No. S057156

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES EDWARD CASE, Defendant and Appellant.	(Sacramento County Superior Court No. 93F05175)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Sacramento

HONORABLE JACK SAPUNOR, JUDGE

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES EDWARD CASE, Defendant and Appellant.	(Sacramento County Superior Court No. 93F05175)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. In particular, appellant does not present a reply to Arguments VIII and IX. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. The following abbreviations are used herein: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief. As in the opening brief, citations to the record are abbreviated as follows: "CT" is used to refer to the clerk's transcript on appeal, "Aug CT" is used to refer to the augmented clerk's transcript and "RT" is used to refer to the reporter's transcript. "Exh." is used to refer to exhibits introduced at trial. For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1 CT 1-3, is the first volume to the clerk's transcript at pages 1-3.

I

APPELLANT'S STATEMENT WAS *MIRANDA*-VIOLATIVE, INVOLUNTARY, AND OBTAINED BY DELIBERATELY IGNORING APPELLANT'S INVOCATION OF THE RIGHT TO REMAIN SILENT, AND THE ADMISSION INTO EVIDENCE OF THE STATEMENT AND THE EVIDENCE ACQUIRED AS A RESULT OF THE STATEMENT WAS PREJUDICIAL ERROR

A. Introduction

Appellant had just been arrested and transported to the police station when he was interrogated by homicide detectives Reed and Edwards. The essential facts of the interrogation are these: detective Reed told appellant that he and Edwards were investigating the double robbery-murder that had occurred the previous night, that a lady had given them some bloody clothes and told them where she had gotten them, and that as a result, they had come to talk to appellant. Reed advised appellant of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 and then asked, "having those rights in mind, will you talk to me now?" Appellant responded, "No, not about a robbery-murder. Jesus Christ." (Exh. 5 [videotape of interrogation]; Aug CT of 11/10/09 Appendix A, pp. 1-2 [transcription of videotape].[2]) Nevertheless, the officers continued with the interrogation, initially asking several pretextual questions regarding appellant's living situation, but quickly turning to questions concerning appellant's whereabouts and actions on the night of the robbery murder. As a result of

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[2] As stated in the opening brief, the transcription in the record indicates that appellant's answer was "(Unintelligible) robbery-murder. Jesus Christ" (Aug CT of 11/10/09 Appendix A, pp. 1-2), but on the videotape of the interrogation (Exh. 5), appellant's answer is easily heard, and Detective Reed, the trial court and the prosecutor all recognized that it was as stated here. (1 RT 1155 [prosecutor], 1226-1227 [Detective Reed], 1232 [prosecutor]; 11 RT 4067 [trial court]; see AOB 56-57, fn. 15.)

Reed's persistent questioning after appellant clearly stated he did not want to talk about a robbery-murder, appellant made admissions that were introduced against him as alleged rebuttal evidence, and police discovered Sue Burlingame, Stacey Billingsley and Greg Billingsley, who testified against appellant at trial.

As set forth in the opening brief, appellant's statement was inadmissible because it was obtained in violation of *Miranda* (AOB 66-79) and was the product of psychological coercion and thus involuntary (AOB 79-83); the testimony of Burlingame and the Billingsleys should have been suppressed because it was derived from a police strategy of deliberately ignoring appellant's invocation of his right to remain silent in order to circumvent *Miranda* (AOB 68-70, 84-92) and would not have inevitably been discovered (AOB 92-96); and the unconstitutional admission of appellant's statement was not harmless beyond a reasonable doubt (AOB 96-120).

Respondent agrees that appellant invoked his right to remain silent under *Miranda*, but contends that the continued police questioning was outside the scope of appellant's invocation. (RB 59-63.) Respondent also implies, but does not directly argue, that appellant waived his right to remain silent (RB 62), and asserts that appellant's statement was voluntary (RB 64-67). In addition, while disputing that the testimony of Burlingame and the Billingsleys should have been suppressed, respondent contends that the officers did not deliberately violate appellant's invocation of his right to remain silent (RB 68-71), and that the evidence would have been inevitably discovered (RB 71-73). Notably, other than asserting there was no deliberate *Miranda* violation, respondent offers no answer to appellant's claim that this Court should craft a remedy excluding from a suspect's trial

evidence that is derived from a calculated and deliberate police strategy of ignoring the suspect's invocation of his *Miranda* rights. (See RB 71, fn. 60.) Finally, respondent contends that admission of appellant's statement was not prejudicial. (RB 73-78.) As shown below, none of respondent's contentions has merit, and they all should be rejected.

B. Whether Appellant's Invocation of the Right to Remain Silent Is Viewed as Complete or Partial, the Officers Failed to Honor It, and Appellant Did Not Implicitly or Expressly Waive His Rights

The basic legal principles governing appellant's *Miranda* claim are set forth in the opening brief. (AOB 66-68.) It bears repeating, however, that a fundamental aspect of *Miranda*'s protections against coercive interrogations is the right to cut off questioning. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474.) A suspect who has been advised of his *Miranda* rights need only make a "simple, unambiguous statement[]" that he wants to remain silent or does not want to talk with the police to invoke his right to remain silent and the ""'right to cut off questioning."'" (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 130 S.Ct. 2250, 2260, citations omitted.) When the suspect invokes the right to remain silent, "further interrogation must cease." (*Id.* at pp. 2263-2264.)

Even in the absence of an effective invocation of rights, "the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2260, citation omitted.) The government bears the "heavy burden" of demonstrating waiver. (*Id.* at p. 2261, citation omitted.)

Respondent discusses whether a suspect has invoked his *Miranda*

rights and whether he has waived them as if they were one question. (See RB 57-62.) "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." (*Smith v. Illinois* (1984) 469 U.S. 91, 98.) Appellant will examine the two issues separately. Appellant's emphatic refusal to answer the interrogating officers' questions was an unambiguous, unequivocal and unconditioned invocation of the right to remain silent, and no reasonable officer would have understood it to permit continued questioning, particularly on the subject of appellant's actions on the night of the charged crime. In interrogating appellant, the officers failed to "scrupulously honor" appellant's invocation, and his statement is therefore inadmissible. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104.) Further, the evidence shows that appellant neither expressly nor implicitly waived his rights. His statement was obtained in violation of *Miranda* and was inadmissible.

1. No reasonable officer would have understood appellant's refusal to talk about the crime under investigation as anything other than an unequivocal invocation of the right to remain silent

When advised of his rights and asked if he would waive them, appellant's answer, "No, not about a robbery-murder. Jesus Christ," was a clear invocation of his right not to speak with the interrogating officers. Respondent concedes that appellant unambiguously and unequivocally invoked his right to remain silent. (RB 59.) The point of contention is the scope of his invocation. In appellant's view, whether considered a complete or partial invocation, at the very outset of the interrogation, he asserted his right to remain silent as to the sole subject of the interrogation – the robbery-murder of the previous night. (AOB 68-73.) In respondent's

view, appellant's refusal to discuss the robbery-murders "amounted to a limited invocation of his right to remain silent as to the details of the crime" (RB 59) which, when considered with his statements after his invocation, did not preclude continued questioning of appellant about his whereabouts and actions on the night of that crime (RB 62-63). Respondent's position is untenable.

a. Any reasonable officer would have understood appellant's statement, "No. Not about a robbery murder. Jesus Christ," as a blanket refusal to talk about anything having to do with that crime

Respondent offers no reasonable, credible explanation of how detective Reed misunderstood the plain meaning of appellant's statement to his invitation to waive his *Miranda* rights. The standard for judging a suspect's invocation of his *Miranda* rights is an objective one, which looks to what "a reasonable officer in light of the circumstances would have understood." (*Davis v. United States* (1994) 512 U.S. 452, 458-459 [discussing the standard for an invocation of the right to counsel]; *People v. Nelson* (2012) 53 Cal.4th 367, 379 [applying the *Davis* standard to an invocation of the right to remain silent].) Appellant's adamant declaration was made at the very beginning of the interrogation, before the officers had begun asking questions. It was his answer to detective Reed's question, asked immediately after reciting the *Miranda* admonitions, "having those rights in mind, will you talk to me now?" (1 RT 1226-1227; Exh. 5.) Appellant had never previously agreed to talk, and therefore his answer could not be construed as a refusal to discuss a subset of the possible topics of interrogation. Nor did his answer itself imply any willingness to waive his right to remain silent on subjects other than the robbery-murder or to

discuss his whereabouts and actions on the night of the crime. Rather, the officers' continued questioning was a failure to heed appellant's unequivocal and unambiguous refusal to waive his right to silence. (See *People v. Martinez* 47 Cal.4th 911, 952 [finding that in *People v. Peracchi* (2001) 86 Cal.App.4th 353, officers failed to heed suspect's "clear refusal to waive his right to silence" by continuing to interrogate after suspect said "'I don't want to discuss it right now'" immediately after a *Miranda* advisement].) No reasonable officer would have viewed appellant's statement as anything other than a clear refusal to waive the right to remain silent and a full invocation of that right. Detective Reed's admitted general practice of ignoring *Miranda* invocations in order to obtain incriminating statements (see 2 RT 1254) further undercuts any suggestion that it was objectively reasonable for him to believe that appellant's statement nevertheless permitted him to continue with the interrogation.

b. Even if viewed as a partial invocation, the plain meaning of appellant's refusal to talk about the robbery-murder included the very topics that the officers continued to probe

As shown in the opening brief, even if appellant's refusal to waive his rights is viewed as a selective invocation of his right to remain silent, the interrogation was unlawful because the officers' questions concerned the very subject that appellant had refused to discuss, namely, the robbery-murders. (AOB 71-73.) Respondent contends that appellant construes the term "robbery-murder" too broadly. (RB 63.) According to respondent, asking appellant about his whereabouts on the night of the robbery-murder "is not the same as discussing the actual details of the crimes," and, because an alibi consists of evidence that the defendant was not at the scene of the

crime, asking about alibi is not asking about the crime itself. (RB 63.) Respondent's argument defies common sense.

Appellant's words are to be "understood as ordinary people would understand them." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529.) Ordinary people do not parse words in the fashion that respondent proposes. Ordinary people would understand a suspect's refusal to discuss a particular crime as a refusal to discuss anything related to that crime, including whether or not the suspect had any defenses to that crime such as alibi. Respondent's approach would require an exceedingly precise and multifaceted invocation in order to effectively cut off questioning regarding all subjects related to a particular crime. Respondent points to no support for such an approach, and in fact, the high court has made clear that no such precision is required, stating that a suspect need not "speak with the discrimination of an Oxford Don" to invoke his rights. (*Davis v. United States, supra*, 512 U.S. at p. 459.)

Detective Reed asked appellant not only where he had been on the night of the robbery-murder, but also numerous other questions about appellant's actions that night, including whom he was with, whether he was aware that the crime had occurred, what time he arrived at The Office, what time he left, who else was there, whether the bartender had rung out the till, whether he knew the bartender, which door he went through when he left, where he was parked, what kind of car he was driving, whether appellant's fingerprints would be on the cash register or in the women's bathroom, how much he had to drink, whether he would remember if he killed someone, where he went after leaving The Office, whether he went to Mary Webster's house, whether he could explain the bloody clothes and boots that Webster had turned in and whether the gun at Webster's house was his.

(Aug CT of 11/10/09 Appendix A, pp. 4-15.) Reed then accused appellant of being the killer. (*Id.* at p. 17.) No ordinary person would doubt that appellant's refusal to discuss a robbery-murder included a refusal to discuss these subjects, and no reasonable police officer would believe that these questions were outside the scope of appellant's invocation.

Further, as discussed in the opening brief (AOB 71-73), the officers' questions were clearly "aimed at eliciting incriminating statements concerning the very subject on which [he had] invoked his right." (*United States v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 665 [question was reasonably likely to elicit an incriminating response on subject defendant had refused to discuss and therefore was a failure to honor the partial invocation]; see also *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 789 [asking defendant what he meant by "I plead the Fifth" was reasonably likely to elicit an incriminating response and therefore was a failure to honor selective invocation].) Indeed, at the in limine hearing regarding the interrogation, Reed repeatedly admitted that the purpose of the interrogation was to elicit incriminating statements about the robbery-murder. (See, e.g., 1 RT 1247; 2 RT 1251.) "An interrogator would only want to probe beyond the suspect's presumed desire to avoid self-incrimination if he expected either to evoke an incriminating response or to get a clue as to how the suspect might be persuaded to abandon his rights." (*People v. Peracchi*, *supra*, 86 Cal.App.4th at p. 363, quoting *Anderson v. Smith* (1984) 751 F.2d at p. 105.)

Even if considered as a partial invocation under *Miranda*, the detectives failed to honor – and instead charged right passed – appellant's clear refusal to talk about the robbery-murders.

c. The cases on which respondent relies do not support its position

Respondent's extensive discussion of *People v. Silva* (1988) 45 Cal.3d 604, *People v. Ashmus* (1991) 54 Cal.3d 932 and *People v. Clark* (1992) 3 Cal.4th 41, which the trial court found to be controlling, does not answer appellant's argument. As set forth in appellant's opening brief, those three decisions are inapposite because the defendant in each case had expressly waived his *Miranda* rights and willingly answered questions about the crime under investigation and later refused to answer a particular question posed during the course of the interrogation. (AOB 73-76.) Respondent's reliance on *People v. Davis* (1981) 29 Cal.3d 814 (RB 61) is misplaced for much the same reason. The defendant in *Davis* expressly waived his *Miranda* rights and answered the officers' questions for an hour before the events that this Court found constituted a refusal to take a polygraph examination, but not an assertion of the right to remain silent. (*Id.* at pp. 823-825.) The defendant had not expressed any unwillingness to answer questions prior to his resistance to the polygraph procedure. Because in *Silva*, *Clark*, *Ashmus* and *Davis*, each defendant had agreed to talk and answered questions about the respective crimes under investigation prior to the potential invocation, this Court could reasonably conclude that he was refusing to answer questions only on a particular topic or, as in *Davis*, from a particular questioner, but he was not refusing to continue answering all questions. The continued questioning on other topics (or as in *Davis*, by a different interrogator) was therefore not a failure to honor a suspect's invocation of the right to remain silent. By contrast, appellant had not previously agreed to talk to the officers, waived his rights or answered any questions prior to his invocation, and therefore, the continuing

interrogation by the detectives violated appellant's *Miranda* rights. (AOB 76.)

Respondent asserts that appellant's analysis presents a "distinction without a difference" (RB 62), but offers no explanation to support that assertion.[3] As this Court has observed, the distinction makes a significant difference. In *People v. Martinez*, *supra*, 47 Cal.4th 911, the Court made precisely this point – that the question of whether a suspect has waived his rights before the commencement of an interrogation is to be distinguished from whether he invoked his rights after a valid waiver. (*Id.* at p. 951.) In *Martinez*, in the middle of a series of interrogation sessions, the defendant stated, "I don't want to talk anymore right now." On appeal, he argued that this statement was an invocation of the right to remain silent, pointing to *People v. Peracchi*, *supra*, 86 Cal.App.4th 353, at p. 361, in which the court of appeal found the statement "I don't want to discuss it right now" to constitute an invocation. The *Martinez* Court distinguished *Peracchi* because the defendant in the latter case had made the statement at the outset of the interrogation, in response to a *Miranda* advisement, thereby "making clear he did not wish to waive his right to silence at that time." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 951.) The statement at issue in *Martinez*, by contrast, was made in the middle of the interrogation. The *Martinez* Court found that further questioning therefore did not "amount to a failure to heed a suspect's clear refusal to waive his right to silence." (*Ibid.*; see also *People v. Williams* (2010) 49 Cal.4th 405, 427 [because suspect had expressly waived right to remain silent, subsequent remarks when asked if

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[3] Respondent summarizes a discussion in *People v. Clark*, *supra*, 3 Cal.4th at pp. 629-630 that is of little or no relevance to the issue at hand, and fails to summarize the holding on which the trial court relied. (RB 60.)

he would give up the right to an attorney were not a clear invocation of the right to counsel].) The same cannot be said here, where appellant's invocation was stated before the interrogation began, in answer to the question whether he would waive his *Miranda* rights, and he emphatically said "no."

d. Respondent's reliance on appellant's statements after the invocation is improper

Respondent appears to rely on appellant's answers to questions posed after his invocation as showing that the invocation was partial rather than complete. Respondent asserts that "appellant neither gave any indication that he wanted the detectives to cease their questioning nor told detectives that he no longer wished to speak to them." (RB 62.) Respondent's assertion is based on an improper and irrelevant consideration.

Whether a defendant's statement constitutes an invocation is judged at the time the statement is made. "An accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." (*Smith v. Illinois*, *supra*, 469 U.S. at p. 100 [it is impermissible to find ambiguity in an invocation by looking to defendant's subsequent responses to continued police questioning].) The interrogator cannot proceed "on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to saying something casting retrospective doubt on the clarity of his initial statement." (*Id.* at p. 99.)

Furthermore, as a matter of logic, the fact that appellant answered the questions posed after he had invoked his rights does not lead to the inference that he was willing to talk. On the contrary, the officers'

persistent questioning after his definitive "No, not about a robbery-murder. Jesus Christ" response could well have indicated to appellant that he had no choice but to answer the officers' questions. (See *Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 867 [where officers tape-recorded defendant's interrogation in spite of his refusal to be tape-recorded, the officers' action implied that he had no right to refuse to talk on tape].) Appellant's answers to the improperly continued questioning cannot be used to cast doubt on the clarity of his invocation, and nothing about appellant's invocation or the events leading up to it indicate that appellant's refusal to talk was anything other than absolute.

Respondent's citation to *Terrovona v. Kincheloe* (9th Cir. 1990) 912 F.2d 1176, does not advance its argument. (See RB 62.) *Terrovona* is inapposite, as there was absolutely no indication there of any invocation, partial or otherwise. After being advised of his *Miranda* rights, the defendant answered the officers' questions regarding his whereabouts on the previous night. The court found an implicit waiver of the right to remain silent. However, "Terrovona gave the detectives no indication that he wished to remain silent." (*Terrovona v. Kincheloe, supra*, 912 F.2d at p. 1180.) Although it may be permissible to infer waiver where the defendant says nothing after being advised of his rights and proceeds to answer the interrogating officers' questions, no such inference can be drawn here, where appellant unambiguously replied "no" when asked if he would waive his rights. Under *Smith v. Illinois*, *supra,* 469 U.S. at p. 99, the fact that appellant subsequently answered the officers' questions does not diminish the clarity of his invocation.

In sum, respondent fails to show that appellant's refusal to talk about the robbery-murders, the only crimes being investigated, was anything other

than unequivocal, unambiguous, unconditional and unqualified. The authorities on which respondent relies are inapposite, and respondent's proposed analysis is contrary to well-established Supreme Court precedent. Respondent points to nothing about appellant's refusal to talk that suggests there were subjects other than the robbery-murder that he was willing to discuss. He clearly intended to refuse to waive his rights and invoke his right to remain silent, and any reasonable officer would have recognized that. The critical safeguard of *Miranda* is that interrogation immediately cease upon invocation, and the admissibility of statements obtained thereafter depends on whether the "right to cut off questioning" has been "scrupulously honored." (*Michigan v. Mosley*, *supra*, 423 U.S. at p. 104.) Here, the detectives did not honor the invocation at all.

2. Appellant neither expressly nor implicitly waived his right to remain silent

Even assuming arguendo that the Court finds no effective invocation or no failure to honor a partial invocation, appellant's statement was nevertheless taken in violation of *Miranda* because the prosecution cannot show that appellant waived the right to remain silent. As the high court has repeatedly held, "[t]he accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2260, quoting *North Carolina v. Butler* (1979) 441 U.S. 369, 373.) There is a threshold presumption against finding a waiver of *Miranda* rights, and the burden is on the prosecution to establish that waiver in fact occurred. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 475; *People v. Williams*, *supra*, 49 Cal.4th at p. 425.) Whether there has been a waiver of rights is viewed

subjectively, from "the state of mind of the person undergoing interrogation, rather than the state of mind of the interrogator." (*Moran v. Burbine* (1986) 475 U.S. 412, 421-422.)

Appellant never waived his *Miranda* rights expressly. In asking appellant, "[h]aving those rights in mind, will you talk to me now?" (Aug CT of 11/10/09 Appendix A, pp. 1-2; 1 RT 1226; 21 RT 7260-7261; Exh. 5 [videotape of interrogation]), detective Reed was asking appellant if he would waive his rights. Appellant's answer, "No, not about a robbery murder. Jesus Christ," was an affirmative refusal to waive. Appellant had not previously waived his rights, answered any questions or expressed any willingness to talk to the detectives. The officers had not indicated that they had any other subject to discuss. There was nothing about appellant's words that indicated a willingness to discuss other subjects. (Cf., e.g., *United States v. Lopez-Diaz*, *supra*, 630 F.2d at pp. 663-665 [defendant refused to talk about the drugs in the van, but agreed to talk about other illegal activity].) Like his exclamation, "Jesus Christ," his reference to the robbery-murder was plainly for emphasis. There can be no doubt that appellant's subjective intent was to refuse to waive his right to remain silent, and no reasonable police officer could have understood appellant's statement as anything other than an unqualified refusal to talk.

Respondent seems to suggest, but never plainly asserts, that appellant implicitly waived his rights by answering the officers' questions after his refusal to talk. (RB 62.) Any such argument is without merit. The high court has held that waiver "may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2261, quoting *North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.) However, that

principle clearly does not apply where the defendant expressly states that he does not want to talk. This is the essential teaching of *Michigan v. Mosley*, *supra*, 423 U.S. at pp. 103-106, which requires that questioning cease immediately when a suspect expresses a desire to remain silent and that it may not be resumed until the passage of a significant period of time. This requirement is premised on the understanding that additional questioning immediately after an invocation is coercive (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 473-474), and prevents "police from badgering a defendant into waiving his previously asserted *Miranda* rights" (*Michigan v. Harvey* (1990) 494 U.S. 344, 350). Indeed, in *Mosley*, the high court, finding that police honored the suspect's right to cut off questioning, noted that when the suspect refused to talk, the police there, unlike detectives Reed and Edwards in this case, did not refuse to discontinue the interrogation or attempt to wear down the suspect's resistance and make him change his mind. (*Id.* at pp. 105-106.) If waiver could be inferred from the mere fact that appellant answered questions asked unlawfully after he had refused to speak and refused to waive his right to remain silent, *Miranda* would be rendered a dead letter. Respondent has not met its heavy burden of proving waiver.

C. Appellant's Statement Was Involuntary

In the opening brief, appellant showed that by ignoring appellant's invocation of the right to remain silent, implicitly threatening him with the death penalty if he did not provide an explanation for the murders and indicating that providing such an explanation would result in greater leniency, the interrogating officers succeeded in getting appellant to talk in spite of his emphatically stated desire not to do so. The detectives' interrogation tactics were psychologically coercive, and appellant's "'will

was overborne'" (*Dickerson v. United States* (2000) 530 U.S. 428, 434, quoting *Schneckloth v. Bustamante* (1973) 412 U.S. 218, 216), and his statement was involuntary, in violation of the Fourteenth Amendment right to due process (*Brown v. Mississippi* (1936) 297 U.S. 278, 285-286). (AOB 79-83.)

Respondent does not dispute that a violation of *Miranda* raises a presumption of coercion, that deliberately continuing an interrogation after the suspect invokes his *Miranda* rights is a factor that weighs heavily in favor of a finding of involuntariness, or that members of this Court have suggested that a deliberate *Miranda* violation may well be inherently coercive. (See authorities cited at AOB 80-81 and fn. 16; see also O'Neill, *California Confessions Law*, 2012-2013, § 1.43, p. 60 [after *Missouri v. Seibert* (2004) 542 U.S. 600, in which the high court condemned a deliberate "question first" practice designed to thwart *Miranda*'s protections, decisions holding that deliberate *Miranda* violations are not inherently coercive may no longer be valid.].) However, in respondent's view, because appellant's invocation was only partial and the ensuing interrogation was lawful, the only factor weighing in favor of a finding of involuntariness is the officers' thinly-veiled threat of the death penalty, which, respondent contends, is not enough to show involuntariness. (RB 66-67.) Respondent's analysis is flawed and should be rejected.

Of course, if respondent were correct that there was no *Miranda* violation, there would be no coercion associated with the detectives' decision to ignore appellant's "No, not a robbery-murder. Jesus Christ" response and forge ahead with the interrogation. But, as shown above, the continued questioning was *Miranda*-violative which, as a matter of law, raises a presumption of coercion. (*United States v. Patane* (2004) 542 U.S.

630, 639.) Further, as set forth in the opening brief (AOB 68-70, 91-92) and in subsection D.2., below, the detectives' decision to continue the interrogation despite appellant's invocation was a tactic deliberately designed to thwart *Miranda*'s protections. The deliberate violation of appellant's *Miranda* rights arguably establishes per se coercion, and, at a minimum, is a factor weighing heavily in favor of a finding of involuntariness. (*People v. Neal* (2003) 31 Cal.4th 63, 81-82; see also *People v. Montano* (1991) 226 Cal.App.3d 914, 932; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628.)

Respondent speculates that appellant's will was not overborne because he "was no stranger to the interrogation process and attempted to use it to his advantage." (RB 67.) Although respondent had a criminal record, there is no evidence in the record that appellant had ever been interrogated in the past or that he was familiar with the interrogation process. Further, there is no indication that appellant was trying to use the interrogation to his advantage. Respondent's citation to *People v. Guerra* (2006) 37 Cal.4th 1067 on this point is misguided because that decision is not analogous to this case. (See RB 67.) In *Guerra*, the defendant voluntarily accompanied the detectives to the police station, expressly waived his rights and repeatedly expressed a willingness to cooperate before requesting an attorney. (*Id.* at p. 1095.) When he requested counsel, the detective said he would have to arrest him for murder and stop questioning him until counsel could be provided. The defendant responded that if that was the case, he did not want an attorney and wanted to continue speaking with the detectives. (*Id.* at pp. 1089-1090.) The Court found that the detective's threat to arrest the defendant did not coerce his statement because the evidence showed that the defendant wanted to be interviewed

so that he could clear himself of suspicion, and claimed he did not need an attorney because he did not have "'a problem.'" (*Id.* at pp. 1096-1097.)

By contrast, in this case, sheriff's department personnel ordered appellant out of Webster's house, arrested him, put him in a car, transported him to the sheriff's department, put him in an interrogation room and handcuffed him to the table. (1 RT 1228, 1242-1244.) At the outset, appellant refused to talk to the officers; he never expressed any desire to be interviewed for any purpose, including to clear his name. Appellant was a parolee, and therefore he had virtually no chance of being released from custody based on his own word. There is no indication that appellant had any hope or expectation of being able to talk his way out of the situation. Respondent's assertion that appellant thought he could use the interrogation to his advantage is a general hypothesis potentially applicable to any suspect being interrogated but, as to appellant, is sheer speculation unsupported by the record.

Respondent's reliance on *People v. Williams*, *supra*, 49 Cal.4th 405 (RB 66-67) is misplaced, as there, the Court found that the defendant had voluntarily waived, and had not subsequently invoked, his *Miranda* rights. (*Id.* at p. 422.) Here, by contrast, the *Miranda* violation is clear, and the officers' disregard of appellant's clear and emphatic refusal to talk was coercive. *People v. Jablonski* (2006) 37 Cal.4th 774, and *People v. Coffman* (2004) 34 Cal.4th 1, on which respondent relies, are also distinguishable because, unlike appellant's case, neither involved any implied assurance of leniency. (*People v. Jablonski*, *supra*, at pp. 814-816; *People v. Coffman*, *supra,* at p. 59.)

Respondent disputes that the detective's statement to appellant that the case could be capital and that appellant would benefit from providing an

explanation were "impermissible threats of punishment or promises of leniency." (RB 67.) Respondent does not provide any basis for its suggestion that some threats of punishment and promises of leniency are permissible. As shown by the authorities cited in appellant's opening brief, it has long been held that it is unlawful for officials to extract a statement "by any direct or implied promises, however slight." (*Bram v. United States* (1987) 168 U.S. 532, 542-543; AOB 81-82.)

The record shows that at the very outset, appellant unequivocally and unambiguously refused to talk about the sole subject of the interrogation. The ensuing questioning caused him to do what he did not want to do: make statements about the robbery-murder that could later be used against him. By virtue of the detectives' refusal to take "no" for an answer and their insistence on asking appellant questions about the very thing that he had refused to discuss, their implicit threat that appellant could be subject to the death penalty and their indication that appellant would benefit from admitting and explaining the crime, appellant's will to remain silent about the robbery-murders was overborne. Appellant's statement was involuntary and therefore inadmissible under the Fifth and Fourteenth Amendments.

D. The Evidence Obtained As a Result of Appellant's Statement Was Inadmissible

During his interrogation, appellant provided the officers with the names of Sue Burlingame, Stacey Billingsley and Greg Billingsley, whose identities and relevance to the present case was previously unknown to law enforcement. (1 RT 1221; 2 RT 1262-1263.) In the opening brief, appellant argued that: (1) the testimony of those three witnesses should have been excluded because appellant's statement was involuntary; (2) his statement was obtained through the use of a strategy deliberately designed

to circumvent the protections that *Miranda* decision was intended to provide, and (3) the witnesses' testimony would not have been discovered without the information provided in appellant's unlawfully obtained statement. (AOB 83-96.) Respondent counters that detective Reed did not engage in deliberate misconduct, that this Court should not "expand the *Miranda* rule" because the United States Supreme Court has declined to apply the fruit of the poisonous tree doctrine to non-deliberate failures to provide *Miranda* warnings, and that law enforcement inevitably would have interviewed Burlingame and the two Billingsleys even without the information that appellant provided. (RB 68-73.) As demonstrated below, respondent's arguments are far from persuasive.

1. The evidence derivative of appellant's statement is inadmissible because appellant's statement was involuntary

The parties' conflicting views on whether appellant's interrogation statements were voluntary or involuntary have been briefed. (AOB 79-83, RB 64-68.) Appellant argued in the opening brief that the testimony of Burlingame and the Billingsleys should have been excluded because that evidence was obtained as a result of appellant's statement, which was involuntary. (AOB 84.) Respondent disagrees. (RB 68.) As set forth above, respondent's argument regarding voluntariness should be rejected. (See Argument I. C., *supra*.) Because appellant's statement was involuntary, the trial court erred in denying appellant's motion to suppress the evidence derivative of that statement.

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2. The evidence derivative of appellant's statement should have been suppressed because the officers deliberately ignored appellant's invocation of the right to remain silent

Whether appellant's emphatic refusal to talk is viewed as a complete invocation of the right to remain silent, a partial invocation or a refusal to waive that right, the officers' continued questioning was part of a deliberate strategy designed to thwart *Miranda*'s protections. (AOB 68-70, 91.) Reed's attempt to characterize his questions concerning appellant's whereabouts and actions on the night of the robbery-murders as outside the scope of appellant's invocation should be recognized as a post hoc attempt to justify what at the time was an intentional decision not to honor the invocation. Because the *Miranda* violation was deliberate, all evidence derivative of that misconduct should be suppressed. (AOB 84-92.)

Respondent acknowledges that detective Reed admitted a practice of continuing to question suspects after they had invoked their right to remain silent in order to obtain statements from them that could be used for impeachment purposes. (RB 69; 2 RT 1256.) However, respondent contends that Reed subsequently "clarified" that this was his practice only where the invocation was limited or partial. According to respondent, where there had been a limited invocation, Reed's practice was to continue the interrogation, but to discuss topics other than that which the suspect had refused to discuss, hoping that the suspect would ultimately begin to talk about it nevertheless. (RB 69-70.) In short, respondent contends that appellant misinterprets Reed's testimony (RB 68-69), that the failure to honor appellant's invocation was not deliberate (RB 64, 68-70) and that Reed's subjective state of mind is irrelevant to appellant's claim (RB 70).

Respondent is wrong on all three points.

The record does not show that Reed clarified his interrogation practice as respondent claims. Rather, the only fair reading of the in limine hearing is that Reed deliberately questioned past assertions of *Miranda* rights, whether full or partial, in the hopes of obtaining incriminating statements. On questioning by defense counsel, Reed admitted that it was his general practice to continue questioning a suspect who invoked the right to remain silent:

> Q. And is it your habit in questioning individuals who invoke their right to remain silent to continue to question them after they have invoked their right to remain silent in order to obtain those sorts of admissions that might be used if a person were to take the stand for purposes of impeaching that person?
>
> A. Is your question in this particular case or in general?
>
> Q. In general.
>
> A. In general, yes.

(2 RT 1254.) In asking defense counsel if the focus of his question was 'in general' or appellant's case in particular, Reed made clear that he intended to confirm that it was his general practice to disregard invocations. However, Reed testified that appellant had not invoked his right not to talk to him; he had only refused to discuss the robbery-murder. (2 RT 1255.) Reed went on to explain that a refusal to discuss a particular subject was not, in his view, an invocation of the right to remain silent, and if "as the interrogation continued, they for whatever reason began to talk about it," those statements were nevertheless admissible. (2 RT 1256.)

Although Reed's view was that he had not disregarded an invocation in appellant's case, he never repudiated his testimony that it was his habit in

general to continue questioning suspects who invoked their right not to speak to him. Further, Reed did *not* say that when a suspect refused to discuss one particular topic, he ceased questioning on that topic and asked questions only on unrelated matters, as respondent repeatedly contends. (See RB 64, 69, 70.) Reed's testimony reflects no intention of honoring any refusal to talk, whether it was on all topics or only one, whether he was willing to call it an "invocation" or not. Given Reed's admission that he routinely ignored *Miranda* invocations and that he continued to question suspects who refused to talk about a particular topic without any qualification as to subject matter, it is unreasonable to contend, as respondent does, that his practice was to abide carefully by a suspect's partial invocation as he continued the interrogation. (RB 69-70.) The plain fact is that Reed's testimony described a general practice of deliberately ignoring invocations of the right to remain silent, whether full or partial.

This case proves that Reed did not, in fact, honor what he considered to be appellant's partial invocation. Reed did not question appellant only about "other topics" (RB 69) until appellant "for whatever the reason began to talk about" the robbery-murders (2 RT 1256). Rather, after asking a few questions about appellant's identity and where he was living, Reed began grilling appellant about matters directly related to that crime. He asked whether appellant owned any guns (Aug CT of 11/10/09 Appendix A, p. 4), a question which Reed admitted related to the robbery murder. (2 RT 1251.) He asked, "care to tell us where you were at last night?" (2 RT 1252; Aug CT of 11/10/09 Appendix A, p. 4), a question directly related to the robbery-murder. Virtually all of the ensuing questions, summarized above (see Argument I. B., *supra*), concerned what appellant had done the previous night – the night of the charged crimes – and culminated in Reed

directly accusing appellant of committing the murders. (Aug CT of 11/10/09 Appendix A, pp. 4-17.) In sum, Reed made no attempt to avoid asking appellant about the robbery-murder, and he admitted that his questions were intended to elicit statements that incriminated appellant in that crime. (2 RT 1252.)

Other evidence supports the conclusion that Reed deliberately ignored appellant's assertion of his right to remain silent. First, when appellant said, "No. Not about a robbery-murder. Jesus Christ," Reed did not ask appellant what he was willing to discuss. Second, an hour into appellant's interrogation, after Reed had questioned appellant extensively about the night of the crime, accused him of being the killer, left the interrogation room for some period of time and then returned, Reed asked appellant whether in refusing to talk about the robbery-murder, he meant that he wanted to talk about his "alibi." (Aug CT of 11/10/09 Appendix A, p. 23.) Appellant had not mentioned "alibi" previously, nor had he stated he was willing to talk about any subject. Reed's post hoc attempt to re-characterize appellant's clear refusal to talk about the robbery-murder as a statement of willingness to discuss the subject of alibi strongly suggests that Reed knew he was disregarding appellant's invocation, and only later realized that he might be able to make it appear that he had in fact intended to comply with *Miranda* all along. This inference is supported by his response when defense counsel asked him why he had asked appellant if his refusal to talk about the robbery murder was in fact a statement of willingness to talk about his alibi, Reed answered that he "knew [he]'d be sitting here on this stand at this hearing . . . ." (2 RT 1258-1259.)

Reed's practice was not unique. In the 1990s, many law enforcement officers in California were *trained* to continue questioning a

suspect who invoked his right to counsel or right to remain silent, i.e., to question "outside" *Miranda*. (Weisselberg, *Saving Miranda*, (1998) 84 Cornell L. Rev. 109, 132-137; *Missouri v. Seibert*, *supra*, 542 U.S. at 611, fn. 2.) The many decisions on the subject reflect that the practice became widespread. (See authorities cited at AOB 52-53; see also, e.g., *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1026 [involving detectives in the Sacramento County Sheriff's Department, as does appellant's case]; *California Attorneys for Criminal Justice v. Butts* (9th Cir., 1999) 195 F.3d 1039, 1042-1044; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220.) Further, this Court recognized that training in techniques to avoid *Miranda* "[had] not been without widespread official encouragement." (*People v. Neal*, *supra,* 31 Cal.4th at p. 81, fn. 5, quoting Weisselberg, *In the Stationhouse After Dickerson* (2001) 99 Mich. L.Rev. 1121, 1136–38.)

For all the foregoing reasons, respondent's contention that Reed's failure to honor appellant's invocation of the right to remain silent was not deliberate is wholly unpersuasive.

Equally unpersuasive is respondent's claim that Reed's state of mind is irrelevant. (RB 70.) Respondent relies on *Whren v. United States* (1996) 517 U.S. 806, 813, a Fourth Amendment decision holding that the relevance of the officer's state of mind is not relevant to determining the lawfulness of a traffic stop. By contrast, the officer's state of mind is relevant to the question of what remedy is appropriate for conducting an unlawful interrogation. As set forth in the opening brief, one of the two rationales for suppression of derivative evidence is the need for deterrence, which depends heavily on whether the officer's violation of *Miranda* was "willful, or at the very least negligent." (*Michigan v. Tucker* (1974) 417 U.S. 433, 447; see AOB 87-89.) Where the high court found that the officers were

"strategists dedicated to draining the substance out of *Miranda*," suppression of the evidence obtained as a result was warranted. (*Missouri v. Seibert*, *supra*, 542 U.S. at p. 616 (maj. opn. of Souter, J.); see also *id.* at p. 622 (conc. opn. of Kennedy, J. [favoring suppression only where "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."].)

As stated above and in the opening brief, no reasonable police officer who intended to abide by *Miranda* and subjectively believed that appellant had refused only to talk about the robbery-murder would have considered it permissible to ask the questions that Reed asked appellant. Reed's approach to appellant's invocation was not a good faith interpretation of *Miranda*; it was a deliberate strategy for thwarting *Miranda*'s purpose. (AOB 67-70, 72, 91; Argument I. B., *supra*.)

Finally, respondent offers scant opposition to appellant's argument that suppression of derivative evidence is warranted where police deliberately violate *Miranda* by purposefully ignoring an invocation of rights. (AOB 83-92.) Respondent first asserts what appellant already has addressed – that the high court has declined to apply the fruit of the poisonous tree doctrine in cases involving non-deliberate failures to provide *Miranda* warnings. (AOB 87; RB 70.) Respondent's only other answer is a footnote attempting to distinguish *Missouri v. Seibert*, *supra*, 542 U.S. 600 on the ground that it "did not involve an application of the 'fruit of the poisonous tree' doctrine." (RB 71, fn. 60.) Appellant had not argued otherwise, and respondent's observation neither diminishes the importance of *Seibert* to the question before this Court nor counters the rationale underlying the rule appellant urges. Appellant points to *Seibert* not as an application of the fruit of the poisonous tree doctrine per se, but because it

demonstrates that the high court views evidence obtained by use of an interrogation strategy "adapted to undermine the *Miranda* warnings" (*Missouri v. Seibert*, *supra*, 542 U.S. at p. 616, fn. omitted (opn. of Souter, J.)) very differently from evidence derived from a non-deliberate failure to provide such warnings, as in *United States v. Patane* (2004) 542 U.S. 630, *Oregon v. Elstad* (1985) 470 U.S. 298, and *Michigan v. Tucker* (1974) 417 U.S. 433. Where, as here,"[t]he interrogation technique used in [the] case is designed to circumvent *Miranda,*" (*Missouri v. Seibert*, *supra*, 542 U.S. at p. 618 (conc. opn. of Kennedy, J.), the evidence obtained as a result of such a deliberate strategy should be suppressed. Respondent offers no serious answer to the significant legal question posed by appellant's claim.

Because detective Reed interrogated appellant pursuant to a strategy of deliberately ignoring any invocation of *Miranda* rights, the evidence derivative of appellant's statement should have been suppressed.

3. The testimony of Burlingame and the Billingsleys would not inevitably have been discovered

In the opening brief, appellant showed that the testimony of Sue Burlingame and Stacey and Greg Billingsley was obtained as a result of information provided by appellant in response to the unlawful interrogation. Whether appellant's statement was involuntary or voluntary and *Miranda*-violative, the testimony of Burlingame and the Billingsleys was inadmissible unless the prosecution could prove by a preponderance of the evidence that it would inevitably have been discovered through other means. Appellant has demonstrated that the prosecution did not meet this burden in his case. (AOB 92-96.) Respondent disagrees, citing Detective Edwards's testimony that during the normal course of investigation, he would have contacted appellant's place of employment "to gain appellant's

'background [information] and his activities," and would have attempted to contact other employees who worked there for the same purpose. (RB 71-73, citing 1 RT 1219-1220.) Respondent's argument is belied by the record.

Edwards's claim that he would have contacted appellant's employer is contradicted by the fact that Edwards did participate in the investigation, and there is no evidence that he or any other representative of law enforcement actually went to appellant's workplace, McKenry's Cleaners, or attempted to identify and contact any of his coworkers other than those mentioned by appellant. Although detective Reed called Chuck McKenry, appellant's employer, on the phone, there is no evidence that McKenry, who had 25 employees, provided information about any of appellant's coworkers or associates or that Reed asked him for such information. (2 RT 1271-1272, 1303.) As Detective Reed admitted, it was speculative that without appellant's statement about Burlingame and the Billingsleys, they would have gone to the McKenry's Cleaners and would have become aware of other employees who knew appellant. (2 RT 1273.)

Nor would the detectives have become aware of the Billingsleys through Jerri Baker. Edwards and Reed did, in fact, contact Baker and asked her about appellant's background and activities, but she did not give them any information about the Billingsleys. (18 RT 6193-6207; see AOB 93-94.) Baker would certainly not have led them to Burlingame, who did not work at McKenry's and who had met appellant only once before she and appellant became romantically involved, a week before the crime. (13 RT 4660, 4678.) Baker did not know that appellant was seeing Burlingame or that he was with her on the day of the crime until she learned of that information by reading the police reports. (18 RT 6146.)

Evidence would not inevitably have been discovered where it is

"equally plausible" that law enforcement would not have discovered it absent the illegality. (*United States v. Ramirez-Sandoval* (9th Cir. 1989) 872 F.2d 1392, 1400.) The admission of the tainted evidence put the prosecution in a significantly better position than it deserved to be. (*Nix v. Williams* (1984) 467 U.S. 431, 443.) The testimony of Sue Burlingame and Stacey and Greg Billingsley should have been suppressed.

E. The Erroneous Admission Into Evidence of Appellant's Unlawfully Obtained Statement Was Prejudicial

In the opening brief, appellant showed that reversal is required under *Chapman v. California* (1967) 367 U.S. 18, 24. (AOB 96-120.) The evidence connecting appellant to the crimes charged was marked by significant gaps and inconsistencies, and witnesses with significant credibility problems. (AOB at 96-120.) Thus, there was a reasonable basis for doubting that appellant was the killer. The prosecutor succeeded in obscuring the weaknesses in its case by putting before the jury extensive evidence of appellant's criminal history and bad character, much of which was inadmissible. (See e.g., AOB Argument II.) The prosecutor's coup de grace was the evidence of appellant's unlawfully-obtained statement, which functioned to eliminate the doubts that the jury otherwise likely had as to his guilt.

Respondent asserts that the evidence of appellant's guilt was overwhelming (RB 73), arguing that appellant had the desire and intent to commit a robbery (RB 73-74) and the opportunity and means to commit the charged crimes (RB 74-75), and that the physical and other evidence pointed to appellant (RB 75-78). However, respondent fails to counter the showing of prejudice set out in the opening brief.

Although, as respondent contends, the jury heard a variety of

evidence from which it could reasonably infer that appellant had the intent to commit robbery (RB 73-74),[4] the issue of intent was not disputed. Such evidence shed no light on identity, the central issue in dispute, other than by encouraging an impermissible inference that appellant had a disposition to commit robbery and therefore was the likely killer.

In contending that appellant "cased" The Office (RB 74), respondent ignores evidence of the reason appellant went there that was consistent with his innocence: his ex-wife had participated in pool tournaments there, and, as he told both Burlingame and Webster, a year earlier, he went there because he hoped to see her. (13 RT 4680; 14 RT 4966.) The rules regarding circumstantial evidence prohibited the jury from drawing the inference that respondent asserts. (See CALJIC 2.0, 2 CT 509 [where circumstantial evidence is reasonably susceptible of multiple inferences, the jury must chose the one pointing towards innocence].)

In contending that physical and other evidence pointed to appellant's guilt (RB 75-78), respondent fails to refute the following the points, made in appellant's opening brief, which show that the evidence provided ample basis for reasonable doubt.

1. The evidence was conflicting as to whether, on the night of the murders, appellant was wearing the shirt and boots that Webster later turned in to the police, stained with blood. (AOB 98-101.)

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[4] Appellant has demonstrated that much of the evidence cited by respondent as evidence of desire and intent was inadmissible, to wit: appellant's purported solicitations of Gentry and Billingsley (AOB at 196-215), his alleged statements to the robbery investigators (AOB 216-238), and his purported statements about having used disguises to commit crimes in the past (AOB 132-137). In light of those errors, the prejudice resulting from the admission of appellant's unlawful interrogation is even clearer.

Respondent does not even acknowledge, much less address, appellant's detailed showing that other evidence conflicted with Baker's and Webster's descriptions of the clothes appellant was wearing on the night in question (see AOB 98-101), and blithely asserts that appellant wore the shirt and boots that were "covered with" Tudor's and Manuel's blood.[5] (RB 75.)

2. The evidence did not establish that appellant was at The Office at the time of the murders. (AOB 102-104.) As set forth in the opening brief, Tracy Grimes was the sole witness to testify that appellant was at The Office on the night of the murders, after he had dropped Burlingame off. (See AOB at 102.) Respondent asserts that Grimes established that appellant was at The Office until it closed and that gunfire was heard "just minutes later." (RB 75.) Respondent misstates the evidence.

Grimes testified that he left The Office at around 8:40 p.m. on the night of the murders. (11 RT 4167, 4171, 4180.) Leslie and Joe Lorman discovered the bodies of Manuel and Tudor at approximately 9:20 p.m. (12 RT 4319.) Anita Dickinson testified that she heard shots sometime before 9:00 p.m. (11 RT 4262), but on the night of the murders, she told law

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[5] Respondent also overstates the record. The evidence showed that based on ABO and PGM blood typing, the blood on the shirt and boots *could have* come from Manuel alone, who was ABO type A and PGM type 2-1+, or Manuel and Tudor combined (16 RT 5481-5486), but it is an overstatement to assert that it was proven to be theirs. (See, e.g., *People v. Page* (2008) 44 Cal.4th 1, 16 [approximately 30% of the population is ABO type A]; *People v. Smith* (1987) 188 Cal.App.3d 1495, 1504 [approximately 35% of the population is PGM type 2-1+].) Regarding the quantity of blood, there were several bloodstains on the right boot and several on the shirt, mainly on the left side; on the left boot, there were some spots so small that they could not be confirmed as blood. (16 RT 5480-5484.) None of these items was "covered" with blood, as respondent asserts. (RB 75.)

enforcement that she heard gunshots between 9:15 and 9:30 p.m. (21 RT 7139.) Her testimony suggesting that Baker's car was in the parking lot behind The Office at the time of the shootings (12 RT 4266) was contradicted by her own prior statement and by her husband's testimony (21 RT 7141, 7143; AOB 103). Thus, the evidence shows that as much as 40 minutes could have elapsed between the time that Grimes last saw appellant at The Office and the time of the murders. Respondent fails to counter appellant's showing that without appellant's interrogation statement, there was a significant gap in the prosecution's time line.

3. The evidence was conflicting as to whether the murder weapon was appellant's gun and was in his possession on the night of the crimes. (AOB 105-110.) Contrary to respondent's contention (RB 76), in raising this point, appellant is not improperly requesting this Court to reweigh the evidence and Webster's credibility. Rather, appellant simply points out the inconsistencies in the testimony to demonstrate the inferences that a juror could have reasonably drawn against the prosecution's case.

4. The absence of blood on the seats of Baker's car was inconsistent with the prosecution's theory of the case that appellant committed the murders and then drove to Webster's house, wearing the blood-stained shirt. (16 RT 5458-5459, 5509; 19 RT 6512-6513; AOB 111-113.) Respondent attempts to counter appellant's argument by pointing to the evidence that Baker cleaned her car with professional cleaning agents. (RB 76.) Although Baker so testified (18 RT 6263-6267), she also stated that she did not clean the seats or cushions (18 RT 6266; AOB 111). Further, the evidence was conflicting as to whether or not Baker had cleaned the car before or after it was examined by law enforcement. (18 RT 6204, 6263; AOB 112.) Respondent fails to address

either argument.

5. Both Mary Webster and Jerri Baker lacked credibility. (AOB 117-119.) Respondent contends that a reviewing court may not reassess witness credibility, citing *People v. Catlin* (2001) 26 Cal.4th 81, 139, *People v. Lee* (2011) 51 Cal.4th 620, 632, and *People v. Maury* (2003) 30 Cal.4th 342, 403. (RB 77.) All those cases are inapposite, as they address claims of insufficiency of the evidence, a claim that appellant has not made. As set forth in the opening brief (AOB 96), the question in assessing prejudice under *Chapman* is "not whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) As stated above, appellant does not argue that this Court should reassess the witnesses' credibility, but that it should recognize that as a result of the witnesses' credibility problems, there is a reasonable possibility that the jury's assessment of those witnesses' credibility, like its assessment of all the prosecution's evidence, might have been affected by the introduction of the unlawfully obtained evidence.

6. Webster had more of a motive to commit the crimes charged than appellant. (AOB at 115-117.) Respondent asserts that there was no evidence linking Webster to the charged crimes. (RB 77.) This, of course, does not address her motive. In any event, respondent is mistaken. The day after the murders, Webster was in possession of some of the money, the murder weapon and the bloody clothes and boots. (15 RT 5228; 16 RT 5671.) Webster's fingerprint, not appellant's, was found on the box containing the murder weapon. (15 RT 5377.)

In addition, respondent concedes that there is "no explanation" for the following other weaknesses in the prosecution case (RB 76):

7. The prosecution failed to connect the bloody footprints at the crime scene with appellant's boots (AOB 113-114);

8. The pattern of bloodstains on the shirt that Webster provided to the police was not consistent with the prosecution's theory of the crime (AOB 113);

9. The absence of fingerprint evidence connecting appellant with the crime scene, the gun, the box containing the gun or the money that Webster turned over to the police was inconsistent with appellant's guilt (AOB 114);

10. The amount of money that appellant had after the killings was inconsistent with the prosecution's theory that he took the money from the bar (AOB 114-115).

Needless to say, the absence of such evidence would be explained by the fact that appellant was not the killer. In short, the numerous weaknesses in the prosecution's evidence left room for at least one juror to have reasonable doubt as to appellant's guilt.

Respondent does not dispute appellant's showing that the prosecutor relied heavily on appellant's statements in closing argument. (AOB 97-98.) Respondent concedes that appellant's statement was "helpful" to the prosecution's case, but contends that it was not "crucial." (RB 73.) The question is not whether the erroneously introduced evidence was "crucial" to the prosecution's case; "the question is whether there is a reasonable possibility that the evidence complained of *might have contributed* to the conviction." (*Fahy v. Connecticut*, *supra*, 375 U.S. at pp. 86-87, italics added.) Respondent attempts to diminish the importance of appellant's

statement to the prosecution's case, contending that it was introduced "merely to rebut portions of the defense case-in-chief. (RB 73.) As set forth in Argument VI, appellant's statement did not rebut any evidence presented by the defense; and, because it tended to establish that appellant committed the crimes charged, the statement should have been presented in the prosecution's case-in-chief, if at all. (AOB 252-270.) The prosecutor's decision not to present it until rebuttal appears to have been either for dramatic effect, because he did not want to risk inserting error into the case by introducing evidence that was unlawfully obtained or both. Because appellant's statement was the last piece of evidence that the jury heard before retiring to deliberate, it is even more likely that it contributed to the verdict than if it had been presented in the prosecution's case-in-chief. That is, the fact that it was presented in rebuttal increases, rather than diminishes, its prejudicial effect.

Respondent has not proven that the admission of appellant's statement was harmless beyond a reasonable doubt, as it must under *Chapman*. (*Chapman v. California, supra*, 367 U.S. at p. 18.) The prosecution relied heavily on the statement and made sure that it was the last thing that the jury heard before retiring to deliberate. In light of the totality of the evidence, it cannot be said that the verdict "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Reversal is required.

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II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR CRIMINALITY AND THE DETECTIVES' STATEMENTS TO MARY WEBSTER FOR THE PURPOSE OF BOLSTERING HER CREDIBILITY

The trial court allowed the prosecution to introduce a raft of evidence of appellant's prior criminality, including evidence that appellant was an ex-convict, that he had physically assaulted Webster's adult son and fought with her former roommate, and that he had admitted robbing banks and killing people in the past, on the theory that such evidence showed Webster's fear of, and devotion to, appellant and the nature of their relationship, which the court found relevant to her credibility. Also to bolster Webster's credibility, the court allowed the prosecution to play for the jury a tape-recorded interview of Webster in which the investigating officers repeatedly asserted their belief in appellant's guilt and their reasons for holding that belief. As shown in the opening brief, Webster's feelings concerning appellant were not disputed and were established by other evidence. By allowing the jury to be exposed to such highly inflammatory and prejudicial evidence of such minimal probative value, the trial court abused its discretion. To the extent that the court limited the jury's use of the evidence, its instructions could not have effectively prevented the jury from being improperly influenced by such extensive evidence of appellant's criminal propensity. The court failed to limit the jury's use of the evidence that appellant had killed before. The court's erroneous admission of the evidence was prejudicial and rendered the trial fundamentally unfair. (AOB 121-195.)

Respondent largely fails to counter appellant's arguments. Much of

respondent's response is a recitation of the arguments of counsel and rulings of the trial court. (See, e.g., RB 78-98, 110-112.) Appellant does not concede any of the arguments made in the opening brief, but addresses below only the few arguments that respondent offers as justification of the trial court's rulings. Where respondent's argument consists of merely repeating the trial court's ruling and asserting its correctness without explanation (see, e.g., RB 110-111, regarding the admission of Webster's taped interview), appellant does not reply, as the opening brief addresses the trial court rulings in detail. Respondent offers no substantial argument in answer to appellant's contention that the admission of the challenged evidence was prejudicial and denied appellant a fair trial. (See RB 111-112.) As set forth in appellant's discussion of Argument I above and in the opening brief (AOB 102-120), the weaknesses in the prosecution's case left room for doubt as to appellant's guilt. The opening brief also fully describes the prejudice resulting specifically from the erroneous admission of the inflammatory and prejudicial character evidence here at issue. (AOB 184-190) The issues are fully joined.

A. Respondent Does Not Refute Appellant's Showing that the Evidence of Appellant's Prior Criminality Was Minimally Probative of Any Disputed Fact

As set forth in the opening brief, appellant did nothing at trial to place in dispute the nature of his relationship with Webster or her feelings for him. (AOB 153-157.) Appellant has also shown that his statements regarding past robberies and the use of disguises had little or no tendency in reason to show that he was planning to commit the crimes charged. (AOB 167-171.) Respondent attempts to refute these contentions, but fails.

1. Respondent does not refute appellant's showing that Webster's fear of appellant was not in dispute

Respondent simultaneously concedes that Webster's fear and adoration of appellant were undisputed and asserts that appellant's argument to that effect is specious. (RB 101, 102.) In support of the latter assertion, respondent contends that defense counsel initially maintained that Webster did not fear appellant, and that when the trial court pointed out that she told the detectives she was afraid, defense counsel shifted theories and disputed the basis of her fear. (RB 102; see also RB 82.)

The discussion to which respondent refers occurred at the hearing on the admissibility of the evidence at issue, outside the jury's presence. Defense counsel argued:

> But what the district attorney is trying to prove somehow is that well, she didn't go to the police because she had fear of Mr. Case. There is nowhere in any of her testimony that he ever threatened her or said to her, look, you throw away this clothing, or else I will come and get you or I will have a friend of mine get you. Mary Webster had never been threatened by Mr. Case by any of those associates. The fear is just not there. And I would object to this evidence on the basis that it shows Mary Webster is fearful.

(11 RT 4091.) When the court subsequently pointed out that in her interview by detectives, Webster stated she was afraid, counsel clarified that he did not deny that Webster feared appellant, and would not be challenging the fact that she was fearful at trial. (11 RT 4092, 4093; see also 11 RT 4098.) Contrary to respondent's contention, this colloquy confirms that appellant did not dispute the fact that Webster feared him, only that fear was the reason that she did not go to the police initially.

Respondent also misinterprets defense counsel's argument that

anyone would be afraid if someone came to their door wearing bloody clothes and said he had just killed two people. (11 RT 4092-4093.)[6] Respondent infers that appellant disputed the basis for Webster's fear. In fact, the point of defense counsel's argument was that admitting evidence of appellant's bad character to show Webster's fear was not justified because the fact that she feared appellant and a reasonable basis for that fear was established by other evidence.

Further, respondent fails to recognize that this colloquy occurred outside the jury's presence, well before the jury heard any evidence or argument. As set forth in the opening brief, defense counsel did nothing in front of the jury to dispute that Webster feared appellant. (AOB 153-157.)

Without any citations to the record, respondent asserts that the basis of Webster's fear of appellant, "to wit appellant's self-portrayal as a dangerous outlaw, was in fact fiercely contested." (RB 102.) There is a reason that respondent does not cite to any support in the record for this

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[6] In response to the trial court's statement that Webster's indecision about what to do with the bloody clothes and the boots was based on her fear of, and love for, appellant, defense counsel argued:

> Essentially, that will be coming out that I think anybody that's reasonable would be afraid of someone that just came into your house and said, look, I just killed a couple of people and here's the blood all over and that's pretty good, you know, pretty good evidence that he may be telling the truth . . . I don't think that we have to go back to crimes in 1974 or '78 or the whole litany of things that Mr. Case has been involved in to prove this fear. Like I say, I don't plan on challenging the fact that she was fearful. Just the incident itself would cause a normal person to be fearful. And I just think that the probative value of that, of this additional fear is highly outweighed by its prejudicial effect.

assertion: the record does not contain any. Appellant presented no evidence or argument to the jury to dispute the evidence that he had fought with Nivens and Hobson or that he had made the statements attributed to him by Webster and others about his criminal history.

As shown in the opening brief, neither Webster's fear of appellant nor the possible bases of that fear were disputed at trial (AOB 153-157), and respondent has not shown otherwise. Defense counsel argued that Webster was motivated by jealousy and implicitly by a desire to deflect suspicion from herself. (16 RT 5536-5537; 22 RT 7404.) He did not dispute that she feared appellant; he disputed that fear was her motivation for assisting in appellant's prosecution. Evidence of appellant's bad character may have established that Webster had additional reasons to be afraid of appellant, but it did nothing to resolve the question whether Webster's fear was the reason for her testimony. Thus, to the extent that the evidence at issue showed that Webster feared appellant, it was not probative of a disputed fact.

2. Respondent does not refute appellant's showing that the altercations with Nivens and Hobson were minimally probative of Webster's fear and cumulative of other evidence

In the opening brief, appellant argued that there was no evidence that witnessing appellant's altercations with Nivens and Hobson caused Webster to fear appellant, that Webster's fear was otherwise established and that the evidence of the altercations was cumulative of other evidence. (AOB 157-161.) Respondent concedes that "there was plenty of evidence demonstrating [Webster's] general fear of appellant," but contends that because Webster personally witnessed appellant's altercations with Nivens

and Hobson, evidence of those incidents was particularly significant and not cumulative. (RB 104.) Respondent asserts that witnessing the two altercations "immediately alerted [Webster] that appellant was indeed capable of violence and had a short temper." (*Ibid.*) However, the causal connection necessary for respondent's argument is missing: there is no evidence that Webster subjectively interpreted those incidents as respondent contends. If those incidents caused Webster to fear appellant, the prosecutor would presumably have elicited that fact from Webster during her extensive testimony. But he did not. In fact, when the prosecutor asked Webster if it was because she was afraid for her son or her brother that she called Detective Ford and told him that about the bloody clothes and gun, she said "no." (14 RT 5032.) There is no evidence of how, if at all, the incidents with Hobson and Nivens affected Webster's state of mind, let alone evidence that they caused or contributed to her fear of appellant. Thus, contrary to respondent's contention, the evidence of those incidents was minimally, if at all, probative of Webster's fear.

3. Respondent does not refute appellant's showing that appellant's statements regarding prior robberies were of scant probative value for any permissible purpose

Appellant also argued in the opening brief that there was no evidence of any causal relationship between appellant's status as an ex-convict or his claims that he had committed bank robberies in disguise and Webster's fear. (AOB 168-169.) Respondent asserts that appellant's "self-portrayal as a highly sophisticated and dangerous ex-convict and bank robber . . . caused Webster fear, which she made clear to the detectives through her interview." (RB 106.) Again, respondent provides no citation to the record to support this statement. In fact, although it is true that Webster told the

detectives that she was afraid of appellant (e.g., CT 6612, 6620), she did not tell them or indicate at any other point that the reason for her fear was either appellant's status as an ex-convict or his stories about committing bank robberies in disguise.

Respondent contends that statements by appellant about past robberies in disguise "gave meaning to the other evidence, e.g., purchase of the gun, of his plan to commit a future robbery," and showed that he planned to commit a robbery in the future. (RB 107.) Respondent provides no explanation for this illogical assertion. As appellant pointed out in the opening brief, a statement admitting a past robbery does not imply an intention or plan to commit a future one, except via an impermissible inference that the prior robbery reflects a propensity to commit that crime. (AOB 169.) Respondent's assertion does not counter that showing in any meaningful way.

B. The Prejudicial Effect of the Evidence, Including Its Inflammatory Nature, Outweighed Its Minimal Probative Value

Respondent contends that even if the nature of Webster's relationship with appellant was not in dispute, the prosecution was entitled to present evidence in support of each element in the case. (RB 103-104.) Respondent implies that the prosecutor had a right to present any evidence that supported its case, no matter how tangential or minimally probative and even if the fact to which it relates was not disputed. Clearly, that is not the case. As stated in the opening brief, the trial court had a duty to exercise its discretion under Evidence Code section 352 to exclude evidence the prejudicial effect of which exceeds its probative value, and because this evidence reflected other crimes, to exclude it unless the People established that it has "*substantial* probative value that clearly outweigh[ed] its inherent

prejudicial effect." (*People v. Bean* (1988) 46 Cal.3d 919, 938; *People v. Ewoldt* (1994) 7 Cal.4th at p. 380; AOB 149.) Particularly in light of the fact that Webster's feelings for appellant and the nature of their relationship were established by other evidence and were not disputed, it was an abuse of discretion to give the prosecution carte blanche to put before the jury so much evidence of appellant's bad character in the guise of bolstering Webster's credibility.

In the opening brief, appellant showed that the prejudicial effect of the admitting evidence of appellant's assaults on Nivens and Hobson and his statements admitting his prior criminality was likely to far exceed the minimal probative value of that evidence. (AOB 161-163, 171-172, 176-177.) Respondent does not dispute that appellant's statements about having killed before were inflammatory and likely to have a highly prejudicial effect. Respondent contends, however, that neither appellant's altercations with Nivens and Hobson, nor appellant's claim that he was an ex-convict who had committed bank robberies in the past, was inflammatory because those incidents were not as inflammatory as the charged crimes. (RB 105, 107.) Respondent is incorrect.

This Court has long recognized that prior acts of violence and other crimes have an inherently inflammatory and prejudicial effect. (See, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Thompson* (1980) 27 Cal.3d 303, 314.) Although the potential for prejudice may be decreased where an uncharged crime is less inflammatory than the charge crime (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405), it is not eliminated. Because the central issue in dispute was identity, exposing jurors to evidence of appellant's past crimes was likely to cause them to find appellant guilty not because the evidence proved it, but based on a belief that he was the kind of

person who would commit the charged crimes. Regardless of whether standing alone, the uncharged crimes were more or less inflammatory than the charged crimes, they involved violent conduct and robbery and therefore, their introduction into evidence was likely to cloud the jury's dispassionate assessment of the evidence. That is, it was highly likely that the other crimes evidence would be regarded by the jury, consciously or otherwise, as evidence that appellant had a violent character and a disposition to commit robbery, and that therefore he was guilty.

With respect to the evidence that appellant told Webster he was a bank robber, respondent contends that the jury knew appellant had never robbed a bank. (RB 107, citing 14 RT 4971, 4998.) This claim is unsupported. Respondent's record citations point to Webster's testimony that appellant "bragged" about being a bank robber and told her stories about bank robberies every night (14 RT 4971), and her testimony that appellant did not rob any banks "during the period of time that he lived with [her]" (14 RT 4997-4998). The jury would not reasonably have deduced from this testimony that appellant had never robbed a bank. Webster believed him, and no evidence proved her wrong. .

For the reasons set forth in the opening brief, the prejudicial effect of the challenged evidence far outweighed is probative value.

C. The Limiting Instructions Did Not Cure the Prejudicial Effect of the Evidence

Respondent contends that the trial court's instructions that the jury could consider the evidence only for a limited purpose, and not as evidence of criminal propensity, effectively mitigated the prejudicial effect of the evidence. (RB 105-106, 108, 109.) Respondent is incorrect.

First, as pointed out in the opening brief, the court gave no

instruction limiting the use of the evidence that appellant had bumped a couple people off, knocked people off or slapped people in the past. (AOB 177-178.)

Second, respondent fails to refute appellant's showing that with so much evidence of appellant's prior criminality, violent disposition and bad character, it was highly unlikely that the jury would be able to follow the limiting instructions that were given. (AOB 164-166, 172, 176-177.) Respondent contends that in the absence of evidence to the contrary, it must be presumed that the jury followed its instructions. (RB 105-106.) That may be the general rule. But, as set forth in the opening brief, numerous courts have recognized that uncharged misconduct may be so prejudicial and inflammatory that judges cannot reasonably expect jurors to be able to compartmentalize their thinking and follow the instructions. (AOB 164-166.) Respondent's contention fails to counter those authorities or explain why, given the sheer volume of bad character evidence presented to the jury, they do not support appellant's argument that the limiting instructions were likely to have been ineffective. Even with the limiting instructions, it is likely that the jury improperly considered that bad character evidence as an indication that appellant was "a dangerous person more likely than others to have committed the present offense." (See *People v. Thompson* (1998) 45 Cal.3d at p. 86, 109.)

As stated above, respondent's remaining contentions with respect to the instant argument raise no significant issues beyond those addressed in appellant's opening brief, and therefore no further reply is required. The issues are fully joined.

III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ADMITTED EVIDENCE THAT APPELLANT HAD SOLICITED BILLINGSLEY AND GENTRY TO COMMIT OTHER CRIMES

In his opening brief, appellant argued that the trial court erred by admitting evidence that appellant had invited Greg Billingsley to help him rob a bowling alley and had asked Bobby Joe Gentry to be a getaway driver in an unspecified robbery, where both incidents were limited by instruction to showing only that the charged robbery-murders were part of an ongoing scheme or plan. (AOB 196-215.) Appellant showed that evidence of common design or plan is relevant and admissible only where the acts involved in the charged offense are undetermined, not where those acts are conceded or assumed, as they were in his case. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 394, fn. 2.) Appellant also argued that even if evidence of common design or plan was theoretically relevant in this case, the solicitations of Billingsley and Gentry were not similar enough to the robbery-murders at The Office to be admissible for that purpose. (*Id.* at p. 402.) Respondent does not dispute that the acts involved in the charged offense were assumed or conceded, but misconstrues the applicable authorities to argue that evidence of plan or scheme was nevertheless admissible. Respondent conflates the two solicitations and exaggerates their similarity to the charged offense. Ignoring the fact that the court instructed the jury that it could consider evidence of the solicitations solely as evidence of continuing scheme or plan, respondent argues that the evidence was also admissible to show motive and intent. Lastly, respondent contends that any error was harmless. (RB 112-125.) Respondent's arguments are without merit and should be rejected.

A. The Solicitations Were Inadmissible as Evidence of Common Design or Plan

As shown in the opening brief, the probative value of evidence of design or plan is "'to show that the act [involved in the charged offense] was in fact done or not done.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393, quoting 1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666.) Such evidence cannot be used to prove the defendant's intent or identity, but only "to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Id.* at p. 394.) Where, as here, the acts involved in the charged offense are assumed or conceded, evidence of common scheme or plan is not relevant to any disputed fact and is therefore inadmissible. (*Ibid.*)

Respondent does not dispute that defense counsel conceded that the acts involved in the charged offenses had been committed. (17 RT 5774.) Instead, respondent relies on the discussion in *People v. Balcom* (1994) 7 Cal.4th 414, 424, about the degree of similarity between the charged and uncharged crimes required for admission of uncharged crimes evidence to prove common design or plan. (RB 121.) Respondent misconstrues the *Balcom* passage it quotes as holding that degree of similarity is the only relevance question that must be answered in determining whether evidence of an uncharged crimes is admissible to show common design or plan. On the contrary, the court must also determine whether the act involved in the charged crime is in dispute. In the *Balcom* opinion itself, before addressing degree of similarity, the Court carefully examined the factual issue to which the uncharged crime evidence related. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422.) The defendant had been charged with rape and robbery. At a previous trial, the jury had convicted him of robbery but was unable to

reach a verdict as to rape. (*Id.* at p. 418.) At the retrial of the rape count, the defense was consent. (*Id.* at p. 420.) This Court rejected the prosecution's argument that evidence of an uncharged rape and robbery was admissible on the issue of intent, finding that "the primary issue for the jury to determine was whether defendant forced the complaining witness to engage in sexual intercourse by placing a gun to her head." (*Id.* at p. 422.) Because no reasonable juror could have concluded that the defendant committed that act but lacked the intent to rape, the Court held that the uncharged crimes evidence was cumulative on the issue of intent. (*Id.* at p. 423.) Because the defendant disputed that he had committed the act of force involved in the rape, the uncharged crime was admissible as evidence of common design or plan. The Court reaffirmed the holding in *Ewoldt* that "'evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged.'" (*Ibid.*, quoting *Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn.2, original italics.) Respondent's interpretation of the above-quoted language is clearly incorrect. Whether uncharged crime evidence is admissible to show common design and plan depends not only on its similarity to the charged offense, but there must also be a dispute as to whether the act involved in the charged offense was committed. Appellant did not dispute that a robbery and a double murder had occurred, but only that he was the perpetrator. Other crimes evidence therefore could not be admitted to show common design or plan, as there was no need to establish what act had been committed.

As appellant showed in the opening brief, even if design and plan evidence were theoretically admissible in his case, the two uncharged crimes at issue were not sufficiently similar to the charged offense to be relevant for that purpose. (AOB 204-207.) Respondent argues to the

contrary, alleging that the uncharged crimes shared four points of similarity with the charged crimes: (1) appellant alone would commit the actual robbery, (2) he would rob a business establishment, (3) with which he had some familiarity, and (4) "thus allowing him to case the establishment." (RB 122.) Respondent fails to distinguish the two solicitations from each other and grossly exaggerates their similarity to the charged crimes. Gentry testified that appellant neither identified whom he wanted to rob nor indicated that he had any place "staked out." (16 RT 5742.) That solicitation did not involve robbery of "a business establishment," let alone one with which appellant was familiar and which he could therefore "case." (See RB 122.) Thus, the solicitation of Gentry did not share three of the four so-called points of similarity.

Conversely, appellant did not identify either Billingsley's or his own role in the "job" that he proposed. (13 RT 4603, 4612.) It was therefore not known whether appellant intended to commit the robbery alone, as respondent contends, or with Billingsley or someone else. Furthermore, respondent's third and fourth alleged points of similarity are for all practical purposes one and the same: being familiar with an establishment necessarily allows one to "case" it for employee routines and one cannot case an establishment without becoming familiar with it. (Cf. RB 122.) For all of these reasons, respondent's analysis of the similarity between the uncharged offenses and the charged ones is wholly unpersuasive. As set forth in the opening brief, the only feature shared by both solicitations and the charged crime is that all seemed to involve robbery. (AOB 207.) Even if common design or plan evidence had been relevant to a disputed fact, the other crimes at issue were not sufficiently similar to the charged crimes to resolve that dispute. Notably, respondent does not dispute appellant's

distinction of decisions, including *Ewoldt* and *Balcom*, where much greater similarity between the uncharged misconduct and the charged crimes supported admission of the evidence to prove common plan or design. (See AOB 206-207.) Nor does respondent cite any case other than *Balcom* to support its position. (See RB 121-122.)

B. Whether the Solicitations Could Have Been Admitted for Another Purpose Is Irrelevant Because the Jury Was Instructed That They Could Be Considered Only on the Issue of Common Design or Plan

Respondent contends that this Court should uphold the admission of the solicitations in this case also because the trial court admitted that evidence to show motive and intent. (RB 122-124.) Respondent fails to acknowledge that, although the trial court stated out of the jury's presence that the evidence was admissible for other purposes, it instructed the jury that the sole purpose for which the solicitations could be considered was as evidence of ongoing design or plan. (2 CT 514; 23 RT 7615.) Whether the evidence could properly have been admitted on another theory is therefore irrelevant. Indeed, in *Ewoldt*, this Court rejected a similar argument that the other crimes evidence was admissible on a theory other than the one that had been presented to the jury:

> We need not, and do not, consider whether the evidence of defendant's uncharged misconduct was admissible to establish defendant's intent as to the single charge of annoying or molesting a child, because the evidence was not admitted for that limited purpose and the jury was not instructed to consider the evidence only as to that charge.

(*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 406-407.)

In any event, the trial court's rulings that the evidence was admissible to show motive and intent were both erroneous.

C. The Solicitations were Inadmissible to Show Intent

Respondent contends that evidence of the solicitations was admissible on the issue of intent. (RB 124-125.) Respondent ignores the fact that intent was not in dispute. Here, as in *Balcom*, "if the jury found that defendant committed the act alleged, there could be no reasonable dispute that he harbored the requisite criminal intent." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422.) Appellant conceded that the killings were intentional (17 RT 5776), and did not dispute that whoever committed the charged crimes intended to steal the money in the cash register.

The prosecutor argued that the alleged solicitations were admissible to show "premeditation and deliberation towards doing the robbery." (RT 5748.) The trial court agreed, finding that the robbery was the result of "a great deal of deliberation." (16 RT 5750.) In fact, whether the robbery was premeditated or deliberate was not a question before the jury, which only had to determine whether the *killings* had been premeditated and deliberate. (CT 541 [CALJIC No. 8.20].) The alleged solicitations were not relevant to that question, as neither Billingsley nor Gentry claimed that appellant had said anything about killing, shooting or even using force.

Furthermore, neither of the uncharged acts was sufficiently similar to the charged offenses to be probative on the issue of mental state. Although the least degree of similarity is required in order to establish that a prior uncharged act is admissible to prove intent, the evidence of appellant's alleged solicitations do not meet even that low threshold. In *Ewoldt*, the Court explained that the "'the recurrence of a similar result'" tends to establish that the charged offense is not the result of mistake or self-defense or inadvertence. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241.) In *Balcom*,

the Court held that evidence of prior misconduct is not admissible to show intent if it shows only some general criminal intention to commit the same class of crime. In order to be admissible on the issue of intent pursuant to Evidence Code section 1101(b), prior misconduct must be similar enough to the present crime that it shows something about "'the mental state with which an act is done.'" (*People v. Balcom*, *supra*, 7 Cal.4th at p. 412, fn. 2.) This Court explained:

> For example, evidence that a defendant charged with rape had committed rape on another occasion in a manner different from the charged offense may tend to establish that the defendant had a propensity to commit rape and, therefore, 'harbored criminal sexual intent toward the current complainant,' but such evidence is inadmissible under Evidence Code section 1101 as mere evidence of criminal disposition. (Citation.)

(*Ibid.*; see also, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 319-321 [intent to steal car keys on one occasion not relevant to prove intent to steal car keys on a second occasion].)

In appellant's case, the results of the solicitations were entirely unlike the results of the charged crimes. The crimes that Gentry and Billingsley described involved no action other than talking; appellant did not actually commit either of the robberies that he reportedly discussed with the two men. Even if the criminal conduct for which appellant purportedly solicited each of the two men had been completed, that conduct would not have been similar to the crimes committed at The Office. In both solicitations, appellant suggested robbery, but did not indicate that he would use a weapon or that he might shoot or kill anyone. In both solicitations, appellant sought a crime partner or getaway driver, whereas the crimes committed at The Office were committed by one person acting alone.

Given that the only similarity was that the same class of crime – robbery – was involved, the solicitations would only have served to establish that appellant had a propensity to commit robbery, which, as set forth above, is inadmissible as evidence of criminal disposition. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 412, fn. 2.)

D. The Solicitations were Inadmissible on the Issue of Motive

Respondent contends that appellant put motive in dispute by arguing that Webster was the mastermind behind the crimes committed at The Office. (RB 123.) Respondent contends that the solicitations were sufficiently similar to the charged crimes to support the inference that appellant harbored the same motive in each instance. (*Ibid.*) At the time of trial, the prosecutor argued that the solicitations were relevant to motive "[t]o eliminate the witnesses and also in anticipation, what the defendant has said that Mr. Case had plenty of money." (17 RT 5793.) The court ruled: "It would be admissible to that also." (17 RT 5793-5794.)

In order for prior uncharged crime to be admissible as evidence of motive for committing the charged offense, a nexus between the prior crime and currently charged crime must be shown. (*People v. Scheer* (1998) 58 Cal.App.4th 1009, 1018; see, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 857 [direct relationship between prior robbery where defendant was rendered paraplegic by police and murder of police officers in retribution]; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 246 [evidence of prior robberies admissible to show motive to murder the witnesses to the robberies].) In this case, such a nexus was lacking.

The prosecution tried to create the missing nexus by arguing at trial that the solicitations tended to show that the motive for the murders at The

Office was a desire to eliminate witnesses. That contention was entirely baseless and illogical. Neither Gentry nor Billingsley attributed to appellant any statement about possible witnesses or about shooting, killing, or even using a weapon in connection with the crimes which appellant purportedly invited them to commit. Neither appellant's invitation to Billingsley to help him steal the bank deposit from the bowling alley nor appellant's invitation to Gentry to assist in an unspecified "hold-up" implied any desire or willingness to eliminate witnesses while committing those or any other crimes. Nor did the solicitations have any other logical connection to the charged crimes. Neither of the solicitations involved Manuel or Tudor, or any group of which either of them was a member. Nothing about those uncharged crimes had a nexus with the crimes committed at The Office except insofar as all three crimes involved at most robbery.

There was no dispute that the motive for the killings at The Office was to acquire the money in the till. As this Court has observed, "the motive for robbery is generally one of acquiring the victim's property, and proof that [appellant] previously committed theft or robbery for this purpose adds little to the case." (*People v. Bigelow* (1984) 37 Cal.3d 731, 748 [defendant's prior thefts and robberies inadmissible to establish that charged robbery-kidnap-murder was committed to obtain victim's property].) The solicitations were therefore inadmissible to show that the charged crimes were financially motivated because that issue was not in dispute.

Respondent posits that the solicitations were admissible because appellant presented evidence of Webster's history of financial struggles and "theorized that Webster had the motive and was the mastermind" behind the charged crimes. (RB 123.) Evidence of the solicitations did not, however,

refute the evidence that Webster was having financial troubles. She had intentionally under-reported her income and had been receiving Social Security benefits to which she was not entitled. (14 RT 5156-5157.) The Social Security Administration had told her that the checks were overpayments and that she should not spend the money, but she had already done so. (16 RT 5621.) At the time of the killings, Social Security was demanding the return of that money. (16 RT 5621.) In fact, Webster had been pressuring appellant to commit robberies because she needed money so badly. (18 RT 6109, 6205, 6318.) Evidence of appellant's prior solicitations was entirely consistent with, and in no way undermined, the evidence of Webster's motive.

To the extent that appellant suggested that he affirmatively lacked a motive, evidence of the solicitations was of scant probative value. The solicitations occurred weeks or months before the charged crimes. (13 RT 4599, 16 RT 5726-5727.) Just two days before the crimes, appellant withdrew over $420 from his bank account. (20 RT 6788.) In his wallet at the time of his arrest was the combination to his employer's safe (21 RT 7260), which on weekends generally contained $250 or $300 (18 RT 6228; 20 RT 6765). Appellant could have easily taken the money in the safe, but did not do so. With this evidence, the evidence that appellant was contemplating committing another robbery weeks before the charged crimes showed little or nothing about whether or not he had a motive to rob on the day of the charged crimes.

The solicitations evidence was not properly admissible on the issue of motive. In any event, that question is irrelevant because the jury was instructed that it could consider the other crimes evidence solely for purposes of deciding whether the charged offense had been committed

according to a common design or plan.

Finally, respondent offers no response whatsoever to appellant's argument that, in addition to the inherent likelihood that other crimes evidence will be viewed as evidence of criminal propensity or disposition, evidence of the solicitations was particularly likely to have a prejudicial impact because appellant had never been charged with those crimes. (AOB 211.)

E. Conclusion

For the foregoing reasons, respondent's arguments are not persuasive. Ignoring the trial court's limiting instruction, respondent argues from a mistaken premise and asserts theories of admissibility, i.e. intent and motive, that not only are inapplicable, but are factually unsupported. Respondent offers no meaningful response to the argument that the only purpose for which the evidence was admitted – as evidence of common design or plan – was irrelevant to the issues in dispute and, in any event, that the evidence of the prior solicitations fell far short of the similarity required for admission under Evidence Code section 1101, subdivision (b). Further, respondent fails even to address the prejudicial impact that the evidence was likely to have.

The only real issue for the jury to decide was whether appellant was the perpetrator. Evidence of another crime was therefore admissible only if it met the demanding "signature" test applicable to evidence of identity: that is, "the uncharged misconduct and the charged offenses must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*Ewoldt*, 7 Cal.4th at p. 403.) Because the act committed was known and neither motive nor intent to rob were contested, the probative value of the solicitations

evidence was solely as evidence that appellant had a propensity to rob, which the jury could only have viewed as evidence of identity. As set forth in the opening brief, admitting that evidence was prejudicial violation of appellant's rights pursuant to Evidence Code section 1101, and, more importantly, appellant's right to a fundamentally fair trial.

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IV

THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S STATEMENTS AS A GUEST SPEAKER AT THE MEETINGS OF ROBBERY INVESTIGATORS

In the opening brief, appellant argued that the trial court committed reversible error in admitting his statements to robbery investigators concerning his mental disposition in relation to his prior robberies. When asked what he would have done had a robbery victim resisted or interfered, appellant answered that he would have been willing to "take them out" or "blow them away." (16 RT 5689; 17 RT 5812, 5819.) Appellant argued that these historical, hypothetical statements were inadmissible because they did not fit within the state of mind exception to the hearsay rule, they were irrelevant to any material disputed fact, and they were more prejudicial than probative. (AOB 216-238.) Specifically, appellant challenged the admission of the statements as "generic threats," the theory on which they were allowed, because the statements did not reflect a present threat, but rather, described appellant's inclinations 15 years prior to the charged crimes; the victims of the charged crimes did not belong to the hypothetical threatened class; the referenced mental state was remote; and the statements were thus irrelevant. (AOB 224-232.)

Respondent disagrees. (RB 125.) Respondent acknowledges, however, that, consistent with all the participants' understanding, the questions posed at the gatherings and appellant's responses referenced past events. (See RB 134 & fn. 70, 133.) Further, there is no disagreement between the parties regarding the applicable law and the degree of caution that must be exercised in admitting this type of prejudicial propensity evidence. (RB 132-133.) Appellant submits that, by disregarding the

exclusively retrospective focus of the gatherings, the trial court failed to engage in the careful analysis required to distinguish statements of mental propensity from statements of present or future intent. The two may be, as here, easily confused.

Respondent counters that the contested statements were properly admitted under Evidence Code section 1250 as generic threats and were relevant to appellant's motive and mental state at the time of the charged crimes. With good reason, respondent abandons the prosecutor's contention, also rejected by the trial court, that the statements were admissible as "admissions" under Evidence Code 1220 as relevant to appellant's "intent, motive, preparation, deliberation towards robbery."[7] (17 RT 5748.) An admission is "an acknowledgment of some fact which tends to prove guilt" of the charged crime. (*Creutz v. Superior Court* (1996) 49 Cal.App.4th 822, 828.) The evidence was uncontradicted that appellant made no statements at either gathering of investigators that indicated an intention to commit future robberies; nor were future robberies the subject of the investigators' inquiries. (16 RT 5702, 5704, 5717.) The only admissions, if any, that appellant made related to past completed crimes, for which he had already served his sentence, and even as to these, his

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[7] As here, in *People v. Karis* (1988) 46 Cal.3d 612, the prosecutor contended that the defendant's statements that he would not hesitate to eliminate witnesses was admissible as a party admission under Evidence Code section 1220. (*Id.* at p. 635.) The Court, however, did not reach the question whether the statements were admissions, upholding their admission solely under Evidence Code section 1250. (*Ibid.*) All of the cases involving "generic threats" have relied exclusively on Evidence Code section 1250 as the ground for their admission. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016; *People v. Thompson* (1988) 45 Cal.3d 86, 109-11.)

statements were purely hypothetical. As such, the evidence at the 402 hearing failed to establish the foundational and relevancy requirements for admission pursuant to Evidence Code sections 1220 or 1250. The statements were therefore inadmissible under any theory. The trial court's contrary ruling was a prejudicial abuse of discretion requiring that the judgment be set aside.

A. Appellant's Answers to the Investigators' Questions Were Not Admissible as Generic Threats Because They Related to Past, Not Future, Events and to A Hypothetical Class of Victims that Did Not Include the Victims in this Case

1. Appellant's statements were not probative of his mental state at the time of the charged crimes

A trial court's determination of the admissibility of a statement as a "generic threat" under Evidence Code section 1250 must be guided by two principles. First, in general, the proponent of the evidence has the burden of establishing its relevance and the foundational requirements for its admission under an exception to the hearsay rule. (*People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Woodell* (1998) 17 Cal.4th 448, 464.) Evidence must be excluded where the proponent fails to make an adequate offer of proof. (See *Morrison*, *supra*, 34 Cal.4th at p. 724.) Second, with specific reference to "generic threat" evidence, where the prosecution seeks to introduce a defendant's statement regarding possible future criminal conduct, "the content of and circumstances in which such statements are made must be carefully examined in determining whether the statements fall within the state-of-mind exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence outweighs [its] potential

prejudicial effect." (*People v. Karis*, *supra*, 46 Cal.3d at p. 636.) Neither principle was honored in the trial court's ruling.

In its ruling, the court ignored the circumstances in which the statements were made and mischaracterized the evidence. First, the court failed to consider the most critical circumstance affecting both the questioners and appellant's mindset in relation to the statements, namely, the shared understanding that the questioning at both meetings where appellant spoke would be confined to past events.[8] Sergeant Voudouris's 402 hearing testimony was unequivocal on this point. (16 RT 5687, 5698 [appellant agreed to be interviewed only after Voudouris and he reached an understanding that he would only be asked questions "relative to his priors"].) Despite a lengthy discussion, the trial court did not once mention this decisive pre-condition to appellant's willingness to submit to law enforcement questioning. Then, in summarizing the evidence, the court misstated Brian Curley's hearing testimony. Lumping the earlier and later statements together, the court incorrectly described them all as expressions of present or future willingness to use force. Even respondent has acknowledged that the questions about resistance at the private security luncheon related to what appellant would have done in the past. (RB 134, fn. 70.) That was also the only reasonable interpretation of what transpired at the meeting with the sheriff's deputies, in light of the past crimes limitation on questioning, which Voudouris's trial testimony subsequently

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[8] Respondent asserts in passing, with no supporting argument or explanation, that appellant's understanding that questions at the seminar would be limited to past crimes "is of no consequence." (RB 134.) This assertion is illogical on its face, as it is tantamount to arguing that appellant's mental state is irrelevant to determining his mental state.

confirmed. (RB 134; 17 RT 5819.)

Respondent's first contention, therefore, proceeds on the incontestable assumption that appellant's statements related to actions he would have – but, in fact, had not – taken in the past. (RB 133.) Nevertheless, respondent contends that a conditional statement that, in the past, appellant would have "blown away" resisting robbery victims is no different in meaning than a statement that, in the future, he would blow them away. (RB 133.) First, the contention is not tenable as a matter of English grammar and usage. (www.e-grammar.org [explaining that "would" has no past tense, but "would have" followed by a past participle is the perfect conditional tense in English (e.g., I would have been or would have done) which can be used to speculate about the past situations which were theoretically possible, but did not happen in fact].) Second, respondent's contention finds no support in the case law.

Respondent cites *People v. Cruz* (2008) 44 Cal.4th 636, without explaining its relevance to this argument. (RB 133.) In *Cruz*, the defendant was convicted of killing a sheriff's deputy by shooting him in the back of head. This Court upheld the admission of a statement made by the defendant about three months earlier when, in also resisting arrest, he threatened to kill another sheriff's deputy in exactly the same way. (*Id.* at pp. 650-651, 671.) The Court held the earlier threat was admissible under the rationale of *People v. Rodriguez* (1986) 42 Cal.3d 730, 757, that a defendant's prior threats to kill a police officer may be admitted on the issue of intent when that defendant subsequently does kill a police officer.[9]

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[9] Unlike the statement in *Rodriguez*, the statement in *Cruz* was an individualized, not a generic, threat when it was made. (Compare *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 75 [defendant's statement that he "would

(*People v. Cruz*, *supra*, 44 Cal.4th at p. 671.)

This case is not remotely analogous to *Cruz*, which involved an actual, not a hypothetical, threat to kill a sheriff's deputy made under circumstances that were virtually identical to those present during the subsequent shooting. (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 650-651.) Here, by contrast, there was no actual, proximate threat to a potential victim or class of victims. Nor is appellant's case similar to other cases where generic threats have been found. In such cases, the threats, although conditional, were spontaneous, unambiguous expressions of a present intent to carry out the threatened actions during the commission of future crimes. (See, e.g., *People v. Lang*, *supra*, 49 Cal.3d 991; *People v. Karis*, *supra*, 46 Cal.3d at p. 636; *People v. Thompson*, *supra*, 45 Cal.3d 86; *People v. Rodriguez*, *supra*, 42 Cal.3d 730.) Here, there were only conjectural answers to hypothetical questions regarding prior conduct that had not, in fact, occurred. Without resorting to an impermissible inference of propensity, appellant's answers regarding hypothetical events during past crimes could not be interpreted as present generic threats to anyone.

In *Rodriguez*, which involved the killing of two highway patrol officers, the defendant had repeatedly expressed to friends, neighbors and

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kill *any officer* who attempted to arrest him,"which was admitted for intent where he subsequently killed two officers] with *People v. Cruz*, *supra*, 44 Cal.4th at p. 671 [defendant's threat to kill Deputy Dikes admitted for intent where he fatally shot Deputy Perrigo during a subsequent arrest].) The Court converted Cruz's statement from a specific to a generic threat, i.e., that the defendant intended to shoot all sheriff's deputies in the back of the head, by engaging in circular reasoning: the later shooting was used to infer that the earlier statement was generic, i.e . directed to all sheriff's deputies, not just Dikes, which then was used to prove the defendant's intent in the later shooting.

others that he hated the police and that he intended to kill any officer who attempted to arrest him. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 757.) On one occasion, a woman companion had physically prevented the defendant from reaching for a shotgun when an officer stopped his car. (*Ibid.*) In *Karis*, three days prior to the charged rape and shootings, the defendant had volunteered during a conversation with a friend that he kept a gun for self-defense, had been to prison, and would consider it self-defense to kill anyone who might send him back or, as paraphrased by the Court, he would not hesitate to eliminate witnesses if he committed a crime. (*People v. Karis*, *supra*, 46 Cal.3d at pp. 625-626, 634; see also *People v. Lang*, *supra*, 49 Cal.3d at pp. 1013-1016 [admitting evidence that when asked by a friend why he had carried around a handgun, the defendant pointed the weapon at the friend and replied that he would waste anyone who screwed with him; the same gun was used in the charged killing]; *People v. Thompson*, *supra*, 45 Cal.3d at pp. 107-110 [admitting in rebuttal the defendant's statement to a roommate that he would kill anyone who got in his way, where other evidence brought this victim within the scope of the defendant's generic threat].)

In all of the foregoing cases, the defendant made an unequivocal, unprompted statement to a friend or acquaintance under circumstances indicating that the defendant had every intention of making good on his threat. (See, e,g., *Karis*, *supra*, 46 Cal.3d at p. 625 [nothing in the record suggested that the defendant's statement made during a social conversation at the home of a friend was not trustworthy].) In some of these cases, the defendant was in possession of a weapon when he made the threatening statement or there was other corroboration, without considering the crime itself, that lent concreteness to the threats. (See, e.g. *People v. Rodriguez*,

supra, 46 Cal.3d at p. 756; *People v. Lang*, *supra*, 49 Cal.3d at p. 1013.)

Here, by contrast, the circumstances under which appellant's statements were made were antithetical to an inference of reliability. The statements were not voluntary disclosures to trusted friends. Rather, they were flip responses to hypothetical questions posed by persons – robbery investigators – who were categorically adverse to appellant, in his own words "a robber by trade." (16 RT 5704.) Appellant had no reason to be truthful with the investigators. In fact, he had a perverse incentive to exaggerate his criminality in order to make himself more valuable as a consultant. (16 RT 5696-5697 [if appellant did well at the free seminars, he might be able to make money as a consultant or advisor].) In short, appellant's untrustworthy speculation about past inclinations failed to meet any of the requirements for admission as generic threats.

Alternatively, respondent contends that Sergeant Voudouris's testimony at the 402 hearing made clear that the hypotheticals posed were in the present tense. (RB 133-134.) Respondent is incorrect. When first asked whether he specifically recalled any of the questions asked and answers given at the sheriff's seminar, Voudouris answered "*generally*, yes." (16 RT 5688.) When prompted by the prosecutor, Voudouris then described a question about "appellant's willingness to use force during a crime" and appellant's answer that he would be "willing to use whatever force it took" if someone tried to stop him. (16 RT 5688-5689.) Voudouris did not testify that either the question or the answer were reported verbatim. In fact, he restated that he would have to speak in generalities, rather than specifically, about questions on the subject. (16 RT 5689.) When next asked whether he remembered appellant specifically being asked what he would do if he faced resistance during a robbery, Voudouris offered that

appellant said "something to the effect" that he would be "willing to take them out." (16 RT 5689.) He then clarified, in contrast to his other testimony, that to the best of his knowledge "willing to take them out" was a direct quote. (16 RT 5689.)

Thus, contrary to respondent's contention, Voudouris never stated, much less made clear, even at the 402 hearing that appellant's hypothetical answers were in the future tense. Rather, Voudouris testified that his only verbatim recollection related to the phrase "willing to take them out," which has no tense. In contrast to Voudouris's imperfect recollection of what actually was said at the seminars stands his clear memory of agreeing with appellant that the questioning by the investigators would be limited to what had occurred in the past. (16 RT 5687, 5698.) In short, nothing in either Voudouris's or Curley's testimony at the hearing satisfied the prosecutor's burden to demonstrate that appellant's statements were reliable indicators of his future intentions, rather than mere conjectures about the past. As such, the statements did not qualify for admission as generic threats and, thus, were not relevant or admissible under Evidence Code sections 1101, subdivision (b), 1250 or 1252.

2. The Victims in this Case Did Not Fall Within the Category of Individuals Which Was the Subject of the Hypothetical Threats

In addition to showing that appellant's statements reliably reflected his present mental state and future intentions, the prosecutor also had the burden, under the generic threats theory, to demonstrate that the victims of the charged crime were brought within the scope of the threat. (*People v. Karis*, *supra*, 46 Cal.3d at p. 637, citing *People v. Lew* (1968) 68 Cal.2d 774, 778 ["Such a generic threat is admissible to show homicidal intent where *other evidence* brings the actual victim within the scope of the threat"

(italics added)].) Thus, to establish the admissibility of a purported threat to kill resisting victims, the burden was on the prosecution, not the defense, to demonstrate that the victims in this case resisted or obstructed appellant in the commission of the robbery. The trial court demanded, and the prosecutor presented, no proof of this foundational fact. Respondent begs the question by offering an irrelevant dictionary definition. (RB 135.) No matter how "resistance" is defined, nothing on the record remotely suggests that Manuel and Tudor resisted the robbery in any way.

3. Because Appellant's Statements Were Limited to Hypothetical Questions Related to Remote Prior Crimes, They Did Not Establish a Present Mental State

Statements are inadmissible under the generic threats theory where the evidence suggests that the threatening state of mind no longer existed at the time of the charged crime. (*People v. Karis*, *supra*, 46 Cal.3d at p. 637.) Because the court ignored the testimony that appellant's statements were directed to events that could have, but did not, occur 15 years earlier, it failed to address the effect of this lengthy lapse of time. Had the court done so, it would have concluded that appellant's retrospective responses did not support an inference concerning his present or future intentions or plans.

Respondent notes that lapse of time is just one factor in the inquiry whether a statement reflected a transitory or no-longer-existent state of mind. (RB 135.) This is true, but respondent's larger argument fails because nothing in the content of appellant's statements or the circumstances in which they were made supports the respondent's reconstruction of appellant's suppositions regarding his past inclinations into assertions of present intentions, irrespective of when the statements were made. (RB 135.)

Respondent's contention also fails because it is transparently fallacious. Specifically, respondent contends "while there was a lengthy gap between the time period in which he committed his prior crimes [robberies] and when he committed the Office robbery and murder, the removal of his period of incarceration [for robbery] considered with his immediate plans to commit robbery upon his release from prison was an almost continuous thread of his willingness to eliminate anyone who resisted during the course of the robbery." (RB 136.) The conclusion does not follow from the premise because, as respondent surely knows, the intent to rob is not remotely similar to the intent or "willingness" to kill; thus, the latter cannot be inferred from the former. The cases cited by respondent in support of this argument underscore its flaws.

Respondent relies on the court of appeal's decision in *People v. Spector* (2011) 194 Cal.App.4th 1335, for the proposition that even a lengthy lapse of time between a threatening statement and the time the threat is carried out does not preclude admission of the statement as a generic threat where the statement was part of a continuing pattern of threatening and violent behavior toward the class of persons, in Spector's case, women who were the subject of the threat. (RB 135-136.) In *Spector*, the prosecutor filled the 10-year gap between the defendant's threats to shoot women and the charged shooting of the female victim with abundant other evidence showing a continuing pattern of violent statements and acts towards women. (*People v. Spector*, *supra*, 194 Cal.App.4th at pp. 1396-1397.) Here, by contrast, the record contains no evidence of a long-standing pattern of conduct reflecting appellant's supposed willingness to "take out" victims who resisted during a robbery. Respondent identifies only one instance of an alleged generic threat to witnesses, that reported by

Jeri Baker, but then undercuts the probative force of it own argument by acknowledging Baker's serious credibility problems. (RB 135, 138.) Further, as Mary Webster's testimony showed, appellant's strategy for avoiding arrest was not to kill witnesses, but instead, to purchase disguises, put on temporary tattoos, wear bulky clothing and use Nu-Skin to avoid detection. (See 16 RT5790.) Because the "sincerity" of these witnesses, both scorned former girlfriends, was itself in doubt, their testimony was of little or no value in establishing the sincerity of appellant's statements. (16 RT 5787.) In any event, appellant's statements were inadmissible not so much because he was being insincere, but rather, because the subject of the statements was prior completed – not future contemplated – crimes.

Respondent's citation to *People v. Davis* (2009) 46 Cal.4th 539, is equally unhelpful to its argument. (See RB 136.) In *Davis*, this Court held that evidence of prior sexual crimes was admissible under Evidence Code sections 1101, subdivision (b), and 1108 (allowing evidence of predisposition to commit a sexual offense) because the prior crimes were similar to the charged crime and were not too remote, considering that the defendant had been incarcerated during most of the intervening time. (*Id.* at pp. 601-602.) Respondent seeks to "remove" appellant's period of incarceration without meeting the threshold requirement of relevance – namely, that the prior robberies showed appellant's willingness to "take out" resisting victims. Plainly, these priors were not sufficiently, if at all, "similar" in this critical respect, or the prosecutor would have presented evidence of the earlier robberies at the guilt phase, which he did not do.

In sum, the relevance of appellant's statements as other crimes evidence depended entirely on their first meeting the requirements for admission under the generic threats theory of Evidence Code section 1250:

that the statements pertained to contemplated future conduct in a hypothetical situation; and that other evidence brought the actual victim within the scope of threat. (*People v. Karis*, *supra*, 46 Cal.3d at p. 636; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 757.) Because the statements did not meet either of these requirements, as appellant established in his opening brief, the statements were not relevant to any disputed issue in the case and should have been excluded as impermissible propensity evidence under Evidence Code section 1101, subdivision (b). For this most basic reason, the trial court abused its discretion in admitting this evidence.

B. The Evidence of Appellant's Statements Was More Prejudicial than Probative

Appellant maintains that the minimal, if any, probative value of appellant's responses to the investigators' questions was substantially outweighed by the risk of prejudice. (AOB 232-234.) Respondent urges the opposite conclusion. First, respondent contends that the statements to the robbery investigators were not cumulative because, *even if not specifically admissible as a "generic threat,"* they bolstered the reliability and accuracy of appellant's statements to Baker. (RB 138.) The argument is perplexing, at best.

Appellant's statements were admitted as generic threats, and their relevance derived entirely from this specific theory of admissibility. There is no exception under sections 1250, 1101, subdivision (b) or any other Evidence Code section that permits the admission of one witness's extrajudicial statements to bolster another witness's testimony. Respondent's next contention, which recognizes that the statements were admitted as generic threats, is still puzzling because it comprises a lengthy fact-specific quotation from *Karis* that, on its face, is inapplicable here.

(RB 138.) In *Karis*, the probative value of the threatening language was greatly enhanced by two factors not present in this case: the threat unambiguously stated the defendant's present homicidal intention and was made only three days prior the charged crime. Here, in contrast, appellant's statements related to past, hypothetical dispositions and were made months before The Office robbery.

Inasmuch as these are respondent's only arguments in support of the trial court's section 352 ruling, no further reply is required. Appellant's challenges to the ruling are fully detailed in his opening brief.

C. The Admission of Appellant's Statements Resulted in a Miscarriage of Justice and Rendered Appellant's Trial Fundamentally Unfair

Appellant argues that the erroneous admission of his informational, non-threatening statements to the robbery investigators was prejudicial within the meaning of both the state Constitution and the federal Due Process Clause. (AOB 235-238.) Because the statements related to appellant's hypothetical mindset 15 years earlier, their only probative use was as evidence of his predisposition to violence.

In his opening brief, appellant fully addressed the weaknesses in the proof of his commission of the murders and the resulting importance of his statements in filling critical gaps to the prosecution's evidence. (AOB 96-120, 235.) Respondent counters that the prosecution presented overwhelming evidence of guilt and therefore any error in the admission of the statements was harmless under both state and federal law. (RB 138-139.)

Respondent does not address any of appellant's specific arguments. Nor does respondent mention the court's limiting instruction, and with good reason. The instruction neither cured the error in admitting the statements

nor diminished their prejudicial effect. Both Voudouris and Curley testified that the questions posed by the robbery investigators were in the past (conditional perfect) tense and that appellant's answers followed suit. (17 RT 5812, 5870.) Nevertheless, the court's instruction, in a clear misstatement of the evidence, changed appellant's answers to the future tense. (2 RT 7274; 23 RT 7615-7616 ["what defendant *would* do," "his reaction to a situation that *might* occur" (italics added)].) In so doing, the court substituted its own erroneous interpretation of the statements for the jury's independent determination of their import based on the evidence actually presented at trial. As such, the court's limiting instruction contributed to the prejudice and the ultimate unfairness of the proceedings. For these reasons, the judgment must be set aside.

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V

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT LAW ENFORCEMENT'S INVESTIGATION WAS INCOMPLETE

In the opening brief, appellant argued that the trial court violated state rules of evidence as well as appellant's state and federal constitutional rights to a fair trial and to present a defense by cutting off appellant's attempt to elicit Detective Stan Reed's testimony concerning the thoroughness of law enforcement's investigation of the murders here at issue. The trial court sustained the prosecutor's relevancy objections when defense counsel asked Reed whether he knew prior to trial of statements made by Steve Langford, Mary Webster's brother, that were inconsistent with Webster's testimony, regarding who retrieved the gun from the car and what appellant was wearing on the night of the murders. (21 RT 6973-6974.) These were two critical aspects of Webster's testimony and therefore of the prosecution's case. Reed's lack of awareness prior to trial of Langford's version of events on these two subjects was relevant to the thoroughness of law enforcement's investigation of the crime. The trial court's rulings violated appellant's right to present a defense. (AOB 239-251.)

Respondent does not dispute that the questions prohibited by the trial court were relevant or that the error, if committed, violated appellant's rights to a fair trial and to present a defense. Respondent's sole response is that the evidence that appellant was attempting to elicit was already before the jury. (RB 143-145.) Respondent is incorrect.

First, defense counsel's questions asked Detective Reed, the lead investigator of the charged murders, whether he was aware prior to trial that

Langford had stated that he was the one who got the gun out of the car. (21 RT 6973.) Contrary to respondent's contention, defense counsel's questions on this subject had not been "asked and answered," and Reed's previous testimony did not show that "Reed was completely unaware of [Langford's previous] version of events at the time of his investigation." (RB 144.) Rather, Reed's previous testimony established that he had not heard *from Langford himself* that he (Langford) had gotten the gun out of the car that night, but it did not establish whether Reed had learned of Langford's version of events from the prosecutor or the prosecutor's investigator or any other person participating in the investigation. The prohibited testimony would have provided a basis, otherwise lacking, for the argument that Reed had not been informed by others working on the investigation of evidence that was inconsistent with Webster's version of events, and that a fortiori, Reed did not investigate information that was inconsistent with the prosecution's theory of the case. (AOB 243.) As it was, the limited evidence about Reed knew from Langford's own statements did not provide a factual basis for that argument. Respondent's contention is without merit.

Second, defense counsel also asked Detective Reed about his awareness of Langford's statement that appellant changed his clothes at Webster's house on the night of the murders. (21 RT 6973-6974.) Respondent contends that Webster's testimony established that appellant had changed his clothes, although respondent acknowledges that Langford said appellant left Webster's house wearing tennis shoes, while Webster testified that appellant was wearing only socks, and argues that Webster's testimony therefore established the facts necessary to challenge the adequacy of the investigation. (RB 145.) Respondent misstates the record

and fails to appreciate the import of the testimony that counsel sought to elicit.

Webster testified that when appellant arrived at her house, he was wearing the pink and white striped shirt and the boots that were in evidence, as well as blue jeans, which were not in evidence. (15 RT 5000, 5007.) According to Webster, appellant removed his shirt and boots and left her house wearing a long-sleeved thermal shirt that Webster had loaned him, socks but no shoes and still wearing his blue jeans. (15 RT 5014-5016, 5020.) Langford testified that appellant came in wearing light-colored pants, a light-colored shirt and cowboy boots (20RT 6699), and that he changed into blue jeans, a t-shirt and tennis shoes (20 RT 6701). Contrary to respondent's contention, Langford's version of events was significantly different from Webster's. His description of the shirt that appellant was wearing when he arrived did not match that of the blood-stained shirt in evidence. His description of the pants appellant was wearing did not match Webster's testimony on that subject. And whether the shooter was appellant or not, Langford's testimony supported an inference that Webster had been in possession of the pants worn by the shooter during the murders, which she denied. (17 RT 5960-5961.) Contrary to respondent's contention, Langford's testimony was inconsistent with Webster's testimony in many highly significant respects, and those inconsistencies supported several possible inferences, including that Webster and Langford had committed the charged crime and framed appellant for them, and that Langford was unaware that, for whatever reason, Webster had not turned given the police the pants worn during the shooting.

Further, respondent ignores the fact that the import of the question that the court prevented defense counsel from asking was not the

inconsistency between Langford's and Webster's respective versions of events per se, as that had been established by their trial testimony. Counsel's question went to Reed's *awareness* of Langford's version of events prior to trial. If counsel had been permitted to elicit from Reed that he was unaware prior to trial of Langford's version of events, appellant would have had a far stronger basis for arguing that Reed had failed to investigate evidence inconsistent with Webster's version of events and that the investigation was sloppy and incomplete. Thus, contrary to respondent's contention, the court's ruling prevented appellant from eliciting evidence necessary to support his attack on the thoroughness of the investigation.

As set forth in the opening brief, the court's rulings were erroneous, as appellant's questions were relevant to the completeness of law enforcement's investigation, a principle respondent does not dispute. Contrary to respondent's contentions, the evidence which appellant sought to present had not been elicited from Reed or any other witness. By foreclosing appellant's attempt to elicit the testimony at issue, the trial court's error violated appellant's state and federal constitutional rights to a fair trial and to present a defense and the judgment must be reversed.

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VI

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY PERMITTING THE PROSECUTION TO PRESENT APPELLANT'S STATEMENT ON REBUTTAL BECAUSE IT WAS NEITHER RESPONSIVE TO, NOR MADE NECESSARY BY, APPELLANT'S DEFENSE

In the opening brief, appellant argued that the trial court abused its discretion when it permitted the prosecution to introduce statements that he made during his interrogation in rebuttal rather than as part of its case-in-chief. (AOB 252-270.) Appellant's statements did not actually rebut any evidence elicited by defense either through impeachment of the prosecution's witnesses or examination of its own witnesses. (AOB 256.) In view of the centrality of the statements to the prosecutor's case, it is reasonable to infer, as appellant has asserted, that the prosecutor's tactical decision to withhold the evidence until rebuttal had both the purpose and the adverse effect of surprising appellant and unfairly maximizing the statements' impact on the jury. (AOB 252, 256-257.) Accordingly, the trial court abused its discretion in permitting the prosecution to present the statements in rebuttal, the error was prejudicial and it violated appellant's due process right to a fundamentally fair trial. Respondent counters that appellant's statements were properly introduced in rebuttal to the evidence presented as part of appellant's case-in-chief, and hence there was no "sandbagging" by the prosecutor. (RB 145-157.) Respondent's argument is unpersuasive.

A. The Evidence of Appellant's Statement Was Improper Rebuttal

Respondent does not dispute appellant's recitation of the legal principles governing the admissibility of the proffered rebuttal evidence in

this case. Rather, its entire contention rests on this Court's observation in *People v. Coffman* (2004) 34 Cal.4th 1 that evidence may be admitted in rebuttal if it meets the requirements for impeachment on points the defense has put in dispute. (RB 153, citing *Coffman*, 34 Cal.4th at p. 68-69 ["Because Coffman testified that she had nothing to do with what happened in the shower . . . and denied knowing that Marlow had killed Novis in the vineyard, the prosecutor was entitled to rebut her testimony with prior inconsistent statements and admissions to Long."].) This observation does not aid respondent nor does it, to any degree, negate appellant's argument that the statements at issue did not meet the threshold requirements for rebuttal evidence. Respondent's attempt to demonstrate the requisite correspondence between the statements and "points the defense has put in dispute" fails across the board.

Appellant's defense was consistent throughout the trial: that (1) three of the prosecution's critical witnesses had a motive to fabricate their testimony (e.g., 22 RT 7551: "Hell hath no fury like a woman scorned"]); (2) the witnesses' descriptions of appellant's clothing were inconsistent (22 RT 7409-7411); and (3) the unidentified blood found on the shirt and boots could not be explained by the shootings, and it was possible that someone had deliberately put blood from the scene on them (19 RT 6494-6507; 22 RT 7390-7391). Appellant's cross-examination of prosecution witnesses and the testimony of his own witnesses conformed to these three theories of defense. None of the proffered statements rebutted these defenses except insofar as they were admissions of guilt.

1. Appellant's statement that he had seen news coverage of the killings at The Office

In his opening brief, appellant argued that his statement that he had

seen news coverage of the shootings on the morning of his arrest and interrogation was not proper rebuttal. (AOB 257-258.) Respondent contends that the statement rebutted the testimony of a defense witness, investigator Tony Gane, that there were no listings for local news between the hours of 9:00 a.m. and 12:00 p.m. on that day.[10] (RB 154.) Respondent is mistaken. Appellant's statement was not inconsistent with nor made necessary by Ganes's testimony. (AOB 258.) It was not proper rebuttal.

2. Appellant's statement that he was at The Office on the night of the crime

Appellant argued in the opening brief that his statements admitting that he was present at the Office twice on the day of the shootings, once with Sue Burlingame and later alone, were wrongly allowed in rebuttal. (AOB 258-263.) These statements were "a material part of the case in the prosecution's possession that tends to establish the defendant's crime," not "evidence made necessary by the defendant's case." (*People v. Daniels* (1991) 52 Cal.3d 815, 859 [where the defendant testified that he had not been present at the murder scene, evidence showing that he had been present at the murder scene was improper rebuttal, "*since proof of his presence was an essential part of the prosecution's case-in-chief*"

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[10] In *People v. Mosher* (1969) 1 Cal.3d 379, cited in *Coffman,* the Court criticized the prosecutor's use of a crucial witness in rebuttal concerning the defense of diminished capacity presented during the defendant's case-in-chief when the prosecution could not have been surprised by the defense and the witness was available and known to the prosecution during its case-in-chief. (*Id.* at p. 399 ["Under such circumstances the prosecution cannot persuasively contend that it should not have introduced the doctor's testimony as part of its own case."].) Similarly here, the prosecutor could not credibly maintain as to any of the statements in question that he was unaware of appellant's defense before it was presented.

(emphasis added)].)

Respondent makes no attempt to defend the trial court's admission of appellant's statement that he was at The Office with Sue Burlingame.[11] Respondent addresses only appellant's statement that he was at The Office until about 8:55 p.m. on the night of the murders. Respondent contends that the latter statement was admissible to rebut the defense evidence attacking Grimes's description of the clothing appellant wore the night of the murders and the purported inference that Grimes fabricated appellant's appearance at The Office due to bias. (RB 154.) This contention is unavailing for several reasons, the most obvious being respondent's near-concession that the defense did not challenge Grimes's testimony regarding the time of appellant's presence at the office.[14] (RB 154-155; see 11 RT 4186-4187.) Rather, the defense sought to impeach Grimes's description of appellant's clothing based on his prior differing descriptions, as well as the conflicting descriptions of the clothing by other witnesses. (11 RT 4198-4201.)

Respondent next resorts to speculation that the jury could have interpreted appellant's targeted attack on Grimes's testimony as an entirely different defense of deliberate misidentification based on bias. (RB 155.) This is similar to, though not precisely the same as, the trial court's rationale for admitting the statement which was based on speculation

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[11] Because of the absence of any argument by respondent regarding the Burlingame statement, appellant stands on the argument in his opening brief. (AOB 263.)

[14] No competent attorney would have attacked Grimes's testimony regarding the fact or time appellant's presence at the Office knowing that appellant had made statements admitting his presence there and, pursuant to the court's ruling, these statements were admissible in the prosecution's case-in-chief.

regarding appellant's closing argument, rather than the jury's interpretation of the evidence. (RB 155; 21 RT 7232.) Neither conjecture is supported by the record.

Defense counsel did not remotely suggest that Grimes had misidentified appellant because he was biased against him. Indeed, when counsel later argued that Grimes was biased against appellant by virtue of his friendship with the victims, he did so to explain why Grimes had changed his description of the clothing between his original *true* statement and his testimony at trial. (22 RT 7428.) Defense counsel affirmatively adopted Grimes's original description of appellant's behavior and clothing as evidence negating appellant's guilt. (22 RT 7423-7228.)

Finally, respondent argues that appellant's statement was not a material part of the prosecution's case because there was other "sufficient evidence of appellant's presence at The Office." (RB 155.) This argument is not reasonable as a matter of law or fact. Materiality in this context is not determined by the strength of the prosecution's case, but rather, by whether the proffered rebuttal is really integral to the case for guilt. As this Court noted in *People v. Carter* (1957) 48 Cal.2d 737, proof of the defendant's presence at the scene of the crime is an essential part of the prosecution's case-in-chief. (*Id.* at pp. 753-754; see also *People v. Robinson* (1960) 179 Cal.App.2d 624, 631 [finding that the defendant's "qualified confession" was not properly admitted on rebuttal where the "alleged confession was offered to establish facts constituting guilt; the impeachment feature was incidental and comparatively unimportant."].)

Here, the impeachment value of appellant's statement was trivial, while its probative value – admitting not only that he was at The Office but also how late he stayed there – was substantial. (Cf. *In re Cox* (2003) 30

Cal.4th 974, 1032 ["as the United States Supreme Court has recognized, evidence of a confession has . . . a 'profound impact on the jury'"]; *In re Sassounian* (1995) 9 Cal.4th 535, 548 ["confessions can provide the prosecution with an 'evidentiary bombshell which shatters the defense' "]; *People v. Bradford* (2008) 169 Cal.App.4th 843, 855.) Respondent's contention is wholly belied, moreover, by the prosecutor's demonstrable need, as reflected in his closing argument, for appellant's admission to prove guilt. (22 RT 7318-7319 ["But how many different ways are there that we can actually prove that . . . [appellant] murdered Val Manuel and Gary Tudor? . . . The defendant told Reed and Edwards that he was at The Office at approximately 8:55 in Jerri Baker's car parked near the white Camaro"].) In basing its admission of the statement on an unfounded conjecture regarding appellant's argument, while ignoring its predictable misuse by the prosecutor, the trial court abused its discretion.

3. Appellant's statement that he was driving Jerri Baker's Ford Probe on the night of the murders

In the opening brief, appellant argued that his admission that he drove Jerri Baker's gray Ford Probe to The Office was not admissible on rebuttal because it did not rebut the defense case as it related to Anita Dickinson's testimony that she noticed an unfamiliar car in The Office parking lot on the night of the killings. (AOB 263-266; 11 RT 4240-4245.) When shown a photograph of Baker's car, Dickinson testified only that it looked similar to the one she saw in the parking lot because she "just got a glimpse of that car." (11 RT 4244-4245.) Dickinson also could not pinpoint the time she saw the unfamiliar car, only that it was between 7:30 and 8:45 in the evening. (11 RT 4240.)

Respondent counters that appellant's statement properly rebutted the

defense evidence "attacking the presence of Baker's car at The Office on the night of the murders." (RB 156.) The defense testimony in question, by investigator Gane, was limited to an accurate description of the height and length of a Ford Probe relative to a Camaro. (20 RT 6823-6824.) If impeachment at all, Gane's testimony was a minor corrective to Dickinson's inexact and varying descriptions of the car. Like appellant's admission regarding the time he returned to The Office, appellant's statement regarding the Ford Probe was minimally impeaching, but substantially probative of guilt in establishing appellant's presence at the crime scene. (See *People v. Carter*, *supra*, 48 Cal.2d at pp. 753-754.) The prosecutor's closing argument again proves the point – that the admission was introduced in rebuttal, not for impeachment, but for maximum impact on the jury in deciding guilt. (See, e.g., 22 RT 7319.)

4. Appellant's statement regarding the clothes and the blood on the clothes

Appellant has argued that his interrogation answers regarding the bloodstained clothing was wrongly admitted in rebuttal because the statements did not rebut his defense that the blood could have been planted. (AOB 266-269.) The first part of the statement, that the blood came from shaving, was arguably evidence of consciousness of guilt that, particularly given the prosecution's advance knowledge of the defense (see, e.g., 11 RT 4157-4163), should have been presented in its case-in-chief. Similarly, the second part of appellant's statement, that the clothes were his, was a critical admission, so used by the prosecution, that should not have been withheld until rebuttal. Because the prosecutor had advance notice of the defense and fully appreciated the value of appellant's statements in proving guilt (22 RT 7331-7334), the only reason to delay introducing the statements was

to ensure that this was the last evidence the jury heard before retiring to deliberate. (*People v. Carter*, *supra*, 48 Cal.2d at p. 754 ["Restrictions are imposed on rebuttal evidence . . . to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of trial."] In allowing the prosecutor to thus gain an unfair advantage by manipulating the order of proof, the trial court abused its discretion.

Respondent acknowledges that the statements were material to the issue of whether appellant wore the bloodstained clothing on the night of the murders. (RB 156.) Appellant agrees. This is precisely the reason the evidence should have been presented in the prosecution's case-in-chief. Nonetheless, respondent, quoting the trial court, argues that the statements were properly admitted in rebuttal as they "would tend to rebut" the defense that the blood on the clothing had not been produced by the shootings because, if appellant were wearing the clothing that night, they "could not have been smeared through the victims' blood" by someone else." (RB 156-157; 21 RT 7249.) This presumes that appellant disputed that the clothing was his. He did not. The defense theory that the blood might have been planted rested on criminalist Peter Barnett's expert opinion that the bloodstains found on the shirt and boots could not be explained by the two shootings, and that nothing showed that the shirt and boots had been worn at the same event. (19 RT 6490-6507.) Appellant's ill-advised and somewhat flippant response that the bloodstains on the shirt, which he had not yet been shown, came from a shaving accident, adding that he healed quickly, hardly rebuts Barnett's expert analysis based on his examination of all the relevant crime scene evidence. In short, appellant's statements regarding the clothing had, at best, minimal value as rebuttal, compared to their substantial probative force as admissions of guilt.

Respondent repeatedly cites to *People v. Young* (2005) 34 Cal.4th 1149 for the proposition that testimony that reinforces a part of the prosecution's case that has been impeached may be admitted in rebuttal, but respondent ignores the attendant concerns acknowledged by this Court. (RB 153, 154, 155, 157; *Id.* at p. 1199.) In *Young*, this Court upheld the admission of rebuttal testimony to corroborate the testimony of a prosecution witness who had been impeached by the defense in cross-examination and in its own case with a prior inconsistent statement. (*Ibid.*) The witness had testified in the prosecution's case-in-chief that the defendant exited the driver's side of the vehicle. (*Id.* at p. 1198.) However, in both her oral and written statements to the police, she had placed defendant on the passenger side. (*Id.* at pp. 1198-1199.) The trial court allowed the prosecution to call another percipient witness to testify on rebuttal that she also had seen the defendant exit the driver's side. (*Id.* at p. 1199.) In holding there was no abuse of discretion, this Court emphasized the trial court's finding that the rebuttal witness's testimony did not raise the concerns or warrant the restrictions set forth in *People v. Carter*. (*Ibid.*, citing *People v. Carter*, *supra*, 48 Cal.2d at pp. 753-754 [restrictions on rebuttal evidence (1) avoid juror confusion; (2) prevent prosecutor from unduly emphasizing impact of certain evidence; and (3) avoid unfair surprise to defendant by confronting him with crucial evidence late in the trial].) This finding was supported by the fact that the rebuttal was limited to a single inconsistent statement by the prosecution's witness which had been directly contradicted by testimony in the defense case-in-chief.[15]

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[15] In *People v. Young* and the other cases cited by respondent, the rebuttal evidence specifically contradicted testimony presented in the defense case. (*People v. Young*, *supra*, 34 Cal.4th at p. 1198 [prosecutor

Here, by contrast, the rebuttal evidence clearly implicated the concerns discussed in *Carter* and *Young*. Mary Webster was not impeached by a prior inconsistent statement regarding the origins of the clothing. Barnett's expert opinion did not contradict any statement in Webster's testimony, but rather, raised other possibilities as to the source of the blood. As such, appellant's statements did not specifically rehabilitate Webster or refute Barnett. His statements were corroborative of Webster only because they were, as urged by the prosecutor, highly damaging admissions of guilt. Any experienced prosecutor would have understood that as admissions, the statements should have been presented in his case-in-chief, but then their impact could have been blunted by the defense case. By withholding the evidence until the end of the case, the prosecutor maximized its effect on the jury and unfairly surprised appellant who would not have expected that his statements would be admitted in rebuttal, given that he had not testified. For these reasons, appellant's statements were not proper rebuttal under *Carter* or even *Young*.

B. Reversal Is Required

In freely admitting appellant's statements without considering the restrictions on the prosecutor's withholding material evidence of guilt until

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argued that the proffered testimony was proper to rebut *evidence presented by the defense in its case-in-chief* that corroborated its impeachment of the prosecution witness]; *People v. Coffman, supra*, 34 Cal.4th at pp. 68-69 [where defendant testified that she had nothing to do with what happened in the shower, prior inconsistent statements and admissions were proper rebuttal]; *People v. Crew* (2003) 31 Cal.4th 822, 854 [where defendant introduced mitigating evidence of his good conduct in prison, testimony about the defendant's plan to escape from jail was proper rebuttal].) None of the cited cases allowed rebuttal testimony based on defense cross-examination generally challenging a prosecution witness's veracity.

rebuttal, the court abused its discretion. For the reasons set forth above in Argument I.E., the error was prejudicial under both the state and the federal constitutional standards of review.

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VII

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY BY RESTRICTING DEFENSE COUNSEL'S VOIR DIRE ABOUT SPECIFIC MITIGATING FACTORS

In his opening brief, appellant challenged the trial court's ruling, made midway through jury selection, that defense counsel could no longer ask whether prospective jurors could consider specific mitigating factors such as poverty or abuse in determining whether to impose death or life imprisonment without the possibility of parole. (AOB 271-295.) This decision to restrict voir dire was an abuse of discretion resulting in inadequate voir dire and a potentially biased jury in violation of appellant's constitutional rights to trial by an impartial jury (Cal. Const., art. I, §§ 15, 16; U.S. Const., 6th & 14th Amends.), and it warrants reversal of the death sentence. Respondent contends there was no error and, if there were error, it does not require reversal. (RB 157-167.)

Respondent accepts, as it must, that "poverty and abuse are mitigating factors for a juror's consideration (§ 190.3, subd. (k)). . . ." (RB 164.) Indeed, the prosecutor realized that the essential question about the jurors in the penalty phase was "can they consider, listen to, and will they consider, not be closed to these different forms of [mitigating] evidence." (6 RT 2548; see AOB 283.) And the trial court recognized that jurors who could not consider appellant's mitigating evidence at the penalty phase would be excluded. (6 RT 2559-2560; see AOB 283.) Nevertheless, respondent disputes that there was state law and federal constitutional error when the trial court decided to preclude defense counsel from asking questions that already had exposed bias in one prospective juror – the inability to consider evidence of an economically disadvantaged childhood

– which led to that juror's exclusion for cause. (RB 164, 166; see AOB 272-273.)

A. The Trial Court Improperly Restricted Defense Counsel's Voir Dire on Mitigation, Resulting in Inadequate Voir Dire and a Potentially Biased Jury

The issue, as the parties agree, is whether the trial court struck the correct balance between permitting defense counsel "to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence" (*People v. Cash* (2002) 28 Cal.4th 703, 720-721) and not allowing counsel to ask a question that is "so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented" (*id.* at pp. 721-722). (See AOB 281-282, 287-288; RB 157, 163.) Appellant submits that defense counsel's questions fell within the former, permissible category, while respondent asserts they came within the latter, impermissible category. As explained in the opening brief, the trial court's ruling was based on two erroneous findings (see AOB 285-289), and respondent does not overcome that showing.

1. The trial court mistakenly found that defense counsel's voir dire questions about specific mitigating factors did not reveal hidden bias

As appellant demonstrated in his opening brief, the trial court's finding that defense counsel's questions did not reveal hidden bias (see 6 RT 2546) is plainly mistaken given the trial court's exclusion of prospective juror Warren for cause based on his answers to the same type of questioning

that it later abruptly forbade counsel to ask. (AOB 273-274, 285-286.) In arguing against the prosecutor's sudden objection to what had been routine voir dire, defense counsel pointed out that their inquiry "had revealed biases that would never ever have been discovered" without their questions about specific mitigating factors such as poverty and abuse. (6 RT 2545.) Undoubtedly, prospective juror Warren, who had been excluded that same day, was fresh in counsel's mind. (6 RT 2438.) And his voir dire examination is instructive. Mr. Warren's bias was not revealed in response to a general question whether he could consider appellant's background, character or any extenuating circumstances as factors in mitigation. (See 6 RT 2425, 2433, 2436.) Rather, it was in response to questions about such specific mitigating factors that prospective juror Warren stated that he would not consider a defendant's economically disadvantaged childhood or abuse at an earlier age or alcohol abuse as explanatory or mitigating factors. (6 RT 2429-2430; see AOB 272-273.)

Respondent offers two points in answer to appellant's strong showing that the voir dire questions defense counsel had been asking some jurors, but was later barred from asking others, were effective in revealing bias. It attempts to discount the reason why Warren was excluded on the ground that his "responses essentially indicated that he was 'absolutely closed' to all mitigating evidence. (5 RT 2433, 2437.)" (RB 164.) This response is curious because the record passages respondent cites do not show Mr. Warren stating or agreeing that he was "absolutely closed" to all mitigating evidence, nor did the trial court so find. But even accepting that description as fairly supported by the record, it serves to discredit – not support – the trial court's restriction on voir dire.

The key fact, as noted above but ignored by respondent, is that Mr.

Warren disclosed his inability to follow the law in response to specific questions about mitigating evidence, but not in response to general ones. After Mr. Warren stated he would not consider particular kinds of mitigating evidence (6 RT 2429-2430), the prosecutor questioned him in general terms about whether he "could listen" to "background evidence on the defendant . . . and whatever aggravating evidence would be . . . and after listening to it, determine what weight to give it." (6 RT 2433.) Mr. Warren responded, 'yes, I would be willing to listen to both sides" and further stated there was no reason he could not be a fair and impartial juror. (6 RT 2433.) On follow-up voir dire, defense counsel tried to clarify Mr. Warren's prior statements that he would not consider some kinds of mitigating evidence. (6 RT 2435-2436.) Using the language of CALJIC No. 8.88, the trial court then explained to Mr. Warren that the jury was entitled to consider any "circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and "any sympathizing or other aspect of the defendant's character or record . . . as a basis for a sentence of less than death." (6 RT 2436.) The court then asked if Mr. Warren could consider those things, and Mr. Warren responded, "Yes, I could." (*Ibid.*) Defense counsel followed with one further question, asking whether Mr. Warren could meaningfully consider factors such as a person's poor upbringing, and Mr. Warren stated, "I honestly don't know." (6 RT 2437.) Almost immediately thereafter, Mr. Warren was excluded for cause on appellant's challenge with no discussion and no objection by the prosecutor. (6 RT 2437-2438.)

Mr. Warren's voir dire confirms the importance of defense counsel's questions about specific mitigating factors, questions that the trial court prohibited later the same day. When asked directly if he would consider

evidence of poverty or abuse, Mr. Warren said he would not. When asked generally about considering extenuating circumstances or background evidence, Mr. Warren's answer did not reveal his inability to consider the very types of mitigating evidence that both the trial court and prosecutor at trial, as well as respondent on appeal, have agreed must be considered by a juror at the penalty-phase of a capital trial. (See AOB 280-281 [discussing federal constitutional and state statutory law].) Mr. Warren's voir dire demonstrates that, contrary to the trial court's and respondent's views, questions about a prospective juror's ability to consider mitigating evidence, couched in general the terms of CALJIC No. 8.88, were inadequate to guarantee appellant a penalty trial by 12 impartial jurors. (See AOB 277-278, citing 6 RT 2551.) The terms "extenuating circumstances," "background" and "character" may be sufficient to guide a jury's weighing of mitigating evidence and its decision-making after hearing all the penalty-phase evidence and listening to closing arguments. But, because these general terms do not convey the types of evidence that may be presented in mitigation, they are inadequate to ferret out before trial biases prospective jurors may hold, perhaps unacknowledged even to themselves, that render them unable to follow the law and consider all the mitigating evidence a defendant offers in support of his plea for a sentence less than death. (§ 190.3, factor (k); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114; *In re Lucas* (2004) 33 Cal.4th 682, 716, 735; see AOB 280-283.) The trial court was simply incorrect in finding that defense counsel's questions did not disclose hidden biases.

In addition, respondent opines that appellant's observation that prospective jurors understand there is one right answer – "yes" – to general questions about whether they will consider mitigating evidence or the

defendant's background (AOB 284-285) also applies to questions identifying a specific mitigating factor. (RB 164.) This assertion, however, ignores the lesson to be drawn from the voir dire and exclusion of prospective juror Warren, where, as just discussed, general questions did not reveal his disqualification, but specific questions did.

2. The trial court mistakenly found that defense counsel's voir dire questions about poverty and abuse were misleading and asked prospective jurors to prejudge the facts

There was a second fallacy underlying the trial court's ruling: the trial court mistakenly found that the voir dire questions about considering poverty and abuse "had a tendency to be misleading" and also asked the prospective juror to "prejudge the fact: Does poverty outweigh or could it possibly outweigh multiple murder and murder committed during the course of robbery." (6 RT 2559; see AOB 280, 286-289.) Respondent repeats these refrains (RB 163-164), but does not show them to be true. The trial court and respondent refer to two separate concerns: one about the voir dire questions being misleading and the other about the questions seeking prejudgment of penalty facts. But they appear to allege a single, inter-related defect, i.e. that the questions were misleading because they asked prospective jurors to prejudge some issues. Respondent contends that the precluded defense voir dire "was misleading as it asked the potential jurors to determine whether poverty and abuse in general, without knowing anything else about these circumstances, could mitigate against a penalty of death for double murder and robbery." (RB 163-164.) Whether phrased as a single finding or separate findings, the trial court's premise was incorrect and, consequently, it erroneously limited appellant's voir dire in violation of state law and the Sixth and Fourteenth Amendments.

As appellant set forth in his opening brief, defense counsel's questions inquiring whether prospective jurors could carefully consider specific mitigating factors, such as poverty or abuse, did not ask that they indicate how much weight, if any, they would give to such evidence, did not ask how they would assess such evidence compared with the aggravating evidence the prosecution might present, and did not otherwise ask how such evidence might affect their determination of the appropriate penalty. (AOB 288.) The defense voir dire questions sought to find out whether prospective jurors *could* consider constitutionally-recognized categories of mitigating evidence, which did not involve prejudging any penalty-phase fact or issue. These questions did not ask whether prospective jurors *would* credit the evidence as mitigating in fixing punishment, which would involve such prejudgment. (See AOB 276.) Respondent does not address this important distinction.

On this prejudgment point, appellant's case is different than those discussed in his opening brief, but overlooked by respondent, in which voir dire restrictions about mitigating factors have been upheld (AOB 288), and also is different than more recent decisions of this Court upholding voir dire limitations. (See, e.g., *People v. Tate* (2010) 49 Cal. 4th 635, 655 [no error in precluding defense counsel from using a detailed, fact-based script to ask prospective jurors "whether, if it were proved beyond reasonable doubt that (1) the defendant kicked in the victim's back door and entered her home with intent to rob, (2) he murdered the victim during that burglary and robbery, (3) the victim died of multiple stabbing and puncture wounds and multiple blunt instrument blows, (4) the defendant severed the victim's ring finger and took her wedding rings, and (5) the victim's adult son discovered her body, the prospective juror would automatically impose either death or

life without parole as a penalty"]; *People v. Butler* (2009) 46 Cal.4th 847, 858 [no error in precluding defense counsel from asking whether any juror would automatically vote for death, if he or she knew about an uncharged jail killing, where jurors had been informed that the case involved multiple killings].)

Although defending the trial court's decision to bar voir dire on specific mitigating factors, respondent says nothing about this Court's very different position in allowing voir dire about victim impact evidence, which is an aggravating factor under section 190.3, factor (a). In his opening brief, appellant pointed out the inconsistency in the trial court's approach to voir dire about mitigating and aggravating evidence, demonstrated there was no principled basis for the court's disparate treatment of voir dire based on the type of evidence counsel sought to explore, and argued that the order permitting voir dire about victim impact evidence underscored its error in precluding voir dire about poverty and abuse. (AOB 280, 287-289.) If voir dire about victim impact evidence, a type of factor (a) aggravation, is not misleading and does not seek prejudgment of penalty-phase facts, then neither is voir dire about poverty or abuse, which are types of factor (k) mitigation. Appellant reads respondent's silence on this point as a tacit admission that appellant's argument is correct.

3. Respondent does not effectively distinguish the cases on which appellant relies or effectively counter his arguments

In addressing appellant's claim of error, respondent attempts to dismiss his reliance on *People v. Noguera* (1992) 4 Cal.4th 599 and *People v. Cash*, *supra*, 28 Cal.4th 703. (RB 164-166.) Its contentions should be dismissed as unpersuasive. In *Noguera*, this Court rejected the defendant's contention that the prosecutor's inquiry asked the prospective jurors to

prejudge the facts when the questions asked whether they would be able to impose a death sentence on a defendant who was 18 or 19 at the time of the homicide and in a case where there was a single victim rather than multiple murders. (*People v. Noguera*, *supra*, at p. 645; see AOB 289-290.) The Court upheld the voir dire questions as proper because they were relevant to and aided the prosecution's exercise of a challenge for cause. (*People v. Noguera*, *supra*, at p. 646.) Respondent contends that, "unlike *Noguera*, defense counsel's question were too abstract and potentially misleading" and "too general in the sense that there were no accompanying facts to give these factors any meaning." (RB 165.) This repeats an earlier claim that asking prospective jurors about poverty and abuse, without more, did not tell them much. (RB 163-164.) But defense counsel's questions in this case, asking whether prospective jurors could consider mitigating factors such an upbringing in poverty and childhood abuse, were no more abstract than those in *Noguera*, asking whether prospective jurors could consider imposing a death sentence on a young defendant or one who had killed only one person. In both cases, the questions struck the right balance between being too abstract and too case-specific. They addressed categories of potentially mitigating evidence – youth and single victim in *Noguera* and poverty and abuse in this case – without delving into the detailed description of the facts of the case to be tried. Had defense counsel here attempted to ask questions about the mitigating factors of poverty and abuse in a more detailed manner tailored to the particular facts of appellant's mitigation case, respondent undoubtedly would argue they were too specific rather than too general. (See, e.g., *People v. Tate*, *supra*, 49 Cal.4th at p. 655.)

Respondent seeks to distinguish *Cash* on two points, both of which

appellant addressed in his opening brief. As a preliminary matter, appellant cited *Cash* for the legal principle it announced, but did not analogize the disputed voir dire in his case to that in *Cash.* Instead, he relied on several cases discussed in *Cash* that, like *Noguera*, found voir dire about specific mitigating factors appropriate to determine whether prospective jurors hold views about the potential mitigating evidence that substantially impair their ability to serve on a capital jury. (AOB 289, discussing *People v. Ervin* (2000) 22 Cal.4th 48, 70-71, *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773, *People v. Pinholster* (1992) 1 Cal.4th 865, 916-917.) Respondent does not attempt to distinguish any of these cases.

Respondent first notes that *Cash*, unlike this case, involved a blanket rule restricting voir dire to the facts appearing on the face of the charging document. (RB 165.) But in his opening brief, appellant readily acknowledged that the trial court ruling here did not impose an absolute bar on inquiry into the subject of mitigating evidence. (AOB 281-282.) He explained that nonetheless the trial court's order limiting inquiry to questions about appellant's "background" or "extenuating circumstances" and barring all reference to specific mitigating factors severely restricted defense counsel's ability to detect prospective jurors who could not follow the law on mitigation. (AOB 282.)

Respondent also contends that in *Cash*, but not in appellant's case, "the challenged factors involved mitigating circumstances and not a general fact or circumstance that would cause jurors to vote for the death penalty." (RB 166.) Again, respondent apparently overlooks the argument in the opening brief where appellant explained that the difference between the questions in his case and the cases he discusses is not decisive because in both situations the questions sought to determine the same thing – whether

jurors' views about potential mitigating factors disqualified them from serving on a capital case. (AOB 291.) Asserting a point appellant already has refuted, particularly without responding to his argument, fails to justify the trial court's sudden decision to restrict appellant's voir dire.

Finally, respondent contends that simply listing factors such as poverty and abuse "without providing any additional details is tantamount to asking the jurors whether they would consider appellant's 'background' and 'extenuating circumstances' in mitigation which is what was done in this case." (RB 164; see also RB 167 [repeating the same point].) But that is an erroneous equation as the voir dire and exclusion of prospective juror Warren, once again, proves. As discussed in section A.1., above, Mr. Warren responded quite differently to questions asking whether he could consider appellant's background and extenuating circumstances (6 RT 2433, 2436) and those asking whether he could consider an "economically disadvantaged childhood," "abuse at an earlier age" or "alcohol abuse" (6 RT 2429-2430). His answers to the former qualified him to serve on appellant's jury, whereas his answers to the latter disqualified him. Common sense suggests that if, as respondent posits, the questions defense counsel wanted to continue asking were equivalent to those the trial court permitted him to ask, there would have been little reason for the prosecutor's mid-jury-selection objection and little reason for defense counsel to vigorously oppose the trial court's order precluding voir dire on the specific mitigating factors of poverty and abuse. Simply stated, the record in this case undermines respondent's contention that asking whether a prospective juror could consider a defendant's background as mitigating evidence was the same as asking whether the juror could consider a defendant's childhood poverty or abuse as mitigating evidence.

The trial court did not strike the right balance in prohibiting appellant from asking whether prospective jurors could consider specific mitigating factors such as poverty and abuse. As this Court has stated, "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721.) That was what appellant sought and the trial court denied. The prosecutor assumed that the jurors "will be opened minded enough to consider the types of evidence" presented at the penalty phase. (6 RT 2545.) But defense counsel, with good reason, wanted to make sure they would. Defense counsel knew, and the voir dire of prospective juror Warren proved, that general questions did not reveal bias, while specific questions did. Appellant was entitled to find out if all the jurors who might sentence him could consider his mitigation case. The trial court erroneously denied him this right in violation of his state and federal constitutional rights to trial by an impartial jury.

B. The Trial Court's Error in Restricting Voir Dire On Specific Mitigating Factors Requires Reversal

In his opening brief, appellant explained that the trial court's error requires reversal of appellant's death sentence whether the reversal-per-se standard, the *Chapman* (*Chapman v. California* (1967) 367 U.S. at p. 18.) standard, or the state-law standard is applied. (AOB 292-295.) Respondent, like appellant, notes the two reasons this Court has identified for finding an error in restricting death-qualification voir dire to be harmless. (Compare AOB 293-295 and RB 167 [both discussing *People v.*

Cunningham (2001) 25 Cal.4th 926].) Respondent concedes that one reason does not apply to appellant's case: the defense was not permitted "'to use the general voir dire to explore further the prospective jurors' responses to facts and circumstances of the case . . . .'" (RB 167, quoting *People v. Cash*, *supra*, 38 Cal.4th at p. 722, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, internal quotation marks omitted; see AOB 294.) By its silence, respondent appears to concede that the other reason for finding this type of error harmless also does not apply to appellant's case. The record here does not establish that "'none of the jurors had a view about the circumstances of the case that would disqualify that juror." (RB 167 [quoting *Cash*, but offering no argument, on this reason]; see AOB 294.) Rather than explain why any error would be harmless, respondent simply restates its position that there was no error. (RB 167 [appellant was allowed to ask whether prospective jurors "would consider appellant's background, character or extenuating circumstances" which was "tantamount to asking generally about poverty or abuse" . . . , so "[b]ecause defense counsel was not completely precluded from asking about mitigating circumstances, any error was harmless"].) In this way, respondent leaves undisturbed appellant's showing that, especially in light of the exclusion of prospective juror Warren after voir dire about specific mitigating factors, there is real doubt that all the jurors who deliberated on appellant's punishment were able to consider all relevant mitigating evidence and thus were impartial. Because the trial court error makes assessment of prejudice impossible, even under the more demanding state-law standard, this Court should reverse appellant's judgment of death.

X

THE RESTITUTION FINE MUST BE SET ASIDE BECAUSE OF INSUFFICIENT EVIDENCE OF APPELLANT'S ABILITY TO PAY

In the opening brief, appellant argued that the trial court's imposition of a $10,000 restitution fine was unlawful because there was insufficient evidence to support the implied finding that appellant was able to pay such a fine. Appellant also showed that the restitution fine should have been offset by the $4,000 that appellant was ordered to pay in direct victim restitution. (AOB 317-328.) Respondent concedes that the restitution fine must be offset by the $4,000 direct victim restitution order, but contends that appellant has forfeited his challenge to the imposition of a restitution fine based on his inability to pay, and that even if the issue has not been forfeited, there was sufficient evidence before the trial court to support a finding of ability to pay. (RB 175-181.) Respondent's position is flawed and should be rejected.

A. Appellant's Claim Is Properly Before this Court Because No Trial Objection Is Required for a Claim That the Evidence Was Insufficient to Establish His Ability to Pay

Respondent does not dispute that appellant's restitution fine is governed by the 1993 versions of Government Code section 13967 and Penal Code section 1202.4, or that those two statutes, as harmonized by the Court of Appeal in *People v. Frye* (1994) 21 Cal.App.4th 1483, conditioned the imposition of even the minimum restitution fine on the defendant's ability to pay. (RB 178-179.)[16] Respondent contends that because appellant

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[16] Respondent incorrectly states that appellant was sentenced in 1993. (RB 178.) Rather, the crimes of which appellant stands convicted

did not object to the fine in the trial court, his claim has been forfeited. (RB 175-177.) Respondent is incorrect. Because appellant's argument is that the imposition of the fine was based on insufficient evidence, no objection below is required. Respondent attempts to recast appellant's claim as one "that the statutory procedure was not followed." (RB 176.) Appellant has made no such claim. Respondent's contention that petitioner's claim is forfeited should be rejected.

As a preliminary matter, this Court's recent decision in *People v. McCullough* (2013) 56 Cal.4th 589, 155 Cal.Rptr. 365, does not foreclose review. The defendant in *McCullough* challenged the imposition of a booking fee pursuant to Government Code section 29550.2, subdivision (a), on the ground that there was insufficient evidence in the record of his ability to pay, a statutory pre-condition to the imposition of the fee. Although the defendant had not raised this challenge in the trial court, he argued that pursuant to *People v. Butler* (2003) 31 Cal.4th 1119, his claim should not be forfeited. (*McCullough*, *supra*, 155 Cal.Rptr. at 371.) This Court held that the determination of the defendant's ability to pay the booking fee did not "present a question of law" like the probable cause finding required for a sentencing court to order a defendant to undergo HIV testing pursuant to Penal Code section 1202.1, at issue in *Butler*, and that therefore, it was forfeited by the failure to object below. (*Ibid.*)

The decision in *McCullough* is not directly controlling in appellant's case, as it concerned a different statute. Nor should the rationale of *McCullough* be applied to appellant's challenge to the restitution fine in his case. The Court in *McCullough* relied in part on the absence of guidelines

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occurred in 1993. He was sentenced in 1996. (3 CT 774-779.)

or procedural requirements in the authorizing statute, which the Court viewed as an indication that the Legislature "considers the financial burden of the booking fee to be de minimis." (*McCullough*, *supra*, at p. 371.) By contrast, Government Code section 13967 set out guidelines for the factors the trial court should consider in imposing the restitution fine. Moreover, Penal Code section 1202.4, expressly referenced in section 13967, required that if the court waived the imposition of the restitution fine, it had to state on the record its reasons for the waiver. Thus, the Legislature did prescribe guidelines and procedural requirements applicable to ability-to-pay determination here at issue. Further, on its face, imposition of a $10,000 restitution fine on a prisoner of any kind, and in particular one sentenced to death, cannot reasonably be considered a "de minimis" financial burden. Lastly, the court in *McCullough* did not address appellant's contention that judicial economy is not served by defaulting the claim. (See AOB 321-322.)

Respondent relies on *People v. Gibson* (1994) 27 Cal.App.4th 1466 in contending that appellant's claim is forfeited. In *Gibson*, the court of appeal held that a defendant who did not object below is precluded from challenging a restitution fine on the ground that the trial court failed to consider his ability to pay. (*Id.* at p. 1468.) That principle is inapplicable to appellant's case, as he does not claim that the trial court failed to consider his ability to pay; he argues that there was insufficient evidence to support the trial court's implied finding of ability to pay.

In dictum, the *Gibson* court also stated that "a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine." (*Ibid.*) The court of appeal reasoned that "[a] challenge to the sufficiency of evidence to support the

imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial." (*Id.* at pp. 1468-1469.) The *Gibson* court further justified its view on the ground that foreclosing appellate review in the absence of an objection below promotes the interest in judicial economy. (*Id.* at p. 1469.)

As noted in appellant's opening brief (AOB 321, fn. 82), the court of appeal in *Gibson* did not have the benefit of this Court's opinion in *People v. Butler*, *supra*, which rejected both the view that only convictions are subject to challenge for insufficiency of the evidence and the judicial economy rationale for foreclosing review where no objection was made below. (*People v. Butler*, *supra*, 31 Cal.4th at pp. 1126-1128.) As noted above, *Butler* concerned a challenge to an order that the defendant undergo HIV testing pursuant to Penal Code section 1202.1. The Court held that "because the terms of the statute condition imposition [of that order] on the existence of probable cause, the appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record." (*Id.* at p. 1127.)

The decision in *Butler* undermines not only the *Gibson* court's theory that a challenge to the sufficiency of the evidence can be made only to a conviction itself, but also its judicial economy rationale for finding such claims forfeited by failure to object below. In *Butler*, this Court found that foreclosing appellate review would not further the interest in judicial economy, as it would only spur appellant into raising the issue on habeas corpus, in the form of a claim that his trial attorney's failure to object was a violation of the right to the effective assistance of counsel. (31 Cal.4th at p.

1128.) That is certainly true of the issue presented here, particularly in a capital case such as appellant's, where he is statutorily entitled to counsel on habeas counsel. (Gov. Code, § 68662.) In appellant's case, it is a virtual certainty that if this Court forfeits the claim here, it will be raised again on habeas corpus.

Post-*Butler*, courts of appeal have permitted challenges on appeal to the sufficiency of the evidence in a number of contexts that were neither challenges to a conviction nor the imposition of an order for HIV testing such as the one before the Court in *Butler*. (See, e.g., *People v. Christiana* (2010) 190 Cal.App.4th 1040, 1046-1047 [challenge to order authorizing involuntary administration of antipsychotic medication]; *In re K.F.* (2009) 173 Cal.App.4th 655, 660 [challenge to basis for victim restitution order]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [challenge to defendant's ability to pay attorneys' fees]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 [same]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561 [challenge to juvenile court's finding of adoptability].)

It goes without saying that the court of appeal's decision in *Gibson* is not binding on this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) For the reasons set forth above, the dictum in *Gibson* concerning claims of insufficiency of the evidence is also lacking in persuasive value. For all these reasons, respondent's reliance on *Gibson* is misplaced.

The other authorities on which respondent relies are similarly unavailing. Respondent cites *People v. Scott* (1978) 21 Cal.3d 284, for the proposition that procedural errors in the trial court are forfeited by failure to object. (RB 175.) *Scott* concerned the lawfulness of a pretrial order that the defendant undergo testing for a sexually transmitted disease and the

admission into evidence at trial of the results of such testing. The Court rejected the prosecution's argument that the claim had been forfeited because the defendant's objection was not sufficient. (*Id.* at p. 291.) *Scott* does not support the proposition for which it is cited, nor is it analogous to appellant's case in any way.

Respondent also cites *People v. Crittle* (2007) 154 Cal.App.4th 368, 371, *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072, and *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836. (RB 175-176.) Each of these decisions simply cites *People v. Gibson*, *supra*, 27 Cal.App.4th 1466, in finding a challenge to a sentencing order forfeited by failure to object at the trial level; none contain any analysis of the issue. Because the validity of the relevant dictum in *Gibson* is undermined by this Court's opinion in *Butler*, a fortiori, decisions relying on *Gibson*, particularly those lacking in any additional critical analysis, are of no persuasive value in assessing appellant's claim. Further, neither *Crittle* nor *Valtakis* concerned restitution fines or the statute here at issue. (See *People v. Crittle*, *supra*, 154 Cal.App.4th at p. 371 [defendant challenged imposition of two $10 fines pursuant to Penal Code section 1202.5]; *People v. Valtakis*, *supra*, 105 Cal.App.4th at p. 1069 [defendant challenged $250 probation service fee imposed pursuant to Penal Code section 1203.1b].) Lastly, *Valtakis* did not even involve a challenge to the sufficiency of the evidence; it concerned a claim that the trial court had failed to follow the applicable statutory procedures for determining his ability to pay. (*Id.* at pp. 1070-1071.)

Respondent's reliance on *People v. Gamache* (2009) 46 Cal.4th 680, is similarly unavailing. As explained in appellant's opening brief, the defendant in *Gamache* argued that the trial court imposed the restitution fine without considering his ability to pay. (*Id.* at p. 409.) He did not raise

a challenge to the sufficiency of the evidence. Nor does this Court's decision in *People v. Nelson* (2011) 51 Cal.4th 198, 227, require a different result. The defendant in *Nelson* also argued that the trial court had failed to consider his inability to pay, not that the evidence was insufficient. (*Ibid.*) Further, the crime involved in *Nelson* occurred in 1995 (*ibid.*), after the 1994 amendment of the relevant statutory provisions as discussed above. The statute at issue in *Nelson* required imposition of a restitution fine "regardless of the defendant's ability to pay," and provided that the court should consider the defendant's ability to pay only in setting the amount of the fine. (Stats. 1994, c. 1106 (A.B. 3169), § 3, eff. Sept. 29, 1994.) Thus, both *Nelson* and *Gamache* are inapposite.

Allowing appellant to challenge his restitution fine for sufficiency of the evidence will not unleash a torrent of similar challenges because the version of the statute here at issue was in existence for only two years. In September of 1992, Government Code section 13967 was amended to add the language "subject to the defendant's ability to pay." (Stats. 1992, c. 682 (S.B. 1444), § 4, eff. Sept. 14, 1992.) As respondent notes, the previous version of that statute did not even mention the defendant's ability to pay. (RB 178, citing *People v. McGhee* (1988) 197 Cal.App.3d 710, 715.) In 1994, the provisions of Government Code section 13967 pertaining to restitution were shifted to Penal Code section 1202.4. (Stats. 1994, ch. 1106, § 2; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182, fn. 100.) Neither the 1994 version of Penal Code section 1202.4 nor later versions of that statute condition imposition of a restitution fine on the defendant's ability to pay. (Stats. 1994, c. 1106 (A.B. 3169), § 3, eff. Sept. 29, 1994.) Thus, permitting appellant's challenge would open the appellate door only to those individuals whose crimes occurred between September 14, 1992,

and September 29, 1994, who were ordered to pay a restitution fine and whose challenge to that order has not already been decided on appeal. That group is not likely to be large.

For the foregoing reasons, appellant claim has not been forfeited, and this Court should consider on the merits appellant's challenge to the restitution fine based on the insufficiency of the evidence of his ability to pay.

B. The Evidence Was Insufficient to Support the Trial Court's Implied Finding of Ability to Pay

In the opening brief, appellant showed that the record before the trial court indicated that at the time of trial, appellant was indigent and that once sentenced to death, he would not be permitted to work. (AOB 322.) Appellant argued that therefore, the evidence before the trial court was insufficient to support the trial court's implied finding of appellant's ability to pay a restitution fine. (AOB 322.) Respondent does not dispute that at the time of trial, appellant was indigent. However, respondent contends that the evidence before the court showed that appellant had future earning capacity. (RB 180.) Respondent's argument flies in the face of the fact that at the time of the order, the court had just sentenced appellant to death. (25 RT 8469-8471.)

Respondent rests its argument on the fact that the evidence introduced at trial indicated that appellant had worked steadily when not in prison and that he had worked in the laundry facility when incarcerated at Folsom State Prison before the convictions and sentence in this case. (RB 180.) However, there was ample evidence in the trial record showing that condemned inmates are not permitted to work. (24 RT 8300.) Respondent points to no evidence to the contrary, and there is none. Evidence that

appellant had worked when not in prison was irrelevant because the sentence meted out by the court eliminated the possibility that appellant would ever be released. Evidence that he worked when incarcerated under a sentence of less than death did not indicate that he would be permitted to do so while awaiting his execution. Lastly, the testimony of James Park, former associate warden of San Quentin State Prison and expert in the operations of the California Department of Corrections, affirmatively established that in California, death row inmates are not permitted to work. (24 RT 8300.)

The California Department of Corrections and Rehabilitation does not allow inmates who are sentenced to death to work. (See http://sojo.net/magazine/2012/09/ending-death-penalty ["Death row prisoners are generally not allowed to work"]; http://www.californiapeopleoffaith.org/woodford-interview.html ["death row inmates are not allowed to work in prison"]; see also Pen. Code, § 2933.2 ("any person convicted of murder, as defined in Section 187, shall not accrue any [worktime] credit".)

As set forth more fully in appellant's opening brief, the record before the trial court at the time of sentencing established that appellant was indigent. The record provided no evidence that once sentenced to death, appellant would be able to work or earn money in the future. On the contrary, the evidence affirmatively showed that appellant would not be permitted to work, and no evidence to the contrary was proffered or presented. The trial court's restitution fine must be set aside because of insufficient evidence to support the implied finding of appellant's ability to pay.

C. Conclusion

For the reasons set forth here and in appellant's opening brief, the restitution fine must be vacated in its entirety because the trial court, having just sentenced appellant to death, had insufficient evidence before it of appellant's ability to pay. If, however, this Court should reject appellant's challenge to the restitution fine as a whole, that fine must, as respondent concedes, be reduced by $4,000, the amount of victim restitution ordered.

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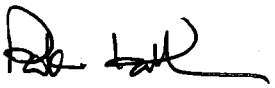
CONCLUSION

For all of the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on automatic appeal, the entire judgment of conviction and sentence of death in this case must be reversed.

DATED: June 14, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, Robin Kallman, am the Deputy State Public Defender assigned to represent appellant Charles Case 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 31,326 words in length.

Dated: June 14, 2013

ROBIN KALLMAN

Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Charles Case*

California Supreme Court
No. S057156

I, NEVA WANDERSEE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attention: Jennevee H. DeGuzman
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101 Second Street, Suite 600
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Each said envelope was then, on June 14, 2013, deposited in the United States Mail at Oakland, California, in the county of Alameda, in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on June 14, 2013, at Oakland, California.

DECLARANT