IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	No. S048337
v.	Los Angeles County Superior Court No. BA075063
REGIS DEON THOMAS,	
Defendant and Appellant.	

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angeles

The Honorable Edward Ferns, Judge

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief appellant replies to the State's arguments that necessitate an answer in order to present the issues fully to this Court. However, he does not address the arguments regarding each claim raised in the opening brief. In large part, the State urges this Court to reject these claims because the Court has rejected similar claims before. On these matters, appellant largely believes that his arguments already have been adequately presented, and the positions of the parties fully joined. Nor does appellant reply to every contention made by the State with regard to the claims he does discuss. Rather, appellant focuses only on the most salient points not already covered in the opening brief. The failure to address any particular argument or allegation made by the State, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, waiver or forfeiture of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court*

(2001) 25 Cal.4th 1046.) The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

* * * * *

I.

THE USE OF JUROR NUMBERS VIOLATED NUMEROUS CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO ASSISTANCE OF COUNSEL AND RIGHT TO A FAIR AND PUBLIC TRIAL

Appellant argued in his opening brief that the reference to jurors by numbers and not by their names offended his constitutional rights to due process and a fair and public trial by an impartial jury by raising the specter that appellant was a dangerous person from whom the jury must be protected. As such, appellant was not regarded as someone innocent at the outset of the trial. (AOB 42-46; see also *United States v. Deluca* (1st Cir. 1998) 137 F.3d 24, 31; *United States v. Edmond* (D.C. Cir. 1995) 52 F.3d 1080, 1090.) Appellant also showed that anonymity permitted jurors to act contrary to their own consciences and contrary to their role as the conscience of the community. (AOB 46; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 519; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 577 [concurring opn.].)

The use of juror numbers in this case also violated appellant's Sixth and Fourteenth Amendment right to be present and to assist counsel in jury selection. A criminal defendant has a right to be present during all proceedings at which his substantial rights are affected. (*Hopt v. Utah* (1884) 110 U.S. 574, 579; *United States v. Gagnon* (1985) 470 U.S.522, 526; *Illinois v. Allen* (1970) 397 U.S. 337.) In particular, the defendant has a right to be present during jury selection because "the prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he

may give to counsel and to the court . . . in the selection of jurors." (*Hopt v. Utah*, *supra*, 110 U.S. at p. 578.)

Even where the attorney knows the names of the jurors, he requires the assistance of the defendant in selecting impartial jurors, and knowing the names of the jurors may be required if the defendant is to be able to assist. The defendant may know something about a juror which would make that juror less than impartial but only if the defendant knows the juror's name. So, for instance, the defendant may not recognize a juror's face but can recognize his name and know that he harbors a bias. From the juror's name, but not his face, the defendant might know some fact about the juror's personal or family history, which the juror had failed to reveal and which might cause him to be biased against defendant. Further, there may be cultural associations between prospective jurors and defendants with certain last names, which affect the impartiality of the jurors and of which the defendant may be aware but his attorney unaware. As such, the use of an anonymous jury interferes with the ability of the defendant to assist his attorney in selecting an impartial jury.

Respondent argued that appellant's rights were not violated because his attorneys knew the names of the jurors. (RB 47.) Respondent misunderstands appellant's argument. It is immaterial that the attorneys knew the juror numbers. The important fact, and the one upon which appellant's argument depends, is that *appellant* did not know the names of the jurors. The record is clear that he did not. Even more important, the record shows that the jurors knew that appellant did not know their names. This is demonstrated by a jury note that was sent out immediately before the conclusion of penalty phase deliberations. In this note the jurors asked that identifying information, including their names be kept confidential. (RT

33:3985; CT 5:1140.[1]) This shows that the jurors believed that up to this point their names had been confidential.

Respondent also argued that appellant has not shown he was prejudiced by the use of juror numbers. (RB 53-54.) However, this error should be analyzed without consideration of prejudice. Because the constitutional error infringed the presumption of innocence, it was reversible without any consideration of prejudice. (*Cage v. Louisiana* (1990) 498 U.S. 39.) Insofar as the error deprived petitioner and the public of a public trial, it was structural error and reversible per se. (*Waller v. Georgia* (1984) 467 U.S. 38, 43; *People v. Byrnes* (1948) 84 Cal.App.2d 72, 79; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741; *Neder v. United States* (1999) 527 U.S. 1, 8; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) As to the denial of appellant's right to participate in the jury process because the effect of the error on the jury is unknowable, it is impossible to assess the effect of the error, and reversal is required without a showing of prejudice. (See *People v. Rist* (1979) 16 Cal.3d 211, 223 ["It is . . . not possible for us to determine on the record before us the degree of prejudice suffered by defendant because of the court's error in failing to grant his motion, and the usual tests for concluding that an error requires the reversal of a judgment of conviction are not applicable."]; *People v. Almarez* (1985) 168 Cal.App.3d 262, 269 ["As we cannot determine the degree of prejudice, we are compelled to reverse."].)

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[1] The exact language of the note was: "Also what ever steps can be taken to keep our names and other personal information confidential would be appreciated (unless otherwise directed on an individual basis)." (CT 5:1140.)

If, however, the error is amenable to harmless-error analysis, respondent cannot prove beyond a reasonable doubt that the error was harmless. Appellant showed that the prosecution can not prove beyond a reasonable doubt that the message which the anonymous process sent to the jury - that appellant was to be regarded as an especially dangerous person - did not cause the jury to be suspicious about appellant, so that they did not to presume him to be innocent. (AOB 51-55.) So far as the denials of the rights to trial by an impartial jury, to be present, and to assist counsel in the selection of jurors is concerned, the prosecution cannot prove beyond a reasonable doubt that, if appellant had known the names of the jurors, he would not have recognized one who was prejudiced against him, either personally or because of the nature of the charges, or recognized the need for further voir dire by his attorney as to the possibility of such prejudice. To prove that appellant was not harmed, the prosecution would have to produce the names of the jurors and show, as to each one, that they did not have any bias toward appellant or people with his background or toward anyone charged with the murder of law enforcement officials. The prosecution would also have had to show that further inquiry would have revealed no such bias. It cannot do so.

* * * * *

II.

THIS COURT SHOULD RECONSIDER ITS HOLDING THAT INDIVIDUAL SEQUESTERED VOIR DIRE IS NOT REQUIRED

Appellant argued that the trial court erred in failing to conduct sequestered voir dire on death qualification and that the failure to conduct such voir dire violated appellant's rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel and a reliable death verdict. (AOB 56-64.) Respondent argues that such voir dire is not required, citing this Court's holding that *Hovey v. Superior Court* (1980) 28 Cal.3d 1 was abrogated by statute and that individualized sequestered voir dire is not constitutionally required. (RB 56-57; see, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1180; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1174-1182.) Appellant can do no more than plead that this Court reconsider its holding about the constitutional necessity of individualized sequestered death qualification. In support of his argument, he offers the following critical evidence from empirical studies demonstrating that sequestered voir dire is required because group voir dire systematically biases a jury against the defendant at both the guilt and penalty phases of a trial.

As appellant pointed out in his opening brief, in *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 74-75, this Court recognized that exposure to the death qualification process itself creates a substantial risk that jurors will be more likely to sentence a defendant to death. (See AOB 59.) The Court cited empirical studies demonstrating that death qualification creates an imbalance to the detriment of the defendant. (*Id.* at p. 74; see Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-*

Qualification Process (1984) 8 Law & Human Behavior 121, 132 [death qualification creates an imbalance to the detriment of the defendant]; Haney, *Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Human Behavior 133, 151.) These empirical studies amply supported this Court's finding that sequestered voir dire was required. The wisdom of this Court's holding has most recently been substantiated by additional studies showing that jurors who had been through a non-sequestered voir dire were more likely to favor the death penalty, in violation of appellant's rights to an impartial jury and to due process of law. (See Allen, Mabry & McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis* (1998) 22 L. & Hum. Behv. 715, 724.)

This Court in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, also considered the question of whether a death qualified jury was more conviction prone, as opposed to merely more likely to impose the death penalty. (*Id.* at p. 1308.) In deciding this issue, this Court conducted an analysis of the research and found that jurors who could be excluded under the terms of *Witherspoon v. Illinois* (1968) 391 U.S. 510, 523, i.e., individuals who would be challenged for cause as opposed to the death penalty, were significantly less conviction prone than the death qualified members. Although the Court accepted that *Witherspoon* qualified jurors, also called "*Witherspoon* excludables" were more conviction prone, none of the cited studies had considered the conviction proneness of a jury pool where, besides the exclusion of jurors who would always vote for life, jurors who would always vote for death were excluded, as California law required. In light of the failure to include such "California excludables" in the studies, this Court concluded that: "petitioner has not made any reliable

showing that a pool of 'California death qualified' jurors differs from the pool of jurors who are eligible to serve at non-capital trials," (*id.* at p. 64, footnotes omitted) and declined to hold that death qualification was unconstitutional.

However, research has shown that the Court's holding that there was no evidence that capital jury pools were more conviction prone than noncapital jury pools is wrong. In fact, such studies have shown that "California excludables," i.e., individuals who would never impose the death penalty, are a small percentage of the population, and that even when such individuals are excluded from the pool, a pool of death qualified jurors is significantly more likely to convict than the pool of jurors in a non - capital group. (See Kadane, *A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 L. & Hum. Behv. 115, 119; Haney, *Hurtado & Vega, "Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 L. & Hum. Behv. 619, 624-630.)

Appellant acknowledges that in *Lockhart v.McCree* (1986) 476 U.S. 162, the United States Supreme Court held that the empirical issue of conviction proneness was irrelevant to the issue of whether death qualification denies the right to a fair trial. Although the defendant had presented numerous studies showing that death qualified juries were more conviction prone the majority rejected the studies as flawed. (*Id.* at p. 171.) Ultimately, however, the Court held that the empirical issue was irrelevant: " we will assume for the purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction prone' that 'non - death qualified juries'. We hold, nonetheless that the Constitution does not prohibit States from 'death qualifying' juries in capital cases." (*Id.* at p.

173.) The Court based its decision on a new interpretation of impartiality, concluding that "an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." (*Id.* at p. 178, italics in original.)[2]

Appellant urges this Court not follow *Lockhart* and urges it to revisit its decision overruling *Hovey*. *Lockhart* should not be followed for two reasons. First, the United States Supreme Court's holding in *Lockhart* that social science findings were irrelevant to the issue of whether a death qualified jury was fair and impartial is inconsistent with this Court's findings in *Hovey, supra*, 28 Cal.3d 1, that social science research on death qualification is highly relevant to the question of a fair capital jury. Many of the empirical studies rejected by the Supreme Court were in fact found to be reliable by this Court in *Hovey*. For instance, the Supreme Court rejected studies on generalized attitudes to the death penalty and other aspects of the criminal justice system as irrelevant to the constitutional question. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 169.) This Court, on the other hand, expressly acknowledged the importance of the studies. (See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 41-61.) Moreover, in

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[2] Research has repeatedly demonstrated that *Lockhart's* conclusion that empirical studies do not show that a death qualified jury is more likely to convict is incorrect. (See Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation* (1984) 8 L. & Hum. Behv. 53-79; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes* (1984) 8 L. & Hum. Behv. 31-51; see Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61 Law & Contemp. Probs. 125, 147; Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1127; see also Allen, Mabry & McKelton, *supra*, 22 L. & Hum. Behv. at p. 721.)

Hovey, the only significant fault this Court found with the studies offered by the petitioner in that case was that they did not include California excludables. (*Id.* at p. 64.) However, as appellant has shown, current studies show that even "California qualified" death penalty juries are more likely to convict than a pool of noncapital prospective jurors.

Second, this Court's discussion of the requirements of a fair jury in *Hovey* was based on both the federal Constitution and on the California Constitution. Although the United States Supreme Court has held that a jury may be fair even if it is shown to be more inclined toward death, this Court has never overruled its holding in *Hovey* to the contrary. Under *Hovey*, a fair jury pool from which capital jurors are drawn must be one which is not only impartial, but is one which is "constitutionally neutral" through diversity. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 66.) California law requires that a fair jury pool be not only one where all members are fair and impartial but one where the members of the jury pool "bring to the determination of guilt a diversity of experience, knowledge, judgment, and viewpoints, as well as differences in their 'thresholds of reasonable doubt." (*Id.* at p. 22.) This Court held that such jury pool diversity was critical to the functioning of a jury because by counter-balancing the various biases among jurors, and by assuring that evidence was considered from different points of view, diversity in a jury pool promoted the accuracy of verdicts. (*Id.* at pp. 23-24.)

In the case of death qualified juries, appellant has shown that the principle of jury neutrality through diversity has been violated. As the data show, death qualification systematically excludes individuals who are more likely to find reasonable doubt in a case, more likely to be skeptical about the prosecution's evidence and less likely to mistrust the defense. As such,

a death qualified jury violates California law. Therefore, this Court should not follow *Lockhart* which relied on incorrect empirical assumptions, a false presumption that the death penalty is fair, and which is inconsistent with the law in California. Moreover, since appellant has shown that the process of group voir dire creates a jury that is more inclined to impose death, this Court should also reverse its recent holdings permitting group voir dire.

This Court must reconsider the constitutionality of non-indivdualized voir dire in light of the evidence delineated above. The Eighth Amendment requires heightened reliability in capital cases both at guilt and at penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Non-individualized death qualification distorts the jury so that it is more conviction prone and more prone to sentence a defendant to death. As such, a death sentence imposed by non-individualized a death qualified jury cannot meet the requirements of the Eighth Amendment.

Moreover, the evidence delineated above shows that non-individualized voir dire violated appellant's rights to a fair trial. In *Taylor v. Louisiana* (1975) 419 U.S. 522, 530-531, the United States Supreme Court identified three purposes underlying the right to a jury trial. First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Non-individualized death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who have attitudes that make it less likely to convict are the very people excluded from the jury via death qualification. Such death qualification makes the "commonsense judgment

of the community" unavailable. It also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 530-531.) Death qualification as currently conducted in this state fails to preserve confidence in the system, and discourages community participation. The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Louisiana, supra,* 419 U.S. at p. 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens. Finally, because death qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement of the Equal Protection Clause. "We think it obvious that the concept of 'distinctiveness' must be linked to the [three] purposes of the fair-cross-section requirement." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 175.)

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III.

THE RECORD SHOWS THAT TWO JURORS WERE ERRONEOUSLY EXCUSED

A large part of appellant's argument was devoted to demonstrating that the 1970 *Floyd*[3] rule permitting the State to satisfy its burden of proof simply by eliciting conflicting answers from prospective jurors predates and is inconsistent with United States Supreme Court holdings in *Gray v. Mississippi* (1987) 481 U.S. 648 and *Adams v. Texas* (1980) 448 U.S. 38. However, as respondent noted (RB 67), in *People v. Schmeck* (2005) 37 Cal.4th 240, 261-262, this Court rejected appellant's argument. Appellant urges reconsideration of this decision for reasons he will explain below. Respondent also argues that the record supports the exclusion of two jurors for cause. Respondent is wrong.

A. This Court Should Reconsider *Schmeck*

Appellant argued that jurors No. 56 and No. 102 were erroneously excused for cause. (AOB 65-79.) Respondent argues that the trial court's determination is binding upon this Court if a juror has made conflicting remarks on the record. (RB 65.) Respondent cites six of this Court's cases for this proposition, i.e., *People v. Griffin* (1988) 33 Cal.4th 536, 558, *People v. Millwee* (1998) 18 Cal.4th 96, 146, *People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319, *People v. Cain* (1995) 10 Cal.4th 1, 60, *People v. Mason* (1991) 52 Cal.3d 909, 953-954 and *People v. Kaurish* (1990) 52 Cal.3d 648, 698, 699. However, all of these cases ultimately rely on *People v. Ghent* (1987) 43 Cal.3d 739, 768. As appellant has shown, *Ghent* relies for this proposition on *People v. Fields* (1984) 35 Cal.3d 329, 355-356.

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[3] *People v. Floyd* (1970) 1 Cal.3d 694, 724, disapproved on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 277.

Fields in turn relies on the 1970 decision in *People v. Floyd* (1970) 1 Cal.3d 694, 724.

In *Schmeck, supra*, 37 Cal.4th 240, this Court articulated the standard of review for claims that a trial court erred in removing an ambivalent prospective juror for not being death-qualified: "If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is *binding*. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence." (*Id.* at pp. 261-262, quoting *People v. Horning* (2004) 34 Cal.4th 871, 896-897; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1247, italics altered ["[Prospective juror] U. earlier gave sharply conflicting statements, and so the trial court's determination of U.'s state of mind, i.e., that U. would be substantially impaired in the performance of his duties as a juror in this case, is binding on us."].) This is exactly the rule that was articulated in *People v. Floyd, supra*, 1 Cal.3d at p. 725 ["Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court."].

However, this is not the rule of *Wainwright v. Witt* (1985) 469 U.S. 412, 425-426. In *Witt*, the high court held that despite "lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Ibid.*) This exact language was quoted by this Court in *Schmeck*. (*People v. Schmeck, supra*, 37 Cal.4th at p. 261.) Yet this is definitely not the same as saying that a trial court's determination that a vacillating juror is substantially impaired is

binding on the reviewing court. Binding is not the same as deferential. This Court's deeming a trial court's evaluation of a vacillating or equivocating prospective juror's state of mind to be binding necessarily provides absolute deference to the trial court's ruling on the challenge for cause of that prospective juror. The absolute deference given to a trial court's determination of a prospective juror's state of mind is vastly broader than the deference this Court ordinarily affords a trial court's evaluation of credibility or demeanor. In the latter scenario, a reviewing court, though deferential, assesses whether the trial court's ruling should be upheld. In contrast, when this Court determines that a prospective juror has vacillated or equivocated it ends the inquiry and automatically upholds the trial court's determination whether the juror is death-qualified. (See e.g., *People v. Gray* (2005) 37 Cal.4th 168, 193; *People v. Moon* (2005) 37 Cal.4th 1, 14; *People v. Blair* (2005) 36 Cal.4th 686, 743; *People v. Harrison* (2005) 35 Cal.4th 208, 227-228; *People v. Horning* (2004) 34 Cal.4th 871, 896-897; *People v. Haley* (2004) 34 Cal.4th 283, 306-308.)

This Court's pattern of viewing a trial court's decision as "binding" in cases of juror equivocation is inconsistent with the United States Supreme Court. First, as noted in the opening brief (AOB 65-74), the High Court in *Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50, most definitely did *not* defer to any of the trial court's conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. *Schmeck's* discussion of this issue overlooks this point. More critically, the practice of viewing a trial court determination as binding is inconsistent with Supreme Court holdings. A criminal defendant has a right to an impartial jury and the exclusion of jurors for the simple reason that they oppose the death penalty creates a jury that is 'uncommonly

willing to condemn a man to die.'" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) The kind of deference this Court affords cases where jurors are uncertain, or express themselves in uncertain ways, about whether they could consider death creates a situation where the State can remove jurors simply because of that uncertainty. That is emphatically not the law: "[t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658, quoting *Wainwright v. Witt, supra,* 469 U.S. at p. 423.) The State's ability to remove jurors who are simply reluctant to impose death, "unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." (*Id.* at pp.658-659, alterations in original, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423 and *Witherspoon v. Illinois* (1968) 391 U.S. 510, 523.)

The proper standard on appeal, whether or not a juror expresses ambiguity or expresses himself ambiguously, has been properly expressed in other decisions of this court. On appeal this Court "will uphold the trial court's ruling *if it is fairly supported by the record*, accepting as binding other trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Stewart* (2004) 33 Cal.4th 425, 441, internal quotation marks omitted and emphasis added.) Thus, whether a prospective juror's voir dire is conflicting or consistent, ambiguous or emphatic, a trial court's exclusion can be affirmed only if it is supported by substantial

evidence. This Court should reconsider *Schmeck* and overrule language suggesting that it is bound by trial court findings.

B. The Record Does Not Support a Finding That the Excluded Jurors Could Not Follow the Law

1. Prospective Juror No. 56

Respondent points to language in prospective juror No. 56's voir dire that he could not see himself living with himself if he "put" the death sentence on somebody. (RB 61; see RT 7:796.) Prospective juror No. 56 would have trouble with the death penalty, but he could follow the law, as he elsewhere stated in his voir dire. That is the language appellant relied on in his opening brief. Although this juror had strong opinions regarding the death penalty, he agreed that there were cases, such as where someone killed fifty people, that he could impose the death penalty. (RT 7:795.) There is nothing in his language that shows that No. 56 could not weigh aggravation against mitigation and decide that death was the appropriate sentence if the evidence showed this. The judge's conclusion that he would have trouble doing his "job properly" (RT 7:820.) was not warranted. It is true that prospective juror No. 56 would be weighed down by a decision, but making a death decision *is* weighty. No. 56's responses to do not show that he would refuse to weigh the evidence and therefore do not show that his ability to serve on appellant's jury was "substantially impaired."

Respondent cites *People v. Barnett* (1977) 17 Cal.4th 1044, 1114-1115, as presenting a situation similar to appellant's. (RB 66.) In that case, this Court found that some answers showed a willingness to follow the law, but that other showed an "inability" to consider a death verdict. This case does not show an inability to consider a death verdict, just a reluctance to do so. This is not enough. The State also cites *People v. Roybal* (1989) 19

Cal.4th 481, 519, for the proposition that because prospective juror 56 said that he would be willing to impose death if 50 people were killed, he could be excluded from the jury. (RT 65.) Reliance on this case is misplaced. First of all, respondent miscites *Roybal*. In *Roybal*, the venire person stated that she could not impose death in the case before her. (*Ibid.*) Prospective Juror No. 56 said no such thing in this case. Second, to the extent that respondent is using *Roybal* to the support the proposition that jurors who express difficulty in imposing the death penalty in some cases are excusable, then its notion contradicts well-established law: "'[V]eniremen *cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment*. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522 (emphasis added).) A trial judge must take care to assure that only jurors who would vote against imposing the death penalty "'without regard to any evidence that might be developed at the trial of the case'" are dismissed. (*People v. Fields*, *supra*, 35 Cal.3d at p. 358, fn. 13.) If anything, the fact that prospective juror No. 56 said that he could vote for death if a lot of people had been killed showed that he would be willing to follow his oath, weigh the evidence and impose the death penalty. As such it was error to excuse him from the jury.

2. Prospective Juror No. 102

As noted in the opening brief, prospective juror No. 102 was not opposed to the death penalty in all cases. (AOB 76.) All he said that made him objectionable to the prosecution was that he believed it would be difficult for him to impose the death penalty. Respondent acknowledges as

much, itself calling No. 102's responses "equivocal." (RB 66.) Respondent again cites *People v. Roybal, supra,* 19 Cal.4th 481, 519, for the proposition that where the record is clear that the juror would impose the death penalty only in an extreme case, then the juror may be removed for cause. (RB 66.) The record does not show that No. 102 had views where he would only impose death in "extreme circumstances." Respondent argues that No. 102's statement in the questionnaire that he could impose the death penalty in the case of the murder of a child, shows that he would be only willing to impose the death penalty in extreme cases. (RB 66.) No 102's responses show no such thing. In fact, prospective juror No. 102's statement was in answer to a question about when the death penalty should always be used; and he stated that the death penalty should always be used when there was the intentional death of a child. (SCT1 8:002234.) This does not show anything at all about whether he would be willing to follow his oath to weigh the evidence and impose the death penalty if he believed that aggravation outweighed mitigation and that the death penalty was the appropriate punishment. All this statement shows is that in a case where the death of a child was involved, prospective juror No. 102 might be struck for cause by the defense because he would not consider mitigation. In fact, No. 102 agreed with the statement in the questionnaire that anyone who intentionally kills a police office should always get the death penalty, although he stated that he did not want to be involved in the decision. (SCT1 8:002233.) Moreover, as with prospective juror No. 56, *People v. Roybal* is not applicable because in that case the prospective juror said that she would not vote for the death penalty in the case in at hand, which happened to involve a single victim. (*People v. Roybal, supra*, 19 Cal.4th at p. 519.) By way of contrast, in this case No. 102 specifically said that he

could impose death in the case before him. He did not particularly want to impose death, but he would do his duty. He stated: "the situation with my duty as a juror, I guess I would have to go beyond the way I feel and make the decisions." (RT 7:735.) A few minutes later he was asked if the trial got to the penalty phase was he capable of "weighing whatever is presented in making a decision to follow the law." He said: "Yes, I would." (RT 7:735.) A few minutes later he was asked "if the facts warranted it or under the guidelines . . . , if you felt it was appropriate, could you vote for death." (RT 7:739-740.) His answer was: "Yes." (RT 7:740.)

Hence, the record affirmatively shows that No. 102 could impose the death penalty, even though it would be difficult for him. The trial judge stated that he thought that No. 102's demeanor and body language said otherwise, i.e., that even though he said under oath that he could impose the death penalty, in fact he could not. For respondent, that was enough. It is not. As appellant argued above, this Court's extreme deference to trial judge findings when there is any ambiguity or equivocation in a prospective juror's answer is incorrect. However, even if correct, there was no such ambiguity in this case.

On his questionnaire, No. 102 did answer the question "Are your feelings about the death penalty such that they would interfere with your ability to be objective during the guilt phase of the trial?" with a "yes." (RT 7:735; SCT1 8:002235.) However, on voir dire he was asked whether this was a misunderstanding. In answering the question, he implied that it was and that he could get over his feelings and impose death. The fact that the questionnaire answer reflects confusion is also shown by the two answers following his answer to the question about whether his feelings about the death penalty would interfere with his ability to be objective in the guilt

phase. In those answers, prospective juror No. 102 stated both that he would not be inclined to find the defendant not guilty because of his feelings and that he would not be more inclined to find the defendant guilty. (SCT1 8:002235.) If No. 102's feelings about the death penalty had affected his ability to be objective at the guilt phase, then he would have stated either the one of the other. It is apparent that No. 102's answer in voir dire was correct. He could be objective at guild. He was simply confused by the question.

Hence, the record does not affirmatively show that No. 102 would not follow his duty as a juror. As this Court has observed, "[b]ecause the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469 U.S. 412, 105 S.Ct. 844." (*People v. Stewart* (2004) 35 Cal.4th 425, 447.) Here No. 102 would find it difficult to impose death, but that under this Court's law is not a showing sufficient for the prosecution to have born the burden of proof that his ability to serve was substantially impaired. (See, *id.* at p. 447 ["A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law."])

The prosecution cannot rely on "body language" when there is nothing in the record to support it. Rather, the juror's inability to perform their functions impartially must appear in the record as a "demonstrable reality" based upon their responses during voir dire as a whole rather than isolated statements taken out of context. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729; *Adams v. Texas* (1980) 448 U.S. 38, 45; *Gray v. Mississippi*, *supra*, 481 U.S. at p. 693; *People v. Beeler* (1995) 9 Cal.4th 953, 972-975; *People v. Mason* (1991) 52 Cal.3d 909, 953.) Since No. 102 said that he could impose death, and there is nothing in the record suggesting otherwise, he was not excusable for cause based on the trial court's feelings which have no support in the record.

* * * * *

IV.

THIS COURT SHOULD CONDUCT ITS OWN REVIEW OF THE PROSECUTION'S REASONS FOR STRIKING AFRICAN-AMERICAN JURORS

Since appellant's opening brief was filed, the Supreme Court issued its decision in *Johnson v. California* (2005) 545 U.S. 162. In *Johnson*, the Court held that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 170.) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 168, fn. 4].) The Supreme Court's decision in *Johnson* rejected this Court's previous requirement that in order to establish a prima facie case of discrimination, an objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias, explaining that, "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Ibid.*) The trial court in the present case did not state the standard under which it evaluated the sufficiency of the prima facie case. Under the same circumstances, in the recent case of *People v. Gray* (2005) 37 Cal.4th 168, this Court conducted its own independent review of the record under the high court's standard. (*Id.* at p. 187.) Appellant urges that the Court do the same in this case. Such a review is especially appropriate in this case because respondent argues that the prosecutor's reasons did not reveal a discriminatory intent.

* * * * *

V.

PROSECUTORIAL MISCONDUCT DURING VOIR DIRE REQUIRES REVERSAL

Appellant argued that he was entitled to a reversal of his conviction and sentence because of prosecutorial misconduct in voir dire. (AOB 98-103.) Respondent asserts that appellant has waived his claim that the prosecution's remark in voir dire was error because he failed to request a curative instruction. (RB 81.) This is incorrect. Generally to preserve a claim of prosecutorial misconduct for appeal, a defendant must object and ask the trial court to admonish the jury to disregard the impropriety. However, there is no such requirement if an objection or request for admonition would have been futile or an admonition would not have cured the harm. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Nor does the rule apply when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) In this case, the request for an admonition would have been an empty gesture since the trial court obviously disagreed that the prosecution's remark was erroneous. (See RT 660 [trial judge stated everyone has the presumption of innocence and "[t]hen it's whether or not the proof is beyond a reasonable doubt in the mind of the jurors," quoted at AOB 100].) Since the trial court thought there was no error, an admonition would not have been given to the jury even had counsel requested it and the request would have been futile. As such, the claim is not forfeited.

Appellant argued in his opening brief that he was denied the presumption of innocence by the prosecution's improper remarks that even guilty people have the presumption of innocence in large part because the remark encouraged the jury not to set aside its bias that appellant had been

arrested and charged with very serious crimes. (AOB 101-102.) Respondent asserts that the prosecution's remark was not misconduct because it was a correct statement of the law, analogizing the prosecutor's remarks to the remark made by the prosecutor in *People v. Seaton* (2001) 26 Cal.4th 598, 636, that "even Jack Ruby . . . had the right to a jury trial" (RB 82), which this Court did not consider erroneous. This Court did not consider in *Seaton*, and indeed has never considered, appellant's argument that remarks by the prosecution to a jury about obviously guilty parties (like Jack Ruby), undermine the presumption of innocence by suggesting to the jury with a "wink and a nod" that the party on trial is guilty and that they are not, therefore, required to set aside their biases because it is likely that appellant is guilty simply because he is on trial.

Remarks by the prosecution about guilty parties are analogous to guilt assuming hypothetical questions. Numerous courts have held that it is improper to ask questions of witnesses which assume the guilt of the defendant because they suggest that there is more evidence than what the prosecution is presenting. (See *United States v. Oshatz* (1990 2d Cir.) 912 F.2d 534, 539 ["The jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record."]; see also *United States v. Guzman* (11th Cir.1999) 167 F.3d 1350, 1352; *United States v. McGuire* (6th Cir.1984) 744 F.2d 1197, 1204.) As it was put in one case, *United States v. Candelaria-Gonzalez* (5th Cir.1977) 547 F.2d 291, 294, '[t]hese hypothetical questions [strike] at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial." Appellant urges that remarks to the jury about guilty parties in voir dire

similarly violate the presumption. This Court's law is incorrect on this issue and respondent's reliance on *Seaton* is therefore misplaced.

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VI.

RESPONDENT NEGLECTS CRITICAL ASPECTS OF APPELLANT'S ARGUMENT THAT THE TRIAL COURT'S REFUSAL TO SEVER MURDER CHARGES VIOLATED APPELLANT'S RIGHTS

The trial court permitted the State to consolidate, over objection, the charges against appellant relating to the homicides of Officers Burrell and MacDonald and that of Carlos Adkins. Appellant argued that permitting the state to join for trial the charges denied him the right to due process, a fundamentally fair trial on guilt, and a fair and reliable penalty determination. (AOB 104-121.) Respondent does not contend that the evidence of the Adkins homicide and the evidence of the McDonald/Burrell homicides was cross-admissible. (See RB 88.) Rather, it argues that there was no error in admitting the evidence of all three homicides because the charges were unlikely to inflame the jury and that the evidence of the charges was strong. (RB 88.) Respondent erroneously minimizes the importance of both the lack of cross-admissibility and the nature of the evidence against appellant.

A. Respondent Fails to Consider the Prejudice of Admitting Evidence Which Was Not Cross-Admissible

Respondent's agreement that the evidence of the three homicides was not cross-admissible is correct as far as it goes; but the State then erroneously tries to take the issue of lack of cross-admissibility out of the case by failing to consider the issue in its discussion of whether the two police officer counts should have been severed from the count involving Carlos Adkins, and in discussing whether the failure to do so was prejudicial. Respondent correctly notes that lack of cross-admissibility

alone is not sufficient to prohibit joinder and demand severance, but fails to recognize that this factor nevertheless weighs heavily in favor of severance, and potential prejudice. (See, e.g., *People v. Smallwood* (1986) 42 Cal.3d 415, 425-426, overruled on other grounds, *People v. Bean* (1988) 46 Cal.3d 919, 939, fn. 8; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448-451 & fn. 9; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) This Court has long and consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Smallwood, supra*, 42 Cal.3d at p. 428; *Williams v. Superior Court, supra*, 36 Cal.3d at pp. 448-450 & fn. 5.)

The admission of such evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Thompson, supra*, 27 Cal.3d at p. 317; *Williams v. Superior Court, supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) Of course, "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; *People v. Garceau* (1993) 6 Cal.4th 140, 186, overruled on other grounds, *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [use of such evidence may dilute presumption of innocence].) Thus, "joinder under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused." (*People v. Smallwood, supra*, 42 Cal.3d at p. 429.) Indeed, "[c]ross-admissibility is

the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.)

The Court of Appeal's reasoning in *People v. Grant* (2003) 113 Cal.App.4th 579, is instructive on the issue of the prejudice from failing to sever counts that are not cross-admissible. In that case, the defendant was charged in one count with burglary based upon evidence suggesting that he had broken into a school and attempted to steal computer equipment. (*Id.* at pp. 582-583.) He was charged in a second count with receiving stolen property based upon evidence that the police searched defendant's home and discovered computer equipment that had been stolen from a different school approximately two years earlier. (*Id.* at pp. 584-585.) The trial court denied defendant's motion to sever, which he challenged on appeal.

The Court of Appeal held that the trial court's denial of the motion to sever was not an abuse of discretion at the time of its ruling. (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 587.) "Nevertheless," the court held, "the joinder substantially prejudiced defendant's right to a fair trial," and thus required reversal. (*Ibid.*) The appellate court held that the evidence relating to the two counts was not sufficiently similar to render it cross-admissible under Evidence Code section 1101. (*Id.* at p. 589.) However, although not sufficiently similar to allow cross-admissibility, the circumstances of the two crimes were sufficiently similar to increase the risk that jurors would draw prohibited inferences of criminal disposition from their determination of defendant's guilt as to one of the counts. (*Id.* at pp. 589-590.) Under the circumstances, the provision of standard instructions to decide each count separately, that the statements of counsel were not evidence, and that the prosecution bore the burden of proving defendant's guilt of each charge beyond a reasonable doubt, were

insufficient to cure the prejudice that arose from joining the counts. (*Id.* at p. 592.) To the contrary, under all of these circumstances, the joinder was so prejudicial as to violate defendant's right to a fair trial as to both charges. (*Id.* at p. 593; see also *Tabish v. Nevada* (Nev. 2003) 72 P.3d 584, 590-595 [refusal to sever counts prejudicial and violated due process where, inter alia, crimes were not sufficiently similar to be cross-admissible or evidence a common scheme or plan, evidence relating to one crime more "graphic" than the other, and prosecutor argued similarity of crimes, despite trial court's limiting instruction].)

Here too the fact that the evidence of the Adkins' homicide was not cross-admissible in the trial of the homicide of Burrell and MacDonald means that it was error not to sever the counts and that the failure to sever the courts was prejudicial. The evidence was not cross-admissible, but there were circumstances of the two sets of crimes that would increase the risk that the jurors would draw prohibited inferences of criminal disposition given that appellant had been accused in so many homicides. So, in considering appellant's guilt of the Adkins' homicide, the jury heard a tremendous amount of evidence regarding the police officer homicides. The prosecution asserted that appellant "executed" (RT 28:4101) the two officers as part of a premeditated and deliberate plan to kill. This was all inadmissible as to the Adkins' homicide, yet this was an argument which a jury could not have overlooked when considering whether or not appellant intended to kill Carlos Adkins. Recall that one of appellant's main arguments at trial relating to the Adkins homicide was that he did not have the intent to kill because the shooting was part of a struggle with Adkins. Moreover, evidence that appellant threatened a witness (Bernard Dickson) in connection with the Adkins homicide cannot but have influenced the

juror's deliberations in connection with the police officer homicides because it showed appellant as a threatening person. Yet this evidence was not admissible on the issue of appellant's guilt on the MacDonald / Burrell homicides. Finally, as appellant noted in his opening brief, the same kind of gun was used in the three murders – something which a jury would have naturally used against appellant, when in reality the fact that someone used a nine millimeter to kill Adkins was utterly inadmissible to show prove that appellant used one in a different case.

Moreover, the jury was not told that it could only consider the evidence of the Adkin's homicide as proof of that count and evidence of the police officer homicides as evidence on those counts. The lack of instructional guidance increases the possibility that the jury misused the evidence. So for example in *Bean v. Calderon* (1988) 163 F.3d 1073, 1085, the omission of limiting instruction was a critical factor considered in concluding that joinder of offenses was prejudicial and violated defendant's due process right to fair trial as to one count. (See also *People v. Grant*, *supra*, 113 Cal.App.4th at p. 593 [same]; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 299-300 [likelihood that jurors will improperly consider other crimes evidence may be so great that even limiting instruction will not protect accused against impermissible inferences of criminal disposition]; *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [same].)

B. The State Minimizes the Inflammatory Effect of the Homicides With Which Appellant was Charged

Appellant also argued that it was error to deny the motion to sever because the crimes were inflammatory. (AOB 117-118.) While averring that the crimes in this case were senseless, the State asserts that the cases were not inflammatory. (RB 88.) Respondent gives short shrift to

appellant's argument. In its argument that neither the police homicides nor the Adkins homicide was inflammatory, respondent has limited the idea of an "inflammatory" homicide to those homicides which are "brutal, repulsive or sensational." (RB 88, quoting *People v. Arias* (1996) 13 Cal.4th 92, 130, fn. 11.) Appellant argued in his opening brief that the police officer homicides were brutal, in the sense that the physical evidence used to prove them up was very disturbing. (See AOB 117-118.) Nevertheless, respondent attempts to limit the idea of "inflammatory" to "brutal" or "repulsive," is to give the word too narrow a legal meaning. Inflammatory evidence is evidence which "tend to cause strong feelings of anger [and/or] indignation [and/or] to stir the passions." (Black's Law Dict. (7th. Ed. 1999) p. 782, col. 2.)

Taking the word in its larger – and correct -- meaning, the evidence of the police officers was clearly inflammatory. The community was outraged by the homicide of its police officers, as was shown by the emotion demonstrated by the members of the community attending the trial. Trial counsel argued as much when he asserted that the mere fact that appellant was charged with the murder was enough to enrage a jury against him. (CT 3:680.) Moreover, we know that Mrs. MacDonald, the mother of one of the victims, openly wept during the testimony about how her son was found. No one would be able to set this aside. In the words of the Court of Appeal, "[o]ne would have to be almost saintly not to be aroused by such evidence." (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 941.) When the meaning of "inflammatory" is correctly construed, it is clear that the evidence of the MacDonald / Burrell homicides was inflammatory and that therefore it was error to fail to sever the two sets of crimes.

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VII.

RECENT CASE LAW SHOWS THAT CORONER'S EVIDENCE REGARDING ONE OF THE VICTIMS WAS ADMITTED IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES

Appellant showed that an autopsy report was testimonial hearsay within in the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 and was admitted in violation of appellant's right to due process and to confront witnesses. (AOB 122-130.) The principle of *Crawford* that the admission of testimonial hearsay is a violation of the confrontation clause was recently reiterated in *Davis v. Washington* (2006) __ U.S. __, 126 S.Ct. 2266. Respondent argues that appellant has waived the claim, and that the report was not testimonial hearsay. It also claims that the report was admissible in spite of *Crawford.* (RB 101-108.) Respondent is mistaken.

A. The Claim is Preserved for Review

Respondent claims that appellant has forfeited this claim because he did not object to the admission of the evidence at the time it was offered. (RB 103-104.) Respondent claims that appellant's trial counsel should have objected to the admission of the evidence even though *Crawford* had not yet been decided because *Crawford* did not create a new constitutional right. (RB 103.) This is not correct. Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The rule announced in Crawford is such a rule, and the courts of appeal have applied it retroactively to cases pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208, *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004)

118 Cal.App.4th 1396, 1400; also see *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-Crawford law"]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].) Before *Crawford*, the autopsy report would have been admissible since under *Ohio v. Roberts* (1980) 448 U.S. 56, 66, the confrontation clause did not bar admission of hearsay evidence with guarantees of trustworthiness and there was no showing in appellant's case that the autopsy report was unreliable.

United States v. Cotton (2002) 535 U.S. 625, 628-630, 631, cited by respondent, is beside the point. First of all *Cotton*, which was about an erroneous sentence under *Apprendi v. New Jersey* (2000) 530 U.S. 466, was a case from the federal trial court, so any issue as to forfeiture involves the federal rules, not California's rules. (*Id.* at p. 627.) Second, *Cotton* was not about a defendant's failure to object. Rather, at the pages cited by respondent, the case is about whether a federal court of appeal erroneously treated the sentencing error in that case as jurisdictional, which is not an issue in this case. Finally, contrary to the way respondent has used the case, the United States Supreme Court actually did address the appellant's claim, although ultimately rejecting it. (*Id.* at p. 634.)

B. The Report was Not Admissible

1. The Report was Testimonial

Respondent contends that the coroner's report was not testimonial and that it was "routine documentary evidence." (RB 105.) Respondent cites cases from other states which have found that autopsy reports are non-testimonial. (RB 105, fn. 51, citing *People v. Durio* (Sup.Ct. 2005) 794 N.Y.S.2d 863, 868-869; *Denoso v. State* (Tex.App. 2005) 156 S.W.3d 166, 182[4]; and *Smith v. State* (Ala. Crim. App. 2004) 898 S.2d 907, 916-917.) Indeed, the issue of the testimonial character of scientific reports has been hotly debated across the country and has split state courts. (See, e.g., *State v. Caulfield* (Minn. 2006) 722 N.W.2d 304 [forensic examiner's report testimonial]; *City of Las Vegas v. Walsh* (Nev. 2005) 124 P.3d 203 [nurse's affidavit testimonial]; *State v. Miller* (Or. Ct. App. 2006) 144 P.3d 1052 [uranalysis and drug residue reports testimonial]; *State v. Rogers* (N.Y. App. Div. 2004) 780 N.Y.2d 393 [blood test testimonial]; *Martin v. State* (Fla. Ct. App. 2006) 936 So.2d 1190 [drug analysis report testimonial]; *People v. Lonsby* (Mich. Ct. App. 2005) 707 N.W.2d 610 [test for semen testimonial]; *State v. Crager* (Ohio Ct. App. 2005) 844 N.E.2d 390 [DNA test testimonial]; *State v. Cao* (N.C. Ct. App. 2006) 626 S.W. 301, 305 [laboratory reports testimonial unless testing is mechanical]; but see *Commonwealth v. Verde* (Mass. 2005) 827 N.E.2d 701 [drug analysis

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[4] *Denoso* held that an autopsy was not testimonial hearsay because it was not generated in response to a police interrogation. (*Denoso v. State*, *supra*, 156 S.W.3d at p. 182.) This holding is inconsistent with the high court's recent pronouncement in *Davis v. Washington* which held that a report does *not* have to be generated in response to a police interrogation to be testimonial. (126 S.Ct. at p. 2274, fn.1 .) The reasoning of *Denoso* should not be relied upon by this Court.

nontestimonial]; *State v. Dedman* (N.M. 2004) 102 P.3d 628 [blood test nontestimonial]; *State v. Forte* (N.C. 2005) 629 S.E.2d 137 [drug analysis]; *People v. Jambor* (Mich. Ct. App. 2007) __ N.W.2d __, 2007 WL 29698 * [latent fingerprint reports nontestimonial].)

The Minnesota Supreme Court's opinion in *State v. Caulfield, supra*, 722 N.W.2d 304 is representative of these cases. *Caulfield* considered the admissibility of a laboratory report when the person who prepared the report was not called as a witness. The court identified the three general categories of testimonial statements,[5] and found that the laboratory report in that case bore characteristics of each of the generic *Crawford* categories. (*Id.* at p. 309.) The findings by the *Caulfield* court are equally applicable to the coroner's report: it functioned as the equivalent of testimony and it was prepared at the request of law enforcement.

The court in *Caulfield* also addressed a claim similar to one being made by the State here – that the person who prepared the report would have played a minor role, merely authenticating the document. (See RB 105.) In discounting the persuasiveness of this assertion, the *Caulfield* court noted the observation made by the majority in *Crawford* that "'The

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[5] These are: 1) ex parte in-court testimony or its functional equivalent–that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; 2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and 3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. (*State v. Caulfield, supra*, 722 N.W.2d at p. 308, citing *Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.)

Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.'" (*State v. Caulfield, supra*, 722 N.W.2d at p. 309, quoting *Crawford v. Washington, supra*, 541 U.S. at p. 66.) In this case, the State averred that had the coroner been present all that he would have done would have been to authenticate the report. Not so. Here the coroner's report contained crucial remarks about the cause of death and descriptions of the wounds, which were critical to the prosecution's theory regarding where the victims were positioned at the time the shootings occurred. (See People's Exhibit No. 83.) These things were all evidence before the jury. There were also photographs made of the wound. The defense could not cross examine on the accuracy of these pictures because the person who witnessed them was not around.

The philosophy expressed in *Caulfield* comports with United States Supreme Court law on scientific evidence. In addressing the government's use of scientific evidence against a defendant, the Court stated that the accused must be afforded the opportunity for meaningful confrontation of the government's case at trial. (*United States v. Wade* (1967) 388 U.S. 218, 227-228.) Similarly, in refusing to recognize a due process right to the preservation of breath samples, the Court observed that there was no violation because defendant had the right at trial to cross-examine the officer who administered the intoxilyzer test. (*California v. Trombetta* (1984) 467 U.S. 479, 490.) These principles are applicable here. A report prepared by a medical official employed by the state to further a criminal investigation constitutes quintessentially testimonial evidence. This is exactly the involvement of government officers in the production of testimony with an eye toward trial that the *Crawford* Court warned against.

2. Whether the Report Qualifies as a Business Record is Not the Question

Citing a footnote from the *Crawford* case, respondent argues that the report was admissible as a business record, noting that the high court stated that business records are a type of non-testimonial hearsay. (RB 106, citing *Crawford, supra*, 541 U.S. at p. 56.) Respondent writes as if classifying something as a business record was decisive. The reference to business records in the *Crawford* case clearly is not meant as a bright-line rule since a footnote immediately following this text augurs against the mechanical use of any statutory hearsay exception. (*Id.* at p. 56, fn. 7.) First, Justice Scalia was at best referring to a record under the federal rules of evidence. He obviously did not have in mind all the different state laws on business records. Second, immediately after the reference to the business records, Justice Scalia wrote, [t]he "involvement of government officers in the production of testimony with an eye toward trial" makes a record testimonial. (*Ibid.*) This is true whether or not it also qualifies as a business record.

The Court of Appeal has recognized that the aside in *Crawford* does not exempt documents that could be classified as business records from the constitutional imperatives of the Confrontation Clause. In *People v. Mitchell* (2005) 131 Cal.App.4th 1210, the court observed that the dicta in *Crawford*, if applied literally, would eviscerate the decision's rationale:

> Classification as a "business record," however, does not alone determine whether this type of evidence is admissible as non-testimonial under *Crawford*. In *Crawford*, the Supreme Court noted business records were one example of hearsay statements "that by their nature were not testimonial." By this the court could not have meant all documentary evidence

> which could broadly qualify in some context as a business record should automatically be considered testimonial.

(*Id.* at p. 1222.)

Both the wording and rationale of *Crawford* indicate that evidence obtained by a prosecutorial branch of government for use in a criminal trial must be tested by cross-examination. (See *United States v. Cromer* (6th Cir. 2005) 389 F.3d 662, 673-674 [*Crawford* applicable to any statement made in circumstances in which reasonable person would realize it likely would be used in investigation or prosecution of crime]; see also *People v. Hernandez* (N.Y. 2005) 794 N.Y.S.2d 788, 789 [latent fingerprint report testimonial because it described maker's methods and conclusions, degree of care taken in lifting prints, and report prepared with ultimate goal of apprehending and successfully prosecuting a defendant] .)

California recognizes this approach to *Crawford.* In *People v. Taulton* (2005) 129 Cal.App.4th 1218, the appellate court found the determinative issue to be whether the statement under consideration was prepared for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue. The evidence at issue in *Taulton* were prison records, and they were deemed non-testimonial because they were not created for the purpose of using them at a criminal trial. (*Id.* at pp. 1224-1225.)

Here, it is beyond dispute that the autopsy report was prepared as part of the anticipated litigation against the perpetrator of Burrell's murder. No reasonable person would dispute that everyone understood that if a criminal charge was brought the report would play a part in the litigation. In *Davis v. Washington, supra,* 126 S.Ct. at pp. 2273-2274 , the high court held that a report prepared pursuant to a police inquiry intended to be used

in a criminal prosecution was testimonial. (See *State v. Miller, supra,* 144 P.3d at p. 1058 [urine test report testimonial because primarily produced to prove presence of controlled substance at criminal proceeding].) Consequently, the report was a document prepared in anticipation of a criminal trial are, therefore, testimonial.

Even if the business record issue were determinative, it would not control the outcome in this case. In this case, the autopsy was not admissible as a business record. In order for a record to be admissible as a business record there must be testimony as to the reliability of the procedures under which the document was generated. (Evid. Code, § 1280, subd. (c).) There was no evidence that the autopsy was conducted under reliable conditions. Moreover, for the opinions in an autopsy report to be admissible there must be expert qualifications of the person making the report. (*People v. Terrell* (1955) 138 Cal.App.2d 35, 57.) In this case, there was no such evidence. (Cf. *People v. Clark* (1992) 3 Cal.4th 41, 158-159 [deceased coroner had previously testified as an expert so trustworthiness was shown on the record].) The respondent cites *People v. Beeler* (1995) 9 Cal.4th 953, 978-981, for the proposition that the autopsy report was an admissible business record. (RB 105.) However, in that case, there was testimony about the reliability of the autopsy procedures followed by the deceased pathologist. (*Ibid.*) Here there was not. As such, the record does not support a conclusion that the report was a business record.

3. The Report was Not Admissible On a Non-Hearsay Basis for the Pathologist's Opinion

Respondent argues that the autopsy report was admitted for a non-hearsay purpose, i.e., as something relied upon by the expert. (RB 106.) The first problem with this assertion is that the record does not support it. The jury was not instructed at the time of the pathologists testimony that any part of it was being admitted solely as the basis for his expert opinion and not for the truth of the evidence itself. Most often, hearsay problems are cured by an instruction that matters admitted through an expert go only to the basis of the expert's opinion and should not be considered for their truth. (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) Such an instruction was not given here, and the jury had no reason to not consider the reports for their truth. True, the jury was instructed at the end of the trial that certain evidence was admitted for a limited purpose and that they should only consider it for that purpose. However, this instruction also told the jury that it was advised at the time of the admission of such evidence that there was a limit to how the evidence could be considered. (CT 5:1045.) Since such an admonishment was not given to the jury at the time of the pathologist's testimony, the jury had no reason to believe that this instruction applied to his testimony. This Court has noted that this type of general instruction is meaningless unless the jury's attention is drawn to the specific evidence it relates to. (*People v. Montiel*, *supra*, 5 Cal.4th 877 at p. 919.)

The way this evidence was offered in support of an expert opinion is illustrated by *People v. Gardeley* (1996) 14 Cal.4th 605. There, the jury was instructed that certain hearsay would be adduced so that the expert

could be asked subsequent questions, and the jury was told it should not consider the hearsay for its truth because it was not being admitted as such. The expert was then asked hypothetical questions that utilized those facts. (*Id.* at pp. 612-613.) By following such a procedure, it is clear to the jury that the facts upon which the expert is basing her opinion are not to be taken as being offered in support of the prosecution case. That was not done here and appellant's jury was free to assume that the report was offered for its truth and that the jury could use it as such in determining whether the prosecution had met its burden of proof.

* * * * *

VIII.

THE DRAWINGS WERE INADMISSIBLE HEARSAY

Appellant showed in his opening brief that his due process rights to a fair trial were violated by the admission of artistic drawings. (AOB 131-147.) Respondent argues that his due process and confrontation federal constitutional claims are forfeited. (RB 108, 112.) Respondent is incorrect. In *People v. Partida* (2005) 37 Cal.4th 428, this Court held that an objection on the grounds that evidence was admitted in violation of Evidence Code section 352 preserved a due process claim where the trial objection required a consideration by the trial court of due process. (*Id.* at p. 437; Evid. Code, § 352.) A claim that evidence violated section 352 preserves a due process claim where the claim is that the admission of the evidence rendered appellant's trial fundamentally unfair. (*Id.* at pp. 436-437.) In other words, the failure to invoke the Constitution will not prevent an argument on appeal that "(1) the trial court erred in overruling the trial objection, and (2) the error was so serious as to violate due process." (*Id.* at p. 436, fn. omitted.) Appellant here makes exactly this claim, i.e., that the admission of the sketches rendered his trial fundamentally unfair. As such, he is not barred from raising a due process argument on appeal even if he did not specifically allude to the Federal Constitution. Appellant has previously explained why his confrontation clause claims are not forfeited. (See Arg. VII.A., *supra*.)

Respondent also claims that the drawings were not inadmissible hearsay because they were only admitted to illustrate witness testimony. (RB 114.) It cites *People v. Mayfield* (1997) 14 Cal.4th 668 and *People v. Rodriguez* (1994) 8 Cal.4th 1060 as controlling. In those cases, this Court held that a videotapes of the crime scenes were admissible over the

defendant's objection that it was in accurate and unduly prejudicial. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 747; *People v. Rodriguez*, *supra* 8 Cal.4th at pp. 1114-1115.) Appellant agrees that these cases hold what respondent says they hold. It is just that they do not address appellant's argument. *Mayfield* and *Rodrigques* are both about whether the evidence was inaccurate. Appellant argued that the evidence was essentially the hearsay statements of the individual or individuals who made the drawings and that they were inadmissible because the artists were not available to be cross-examined. Respondent has not addressed the substance of this claim.

In a footnote, respondent maintains that appellant has waived any claim to the inaccuracies of the drawings because when the trial court's offered to alter the drawings to the extent that they contained inaccuracies, defense counsel indicated that if the drawings were to be admitted, he wanted them admitted "as is." (RB 113, fn. 43, citing RT 27:3994.) Respondent has taken the trial court's offer and defense counsel's response out of context. The trial court was concerned that the car in the drawings showed a licence plate number when none had been identified by the witnesses. (RT 27:3993-3994.) However, defense counsel never objected to the license plate number, but to aspects of the drawings showing the lighting and the positioning of the witnesses. He agreed that the drawing could come in with the license plate number. He did not waive any other objections as to the accuracy of the drawings. (RT 27:3995-3997.)

* * * * *

IX.

APPELLANT HAS NOT FORFEITED HIS FEDERAL CONSTITUTIONAL OBJECTIONS TO PREJUDICIAL EVIDENCE CONCERNING THE DEATHS OF THE POLICE OFFICERS

Appellant argued that the admission of so much graphic evidence in this case violated his right to due process and a fair trial. (AOB 148-160.) Respondent argues that appellant cannot raise his federal due process claims relating to the admission of this evidence because he failed to object to the evidence on federal constitutional grounds at the trial court. (RB 118-119.) This is not the case. As noted in the argument immediately above (see Arg. VIII, *supra*), in *People v. Partida*, *supra*, 37 Cal.4th 428, this Court held that an objection on the grounds that evidence was admitted in violation of Evidence Code section 352 preserved a due process claim where the claim was that the admission of the evidence rendered appellant's trial fundamentally unfair. (*Id.* at pp. 436-437.) Since this was exactly appellant's claim in relation to the mountain of graphic evidence admitted against him, he is not barred from raising a due process argument on appeal.

Respondent has systematically gone through the graphic evidence that appellant objected to and argued that each piece of evidence was admissible. Respondent ignores the fact that many of the issues it relies on were not disputed by the defense. Moreover Respondent ignores the main thrust of appellant's argument that it was not the admission of any individual piece of evidence violated his right to a fair trial. Rather, it was that the prosecution just went over the top with its graphic evidence. The facts of this crime were unpleasant, as respondent asserts (RB 130) and appellant does not deny. However, it is such unpleasant facts that made the case cry out for judicial oversight. It was too much horrible evidence for

many issues which did not need proof. Respondent does not address appellant's argument that it was the cumulative effect of the evidence that was prejudicial.

* * * * *

X.

THE REENACTMENTS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL

Appellant argued that three reenactments where the prosecution pretended to be the crime victim about to be murdered violated his rights to a fair trial and to due process of law. (AOB 161-174.) Respondent contends that appellant has waived any objection on grounds of the federal constitution. As noted in the argument above, this contention is defeated by this Court's ruling in *People v. Partida, supra*, 37 Cal.4th 428 437, where this Court held that an objection on the grounds that evidence was admitted in violation of Evidence Code section 352 preserved a due process claim when the trial objection required a consideration by the trial court of due process. That is exactly what happened here. The defense objected to the reenactment on the grounds that it more prejudicial than probative. (See AOB 116.) As such, he has preserved his claim that the reenactments violated federal due process.

Respondent also argues that the demonstrations were admissible because the evidence was relevant to show the circumstances of the murder; and argues that eye-witness testimony was no substitute for the reenactments because distances are difficult to establish with words alone. (RB 133-134.) Appellant has not argued that reenactments generally are not useful to show distances and positions; and appellant agrees that sometimes physical illustrations are useful. Rather, appellant argues that the reenactments in this case were not very probative because they did not accurately reflect the conditions. There were especially not useful as an accompaniment to eye-witness testimony which crucially relies upon how long the witness saw the crime and under what conditions, both of which

wwere inaccurately portrayed in the reenactment. Moreover, the reenactments were highly emotional – especially because the prosecutor himself lay on the floor and had witnesses point a gun at his head. In short, the reenactments did almost nothing to assist the jury and a lot to prejudice them. As such, reversal is required.

* * * * *

XI.

THE TRIAL COURT ERRONEOUSLY ADMITTED APPELLANT'S STATEMENT WITHOUT LIMITATION

In response to appellant's argument that it was error to admit his statement to Bernard Dickson reminding Dickson of the shooting death of Andrea Chappell without evidentiary limitation (AOB 175-184) respondent argues that appellant should have requested a limiting instructions to assure that the evidence would not be used as propensity evidence. (RB 139.) Respondent has not considered the procedural background of this claim. The trial court in this matter concluded that the evidence could come in without limitation, over the explicit defense argument that the evidence would be used to show that appellant was involved with the death of Andre Chappell. (See AOB 176-177.) Had trial counsel asked for the limiting instruction, he clearly would have been refused. Hence, counsel cannot be charged with failing to have asked. (See *People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

Appellant explained in his opening brief that the admission of the statement about Chappell was prejudicial in large part because it was yet another instance (one of three) where the jury heard evidence of killing associated with appellant. (AOB 181-183.) Respondent argues that appellant was not prejudiced because the jury was admonished not to take the evidence of any of the deaths into consideration. Respondent fails to recognize that it has been generally recognized that even a full and forceful admonition may be inadequate. For example, the following cases have held admonitions to be insufficient: *United States v. Figueroa* (2nd Cir. 1980) 618 F.2d 934, 943; *United States v. Schiff* (2nd Cir. 1979) 612 F.2d

73, 82; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129; *People v. Matteson* (1964) 61 Cal.2d 466, 469-470, overruled on other grounds, *People v. Cahill* (1993) 5 Cal.4th 478, 510; *People v. Johnson* (1964) 229 Cal.App.2d 162, 170; *People v. Roof* (1963) 216 Cal.App.2d 222, 225; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-506; *People v. Hardy* (1948) 33 Cal.2d 52, 61-62; *People v. Wagner* (1975) 13 Cal.3d 612.) Here the jurors were given the impossible task for forgetting what they had heard about yet another killing that appellant was related to. As such, admonitions did not cure the error. As defense counsel pointed out, once someone is told not to think about a pink elephant, the only thing the person can think about is pink elephants. (AOB 180.)

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XII.

THE TRIAL COURT ERRONEOUSLY ADMITTED THE EVIDENCE OF THE SHOOTING DEATH OF A WITNESS

Appellant argued that the trial court erroneously admitted evidence of the shooting death of a witness. (AOB 185-189.) Appellant corrects an assertion made in his opening brief. He stated that there was testimony from Dickson that Chappell had been shot. This is not correct, as respondent notes. (RB 141.) Yet neither is the testimony as respondent portrays it. Dickson did not simply say that Chappell was dead, as respondent states. (RB 141.) Rather, he testified that he did not want to end up dead like Chapell. The clear implication of this is that Chapell had died as the result of some foul play – and given the context of the remark, the implication is that Chappell had been shot to death. Respondent implies that the remark could be taken to mean that Chappell had met his death accidentally. (RB 141.) This is not true.[6]

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[6] Bernard Dickson testimony was as follows:

Q. [by the prosecution] Did either you or the defendant mention Andre [Chappell]?

A. Oh yeah. Well, he told me I didn't want to end up like Andre. Andre was dead.

Q. Now, say the words as best as you can that the defendant said when he talked about Andre.

A. He just made a statement. It wasn't really talking about it. You know, he was trying to compromise, and, you know, he was aggressive to me and violent. Man, he was just trying to compromise me because he knew I was going to court.

Q. Now, what was the statement that he made about Andre?

A. He said I didn't want to end up like Andre.

A few lines later, Dickson testified:

Q. [by the prosecution] Now, when the defendant told you

(continued...)

Respondent also argues that the evidence was not prejudicial, asserting that jury admonitions were sufficient to assure that the evidence was not improperly used. Respondent ignores appellant's argument that the evidence was more than just evidence that Chappell was shot; it was evidence that he was murdered – as the prosecution himself stated. (See AOB 189.) Respondent argues that prosecution's remark to this effect in opening statement made no difference to the outcome because the jurors were told that opening statements are not evidence. (RB 142.) However, that does not mean that the jurors did not consider the Chappell shooting as the murder of Chappell. The evidence was admitted to show that Dickson was afraid of appellant. The reason Dickson would be afraid of appellant was that he thought that appellant had shot and killed Chappell. The impression he left with the jury was that he was seriously afraid of appellant because appellant had killed Chappell. Dickson would not have been afraid

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[6] (...continued)
that you didn't want to wind up like Andre, did that have some meaning to you?

A. Yeah.

Q. Well, why – what in your mind had happened to Andre?

A. Andre was dead.

Q. And is that Andre Chappell?

A. Yes.

Q. And the defendant had told you, you don't want to wind up like that?

A. Right.

(RT 10:1359-1360.)

It is clear from this exchange that Dickson's testimony was that he was afraid that the same thing that happened to Chappell would happen to him if he were to testify against appellant. Since this evidence only came in to show Dickson's state of mind, there was no need for other details about Chapell's death. As such, it was error to admit such details.

if he thought that appellant had accidentally killed Chappell. In point of fact, the prosecution only clearly stated what the jurors must have thought, i.e., that appellant had shot and killed Chappell. So, appellant was really on trial for an extra murder, a murder for which there was no evidence of his involvement. The evidence was thus prejudicial.

* * * * *

XV.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON VOLUNTARY AND INVOLUNTARY MANSLAUGHTER

Respondent was unpersuaded by appellant's argument that the trial court erred in failing to give instructions on voluntary and involuntary manslaughter both because (AOB 221-236) on the grounds that the instruction was not supported by the evidence. (RB 151) As to appellant's argument that involuntary manslaughter instructions were required, respondent characterizes as "speculation" appellant's assertion that because Adkins grabbed for the gun a properly instructed jury might have concluded that appellant fired the shots while brandishing the gun, asserting that the evidence that appellant placed the gun between Adkins' eyes and threatened him before the gun was grabbed ruled out the possibility that appellant brandished the gun. (RB 154.) From this, respondent argues that the incident was assault with a firearm rather than brandishing a weapon. (RB 154.) This, however, presumes that the jury has concluded that Adkins did nothing prior to the threat to create fear. As appellant pointed out, there was evidence that Adkins had a high level of phencyclidine in his blood stream at the time he was shot (RT 24:3749), and evidence that individuals with such extreme levels of PCP in their systems often behave erratically. (RT 24:3749, 24:3751, 24:3781.) Also, as trial counsel pointed out (RT 26:3924) the incident is only assault if the jurors believed the prosecution's witness, which, given the evidence of the victim's PCP intoxication they had grounds not to do. In other words, the facts of the killing are not incompatible with a conclusion that the killing was accidental.

Voluntary manslaughter instructions were also required, contrary to respondent's argument that there was insufficient evidence that the circumstances surrounding the Adkins' killing were not enough to inflame the passions of an ordinarily reasonable person. (RB 156.) In so concluding, respondent, like the trial court in this matter, has assumed a task that really belongs to the jury, i.e., determining the credibility of the evidence. However, as noted in the opening brief, the issue is not whether the testimony was believed by the trial court, but whether the question of manslaughter should have been submitted to the jury. (*People v. Edwards* (1985) 39 Cal.3d 107, 116; *People v. Ceja* (1994) 26 Cal.App.4th 78, 85, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82.)

Because there was some evidence showing that appellant's fear was objectively reasonable, the jury should have been instructed on voluntary manslaughter. Respondent cites *People v. Balderas* (1985) 41 Cal.3d 144, 196, for the proposition that predictable conduct by a victim who is resisting a felony does not constitute provocation. So far so good: however, to conclude that the gun was fired while the victim resisted a felony is to decide the issue that belonged to the jury, i.e., whether appellant's conduct amounted to the felony of assault with a firearm or was only the misdemeanor of brandishing a firearm. Since this was a jury question *Balderas* is beside the point.

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XVII.

APPELLANT WAS DENIED HIS RIGHTS TO STATE AND FEDERAL DUE PROCESS AND TO A FAIR TRIAL BY JURY BY THE PROSECUTION'S REFERENCE TO ITSELF AS "THE PEOPLE"

In his opening brief, appellant argued what is an issue of first impression to this Court, i.e., that it was a violation of his rights to due process and a fair trial for the prosecution to be referred to as "the People." (AOB 246-254.) The practice flies directly in the face of both the language and the spirits of the state and federal constitutions -- wherein we, the people, created a tripartite form of government in order to protect individuals against potential overreaching by the state. Calling the prosecution "The People" violates the principles those constitutions establish and protect. In order for jurors to comprehend their role in the prosecution of an individual, the jurors must understand they are not the government. They are the judges of the facts presented by the state against a defendant. Calling the prosecution "The People" blurs this critical distinction between the state and the jurors; simultaneously, the practice impermissibly excludes the defendant from his community of people. As set forth at length in appellant's opening brief, this violates substantive due process and the right to fair trial by jury. Respondent does not acknowledge any of this. Rather, respondent's primary argument is that the practice is justified by the legislature's decision long ago to implement the policy. (RB 163.) Yet respondent has not -- and cannot -- point to any authority saying we *should* call the prosecution "The People." What respondent has not acknowledged is that the prosecution in California has traditionally been called "The People" apparently only because no one has ever asked for the practice to end.

In rejecting this claim, respondent cited *People v. Black* (2003) 114 Cal.App.4th 830, in which the court of appeal held that there is no error in calling the prosecution "The People." *Black* is poorly reasoned and should be rejected by this Court. First, *Black* noted that even if California's practice were unique among all state and federal jurisdictions, this would not necessarily invalidate it. (*Id.* at p. 833.) Although true, the United States Supreme Court recognized in *Duncan v. Louisiana* (1968) 391 U.S. 145 that while "virtually unanimous adherence" to a standard "may not conclusively establish it as a requirement of due process," such overwhelming consensus "does reflect a profound judgment about the way in which law should be enforced and justice administered." (*Id.* at p. 155.) California's being amongst only a small handful of jurisdictions using "The People" casts strong suspicion on its practice.

Second, the appellate justices in *Black* rejected appellant's claim because they were personally unaware of any instance in which calling the prosecution "The People" actually influenced a jury's verdict, they concluded that there was "no unfairness" to the procedure. (*People v. Black, supra,* 114 Cal.App.4th at p. 833.) Others have the awareness these judges lack. (See Forcite, F No. 0.50d [detailing experience of defense attorney who believed that persuading the trial court to refer to the prosecution as "the Government" "was an important factor in gaining an acquittal"].) Indeed, the courts are becoming increasingly aware of what linguists and sociologists have learned: language shapes perception. For example, pattern jury instructions have switched in recent years to using gender-neutral language. (See, e.g., CALJIC Nos. 1.26 & 1.27.)

Respondent argues that any error was harmless. The State does not discuss appellant's contention that the error is structural. Referring to the

prosecution as "The People" is a structural defect that requires reversal per se because it defines traditional "harmless error" analysis because it is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) The ubiquitous reference to the government as "The People" permeates our criminal justice system and necessarily affects the framework within which any defendant's trial proceeds.

Respondent also argues that this claim is waived because of trial counsel's failure to object. Appellant is excused from failing to object. As appellant has noted, this issue is only now being brought before this Court. Objection by trial counsel would have been a futile gesture. Moreover, in part appellant's claim rested on instructional errors. (See AOB 246.) An instructional error that affects the substantial rights of a defendant may be rainsed on appeal even if no objection was made in the trial court. (Pen. Code, § 1259.) Thus, the failure to object to an erroneous instruction does not waive the issue on appeal. Moreover, "a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

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XIX.

THIS COURT SHOULD RECONSIDER ITS RULING THAT THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONALLY OVERBROAD

In his opening brief, appellant argued that the multiple murder special circumstance is unconstitutionally overbroad. (AOB 258-259.) Respondent understandably cites this Court's precedents for the proposition that the special circumstance is not overbroad. (RB 169.) However, respondent does not address the main thrust of appellant's argument, i.e., that the narrowing factor for the multiple murder special circumstance is not the defendant's mental state, but the act which was committed. Thus, the relative culpability of defendants is determined by the *actus reus* alone and not *mens rea,* so that multiple murder sweeps within its ambit defendants of widely varying culpability when the whole point of special circumstances is to segregate individuals whose crimes are most worthy of the death penalty. Appellant urges this Court to reconsider its position.

Respondent cites this Court's opinion in *People v. Sapp* (2003) 31 Cal.4th 240, 286-287. (RB 169.) This is not persuasive. As appellant will show, *Sapp* incorrectly distinguished *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, replied upon by appellant in his opening brief. In *Sapp*, this Court distinguished *Cheely* on the ground that the mail-bomb statute under consideration in that case permitted individuals to be sentenced to death even if no "serious bodily harm or death were intended" and the defendants did not have the "mens rea of murderers," averring that California's multiple murder special circumstance would not permit a conviction under those circumstances. (*People v. Sapp*, supra, 31 Cal.4th at p. 287.) The flaw in this Court's analysis is that it overlooks the situation where a person

who accidentally kills during the course of a robbery did not harbor malice - the *mens rea* of a murderer -- but did not intend either "serious bodily harm or death." He is guilty of first-degree murder only because of the felony-murder rule. The mail-bomb statute at issue in *Cheely* likewise created a category of felony murder and allowed anyone who fell within it to be sentenced to death. Both it and Penal Code section 190.2, subdivision (a)(3) create "a broad class, composed of persons of many different levels of culpability." Allowing juries "to decide who among them deserves death" is what creates "the possibility of aberrational decisions as to life or death" and violates the Eighth Amendment. (*United States v. Cheely*, *supra*, 36 F.3d at p. 1445.)

Appellant notes that in its consideration of this issue, this Court has also incorrectly cited United States Supreme Court precedent. In *People v. Coddington* (2000) 23 Cal.4th 529, 656, this Court noted that the United States Supreme Court held that multiple murder is a constitutionally proper narrowing category in *Lowenfield v. Phelps* (1988) 484 U.S. 231. Not so. In *Lowenfield*, the question presented was whether, in a non-weighing state, an aggravating circumstance at the selection stage may duplicate an element of a capital crime or - put another way - a special circumstance creating death eligibility (there, intentional murder with intent to kill more than one person). The Supreme Court held that such duplication was constitutionally permissible because, while the capital murder element, or special circumstance finding, accomplished the narrowing required by the Eighth Amendment, the question in the penalty phase was whether mitigation outweighed aggravation. (*Id.* at pp. 241-246.) The Court was simply not presented with the question whether the multiple-murder special circumstance adequately narrowed the class of persons eligible for the death

penalty. That issue was neither raised by the defendant nor discussed by the Supreme Court.

Appellant also notes that if this Court does reverse the special circumstance, the death judgment is void. (See *Godfrey v. Georgia* (1980) 446 U.S. 420, 422-33 [death sentence vacated where Supreme Court finds sole eligibility factor unconstitutionally broad]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 [invalidation of sole special circumstance requires per se reversal].)

* * * * *

XX.

THE JURY'S CONSIDERATION OF THE MURDER OF A WITNESS' WIFE WAS REVERSIBLE MISCONDUCT

In response to appellant's argument that jury misconduct requires reversal (AOB 265-272), respondent cites *People v. Nesler* for the proposition that because the information about Buster's wife was not information about a party nor information about the case, it was not misconduct for the jury to consider it. (RB 175, citing *People v. Nesler* (1997) 16 Cal.4th 561, 578.) Respondent miscites *Nesler.* At the point cited by respondent, *Nesler* quoted with approval cases holding that it is misconduct for a juror to receive information about a party to the case or information about the case. (*Ibid.*, citing *People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) *Nesler* emphatically does not hold that outside information must be about a party or the case to count as misconduct. The rule from *Nesler* is that any material, whatever its source, when judged objectively is prejudicial if it is inherently and substantially likely to have influenced a juror or if the nature of the misconduct and the surrounding circumstances suggest that it is substantially likely the juror was actually biased against the defendant. (*People v. Nesler, supra,* 16 Cal. 4th at p. 587, citing *In re Carpenter, supra,* 9 Cal. 4th at p. 657; also see *In re Lucas* (2004) 33 Cal.4th 682, 696.) In this case, as appellant showed, the material was so prejudicial it is substantially likely to have influenced at least one juror.

Respondent also argues that there was no prejudice because the trial court told the jurors that the Buster murder was unrelated to appellant's case and should therefore not be considered. (RB 175.) Appellant has

elsewhere pointed out that even the most forceful admonition cannot cure an error where there is a danger of undue prejudice. (See Arg. XI, supra.) Because of the nature of the evidence the jury considered, the trial court's admonition did not go nearly far enough to cure the harm of the jury's exposure to the evidence. In this case, it is particularly unlikely that the jurors were persuaded by the court's admonition to ignore the killing because at least one of the jurors thought that the evidence should have been presented, suggesting that person believed that appellant was responsible for the killing. (See AOB 267.) Jurors who believe that the evidence shows appellant was responsible for the death of an entirely innocent woman – and who believe that the lawyers have kept that information from the jury – are unlikely to attend to an admonition to ignore the evidence. Moreover, at least some of the jurors in this case were unlikely to have paid attention to the court's admonition since by even reading about the killing of Mrs. Buster, the jury was ignoring the court's admonition in the first place not to read articles about the case. (RT 6:501.)

* * * * *

XXI.

THE TRIAL COURT ERRED IN ADMITTING THE WEAPONS CONVICTIONS

Appellant argued that his prior convictions on counts 4 and 5 (the weapons charges) were inadmissible, showing that they were inadmissible either as a prior conviction (factor (c)) or as a prior act of violence under factor (b). (AOB 573-578.) Respondent agrees that the convictions were inadmissible under factor (c), and does not take issue with appellant's argument that the acts underlying these convictions were inadmissible under factor (b) as a prior act of violence because the acts did not involve the implied or express use of force or violence. Rather, the State argues that the convictions were admissible under factor (a), as a circumstances of the underlying crime. (RB 177-179.) Respondent is incorrect.

A. Neither the Weapons Incidents Nor the Convictions Were Admissible as Circumstances of the Crime

As explained in his opening brief, appellant pled guilty to two gun related felonies. (AOB 573-574; RT 6:447-460.) The date on which the acts underlying the pleas occurred was May 23, 1992. The date of these acts was obviously well after the events charged in the capital counts which were January 31, 1992 and February 22, 1993. (CT 3:597-602, 3:603-608.) Therefore, acts underlying the weapons charges were not anywhere near in time to the homicides for which appellant was convicted. In addition, although the prosecution stated that he thought that the weapons were circumstances of the offense and thus admissible under factor (a) (see RT 30:4442), there was no contention at trial that the two gun charges were in any way related to the homicides for which appellant was convicted. Respondent does not dispute these facts, yet it argues that because appellant

was charged with the weapons offenses in the same document as the capital offenses, the convictions were admissible as circumstances of the crime.

Respondent cites *People v. Fairbank* (1997) 16 Cal.4th 1223, 1232, 1243-1244, as authority for this proposition. This case does not stand for the proposition that conviction for any crime charged in the information in a capital case is admissible as a circumstance of the crime under factor (a). In *Fairbank*, the defendant pled guilty to a capital homicide and admitted two of the three special circumstances. The prosecution dismissed the third special circumstance. (*Id.* at p. 1231.) In the penalty phase, the prosecution presented evidence that would have been relevant to the homicide and special circumstances. (*Id.* at p. 1232.) On appeal, Fairbank contended that it was ineffective assistance of counsel for the defense counsel to advise him to plead guilty. (*Id.* at p. 1243.) This Court held that ineffective assistance of counsel could not be established because trial counsel's decision to have Fairbank plead guilty was reasonable given the strength of the prosecution's case against him. Moreover, most of the evidence "that the jury would have considered as part of the guilt phase if defendant had not pleaded guilty was also relevant at the penalty phase because it related to '[t]he circumstances of the crime' or 'the existence of [the] special circumstances.'" (*Ibid.*, citing Pen. Code, § 190.3, subd. (a).) *Fairbanks* says nothing about whether a conviction for a crime unrelated to a capital crime is admissible simply because it was charged together with the capital crime. Indeed, *Fairbank* affirms the principle that evidence is not admissible simply because of the way in which the prosecution charged the case. Rather, by limiting the evidence which could be admitted at penalty phase to factor (a) evidence, *Fairbank* more properly stands for the proposition that evidence of a crime (or of the conviction for a crime), even

when a plea is involved, is not admissible unless the evidence is admissible under one of the statutorily enumerated factors.

This Court's holding is that the "circumstances of the crime extends to '[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Robinson* (2005) 37 Cal.4th 592, 651, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 833.) Appellant's gun convictions are not materially, morally or logically related to the capital crimes themselves. As such, they were in admissible at his penalty phase trial.

This Court has held in *People v. Rogers* (2006) 39 Cal.4th 826, 909, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 939, fn. 33. that "we have assumed that factor (a), though it speaks in the singular of the 'crime' of which defendant was currently convicted, covers the 'circumstances' of *all* offenses, singular or plural, that were adjudicated in the capital proceeding." (See also *People v. Sanchez* (1995) 12 Cal.4th 1, 70 [citing *Montiel* for the proposition that the circumstances of a non-capital homicide which was tried with the capital homicides was properly considered as an aggravating factor under factor (a)].) However, in *Rogers* the issue was whether in a motion to modify the verdict the trial judge properly considered a prior homicide for which the jury had convicted the defendant both as "a circumstance of the crime," and as a special circumstance. (*Id.* at p. 908.) The issue was not whether the homicide conviction itself was admissible at the penalty phase. This Court held that the trial judge properly considered the act of homicide as a "circumstance of the crime." (*Id.* at p. 909.) Moreover, in *Rogers* the prior homicide was part of the capital crime with which the defendant was charged. In appellant's case, that is not true. The weapons offenses have nothing to do with the captial crimes.

In *Montiel*, the case relied upon by *Rogers*, the defendant argued that neither factor (a), nor factor (b), permitted the consideration at penalty phase of a robbery that was factually unrelated to the capital homicide for which the defendant had been convicted. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 939, fn. 33.) As in *Rogers*, the issue in *Montiel* was not the admissibility of a conviction for robbery. Moreover, in that case, the robbery itself was admissible under factor (b), as "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, subd. (b).)

Moreover, *Montiel* relies upon two other cases for the cited holding, i.e., *People v. Ashmus* (1991) 54 Cal.3d 932, and *People v. Caro* (1988) 46 Cal.3d 1035, overruled on other grounds, *People v. Whitt* (1990) 51 Cal.3d 620, 657 fn. 29. Neither of these cases stands for the proposition that an otherwise inadmissible prior conviction is made admissible by being charged in the capital proceeding. In *Ashmus*, this Court dealt with the issue about whether it was error to read the instruction on factor (c) regarding "prior convictions" without the word "prior." This Court held that it was error to omit the word "prior," because factor (c) was clearly limited to crimes which had occurred prior the capital homicide. However, in Ashmus' case the error was harmless. The jury had convicted Ashmus of assault with intent to commit rape and "the facts underlying his conviction of the felony of assault with intent to commit rape was properly admitted on the issue of other violent criminal activity." (*Id.* at p. 999.) Given that fact, the *Ashmus* court found that there was no likelihood that the jury gave any significant weight to the inadmissible assault conviction. (*Ibid.*) Although in *dicta*, the *Ashmus* court observed that "the factor involving the

circumstances of the present crimes covers the offenses of which the defendant is convicted in the capital proceeding" (*id.* at p. 998), this Court clearly did not hold that the conviction was admissible as factor (a) evidence.

In *People v. Caro, supra*, 46 Cal.3d 1035, this Court considered the defense argument that it was error for the trial court to fail to *sua sponte* instruct the jury that the crimes for which Caro had been convicted could only be considered in aggravation as part of factor (a), the circumstances of the offenses of which the defendant was convicted, and not also under factor (b), the presence or absence of crimes of force or violence. (*Id.* at p. 1063.) This Court held that although the prosecution argued that some of the crimes should be considered as factor (b) evidence, instead of factor (a), there was no evidence that the jury double counted the crimes, so that failure to give the argued for instruction was not error. (*Ibid.*) Citing *People v. Miranda* (1987) 44 Cal.3d 57, this Court observed that in the future, juries should be instructed that factor (b) and factor (c) evidence referred to evidence of crimes "other than those underlying the guilt determination." (*Ibid.*) Clearly then, the *Caro* court did not hold that other inadmissible convictions could become admissible when charged as part of the capital case.

When one turns to the case cited in *Caro*, i.e., *People v. Miranda, supra*, 44 Cal.3d 57, which is the first time this Court considered the scope of factor (a), it is clear that when the Court was referring to the evidence of crimes "other than those underlying the guilt determination" it meant that factors (b) and (c) refer to crimes other than those which are part of the *capital* case, not other crimes charged along with the capital crimes. In *Miranda*, the defendant was convicted of murdering Gary Black (*id.* at p.

71), then at penalty phase the prosecution put on evidence of a second murder committed several weeks before the capital murder, that of Robert Hosey. (*Id.* at p. 93.) The defendant argued that the pattern instruction CALJIC No. 8.84.1 had to be modified to make it clear that only the second murder (the Hosey crime) was could be considered under factors (b) and (c) and that factor (a) only included the murder for which Miranda had been convicted, i.e., the Black murder. (*Id.* at pp. 105-106.) This Court held that there was no error in failing to modify the pattern instruction because it was unlikely that a jury could confuse the two, but that trial courts "in the future should expressly instruct that subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination." (*Id.* at p. 106, fn. 28.) This is not a holding that any crime charged with the captial offense is admissible as factor (a) evidence.

In fact, this Court in *People v. Melton,* citing this very holding in *Miranda,* explicitly held the term "criminal activity [involving] force or violence" as used in subdivision (b) is limited to conduct other than the immediate circumstances for which the death penalty is being contemplated. (*People v. Melton* (1988) 44 Cal.3d 713, 763, citing *People v. Miranda, supra*, 44 Cal.3d at pp. 105-106.) The *Melton* Court mandated that "[i]nstructions in future cases should explain that the violent crimes described in subdivision (b) do not include the circumstances of the capital offense itself." (*Ibid,* citing *People v. Miranda, supra*, 44 Cal.3d at p. 106, fn. 28 and *People v. Rodriguez* (1986) 42 Cal.3d 730, 787.) By limiting factor (b) only to conduct "other than" the immediate circumstances for which the death penalty is being contemplated, *ipso facto*, this Court clearly meant that factor (a) evidence encompasses only conduct "for which the death penalty is being contemplated." (*Ibid*; see *People v. Rodrigquez,*

supra, 42 Cal.3d at p. 787 [trial court correctly instructed the jury to consider robberies not related to the homicides as factor (b) evidence].) In fact, in *People v. Anderson* (2001) 25 Cal.4th 543, 584, this Court itself cited *Montiel* for the proposition that factor (b) refers to violent conduct other than the capital crime, implying once again that factor (a) is limited to conduct relating to the capital crime.

Clearly then, this Court has never held that convictions which are inadmissible under factor (c) are admissible under factor (a) circumstances of the crime simply by being charged in a capital case. In fact, its precedents suggest the opposite, i.e., that factor (a) does not include evidence of either the circumstances of, or convictions for, conduct not related to the capital crime. This Court has also never held that acts which are inadmissible under factor (b) because they do not involve force and violence are admissible under factor (a) simply because the prosecution chose to charge the acts in a capital case. In fact, the statute is explicitly *contra*. Penal Code section 190.3 specifically states that ". . . no evidence shall be admitted regarding other criminal activity by the defendant which did not involved the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence."

To the extent that any of the language of *People v. Rogers, supra,* 39 Cal.4th 826 or *People v. Montiel, supra,* 5 Cal.4th 877 suggest otherwise, such language should be disavowed as inconsistent with this Court's law, the statute, and the constitutional limits which must be set on the admissibility of aggravating evidence. A holding that a conviction inadmissible under factor (c) is admissible aggravating evidence simply if the prosecution chooses to charge that act in the same proceeding with other capital crimes would make meaningless the limitation in factor (c) to felony

convictions which proceed the conviction of the capital crime. (See *People v. Williams* (1997) 16 Cal.4th 153, 273.)

Moreover, allowing the admission of either the conviction for prior felonies or the acts underlying those crimes as evidence of circumstances of the crime would vastly expand the scope of factor (a) evidence. In his opening brief appellant argued that this Court has permitted extraordinary expansion of the meaning of "circumstances of the crime" in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment. (AOB 441-448.) An interpretation of the statute permitting the admissibility of any act charged in the capital proceeding would vastly expand the scope of the statute to well past the breaking point. In effect, the prosecution could get any felony conduct considered by the jury at penalty phase simply by getting a conviction for the crime at the guilt phase of the case, thus transforming all felony conduct into aggravation, when clearly it was the intent of the drafters of section 190.3 to limit aggravating felony conduct to conduct involving the express or implied use of force or violence.

In addition, admission of any felony conduct whatsoever flatly contradicts this Court's law that says the sentences must "evaluate all aggravating and mitigating aspects *of the capital crime itself*. . . ." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1164, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232, italics altered.) Under this precedent, only evidence related to the capital crime is admissible under factor (a). So, for example, in *People v. Medina* (1995) 11 Cal.4th 694, 770, this Court held that guilt phase evidence that defendant had stolen a gun, probably the murder weapon, from pawn shop, was relevant during the penalty phase of a capital murder case as "background information" regarding circumstances of

charged offense. So too, in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1156-1157, the defendant's kidnapping of his ex-wife and attempted murder of police officer were admissible as part of the circumstances of the crime. However, the crimes in *Gutierrez* were committed in connection with charged murders; the kidnapping was contemporaneous with the capital murder and the attempted murder of the police officer was done in an attempt to avoid arrest. That is not so in this case. The two sets of crimes have nothing to do with each other. As such, respondent is incorrect that the gun crimes were admissible under factor (a).

B. *Brown v. Sanders* is Authority for the Appellant's Assertion that the Error was not Harmless

Respondent also argues that any error in admitting the convictions does not require reversal because there is no reasonable possibility appellant would have received a different verdict. (RB 179.) In response, appellant notes that since the filing of his opening brief the United States Supreme Court has emphasized the devastating effect that the erroneous admission of aggravating evidence has in a penalty trial where the jury is told to weigh aggravation against mitigation. (*Brown v. Sanders* (2006) 546 U.S. 212, __, 126 S.Ct. 884, 892 [due process violation only where invalid aggravating factor results in admission of evidence in the weighing process that the jury would not otherwise have heard].) He urges this Court to take *Brown* into consideration when considering prejudice.

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XXII.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE

Appellant argued that several of the prosecutors comments during penalty phase argument were misconduct and required the reversal of his death sentence. (AOB 279-285.) Respondent rejects this argument on the grounds that appellant has waived his objection to some of the remarks and that anyway the comments were not "calculated to arouse passion or prejudice" and did not result in prejudice. (RB 180.) Respondent is incorrect.

A. Appellant Has Not Waived a Claim Relating to the Comments About Conjugal Visits

Respondent first argues that appellant has forfeited any claims regarding the remarks about appellant's ability to have conjugal relations with his wife in prison. (RB 180.) Appellant objected in a timely manner to the remark on the grounds of relevance. His objection was sustained, but he did not ask for an admonition. (RT 31:4629.) However, as respondent notes, there is no need to request an admonition when the admonition would not have cured the harm. (BR 181, citing *People v. Valdez* (2004) 32 Cal.4th 73, 122.) In this case, an admonition would not have cured the harm. The prosecutor's question insinuated that appellant would have sex with his wife, a fact for which there was no evidence, and for which there could be no evidence, because such information is not a statutory aggravator. Once the jury believed that the prosecution had evidence for this, there is no way they could have ignored it, particularly since the supposed information came from the prosecutor, who brings a cloak of high respectability to the courtroom. (*People v. Green* (1980) 27 Cal.3d 1, 27,

overruled on another ground, *People v. Martinez* (1999) 20 Cal.4th 225; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104 [prejudicial prosecutorial misconduct].)

In any case, the State's reliance on *People v. Arias* (1996) 13 Cal.4th 92, 178, is misplaced. In *Arias*, the prosecution remarked on evidence that the defendant would actually have conjugal relations if he were given life in prison. (*Ibid.*) Here, there was no such evidence and, therefore, no grounds for an argument that should the jury select life without the possibility of parole as a sentence appellant would get something his victims would not. Here the prosecution was trying to insinuate appellant would have such relations, when there was absolutely no evidence of this. As such, the comment was misconduct.

B. It Was Misconduct to Argue Future Dangerousness

In relation to appellant's argument that the prosecutor's remark that appellant would get a "freebie" if he were sentenced to life without parole, respondent contends that this was permissible argument. (RB 185-186.) The State avers that "[a]rgument relating to future dangerousness is permissible when based on the defendant's conduct rather than on expert opinion," citing *People v. Ervin* (2000) 22 Cal.4th 48, 99 for this proposition. (RB 186.) Appellant acknowledges that this is this State's law. This State's law is wrong. By permitting a prosecutor to argue that a defendant is dangerous, the prosecutor is in effect testifying that the prison system cannot control the defendant. By "serving as his own witness, . . . beyond the reach of cross-examination," he violated appellant's Sixth Amendment right to confrontation. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 4, citing *California v. Green* (1970) 399 U.S. 149, 158-159.) Moreover, the prosecutor's emphasis on this area during his penalty

phase argument deprived appellant of his right not to be sentenced to death except upon relevant aggravating evidence. (See *People v. Boyd* (1985) 38 Cal.3d 762, 772, 776; *Zant v. Stephens* (1983) 462 U.S. 862, 878-879, fn. 17.)

This court in *People v. Murtishaw* (1981) 29 Cal.3d 733, 773, held inadmissible the testimony of an expert witness who predicted that the defendant would be dangerous to others in prison. The expert's prediction about the defendant's conduct was not relevant to any of the listed [aggravating] factors" set forth in Penal Code section 190.3. This Court found the testimony to be extremely prejudicial, and reasoned: "Such testimony implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant - the only way to forestall another instance in which defendant responds to frustration with deadly violence." (*Ibid.*) These statutorily extraneous considerations manifestly "'discourage the sort of individualization that the [U.S.] Supreme Court has demanded of death penalty procedures.'" (*Id.*, at pp. 773-774, citations omitted.)

As noted, in subsequent decisions, this Court has declared that prosecutorial argument concerning future dangerousness does not pose the same risk of prejudice as expert testimony and is not outside the bounds of permissible argument. (See, e.g., *People v. Danielson* (1992) 3 Cal.4th 691, 721, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1059; *People v. McDowell* (1988) 46 Cal.3d 551, 571; *People v. Miranda* (1987) 44 Cal.3d 57, 110-111; but see *People v. Taylor* (1990) 52 Cal.3d 719, 752 (conc. opn. of Mosk, J.) [evidence or argument on future dangerousness impermissible except in rebuttal].)

Appellant disagrees. In cases such as *People v. McDowell* and *People v. Miranda*, the comment will be unsupported by evidence; in others, the comment will be based on evidence improperly admitted in the prosecutions' case-in-chief (see *People v. Benson* (1990) 52 Cal.3d 754, 798; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776). The reasoning of *People v. Miranda* and the cases following it on this point is that prosecutorial comment on future dangerousness, in the absence of any supporting evidence, presents less potential for prejudice than expert testimony such as that disproved of in *People v. Murtishaw*, *supra*, 29 Cal.3d at pp. 767-774. Hence, it does not follow that argument based on improperly admitted evidence, or no evidence, can ever in itself be proper.

Finally, even assuming that prosecutors can sometimes argue future dangerousness, it should not have been permitted here. Permitting argument as to future dangerousness by the prosecutor allowed argument based on pure speculation, since here there was no admissible evidence supporting the proposition that appellant would be dangerous in the future. (See *People v. Millwee* (1998) 18 Cal.4th 96, 153 [future dangerousness argument proper only if based on evidence of past crimes admitted as statutory aggravators].) As such, it was misconduct for the prosecution to argue future dangerousness.

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XXIII.

PHOTOGRAPHS OF THE VICTIMS AND THEIR FAMILIES WERE ERRONEOUSLY ADMITTED AT THE PENALTY PHASE

Appellant argued that the admission of the photographs of the victims at the penalty phase was just too much – that such photos made it impossible for the jury to exercise its moral judgement in evaluating appellant's death worthiness. (AOB 286-295.) Citing *People v. Edwards* (1991) 54 Cal.3d 787, *People v. Benevides* (2005) 35 Cal.4th 69, 107 and *People v. Pollock* (2004) 32 Cal.4th 1153, 1180, the State argues for a broad interpretation of the admissibility of victim impact evidence – that it is admissible as a circumstance of the crime and to show the impact of the defendant's acts on the victim's family and friends. (RB 188.)

So, according to respondent, the photographs were permitted because they illustrated the close relationships the family had with the victims. (RB 188, citing *People v. Stitely* (2005) 35 Cal.4th 514, 565; *People v. Boyette* (2002) 29 Cal.4th 381, 444.) Respondent has not incorrectly cited these cases. Both *Stitly* and *Boyette* upheld the admission of family and victim photographs. However, by focusing on types of admissible evidence, respondent has ignored the critical fact about victim impact evidence. The fact is that under United State Supreme Court precedent – and under this Court's law – it is not correct to say that the Constitution permits whole classes of evidence to be admitted. Rather, the law is that the Eighth Amendment does not make evidence of the victim's family relationships and the impact of the murder necessarily inadmissible. (See *Payne v. Tennessee* (1991) 501 U.S. 508 ["[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that

subject, the Eighth Amendment erects no per se bar."] So in *People v. Edwards*, *supra,* 54 Cal.3d at p. 835, the first case this Court considered after *Payne* lifted the ban on victim impact evidence, this Court cautioned that although it was holding that victim impact evidence was admissible as a circumstance of the crime, it found that there were an extraordinary "limits on emotional evidence and argument." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) This Court especially emphasized the requirement to "'strike a careful balance between the probative and the prejudicial . . . [and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response . . . . ' [Citation.]" (*Ibid.*) This Court has restated those principles as recently as its opinion in *People v. Panah* (2005) 35 Cal.4th 395, 495.

Thus, both the *Payne* and *Edwards* decisions recognized that while the federal Constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury.[7] (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836; *see also Gregg v. Georgia* (1976) 428 U.S. 153, 189 [discretion to determine whether a life should be taken must be suitably directed and limited so as to minimize an arbitrary and capricious response]; *Gardner v. Florida* (1977) 430 U.S. 349, 358 [decision to impose the death sentence must be, and

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[7] The highest courts of other states have articulated a similar recognition. (See, e.g., *Berry v. State* (Miss. 1997) 703 So.2d 269, 275; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180-81; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891; *State v. Taylor* (La. 1996) 669 So.2d 364, 371-372; *Conover v. State* (Okl.Cr. 1997) 933 P.2d 904, 921.)

appear to be, based on reason rather than caprice or emotion]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 ["[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."]. The admissibility of victim impact evidence therefore must be determined on a case-by-case basis.

This is the rule. It is not true, as respondent's citations suggest, that whole classes of evidence are admissible if relevant. It does not matter if the evidence shows the impact of a defendant's acts or shows the loss casued to the family if the evidence diverts the jury's attention from its proper role or invites a "purely subjective response." As appellant argued, this is what the evidence did in appellant's case. The photos did not add any information to what was already in evidence from the victim's family; and, as noted in the opening brief, the prosecution used the photos, rather than information conveyed by the photos, to argue at for death. (AOB 294.)[8] As such, it was error to admit the evidence and appellant's sentence of death must be reversed.

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[8] Respondent argues that appellant waived a claim that the prosecution improperly used the photos to argue for death. (RB 189.) Appellant made no such claim in his argument. Appellant's trial counsel failed to object to the remarks and failed to ask for an admonition (*People v. Green* (1980) 27 Cal.3d 1, 35 n.19) so that any claim related to the improper remarks must be brought up as a claim of ineffective assistance of counsel by way of petition of habeas corpus. Rather, appellant cited to the prosecution's argument to show the prejudicial impact of the improperly admitted evidence.

XXIV.

THE TRIAL COURT ERRED IN FAILING TO READ AN INSTRUCTION GUIDING THE JURY'S CONSIDERATION OF VICTIM IMPACT EVIDENCE

Appellant argued he was entitled to an instruction warning the jury of the potential dangers of victim impact evidence. (AOB 296-321.) Respondent argues that the instruction was not required because it duplicated CALJIC No. 8.84.1 and was confusing and misleading. (RB 193.) Respondent also argues that any failure to instruct was not prejudicial. (RB 194.) Respondent is wrong.

A. The Proposed Instruction Was Not Misleading or Duplicative

Respondent observes that *People v. Harris* (2005) 37 Cal.4th 310, 359, has rejected the instruction requested by trial counsel in this case. Appellant urges that *People v. Harris* was wrongly decided and should be reconsidered by this Court. In *Harris* this Court held: "the [defense proposed] instruction was unclear as to whose emotional reaction it directed the jurors to consider with caution-that of the victim's family or the jurors' own." (*Ibid.*) This simply is not so. The proposed instruction explicitly refers to "emotional evidence" – which in context is clearly a reference to the victim impact evidence. Additionally, in context, it is clear that the instruction refers to the response of the juror him or herself to the evidence, not to the feelings of the witnesses. After all, the subject of the sentence is "you" which is a clear reference to the individual jurors, not to witnesses. (CT 5:956.[9])

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[9] The instruction read as follows: "CAUTIONARY AND LIMITING: VICTIM IMPACT Evidence has been introduced for the

(continued...)

The *Harris* court also found that the instruction was not needed because the "instructions given as a whole did not give the jurors the mistaken impression that they could consider emotion over reason, nor did the instructions improperly suggest what weight the jurors should give to any mitigating or aggravating factor." (*People v. Harris*, *supra*, 37 Cal.4th at p. 359; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 445 [considering similar instruction].) *Harris* is asserting that CALJIC No. 8.84.1 is sufficient to convey to the jury that it must deal with victim impact evidence as it would any other evidence. This is not so. CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury that victim impact evidence was introduced only to show the specific harm caused by the defendant's crime, and does not caution the jury against an irrational decision. It does not draw attention to the victim-impact evidence or identify its proper and prohibited uses. Rather, it was a very general introduction to the penalty phase instructions. The only part of it that was even marginally relevant to appellant's request was a general admonition to be fair and follow the law. Such an admonition is, in one form or another, given in every trial. (See CALJIC No. 1.00; BAJI No. 1.00.)

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[9] (...continued)
purpose of showing the specific harm caused by the defendant's crime. Such evidence was not received and may not be considered by you to divert your attention away from your proper role of deciding whether the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction of death as the result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy."

It is true that CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives. In every capital case "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction appellant proposed here would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. As such, appellant's proposed instruction should have been given.

Moreover, appellant need not have proposed an absolutely correct instruction to have been entitled to the protection which an appropriate limiting instruction would have given them. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.) Almost every word of the version they presented was drawn from *People v. Edwards* (1991) 54 Cal.3d 787.[10] It appropriately directed the jurors'

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[10] The draft instruction is quoted in the footnote immediately above. *Edwards* held that victim-impact evidence showing "the specific harm caused by the defendant" is admissible. (54 Cal.3d at p. 833.) The trial (continued...)

attention to the purpose of the evidence, reminded them of the question on which they were to focus (the appropriate punishment for appellant), and told them not to let emotional evidence and argument interfere with their sober and rational exercise of judgment about that question. Perhaps one could quibble with some of the wording (although a strong argument can be made for its propriety exactly as read). Nevertheless, it would have been a minor matter to change any offending drafting choices, and it was within the trial court's discretion to do so. But it was not within its discretion to refuse to give a limiting instruction at all because of its disagreement with some of the wording. (*People v. Falsetta, supra*, 21 Cal.4th at p. 924; U.S. Const., 8th & 14th Amends.)

Respondent implies in its argument that victim impact evidence is like all other aggravating evidence and that it can be properly dealt with only the pattern instructions. This is not so. In fact, "in some cases, victim impact evidence is properly described as 'the most problematical of all of the aggravating factors and may present the greatest difficulty in determining the nature and scope of the "information" to be considered.' [Citation.]" (*United States v. Williams* (S.D.N.Y. 2004) 2004 WL 290027 *23, fn. 39.) As appellant showed, victim impact evidence is unique in that it creates the danger that the jury will not follow the law both because

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[10] (...continued)
court "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836, quoting *People v. Haskett, supra*, 30 Cal.3d at p. 864.)

victim impact evidence inevitably exposes the jury to intensely emotional evidence likely to divert the jury from its task in assessing the defendant's moral culpability, and because the evidence improperly invites the jury to base its consideration of the proper sentence solely on the basis of the comparative worth of the defendant to the victim and his or her family. (See Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike* (1993) 41 Buff. L.Rev. 85, 127 ["The jury no longer determines the defendant's individualized moral desert; the jury now chooses between two contestants: the defendant and the victim . . . ."]; Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims* (2003) 88 Cornell L.Rev. 343, 372 [capital trial was a contest between the sorrow of two mothers with the jury ultimately rejecting the defendant's mother]; see also *State v. Muhammad* (1996) 678 A.2d 164, 196 (dis. opn. of Handler, J.) ["An inescapable consequence [of allowing testimony demonstrating the value of the victim] is that jurors will compare the two sets of character testimony"]; *State v. Carter* (Utah 1994) 888 P.2d 629, 652 ["[A] judge or jury considering victim impact evidence is more likely to empathize with the family's tragedy, perhaps asking, 'What if I, or a member of my family, were the murder victim?' Such empathy dangerously increases the possibility of improper passion or prejudice."].)

Victim impact evidence is also likely to arouse the jurors' anger, and make them think that only a death sentence could respond to crimes that cause such enormous suffering—regardless of mitigating factors or the fact that such suffering is the baseline consequence of committing homicide. It also invites them to see the question as whether the survivors or appellant were more deserving of their consideration, and generally distracts them from focusing on the nature of the offense itself and the offender. As such,

victim impact evidence is qualitatively different from all other kinds of aggravation , and special guidance must be given to assure that it is properly weighed by jurors. In spite of this evidence, "[t]he determination of penalty," however, "like the determination of guilt, must be a rational decision. Evidence that serves primarily to inflame the passions of the jurors must therefore be excluded . . . ." (*People v. Love* (1960) 53 Cal.2d 843, 856, overruled on other grounds, *People v. Daniels* (1969) 71 Cal.2d 1119.) In other words, the decision to impose death must "'be, and appear to be, based on reason rather than caprice or emotion.' [Citation.]" (*Monge v. California* (1998) 524 U.S. 721, 732.) This necessitates careful instruction by a jury that will use the evidence, making it different than any other aggravation.

Empirical studies support appellant's observations about the dangers of victim impact evidence. In one study, mock jurors were asked about the weight that various prosecutorial arguments carried with them. A brief statement about the victim being a pretty, young, unmarried girl of high morals, and a simple reminder that her family would celebrate its Thanksgivings without her, had more influence than statements that crime was increasing in the absence of executions, that the prosecutor's office rarely sought death sentences, that we are in a losing war against a criminal element that must be eradicated like the enemy in any other war, and that we must remove cancers like the defendant from the body of our civilization to save it. These statements, each less effective than the victim-impact references, had all been held by an appellate court to be prosecutorial misconduct, banned because of their prejudicial effect. (Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23

Law & Hum. Behavior 471, 476, 478–479, 481.) This study illustrates the danger that victim impact evidence presents for jurors to ignore their responsibility to soberly weigh the evidence to determine a defendant's moral capability in the face of the emotions which victim impact evidence presents.

B. Even if an Instruction Is Not Always Required Failure to Instruct in this Case Was Prejudicial

Respondent argues that even if the instruction was required, there was no indication that the jury applied the instructions it was given in a manner that affected appellant's constitutional rights. (RB 194.) With this argument respondent has implicitly twisted the standard of review, requiring appellant to show the effect of the error, rather, as is long-standing precedent, than the burden being on the respondent to show that the error was harmless. As the Court of Appeal recently held, when "it is impossible to know" whether error "contributed to" the verdict, respondent cannot show harmlessness beyond a reasonable doubt (*People v. Armstead* (2002) 102 Cal.App.4th 784, 795.) Under *Chapman* analysis, the question is "not whether, in a trial that occurred without the error, [the same] verdict would surely have been rendered, but whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) As such, the burden is on respondent to show that the failure to properly instruct the jury was harmless, not visa versa. Here the respondent cannot show that the death judgment was not due to the failure of the trial court to read appellant's proposed instruction. As such, reversal is required.

Respondent also argues that the long deliberations in this case were not an indication that emotions about the victim impact evidence had

overcome the jury, asserting that the reason the jury took long to deliberate was that they were weighing the evidence. (RB 194.) Respondent seems to have forgotten how emotional the evidence was. As noted in some detail in the opening brief, the jurors, as well as nearly everyone else in the courtroom, were tearful and emotional throughout the victim impact testimony. The mother of one of the victims cried everyday; the witnesses cried; the jurors cried; the audience sobbed. The trial judge had a hard time not crying himself. The jury must have been distracted from its responsibly to "soberly" weigh the evidence. It is clear that reversal is required.

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XXVI.

THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

In his argument that appellant he was entitled to a requested instruction defining the penalty of life without the possibility of parole, appellant argued that this Court wrongly concluded in *People v. Arias* (1996) 13 Cal.4th 92, 172-174, that juries understand the meaning of life without the possibility of parole. (AOB 332.) He pointed to evidence that there was a wide-spread misunderstanding of the term, and that in fact a majority of jurors believed that a person sentenced to life without the possibility of parole was likely to get out of prison at some point. (AOB 332-333, citing Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45, Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.) Respondent argues that the instruction was not required because the pattern instructions read to appellant's jury were sufficient to convey an accurate understanding of the concept, without even mentioning appellant's evidence showing that there is a misunderstanding of the meaning of life without the possibility of parole. (See RB 197-200.)

This lacuna is fatal to respondent's argument that life without the possibility of parole did not require definition because the meaning of the sentence was adequately conveyed by the pattern instructions. Obviously, as appellant's evidence shows, the everyday meaning of "life without parole" is at odds with the technical meaning the phrase has in a death penalty trial. A court has a duty to define terms used in the jury instructions

which have a "technical meaning" peculiar to the legal field. (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470.) The duty to define technical terms includes terms whose legal meaning differs from ordinary usage. For example, before 1985, CALJIC No. 10.30.1 advised the jury that the use of "force" was an element of a lewd and lascivious act on a child. However, the term "force" was not defined in the instruction. Because the term "force" had a specific meaning unknown to the layperson, it was error for the trial court to fail to define the term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.) Such terms as "assault," "accident," "dangerous," and "explosive" have all been determined to be "technical terms," requiring definition for the jury, although these terms also have a common meaning. (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393, overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484, fn. 12; *People v. Jiminez* (1992) 11 Cal.App.4th 1611, 1628, overruled on other grounds, *People v. Kobrin* (1995)11 Cal.4th 416, 419; *People v. Kirk* (1975) 49 Cal.App.3d 765, 769; *People v. Clark* (1990) 50 Cal.3d 583, 599-606.) The term "life without possibility of parole" is similar. The term has a lay meaning which, for the majority of citizens, includes the possibility that someone could be paroled at some time. Because the legal meaning of the term is different, the trial judge was required to instruct on its meaning. (*People v. Reynolds*, *supra*, 205 Cal.App.3d at p. 779.)

Respondent also suggests that there was no prejudice in this case because the jurors wrote in their questionnaires that if sentenced to life without parole appellant would never get out of prison. (RB 199.) This ignores appellant's argument that the prosecutor himself suggested to the jury that appellant might get out of prison should he be given life without

the possibility of parole. (AOB 335-336.) At least some of the jurors must have believed the prosecutor, since he stood uncorrected. As such, the failure to give an instruction defining the meaning of the term was prejudicial.

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XXVIII.

THE TRIAL COURT ERRED IN REFUSING AN INSTRUCTION THAT IT IS IMPROPER TO RELY SOLELY UPON THE FACTS SUPPORTING THE FIRST-DEGREE MURDER VERDICTS AS AGGRAVATING FACTORS

Appellant argued that the trial court erred in failing to instruct that the jury could not rely on the facts underlying the special circumstances to sentence appellant to death. (AOB 352-360.) Respondent argued that it is permissible under California's death penalty scheme to use identical facts both to determine that a defendant is eligible for the death penalty and to determine that the defendant should receive the death penalty. (RB 204-207.) Respondent cites *Tuilaepa v. California* (1994) 512 U.S. 967, 971, for the proposition that California is not required to limit in any manner the facts which a sentencer considers in determining whether death is the appropriate punishment, so long as it properly narrows the class of individuals who are eligible for the death penalty. (RB 207.)

Yet respondent fails to consider appellant's argument that in California the discretion of the sentencer at penalty phase must be channeled because California's statute does not rationally narrow the class of murderers who will be eligible for the death penalty. (AOB 356, citing Shatz & Rivkind (1997) *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U.L. Rev. 1283.) Given the fact that there is virtually no narrowing of the class of murderers in this state, the jury's discretion must be channeled at the penalty phase – so that there is an objective and rational distinction between persons sentenced to death and persons who are death eligible and not sentenced to death, as required by the Eighth and Fourteenth Amendments. Whatever the channeling of the jury's discretion

might be required *if* the legislature and courts had properly narrowed the class of eligible murderers, the fact of the matter is that California does not narrow. As such, guided discretion is required and it was error to fail to instruct the jurors that they could not rely on the facts underlying the special circumstances to sentence appellant to death.

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XXIX.

STUDIES SHOW THAT THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTIONS REGARDING THE SCOPE OF MITIGATION

Appellant argued in his opening brief that it was error not to read Defendant's Requested Instruction No. 4A, in which trial counsel delineated the evidence he believed should count as mitigation. (AOB 365-370.) In No. 4A, appellant explicitly pointed to the evidence of his deprived and drug riddled background as mitigation evidence. He also pointed to the evidence that he was loved and that his family did not want him killed. (See AOB 365, fn. 68 [quoting the instruction in full].) Respondent argues that failure to give the instruction was not error because appellant was not entitled to "list" favorable evidence and because it duplicated CALJIC No. 8.85. (RB 210-213.) Appellant urges that the instruction was necessary precisely because it does go into detail about the evidence appellant offered as mitigation under factor (k) of the statute (Pen. Code, § 190.3, subd. (k)), and that it in no manner duplicated CALJIC No. 8.85.

The fact is jurors are unlikely to understand how they are to weigh evidence offered under factor k without a modification to CALJIC No. 8.85 such as that proposed by appellant. Studies of California capital juries confirm that the pattern 8.85 "one size fits all" instruction does not adequately inform the jury that it can – indeed it must – consider appellant's background evidence as mitigation. Studies show that jurors who were given California pattern instructions are likely to misunderstand factor (k), the so-called "catch all" factor which included the evidence from appellant's childhood and background. Far from understanding that

background should be considered as mitigation, a substantial minority of California capital jurors who had been read the pattern instruction identified background evidence as an aggravator, rather than as mitigation. (Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Hum. Beh. 575, 581; see also Butler & Moran, *The Role of Death Qualification in Venirepersons' Evaluation of Aggravating and Mitigating Circumstances in Capital Trials* (2002) 26 L. & Hum. Behv. 175, 175-176 [death qualified jurors less likely to consider non-statutory mitigation.].) Because jurors using only the pattern instructions did not understand that background evidence was mitigation, they systematically undervalued defendant's mitigation, and, as such, were much less likely to use a defendant's background as part of penalty phase deliberations. (*Clarifying Life and Death Matters*, *supra*, at p. 583; Haney & Lynch, *Comprehending Life and Death Matters* (1994) 18 Law & Hum. Behav. 411, 420-22) [in a study on the comprehensibility of jury instructions, 45 percent of subjects focused exclusively on nature and circumstances of the crime rather than the character and background of defendant].)

As such, the error in failing to read appellant's requested background instruction has constitutional dimensions. Instructions that fail "to tell the jury that any aspect of the defendant's character or *background* [can] be considered mitigating, and [can] be a basis for rejecting death even though it did not necessarily lessen culpability . . . [are] constitutionally inadequate." (*People v. Lanphear* (1984) 36 Cal.3d 163, 167-168, italics added.) When the court instructs the jury that it may consider a background of abuse as a child, this is in fact highly likely to influence the jury in the defendant's favor. (See *Williams v. Taylor* (2000) 529 U.S. 362 [Evidence

of a childhood filled with "abuse and privation" can influence the jury's appraisal of the defendant's moral culpability]; *In re Lucas* (2004) 33 Cal.4th 682, 731-732 [weighty history of childhood abuse, rejection and juvenile institutionalization could be a basis for concluding that defendant's relative moral culpability is less than the aggravation would suggest]; see also *Deciding to Take a Life*, *supra*, at p. 163 [social science study of capital jurors found that "it was clear from the interviews that all of the . . . juries [sparing the defendant's life] took the defendant's background somehow into account."].) The instructions here did not so inform the jury adequately about the critical background evidence offered for appellant and therefore were constitutionally inadequate. Failure to tailor the instructions prejudicially misled the jury into disregarding pertinent evidence so that it failed to give consideration and full effect to constitutionally relevant mitigation. (*Lockett v. Ohio* (1978) 438 U.S. 586.) Appellant was deprived of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) The pattern instructions alone unfairly skewed the verdict toward death, in violation of the Eighth and Fourteenth Amendments. The empirical evidence cited by appellant shows that it is reasonably likely that the jury did not believe that they were required to consider appellant's background evidence (see *Ayers v. Belmontes* (2006) __ U.S. __, __, 127 S.Ct. 469, 480), and the judgement must be reversed.

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XXX.

WITHOUT THE INSTRUCTIONS EMPHASIZING A PENALTY JURY'S MORAL DECISION, IT WAS ERROR TO REREAD THE GUILT INSTRUCTIONS AT PENALTY PHASE

Appellant argued that it was error to re-read the guilt instructions at the penalty phase, instructions which emphasized the jury's fact-finding role, without also reading requested defense instructions delineating the normative decision a jury must make in determining whether appellant should live or die. (AOB 374-385.) Respondent argues that the instructions re-read from the guilt phase were appropriate and that, on the whole, the jury was properly guided as to its penalty phase function. (RB 218-221.)

Respondent appears to accept without question that a jury is adequately informed of its normative role at the penalty phase with the CALJIC pattern instructions. (See RB 220 [. . . "the jury was also throughly instructed on its ultimate role in the penalty phase."] Although this Court has held that the jury is adequately informed of its penalty phase tasks with instructions CALJIC No. 8.85 and CALJIC No. 8.88 (see, e.g., *People v. Monterrosso* (2004) 34 Cal.4th 743, 793; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054), empirical evidence has shown that this is false. Contrary to the unexamined assumption by this Court, such studies show that capital juries instructed with pattern penalty phase instructions do not understand that their task at penalty phase is in any way different from the fact finding task at guilt. Interviews with California capital jurors show that pattern penalty instructions as currently crafted "fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake." (Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind.

L.J. 1043, 1077.) As perceived by jurors, the instructions on the sentencing decision had little or nothing to do with a moral decision by the jurors. Rather, capital jurors instructed with nothing more than the pattern instructions believe that a death penalty decision "involves nothing more than simple accounting, an adding up of the pluses and minuses, aggravation against mitigation, on the balance sheet of someone's life." (Haney, Sontag & Constanzo, *Deciding to take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death* (1994) J. Soc. Issues 149, 172.)

Additional empirical evidence shows that jurors who believe that the sentencing decision was an "amoral task" were likely to assume that the decision to impose death was not a matter of his or her individual judgment; rather, they saw the instructions as dictating a "legally correct" outcome, for which the "law" or the "judge" had responsibility, rather than the jury. (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1484; Hoffman, *Where's the Buck?--Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137, 1138, fn. 11.) Jurors who saw the penalty phase as analogous to guilt were more likely to assume that the law required that the death penalty be imposed. (Deciding to Take a Life, *supra*, at p. 172; Violence and the Capital Jury, *supra*, at p. 1482.)

The Eighth and Fourteenth Amendments were implicated by penalty phase instructions emphasizing the jury's fact finding function, without also informing the jury that it must make individualized normative judgements. Under the Eighth Amendment right to a reliable penalty verdict, appellant was entitled to a jury who deliberated with accurate information about its

responsibility for a decision to sentence him to death. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 333 ["[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."]; *People v. Farmer* (1989) 47 Cal.3d 888, 931, overruled on other grounds, *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) A right to a jury that deliberates with a clear view about its responsibilities is also guaranteed by the Fourteenth Amendment right to a fair trial. (*McGautha v. California* (1971) 402 U.S. 183, 221; see also *New Jersey v. Rose* (N.J. 1988) 548 A.2d 1058, 1087 ["In no other determination in the criminal law is it more important to make absolutely certain the jury is aware, not simply of the consequences of its actions, but of its total responsibility for the judgment."].) It is also reversible error for a jury to deliberate a sentence of death under the mistaken belief that a sentence is mandatory. (See *People v. Farmer*, *supra*, 47 Cal.3d at p. 931; *United States v. Tucker* (1972) 404 U.S. 443, 446 [defendant may not be sentenced on the basis of misinformation of "constitutional magnitude"].)

Without the instructions proposed by appellant, it is likely that the jury was misled into believing that its only or primary role was to find facts, when, in fact, the fact finding plays only part of the role in a penalty phase. Since appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, its role as the voice of the "conscience of the community." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.) It was therefore error to fail to read appellant's proposed instructions.

XXXI.

THE PROSECUTION'S IMPROPER REMARK THAT THE "ENTIRE" CASE WOULD BE RETRIED IF THE JURY WAS NOT UNANIMOUS WAS PREJUDICIAL

Respondent disagrees with appellant's contention that the prosecution's remark that the "entire" thing would have to be retried required the reversal of appellant's conviction. (AOB 386.) It argues that when the prosecution said that the "entire" thing would have to be retried that he only meant that the penalty phase would have to be retried. (RB 224.) Respondent may or may not be correct that this is what the prosecutor had in mind when he alluded to the "entire thing." However, this would not be what a lay person would necessarily understand by the "entire thing." A lay juror would understand by the "entire" thing, well, the "entire thing," i.e., the whole trial. It would be a mistake to import a lawyers point of view into what a jury understands.

More importantly, respondent argues that "further instruction" of the jury would have caused more harm than good because it would have confused and misguided the jury as to its proper role and function in the penalty process. (RB 224.) Respondent cites *People v. Hines* (1997) 15 Cal.4th 997 for this proposition. (RB 224.) *Hines* is not applicable. In *Hines*, this Court considered the issue of whether the trial court erred in failing to tell the jury "what would happen if it was unable to reach a verdict" (*id.* at p. 1075), holding that such instructions are potentially confusing. That is not the issue in this case. In appellant's case, the prosecution made an affirmative misrepresentation about what would happen should the jury be unable to come to a verdict, suggesting that there was the possibility that appellant would go free if the jury hung. In appellant's case, unlike *Hines*, the prosecution had also suggested numerous

times at trial that the jury had to reach a verdict so that there would be justice for the victims. The prosecutor continued to do so, even after the trial court told the jury to ignore the "entire thing" remark. (See AOB 387-388.) In this case, unlike *Hines*, the jury was misinformed about its role, and encouraged by the prosecution to come to a verdict, even if it did not believe that death was the appropriate judgement. *Hines* is thus distinguishable.

The judge had an affirmative obligation to correct the confusion, particularly when it appeared after many days of deliberation that the jury was struggling with its life and death decision. To this extent, appellant's case is best guided by the language in *McDowell v. Calderon* (9th Cir. 1997)130 F.3d 833, 836 (en banc), disapproved on another ground in *Weeks v. Angelone* (2000) 528 U.S. 225, where the Ninth Circuit explained that the trial judge's duty to instruct the jury adequately "continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, they may need ongoing guidance." Here, it is reasonably likely that the jurors had departed from the channel "charted" by state law and were deliberating under the false belief that appellant might go free if they did not come to a verdict. As such, the judge had an obligation to instruct the jury as requested by the defense.

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XXXV.

RECENT SUPREME COURT JURISPRUDENCE SUPPORTS APPELLANT'S CLAIM THAT THE CALIFORNIA DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

Appellant laid out a number of reasons why California's death penalty statute and instructions fail to pass constitutional muster. (AOB 435-500.) Respondent argues that each of appellant's attacks on the constitutionality of California's death penalty statute should be rejected since this Court has rejected them previously. (RB 196-209.) To the extent this is correct, appellant requests this Court to reconsider its previous rulings. However, two issues deserve this Court's special attention because of recent rulings in the United States Supreme Court.

A. The United States Supreme Court Has Recently Emphasized the Centrality of Narrowing in Assessing the Constitutionality of a State Death Penalty Statute

Appellant demonstrated in his opening brief that California's statute violated the Eighth and Fourteenth Amendments because the statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 436-440.) Appellant also demonstrated that long-established United States Supreme Court precedent holds that to avoid the Eighth Amendment's proscription against cruel and unusual punishment the state must rationally and objectively narrow the class of murderers eligible for the death penalty. (AOB 437, citing *Zant v. Stephens* (1983) 462 U.S. 862, 878.) This core constitutional principle was most recently reiterated in *Kansas v. Marsh* (2006) __ U.S. __, 126 S.Ct. 2516, where in an opinion by Justice Thomas, the high court held that while states had wide discretion to determine the parameter's of their death penalty laws, a death penalty

scheme must at an absolute minimum ensure that the procedure "rationally narrow[s] the class of death-eligible defendants." (126 S.Ct. at p. 2524-2525.)

As appellant pointed out in his opening brief, and without contradiction by respondent, this Court has never considered whether Penal Code section 190.2's all embracing special circumstances, together with the Court's ever more expansive interpretation of those special circumstances, fails to rationally narrow the eligibility pool. (AOB 438-439.) In light of the increasing role the United States Supreme Court has given narrowing in its death penalty jurisprudence, it is time this Court did so.

B. *Cunningham* Supports the Argument that California's Statute Is Unconstitutional Because it Fails to Set out the Appropriate Burden of Proof

Appellant's claim that his death verdict is unconstitutional because it was not premised on findings beyond a reasonable doubt by a unanimous jury (AOB 176-211) must be considered in light of *Cunningham v. California* (2007) __ U.S. __, 2007 WL 135687. This case, filed early this year, supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington* (2004) 542 U.S. 296 (see *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 and *People v. Morrison* (2004) 34 Cal.4th 698, 731) should be re-examined.

As appellant argued in his opening brief, the *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than

the maximum otherwise allowable for the underlying offense. In *Blakely,* the United States Supreme Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California, supra,* 2007 WL 135687, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was does the Sixth Amendment right to a jury trial require that the aggravating facts used to sentence a non-capital defendant to the upper term (rather than to the presumptive middle-term) be proved beyond a reasonable doubt? The High Court held that it did, reiterating its holding that the Federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" (*id.* at *11, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth

Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at *12.) Justice Ginsburg held that there was a bright-line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. *Blakely*, 542 U.S., at 305, and n. 8, 124 S.Ct. 2531." (*Ibid.*)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (See AOB 454; *People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*.

In *People v. Prieto*, *supra*, 30 Cal.4th at p. 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the factfinding was something "traditionally" done by the sentencer. The only question relevant to the

Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California*, *supra*, WL 135687 at *12.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point. Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does

not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact has to found beyond a reasonable doubt.[11] Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

Kansas v. Marsh (2006) __ U.S. __, 126 S.Ct. 2516, discussed above, also deserves mention in appellant's reply, if only to show that it has no application to the issue of whether the California sentencing scheme is defective because of its failure to require that the jury find beyond a reasonable doubt that the aggravating circumstances outweigh mitigating circumstances. The Kansas statute considered in *Marsh* provided: "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law." (Kan. Stat. Ann. § 21-4624(e) (1995),

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[11] The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 159 L.Ed.2d at p. 429) merelyy to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona, supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of Ring and Apprendi: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

quoted at 126 S.Ct. at p. 2520.) The Kansas Supreme Court reversed Marsh's death sentence, holding that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, in the event of equipoise, i.e., the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required. (*Id.* at p. 2521.)

The United States Supreme Court reversed the Kansas court's ruling. The high court deemed the issue to be governed by its ruling in *Walton v. Arizona* (1990) 497 U.S. 639, overruled on other grounds, *Ring v. Arizona* (2002) 536 U.S. 584. (*Kansas v. Marsh, supra,* 126 S.Ct. at p. 2522.) Appellant's challenge to the absence of a beyond a reasonable doubt burden of proof from the California sentencing formula was not before the high court in *Marsh* because, as that court noted, "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate. . . ." (*Kansas v. Marsh, supra,* 126 S.Ct. at p. 2524.) The only question before the high court in *Marsh* was whether Kansas could require the sentencer to impose a death sentence when it had not found "that the . . . aggravating circumstances [were] not outweighed by any mitigating circumstances." (*Kansas v. Marsh, supra,* 126 S.Ct., at p. 2522.) As such, *Marsh* has no bearing on the issue of California's sentencing formula.

Because the sentencing formula that was used to determine that appellant should be put to death as a result of his conviction did not require that the jury make its sentencing determination beyond a reasonable doubt, the sentence of death must be reversed.

C. This Court Has Put No Limits on Section 190.3, subdivision (a)

In his opening brief, appellant argued that California's death penalty was unconstitutional because this Court had failed to apply a limiting construction to section 190.3, subdivision (a). (AOB 441-448.) In *People v. Blair* (2005) 36 Cal.4th 686, 7494, the Court explicitly held that for evidence to be considered "circumstances of crime," there is no requirement of spatial or temporal connection to the crime. It is apparent that this Court does not believe that there are any limitations necessary on its construction of 190.3, subdivision a. For the reasons articulated in his opening brief, appellant urges this Court to reconsider this holding.

* * * * *

XXXVI.

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

Appellant argued the punishment of death for ordinary crimes violates international law and the Eighth Amendment. (AOB 489-494.) Respondent rejects appellant's argument in a brief paragraph. (RB 238.) Recent developments in Eighth Amendment jurisprudence further support appellant's claim. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals is cruel and unusual punishment, the Court looked to international law standards as informing the Eighth Amendment:

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

(*Id.* at p. 575.) Respondent has not answered the merits of appellant's claim that the use of death as a regular punishment violates international law, as well as the Eighth and Fourteenth Amendments. Appellant asks this Court to reconsider its position on this issue and to reverse his death judgment.

CONCLUSION

For all the reasons stated above and in appellant's opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: April 2, 2007.

Respectfully Submitted,
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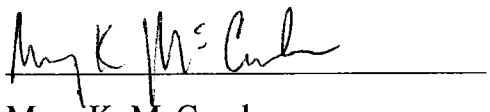
CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(B)(2))

I, Mary K. McComb, am the Deputy State Public Defender assigned to represent appellant, Regis Deon Thomas, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 29, 260 words in length excluding the tables and certificates.

Dated: April 2, 2007



Mary K. McComb

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Regis Deon Thomas**
Case Number: **Supreme Court No. Crim. S048337**
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I, the undersigned, declare as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 2, 2007**, at Sacramento, California.

Saundra Alvarez