totality of the circumstances demonstrates that the court erred even under an abuse of discretion standard, it is important to note that the correct standard is more stringent than that:

> "Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion (see, e.g., *People v. Leonard, supra*, 40 Cal.4th at p. 1409), we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror's inability to perform as a juror must be shown as a 'demonstrable reality' (*People v. Cleveland* (2001) 25 Cal.4th 466, 474), which requires a 'stronger evidentiary showing than mere substantial evidence' (*id.* at p. 488 (conc. opn. of Werdegar, J.)). As we recently explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: 'To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an

> unbiased jury.' " (*People v. Wilson* (2008) 44 Cal.4th 758, 821.)

Later in the same opinion, this Court also explained that the typical deference to trial court factual determinations is also very different in the context of removing a juror during deliberations:

> "While we rely on our trial courts to assess a juror's state of mind in such circumstances, we have explained that such decisions are not subject to the substantial deference afforded other factual decisions. Instead, a court's decision to remove a juror must be supported by evidence showing a demonstrable reality that the juror is unable to perform the duties of a juror. (Citation omitted.)" (*People v. Wilson, supra,* 44 Cal.4th at p. 840.)

Applying these standards to the totality of the circumstances shown below, it cannot be said that any improper bias or inability to adhere to the oath of a juror was shown to a demonstrable reality. Instead, we have a juror who said on voir dire that she could consider both penalty options, who fully participated in the deliberations, and who explained under questioning that she had considered both options and had simply concluded that the evidence failed to persuade her that death was the appropriate penalty in this case. Anything inconsistent with this description was due to a poor written articulation of her state of mind in her note to the court. That was fully and reasonably corrected in her verbal responses, which also indicated she had more to say, which the judge would not allow. On this record, it can only be concluded that the discharge of this juror was prejudicial error.

B. Even If the Facts Shown By the Inquiry Below Had Been Sufficient to Support a Tentative Conclusion That the Juror Should Be Discharged, Further Inquiries Were Necessary Before Any Final Decision to Remove the Juror Could Be Made

Respondent begins this subdivision by again misstating what occurred when the court below began its inquiry regarding the note that had been received from Juror No. 8. Respondent states that the juror confirmed what she had written – that she could only consider death in cases involving rape, torture, or a child victim. (RB 430; see also RB 431.) As shown above, in her verbal responses the juror never said that murders involving rape, torture, or child victims were the **only** cases in which she could vote for death. Instead, she reiterated that those were cases where she could impose death, but she also said there were "other factors involved" in her reaching her decision in this case. The trial court prevented her from ever explaining what those other factors were. Also, simultaneously with the juror's reiteration of some of the situations in which she could vote for death, she also made it abundantly clear that she believed she was still being consistent with what she had said in voir dire, and that she had considered and rejected a death sentence, based on the evidence presented in this case. (RT 146:18487-18488.)

Thus, Respondent is again absolutely wrong in stating that the juror was emphatic in court that she could only consider death in three limited

situations. (RB 432.) Respondent's further characterization of the juror's "unwavering position" that "precluded *any possibility*" that the juror could fairly evaluate the penalty (RB 432) is also entirely fictional. Once again, Respondent's argument applies the law to imagined facts unsupported by the record, and must be rejected in regard to the actual facts of this case.

Returning to reality, the clearest path to the conclusion that more inquiries were necessary is to simply consider the options that were available to the trial court. Here, the court reached the conclusion that the juror was unable to consider both penalties and should be removed. Defense counsel urged in the alternative that the court declare a mistrial (based on the inability of the jury to reach a unanimous verdict) or make further inquiries. If the court had made further inquiries and they supported the need to discharge the juror, then juror No. 8 would have no longer been involved in the deliberations. If further inquiries had made it clear that the juror had properly considered both penalties and had simply rejected death based on the evidence and the instructions, then a mistrial would have been granted and neither juror No. 8, nor any of the other jurors, would have been involved in any further deliberations. Thus, either way, there was no danger of creating new problems by delving too deeply into the state of mind of a deliberating juror.

Even if we consider the third possible option – that further inquiry could have revealed that Juror No. 8 was deliberating properly, but that further deliberations might be useful – we are still left with no legitimate basis

for precluding that further inquiry. This option could have only come to fruition if the trial court was mistaken in the earlier conclusion that discharge of the juror was appropriate. Once further inquiries demonstrated that mistake, the trial court would have been far better equipped to determine whether further deliberations were appropriate, or whether the inquiries had tainted the deliberations to a point where a mistrial was appropriate. Either of these alternatives would have been better than a mistaken discharge of a juror.

The only possible argument against further inquiries was that they would have required more time. But the further inquiries requested by the defense were quite limited and would have taken only a few minutes, following a trial that had lasted more than nine months. There was simply no legitimate basis to discharge the lone holdout for a non-death verdict, based on an ambiguous record, while refusing to spend a few additional minutes in an effort to resolve any ambiguities.

C. Under the Totality of the Circumstances, the Replacement of the Lone Holdout for a Verdict Other Than Death Resulted in a Coerced Penalty Verdict

In the opening brief it was shown that under the totality of the circumstances here, the trial court's replacing the lone holdout juror and ordering further deliberations was inherently coercive. (AOB 669-673.) It was also recognized that this Court has routinely resisted arguments that

ordering further deliberations while knowing a jury is deadlocked 11-1, and knowing which side has eleven votes, is coercive. It was further explained that this case had even greater potential for coercion than the typical "11-1" case that this Court has affirmed; in the typical case the deliberations resume with the lone holdout in place, while here, the lone holdout was removed from any further deliberations.

Almost everything Respondent has to say about coercion was fully answered in the opening brief. What is most significant about Respondent's argument is what it does **not** say. One important point made in the Opening Brief was that the trial court here expressly recognized that by removing the holdout juror and ordering further deliberations, the all-but-certain result was a death verdict for Steven Homick. (RT 147:18510-18511.) This effectively transformed the penalty trial from a jury trial to a court trial, wherein it was the judge who made the decision she knew would lead directly to a death verdict. (See AOB 673.) Respondent has nothing to say about this deprivation of Steven Homick's state and federal constitutional rights to a jury trial on the penalty issue.

In the opening brief, it was also shown that the actions taken by the trial court here also had the negative impact of unmistakably conveying to the jurors the fact that the trial court believed death was an appropriate penalty, thereby relieving the jurors of their sense of responsibility over the penalty verdict, violating the principles set forth in *Caldwell v. Mississippi* (1985) 472 U.S. 320. (AOB 674-675.) Respondent answers this by pointing

to the comments the judge made to the jurors, trying to assure them she was not trying to imply she was approving any particular outcome. (RB 436-437.) But while this effort may have been better than nothing, the fact remains that the jurors knew that the judge knew they had voted 11-1 in favor of death, that the judge had then removed the only juror who was opposed to death and substituted in a new juror, and the judge then ordered further deliberations.

It does not take a rocket scientist to understand that after this sequence of events a death verdict was highly likely and a non-death verdict was all but impossible. These jurors also knew that a great deal of time and money had already been expended on this trial. No matter what the judge may have said, her actions spoke far louder than her words. It must have been obvious to the jurors that the judge would not have taken these actions unless she believed that a death verdict was an appropriate outcome. Thus, at best Respondent has given us a weak answer to the coercion argument, but no meaningful answer to the "relieved of responsibility" argument.

D. Even If No Error Occurred When the Substitution Order Was Made, the Additional Showing in Support of the Motion for a New Trial Compelled an Evidentiary Hearing

In the Opening Brief it was shown that the declaration attached to the motion for a new trial explained far more clearly what Juror No. 8's

true state of mind had been when she wrote her note to the court during penalty deliberations. (AOB 675-677.)

The juror's declaration goes a long way toward explaining why her note to the court contained a poor articulation of her actual state of mind; the note had not been her own product, but had been written at the insistence of the other jurors who had proofread it and rejected juror No. 8's initial drafts. (SCT 7:1933-1934, set forth at AOB 656-657.) The declaration also made it crystal clear that the juror was truthful in her claims that she could consider death as a viable option in a case like the present case; the juror had ultimately concluded that Stewart Woodman deserved a death sentence for his part in arranging for the murders of his parents. The declaration also made it clear that the juror considered the option of death for Steven Homick but rejected it for entirely proper reasons: the juror was convinced that Michael Dominguez was the actual shooter, the juror was swayed by the fact that Steven Homick had lived a substantial adult life free of violent crimes or felony convictions while maintaining responsible employment, and the juror was further swayed by the more lenient sentences that Stewart Woodman and Michael Dominguez had received.

These new revelations would have occurred earlier if the trial court had allowed the juror to state fully what was on her mind. Thus, it would be grossly unfair to reject the declaration out of hand as the product of a juror collaborating with the defense team. The juror could have easily been questioned at a time when any responses would have been totally her own, with

no input from counsel for either side. It was the defense that sought such questioning, the prosecution that resisted it, and the court that precluded it. Thus, the new revelations established that the penalty verdict had been the result of gross unfairness that deprived Steven Homick of the benefit of multiple constitutional rights. If this was not enough to mandate the granting of a new penalty trial, it was at least enough to compel an evidentiary hearing to verify whether the allegations in the declaration were true.

Respondent's only answer is contained in a footnote that reiterates Respondent's completely mistaken belief that the hearing which preceded the juror's removal had verified beyond dispute what was contained in the juror's note, so that no further consideration was necessary. (RB 432-433, fn. 163.) But the new information was so relevant and so completely consistent with the juror's testimony at that earlier inquiry that it was impossible to dismiss it as inherently incredible without even bothering to conduct a hearing. Respondent's eagerness to see the execution of Steven Homick should be rejected. Simple fairness called for an evidentiary hearing to resolve any uncertainties about the truth of the statements in the declaration. The juror could have been examined by counsel for one side, cross-examined by counsel for the other side, and then the trial court could have made an enlightened determination of the true facts, just as trial courts do all the time. Instead, the trial court cut short the initial inquiry and refused to reopen the matter even after a declaration convincingly demonstrated the error in the court's earlier decision. Now Respondent urges this Court to

keep the ball rolling, and affirm a sentence of death without ever bothering to resolve the troubling issues raised in this declaration. Rather than leaving these troubling issues for inevitable consideration in the federal courts, this Court should correct the trial court's error and send this case back to Los Angeles County for a new penalty trial, or for the imposition of a sentence of life without parole for Steven Homick.

XVII. THE PENALTY JURORS WERE ERRONEOUSLY ALLOWED TO CONSIDER MITIGATING FACTORS ONLY IF THEY WERE "CONVINCED" THEY EXISTED

In the opening brief, it was shown that the wording of the instructions given to the jurors at the conclusion of the penalty trial improperly limited consideration of mitigating factors to factors jurors were "convinced" existed. (AOB 678-680.) Not surprisingly, Respondent parses the instructions as an experienced attorney would, and concludes there was no reasonable likelihood that any jurors would have been misled. But the jurors were not attorneys. There is no basis for concluding jurors would have read them in the manner Respondent suggests. Instead, the likelihood was great that one or more jurors would have relied on a common-sense reading of the language employed. Thus, Respondent's position must be rejected. Error occurred, and it was plainly prejudicial.

Respondent begins by noting that the modified version of CALJIC 8.87 was given without objection. (RB 437.) But Respondent ignores the fact that the defense expressly requested an additional instruction that correctly stated the law and would have focused jurors on the correct standard (or lack of standard) regarding when any particular factor in mitigation could be considered. That expressly requested additional instruction can only mean that the defense did have a concern that jurors would misunderstand the modified version of CALJIC 8.87 that was given. While the instruction proposed by the defense was not labeled as an objection to CAL-

JIC 8.87, the effect was the same. The defense focused the trial court's attention on the problem with a correctly worded instruction that the court erroneously rejected as redundant. Plainly, it was not redundant. Respondent makes no attempt to defend the court's refusal to give the requested instruction. Error occurred and appellate review of that error was preserved.

Respondent argues that the last paragraph of CALJIC 8.87 did not address any burden of proof at all; instead it addressed only the subject of juror unanimity. (RB 438.) While lawyers might appreciate that distinction, there is no basis whatsoever for believing that lay jurors would even notice it, let alone understand it. Indeed, the instruction as a whole went back and forth in dealing with issues such as burden of proof and juror unanimity. The third paragraph mixed the two concepts in a single sentence, stating "a juror" (not "the jury") could consider criminal acts in aggravation if "a juror" was satisfied beyond a reasonable doubt the factor existed. (SCT 5:1365-1366, set forth at RB 437-438.) The fifth paragraph started with a sentence clearly dealing with the unanimity: "It is not necessary for all jurors to agree." The following sentence switched to burden of proof, using the word "convinced" followed by the phrase "beyond a reasonable doubt." The next sentence told the jurors that if they were not so "convinced," they could not consider the factor at all.

Against that backdrop, we come to the final paragraph, which starts with a sentence dealing with unanimity, repeating that there was no need for all jurors to agree to the existence of any factor in mitigation. The next,

and final, sentence appears to switch back to a burden of proof, using the same word – "convinced" – that had just been used in connection with the beyond a reasonable doubt standard that applied to evidence of other crimes offered in aggravation. That final sentence was also the **only** part of the instruction that appeared to deal with the burden of proof for factors other than other crimes evidence.

The end result, at worst, was that jurors would conclude that no unanimity was needed, but no factor could be considered unless a juror was convinced beyond a reasonable doubt that the factor existed. Even at best, jurors would conclude (as Respondent optimistically suggests) that the "beyond a reasonable doubt" standard was not applicable since it was not mentioned again, but they would also conclude that whatever alternative standard did apply, it at least required a juror to be "convinced" that the factor existed.

Common synonyms for "convinced" include terms such as "persuaded," "won over," "certain," "sure," "positive," or "confident." These terms connote a burden of proof that at least rises to the level of a preponderance, and probably exceeds that substantially. But the reality, never revealed to the jurors, was that no burden whatsoever existed. As the rejected defense instruction properly explained, a mitigating factor could be utilized even if the evidence supporting it was weak. Such perceived weakness might cause a juror to give the factor less weight than would be given if the proof was stronger, but it still allowed the juror to give it some weight,

even if they were not "convinced" that the factor existed. A juror, for example, who suspected but was not convinced that Steven Homick was not the actual shooter, should have been free to give mitigating weight to that suspicion.

Respondent closes with citations to two cases that concluded trial courts are not required to instruct the jury that there was no burden of proof regarding mitigating factors. (RB 439.) But those cases did not include deviations from standard CALJIC instructions that affirmatively indicated to the jury that there was a burden of proof regarding mitigating factors. Thus, the cited cases may have offered Respondent support for arguing there was no error in refusing the instruction proposed by the defense if the jury had otherwise been properly instructed. But once the modified version of 8.87 was given the jury was affirmatively misled in a manner that was not present in the cases relied on by Respondent. Thus, under the circumstances of the present case, the authorities cited by Respondent do not apply at all.

In sum, the failure to give the instruction requested by the defense was erroneous and exacerbated the error in using the ambiguous modification to CALJIC 8.87. CALJIC 8.87 as given might have been harmless if it had been supplemented by the defense requested instruction, but without the instruction requested by the defense, the jury was left with language that indicated the defense had a burden of proof, when that was contrary to the law. The instruction as given, without the supplemental instruction proposed by the defense, was erroneous and prejudicial.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTES ARE FUNDAMENTALLY FLAWED IN MULTIPLE RESPECTS

In the opening brief, it was shown that the California Death Penalty Law has numerous constitutional defects which this Court has consistently refused to acknowledge. (AOB 681-691.) Respondent disagrees, finding the complex statutory framework to be flawless. (RB 440-445.) Because the primary purpose of this portion of the opening brief was to preserve these issues for further review in the federal courts, there is no need to address them further at this point.

XIX. ERRORS DURING THE GUILT TRIAL WHICH MAY BE FOUND HARMLESS ON APPEAL MUST NONETHELESS BE CONSIDERED AGAIN FOR THEIR POTENTIAL IMPACT ON THE PENALTY VERDICT; THE GUILT AND PENALTY PHASE ERRORS IN THE PRESENT CASE THAT POTENTIALLY IMPACTED THE PENALTY VERDICT MUST BE CONSIDERED PREJUDICIAL UNDER THE TOTALITY OF THE CIRCUMSTANCES OF THE PRESENT TRIAL, EITHER WHEN CONSIDERED INDIVIDUALLY OR WHEN CONSIDERED CUMULATIVELY

In the opening brief, it was shown that guilt phase errors found harmless on appellate review might nonetheless have had an adverse impact on the penalty verdict, since the penalty phase jury is told that it must again consider all of the evidence admitted during the guilt trial. Thus, such errors must be considered again in regard to the penalty verdict. (AOB 692-695.) Respondent's only answer to this argument is to claim there were no significant guilt phase errors at all. (RB 445-446.) Thus, Respondent does not dispute the basic principle argued in the opening brief – that if there were guilt phase errors that were found harmless in regard to the guilt verdict, they must nonetheless be reconsidered for their possible impact on the penalty verdict. If this Court disagrees with Respondent and does find significant guilt phase errors, but finds them harmless in regard to the guilt verdict, then this Court must again consider those errors in regard to their potential impact on the penalty verdict.

In the opening brief it was also shown that the proper standard of review for guilt or penalty phase errors is that any substantial error that reasonably might have impacted the penalty verdict must be considered prejudicial. (AOB 695-702.) Again, Respondent's only answer is to contend that there were no substantial errors. (RB 446-447.) Again, Respondent does not dispute in any way the principles set forth in the opening brief. If this Court disagrees with Respondent and does find one or more guilt or penalty phase errors that might have impacted the penalty verdict, then reversal of the penalty judgment is required unless this Court can conclude beyond a reasonable doubt that the error or errors did not contribute to the penalty verdict.

Finally, in the opening brief it was shown that the present penalty trial must be considered close, so that no significant error can be considered harmless. (AOB 702-704.) Respondent disagrees and sees the present penalty phase evidence overwhelming, in support of a death verdict. (RB 446-447.) Yet again, Respondent conflates the any substantial evidence standard of review for sufficiency of the evidence claims with harmless error review. Respondent is mistaken. When assessing the impact of an error on a verdict, there is no rule of law or principle of logic that supports reliance on any assumption that all evidentiary conflicts were resolved in favor of the verdict.

Thus, Respondent relies on the conclusion that all mitigating evidence pales in comparison to the "sheer number" of murders allegedly

committed by Steven Homick. (RB 446.) But we simply have no way of knowing whether every single one of the penalty phase jurors concluded beyond a reasonable doubt that Steven Homick committed the Tipton murders. The defense presented considerable evidence supporting an alibi defense for Steven Homick, and additional evidence that Michael Dominguez confessed to a fellow prison inmate that it was he and Kelly Danielson, rather than Steven Homick, who committed the Tipton murders. If any juror was left with a reasonable doubt of Steven Homick's guilt such a juror or jurors could not have considered those crimes in aggravation of the penalty. Such jurors might nonetheless have voted for the death verdict, based solely on the guilt phase evidence, but impacted also by the errors that occurred at the guilt and/or penalty phases.

Similarly, Respondent's argument that the penalty verdict was not close assumes without discussion that every single juror concluded that Steven Homick was the person who fired the shots that killed the Woodman parents. Indeed, Respondent also assumes that every single penalty phase juror concluded that Steven Homick "masterminded" the Woodman killings. (RB 446.) But one or more jurors could have very reasonably concluded that Stewart Woodman was the person who masterminded the murders of his own parents. One or more jurors could have reasonably concluded that Robert Homick played a greater role in the killings than did Steven Homick. One or more jurors could have easily concluded (as all rea-

sonable jurors should have concluded) that it was Michael Dominguez, not Steven Homick, who fired the shots that killed the Woodmans.

Any juror or jurors who came to one or more of these conclusions could still have concluded that Steven Homick was sufficiently involved in the Woodman killings to justify the guilt verdicts rendered against him, and could have then been persuaded to support a death verdict because of the added penalty phase evidence of the Tipton murders, with their decision to vote for death also impacted by the erroneous character evidence heard during the guilt trial, or by penalty phase errors such as the introduction into evidence of the evidence that a Nevada jury had previously found Steven Homick guilty beyond a reasonable doubt of the Tipton murders.

In sum, we are left with many unknowns in regard to what the jurors concluded about the guilt phase evidence and about the penalty phase evidence. If even a single juror viewed the case as close, and was impacted by any guilt or penalty phase evidence, than the death judgment against Steven Homick cannot stand. Indeed, even if none of the jurors viewed the case as close, the fact remains that under the totality of the circumstances, and in consideration of all the applicable legal principles, this Court should view the penalty case as very close and should vacate the death verdict unless it can honestly be said beyond a reasonable doubt that the guilt and penalty phase errors could not have impacted the penalty verdict.

CONCLUSION

For the reasons set forth in the opening brief and in this brief, the convictions should be reversed, and/or the penalty verdict should be vacated.

DATED: July ___, 2010

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Ellen I. Cutler, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P. O. Box 172, Cool, CA 95614-0172.

On July __, 2010, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States Mail at Cool, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____ day of July, 2010, at Cool, California.

_____