IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER ALAN SPENCER, Defendant and Appellant.	**AUTOMATIC APPEAL** Crim. S057242 Santa Clara County Superior Court No. 155731

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Clara

HONORABLE HUGH F. MULLIN III JUDGE

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DEATH PENALTY

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	)	Santa Clara County
	)	Superior Court
CHRISTOPHER ALAN SPENCER,	)	No. 155731
	)	
Defendant and Appellant.	)	
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APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant in this Rely Brief will address specific matters, in light of Respondent's Brief, where additional briefing may benefit this Court. However, no attempt will be made to respond to all of Respondent's contentions, because many if not most of those contentions have already been addressed in advance in Appellant's Opening Brief. Any occasion of Appellant not responding or replying to any particular argument, sub-argument or allegation made by Respondent is not a concession or waiver by Appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

In this brief, Appellant assumes this Court's familiarity with the salient facts and arguments set forth in the parties' prior briefing.

As used in this Reply Brief, "AOB" refers to Appellant's Opening Brief. "RB" refers to Respondent's Brief.

ARGUMENT

I

THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTION'S CHALLENGE UNDER *WITHERSPOON V. ILLINOIS* AND *WAINWRIGHT V. WITT*, VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY AND TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENTS AND ARBITRARY IMPOSITION OF THE DEATH PENALTY. (U.S. CONST., AMENDS. VI, VIII, XIV; CAL. CONST., ART. I, SECS. 15, 16, 17.)

Respondent contends there was substantial evidence to support the trial court's dismissal of juror C-67 for cause, based on that juror's expression of a religious bias against the death penalty. (RB 20.) Respondent asserts that juror C-67's uncertainty about imposing a death sentence was a "substantial impairment" of that juror's ability to follow the law; *i.e.*, to weigh mitigating evidence and aggravating evidence and reach a death verdict, if warranted, based on the result of that weighing process. (*Id.*) Respondent is mistaken.

As noted at AOB page 60 a "higher threshold" for imposition of the death penalty imposed by a prospective juror, even one based on religious scruples against, the death penalty is not evidence of substantial impairment. (*Witherspoon v. Illinois* (1968) 391 U.S. 510. 522-523; *People v. Kaurish* (1990) 52 Cal.4th 648, 699.) At the very least, it betrays a tendency to vote in a particular fashion, which does not amount to evidence of substantial

impairment. (*People v. Stewart* (2004) 33 Cal.4th 425, 448-449) In this case, juror C-67's statements of philosophical opposition to the death penalty were less strident than those occurring in *People v. Stewart*, *supra,* at p. 448. *Stewart* involved categorical statements of opposition to the death penalty, which are not present here; yet such statements were not found to be evidence of substantial impairment.1 While statements such as those presented here and in Stewart may invite further inquiry, such inquiry may or may not generate substantial evidence on the issue of the juror's impairment or lack of it. (*People v. Stewart, supra*, at p. 448) In fact, substantial impairment is present if, and only if, the juror cannot engage in the weighing process. (*People v. Kaurish, supra,* at p. 699.)

In this case, further inquiry generated a response from the juror that he would be able to impose the death penalty in an appropriate case. (64 RT 19981-19982.)2 On this discrete factual issue, there is no other evidence

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1 Accordingly, Respondent's assertion that *Stewart* does not assist Appellant because juror C-67 expressed a religious bias against the death penalty, is inexplicable and incorrect. (RB 20.)

2 The record discloses the following questions propounded to juror C-67, and the following answers obtained:

Q: Do you think the death penalty would ever be warranted in any kind of a case?

A: Yes.

Q: Do you think that it would be possible for you to vote for the death penalty in

and thus, no ambiguity.3

For this reason, Respondent's predictable attempt to salvage the dismissal of juror C-67 on grounds that the reviewing court must defer to the trial court's judgment as to the prospective juror's state of mind is unavailing. This principle applies only if there is substantial evidence of impairment. Here there is none; nor is there ambiguity on the determinative issue of whether the juror could impose the death penalty in an appropriate case. (*Cf. People v. Vigil* (2011) 51 Cal.4th 1210, 1243 [reviewing court may defer to the trial court where ambiguity exists on the issue of substantial impairment].) As stated, juror C-67 may well have set a higher than usual bar for imposition of the death penalty; but *as a matter of law* this did not amount to "substantial impairment."

Indeed, abdication of judicial review of the trial court's conclusion in cases such as the present case, in which, under this Court's prior rulings, there is no evidence of "substantial impairment," would effectively allow *all* prosecution-initiated dismissals of prospective jurors on *Witt-Witherspoon*

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a given case without going into what that case might be?

A: I can imagine things horrible enough to get me to vote for the death penalty. (64 CT 19981-19982.)

3 Respondent correctly notes that at one point the juror indicated that he would prefer castration to the death penalty (RB 20), a belief that could well be held by many if not most jurors. Respondent does not articulate how this was evidence of substantial impairment.

grounds to be insulated from appellate review. A trial court's statement that he or she did not like the juror's looks, or had a negative 'gut" reaction to the juror, without more, would automatically be binding.

Uttecht v. Brown (2007) 551 U.S. 1, cited by Appellant on this point (AOB 69), reiterated the principle that such rulings must be amenable to meaningful appellate review. This requires facts in support of the trial court's ruling and an adequate record for appellate review. Both of which are incompatible with the notion that an unquestioning deference is afforded to the trial court's ruling simply because the ruling was made, which is the logical end result of Respondent's argument under the circumstances of this case. In other contexts, at least, it is clear that an exercise of judicial discretion must be meaningful and effective and not merely a *pro forma* exercise. (*E.g.*, *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 [admission of evidence of uncharged conduct] citing *United States* v. *Myers* (5th Cir. 1977) 550 F.2d 1036, 1044.)

This reasoning should apply here. The trial court dismissed juror C-67, in effect, based on an adverse "gut reaction." (64 RT 19881-19883; *e.g.*, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.) However, the record lacks any *legally cognizable evidence* on the issue of substantial impairment of this juror, which demonstrates that none was present here. Accordingly, there is simply no principled basis for affording deference to the court's conclusion.

For the above reasons, and for those set forth in Appellant's Opening Brief, the judgment of death must be reversed.

II

APPELLANT'S ARREST WAS MADE WITHOUT PROBABLE CAUSE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE, ANY SUBSEQUENT STATEMENTS HE MADE WHILE IN CUSTODY WERE THE ILLEGAL FRUITS OF THAT ARREST AND THEIR ADMISSION INTO EVIDENCE WAS IN ERROR

Appellant contends that his arrest was without probable cause. (AOB Argument II.)

Respondent's arguments in opposition have, for the most part, been addressed and refuted in advance in Appellant's Opening Brief. Briefly summarized, on this issue Respondent contends that the informant upon whose information the arrest was based, was a "citizen informant;" therefore, law enforcement authorities were justified in relying on the information provided by her in arresting Appellant, without the requirement that such information be corroborated. (RB 26-27.) Respondent further contends that in any case, the informer's information was corroborated, thereby permitting law enforcement to arrest Appellant based on the informer's tips. (*Id.*)

Respondent's arguments are without merit.

As stated at AOB pages 83-84, "a citizen informant is one who has witnessed or is a victim of a crime." (*People v. Schulle* (1975) 51 Cal.App.3d 809, 814-815.) In Appellant's case, there is no indication that the relied upon informant either witnessed or was a victim of a crime. The informer here, therefore, was not a "citizen informant." Respondent utterly fails to address this deficiency.

Regarding the issue of "corroboration," Respondent points out that

some details of the information provided by the informer were independently discovered by police detectives in the course of the investigations of the stun gun robberies and the LeeWards murder. (RB 26-27.) However, as noted in Appellant's Opening Brief, none of this purported corroboration pertained to the alleged criminal activity itself (AOB 84; see, *People v. Costello* (1988) 204 Cal.App.3d 431, 446). Such facts therefore were insufficient to supply the corroboration required so as to uphold the arrest of Appellant based on the anonymous informer's tip.

Because the information supplied by the anonymous informant was the sole basis for Appellant's arrest, and that information, as a matter of law, did not supply probable cause for the arrest, the arrest was invalid. As argued at AOB page 90, all fruits of that arrest, including Appellant's confession, should have been suppressed as "fruit of the poisonous tree." (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) There is no principled argument available, and Respondent offers none, where the admission of the fruits of this improper arrest could not possibly have affected the verdict in Appellant's case. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, the judgment must be reversed.

III

APPELLANT'S STATEMENT TO SERGEANT KEECH WAS OBTAINED WITHOUT PROPER RE-ADVISEMENT OF *MIRANDA* IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

The parties agree that the question of whether a re-advisement of *Miranda* rights is necessary (*Miranda v. Arizona* (1966) 384 U.S. 436) depends on the totality of the circumstances. (AOB 97; RB 32.)

In Appellant's case, the time lapse between the two interrogations in question, four hours, is not determinative as to either parties' position. However, the fact that Appellant was interrogated by two separate agencies concerning different matters, weighs in favor of a requirement for a re-advisement. (*People v. Quirk* (1982) 129 Cal.App.3d 618.) As does Appellant's lack of prior contacts with the criminal justice system. Respondent points out that because Appellant had prior misdemeanor convictions, he was therefore familiar with law enforcement thus eliminating the need for a re-advisement. (RB 31.) However, this fact is not determinative, and a far cry from the cases in which the suspect's *felony* record with the criminal justice system was invoked as a factor supporting Respondent's position that a re-advisement was not necessary. (RB 30-31; see *People v. Mickle* (1991) 54 Cal.3d 140, 171-172 [forcible rape, lewd conduct].) *People v. Smith* (2007) 40 Cal.4th 483, 504-505 [domestic violence].)

Respondent relies heavily upon the fact that at Appellant's first interrogation by the San Jose police concerning a liquor store robbery, he was advised and waived his *Miranda* rights; at his second interrogation, this time by the Santa Clara police concerning the LeeWards murder investigation, he was asked if he previously waived his rights during the liquor store interrogation and again at the end of the interrogation he was asked what he was of advised of during the liquor store interrogation by the San Jose police officers. (RB 28-29; 1 Supp. CT 2 55-56.) Importantly, the officer from the second interrogation, although he questioned Appellant about his waiver regarding the liquor store interrogation, he never informed Appellant that he had the same rights regarding the murder interrogation. Additionally, Appellant had to be prompted in order to remember those rights previously made to him, indicating that he did not remember them at the time of the *commencement* of the second interrogation. Indeed, this is affirmative evidence that at the commencement of the second interrogation, Appellant was *not* aware of and did *not* understand his rights under *Miranda.* Accordingly, under the circumstances of *this* case, it cannot be inferred that that the re-advisement was unnecessary because the suspect was aware of and understood his rights.

Viewing the totality of the circumstances, Appellant's confession was obtained in violation of *Miranda.* While it would have been a simple

matter to re-advise Appellant *prior* to the second interrogation, the detective declined to do so, likely, because such a procedure would have raised the risk that Appellant would invoke his constitutional rights under the Fifth Amendment and the Santa Clara detective may not have been able to obtain Appellant's confession. As a result, Appellant indeed confessed, though that confession was *not* based on a knowing and intelligent waiver of Appellant's *Miranda* rights.4

This Court recognizes that a confession is "like a kind of bombshell that shatters the defense." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Accordingly, the gravity of the error is such that the prosecution cannot meet the "harmless error" standard of *Chapman v. California* (1967) 386 U.S. 18, 24, which requires the prosecution to prove beyond a reasonable doubt that the error was harmless and did not affect the verdict.

Appellant's confession to capital murder and burglary/robbery was the core of the prosecution's case. Under these circumstances, there is no principled argument available that the error could not possibly have affected the verdict. (*Chapman, supra*, at p. 24.)5 Accordingly, the judgment must be reversed.

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4 Such law enforcement subterfuge, now routine, has been roundly criticized by this Court. (*People v. Neal* (2003) 31 Cal.4th 63, 79-82.)

5 While Respondent suggests that the appropriate standard for harmless error in this situation is whether "the weight of evidence supported the jury's verdict" (RB 38), this is incorrect. The correct standard is as set forth above and in *Chapman, supra.*

IV

APPELLANT'S STATEMENT TO SERGEANT KEECH WAS INVOLUNTARY IN THAT IT WAS THE PRODUCT OF COERCION THAT OVERBORE APPELLANT'S FREE WILL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

The question to be resolved in determining whether a defendant's statement is voluntary, is whether the defendant's will was overborne by improper police practices and techniques. (*People v. Carrington* (2009) 47 Cal.4th 145, 175.) This determination is made based on the totality of the circumstances. (*Colorado v. Spring* (1987) 479 U.S. 564.)

Respondent, in contending that Appellant's confession was voluntary, parses the numerous factors indicative of an involuntary confession in this case, "analyzes" them in isolation, then concludes that Appellant's confession was voluntary. (RB 34.) Respondent's analysis obscures the issue. Correctly analyzed, the totality of the circumstances show that Appellant's confession was involuntary.

Interrogations that seek to exploit particular and peculiar vulnerabilities of the suspect, and are conducted with such persistence as to convey that the interrogators will be satisfied only with the story the interrogators want to hear, and the interrogation continues until such time as the suspect capitulates, are all indicators that the resulting confession was the product of free will being overborne and therefore, coerced. (See *People v. Carrington, supra*, at p. 176; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485-6.) Similarly, threats or promises of leniency may invalidate a confession. (*Malloy v. Hogan* (1964 378 U.S. 1, 7.) Uses of false or

misleading information, while not categorically forbidden, are factors to be considered in determining the voluntariness of a confession. (*People v. Hogan* (1982) 31 Cal.3d 815, 841.)

The interrogation in Appellant's case contained all of the above elements which combined to cause Appellant's free will to be overborne, rendering his confession involuntary. First and foremost, Appellant's interrogators focused on the fact that he was facing a possible death sentence, i.e., a vulnerability particular to Appellant. (See e.g., *People v. Carrington, supra*, 47 Cal.4th at p. 176 [religious anxieties].) Unmistakably, interrogating officers made it clear that Appellant's case was a death penalty case and, as told to him by the interrogators, if Appellant failed to cooperate, he would "fry." (1 CT Supp. 2 17.) This fact by itself lends itself to the conclusion that the resulting confession was involuntary. Respondent seeks to mitigate this problem by suggesting that the officers' use of the word "fry" did not refer to the death penalty. (RB 35.) Appellant will let this argument speak for itself. In a word, Respondent's argument can most charitably be described as disingenuous.

Having established that Appellant was facing a death sentence which, as suggested by the officers, was more likely to occur if he did not cooperate, a blatantly false proposition, the officers further suggested that matters would go better for Appellant if he was involved in the crime but not as the main actor (1 CT Supp. 2 16, 32), also blatantly false. While exhortations to tell the truth and exhortations that matters will go better for the suspect if he does so are not necessarily improper, the "exhortations" in Appellant's case crossed

the line when they honed in on the life-or-death question of whether Appellant wanted to tell the officers what they wanted to hear (life) or not (death). In fact, this was a false and misleading choice and exploited Appellant's particular vulnerability. Moreover, Appellant's vulnerability was exacerbated by the length of the interrogation and the fact that Appellant was obviously ill, a factor minimized by Respondent (RB 37) but clearly indicative of a defendant in a physically weakened condition. (See *People v. Esqueda, supra,* at pp. 1485-1486.)

All of the foregoing, Appellant's fear of the death penalty, the false suggestion that he might have a better chance of avoiding it if he cooperated with officers and admitted his involvement rather than if he did not and his physically compromised condition, were further exploited by the officers' browbeating of Appellant and their sending a clear message that the interrogation would go on ad infinitum if the officers did not get the story they wanted. (See, *People v. Esqueda, supra,* at p. 1486.)

When the combined effect of these factors is considered, it is clear that a confession, whether true or not, was a foregone conclusion. Based on the circumstances of the interrogation and the applicable authorities, the confession was manifestly involuntary. The facts of this case confirm this Court's conclusion "that a confession is "like a kind of bombshell that shatters the defense." (*People v. Neal, supra,* 31 Cal.4th at p. 86.)

Accordingly, the prosecution cannot meet the "harmless error" standard of *Chapman,* which requires the prosecution to prove beyond a reasonable doubt that the error was harmless and did not affect the verdict.

(*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's confession to capital murder was the core of the prosecution's case. Under these circumstances, there is no principled argument available that the error could not possibly have affected the verdict. (*Chapman, supra*, at p. 24.)

Accordingly, the judgment must be reversed.

V

THE SUPERIOR COURT, AND THIS COURT, HAVE DENIED APPELLANT HIS RIGHTS TO DUE PROCESS, MEANINGFUL APPELLATE REVIEW, COUNSEL, AND A NONARBITRARY DETERMINATION OF HIS SUITABILITY FOR THE DEATH PENALTY, BY VIRTUE OF THEIR REFUSAL TO ALLOW APPELLANT TO RAISE ON APPEAL, ISSUES WHICH WERE PROPERLY PRESERVED BELOW AND WHICH SIMILARLY SITUATED DEFENDANTS ARE PERMITTED TO RAISE ON APPEAL. THESE INCLUDE ALLEGATIONS OF BAD-FAITH PROSECUTION AND POTENTIAL INSTRUCTIONAL ISSUES

The gravamen of this claim is that Appellant was denied due process and meaningful appellate review by virtue of the refusal of the trial court to include the transcript of codefendants' (Travis and Silveria) trial as part of the record on appeal in his case. Appellant has pointed out that the codefendants' transcript was relied upon by the trial court in denying Appellant's claim under *In re Sakarias* (2005) 35 Cal.4th 140, 156, *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1055-1057 and like cases, which ruled that it was improper for the prosecution to rely on inconsistent theories at different trials of the same case but of different defendants. (AOB 126.) The codefendants' transcript was not merely a proper part of Appellant's record on

appeal, it was indispensable for purposes of demonstrating that the trial court's ruling was erroneous.

Respondent contends Appellant was not denied meaningful appellate review because the "inconsistent theories" ("Sakarias") claim is one that must be raised by way of habeas corpus, not appeal. Respondent also asserts that this claim was never presented at any hearing below; nor was codefendants' transcript ever presented to the trial court in support of the claim. (RB 40-42.)

Respondent is wrong on all counts.

The record clearly reflects that Appellant raised the "inconsistent theories" issue in the trial court, when trial counsel objected to the prosecutor's closing argument that improperly exaggerated and inflated Appellant's role in the present offenses:

> MR. MANTELL [outside the presence of the jury]: I'm very disturbed about where the argument is going at this point. I recognize that there are some lacunae in the evidence in this case with regard to the details of every actor's participation, but I apparently am about to hear . . . Travis and Silveria reduced to the position of stooges for Chris Spencer. And that I think is not permissible.
>
> This case has already been tried once where they were the principals and Mr. Spencer was absent. Of course, that was not the prosecution's theory at the time. But more importantly there is on the record of this case evidence which the prosecution must be aware of which establishes very clearly the tertiary position of Chris Spencer in the planning and plotting of this entire operation.

> I think that the suggestion by the prosecution that this is even possible to the jury on the basis of hard evidence to the contrary in this case hovers perilously close to shystering, if it does not in fact fall over the edge. I would like it abandoned. I would like the jury admonished. I think that one more word and a motion for mistrial would be in order. (86 RT 22390.)

As noted at AOB pages 119-121, 126-127, the trial court's remarks following trial counsel's objection ("stick to what was brought out during the course of this trial. What the theory of a prior trial was has absolutely nothing to do with this case." (86 RT 22390), accomplished two objectives: First, it effectively overruled Appellant's objection, thus preserving the issue for appellate review; and second, it implicated the substantive portions of the Silveria/Travis transcript which were inconsistent with the prosecution's argument at Appellant's trial:

> In this case it [the "inconsistent theories" reference) wasn't only objected to in the trial court, it was fully developed in that the Court over objection permitted such argument by ruling that the prosecutor was to argue on the record of this case. This allowed the prosecutor to argue the facts of this case regardless of what he argued in Silveria/Travis I, even if it was factually incompatible with what he argued in this case. This effectively overruled Appellant's objection and presupposed that the prosecutor did not raise arguments incompatible with theories presented in Appellant's case, in Silveria/Travis I. (AOB 27, fn. 31.)

The Silveria/Travis transcript, notwithstanding, Respondent's contention to the contrary (RB 42), was indeed before the trial court; Appellant's trial judge heard the Silveria/Travis trial, and could not have overruled Appellant's

objection (albeit in a *de facto* manner), without considering the testimony presented in the prior trial.

Penal Code section 190.7, subdiv. (2), defines the "entire record" in a capital appeal as including but not necessarily limited to

> [a] copy of any paper or record on file or lodged with the superior or municipal court and *a transcript of any other oral proceeding reported in the superior or municipal court pertaining to the trial of the case.* (Emphasis added.)

For the above reasons, Respondent's contention that the *Sakarias* claim is one that may only be raised via habeas corpus, is meritless. The present case, unlike the authorities relied on by Respondent, involves a claim *raised* and *preserved* in the trial court and denied, in part, on the basis of the transcript Appellant sought to include in the appellate record for purposes of arguing this issue on appeal. This renders the claim a viable issue on appeal. Inclusion of the Silveria/Travis record in Appellant's record on appeal was therefore necessary in order to ensure review of Appellant's *Sakarias* claim. .

Accordingly, Appellant reasserts his claim that the court's failure to include codefendants' transcript of their first trial, denied and denies, him effective appellate review and due process of law.

VI

PHYSICAL EVIDENCE AND TESTIMONY PURPORTEDLY RELEVANT TO THE CIRCUMSTANCES OF THE CRIME WAS IN FACT CUMULATIVE, MISLEADING AND HIGHLY INFLAMMATORY AND ITS ADMISSION DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS AND VIOLATED CALIFORNIA LAW.

A. The Exhibit Displaying The Victim's Blood-soaked Shirt Had No Legitimate Probative Value And Was Intended To Arouse Overwhelming Prejudice.

Respondent argues the trial court acted within its discretion when it admitted Exhibit 65 (the victim's blood-soaked shirt). Respondent states that "The shirt showed the wounds inflicted on Madden "in a fashion that gives a more complete view than any of the photographs" and also demonstrated that the cuts and stabs were directed at his "vital areas" rather than his extremities. (See 82 RT 21903.)" However, the quoted passage by Respondent was not the conclusion of the trial court, rather a response to a leading question by the very person who created the exhibit, Sergeant Keech. (RB 49.) Sergeant Keech's opinion is not consistent with the photographs offered into evidence at Appellant's penalty trial. Further, Respondent claims that if the admission of the bloody shirt was prejudicial because it did not accurately represent the shirt as it was found at the crime scene, the prejudicial effect was limited. (RB 50.)

As noted at AOB page 210, it is beyond dispute that clothing stained with the murder victim's blood is uniquely prejudicial evidence likely to arouse the jurors' emotions. (See *Miller v. Pate*, 386 U.S. 1, 4-5 [87 S.Ct. 785, 787, 17 L.Ed.2d 690] (1967).) Due to the highly inflammatory nature of such evidence, it must be carefully scrutinized so as to determine whether it will "exert an intense emotional force [e.g., outrage, a demand for retribution; use of the clothing as a powerful and immediate symbol of victims and the brutality of their murders] unconnected to [its] legitimate probative value." (*United States v. Sampson* (D. Mass.) 335 F.Supp.2d 166,

185; see also, *People v. Blue* (Ill. 2000) 189 Ill.2d 99 [724 N.E.2d 920, 934].) Accordingly, if the evidence is only minimally relevant to legitimate factual issues in the case, it should be excluded. Even if relevant, if the evidence serves to create an intense emotional force unrelated to its legitimate probative value, then, though relevant, it should be excluded.

In the present case, the trial court cavalierly ignored the above principles by perfunctorily overruling defense objections to Exhibit No. 65, the display of the victim's blood-soaked shirt. (81 RT 21854; 82 RT 21899.) In fact, in ruling on the admissibility of photographs at the penalty trial, the Court found that the pictures adequately depicted the "cruel manner in which the victim was murdered," and "show the conclusion of the act that Mr. Spencer started, as to what had happened. (RT 21863.) With this finding the court admitted photographs and summarily without explanation admitted the bloody shirt in evidence. (*Id.*) The court did not provide special consideration to this evidentiary ruling despite the unusual nature of the exhibit and the obvious seriousness of the proceedings. Due process requires more- - especially in the penalty phase of a capital case.

Authorities cited in Appellant's Opening Brief (AOB 212-214), in particular *People v. Blue, supra*, and *United States v. Sampson, supra*, both shared the central concern discussed above, i.e., that exhibits of victims' bloodied clothing are extensively and inherently prejudicial. As the federal

district court observed, "Display of the clothing of the dead is an age-old strategy for inciting a desire for revenge." (*Sampson, supra,* at p. 185, n. 9)

The *Sampson* opinion noted the findings in *Frazier v. Mitchell* and *United States v. Rezaq* which similarly held that the admission of a victim's bloody clothing was unduly prejudicial. (*Ibid. See also, Frazier v. Mitchell*, 188 F.Supp.2d 798, 826 (N.D.Ohio 2001) [with bloody clothing before the jury, prosecutor stated in closing that the victim "is not here. We have bloody clothing to represent her;" the reviewing court viewed this as "unprofessional, improper and excessive"]; and, *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C.Cir.1998) [wherein the District of Columbia Circuit Court of Appeal stated in its opinion: "'Blood will have blood' "; excessive depictions of "gore may inappropriately dispose a jury to exact retribution," quoting William Shakespeare, The Tragedy of Macbeth, act 3, scene 4].)

As thoroughly discussed in Appellant's Opening Brief, the courts in *Sampson* and *Blue*, concluded the bloody clothing exhibits should not be admitted. (AOB 217.) It bears repeating, the *Sampson* and *Blue* courts found that the potential for prejudice in these instances was too great a risk given the limited evidentiary value.

In the present case, the intense "shock" value of Exhibit 65, the victim's bloody shirt, clearly calculated by the prosecution (RB 49-50), far outweighed any probative value it may have had as a circumstance of the

offense. (AOB 212-219.) The prejudice resulting from the admission of this evidence was not limited to the intense emotional impact it caused, but was also unduly prejudicial as it misrepresented the facts. Specifically, because many of the cuts depicted on the bloody shirt (Exhibit 65) were not inflicted by Appellant. As a result of this admission, the jury's consideration of Exhibit 65 violated Appellant's state and federal rights to due process and to be free of cruel and unusual punishments.

Respondent argues that the trial court's ability to exclude evidence of the type at issue here is circumscribed because the determination of penalty is a subjective one. (RB 49.) Respondent also argues that the victim's bloody shirt was relevant because it showed the violence of the attack, and showed all the cuts sustained by the victim. Respondent goes on that even if the jury was "shocked" by the amount of blood, this was of no legal significance because the jury was aware that this was not what the shirt looked like when the victim was discovered. (RB 49-50.)

Respondent's arguments are both meritless and disingenuous.

Respondent is incorrect in its claim that the penalty phase creates a license to admit inflammatory evidence as a result of a capital case judgment being subjective. Respondent misconstrues the application of a subjective determination by a juror at a capital penalty trial. The penalty decision is subjective only insofar as each juror is permitted to assign the value he or she deems appropriate to objective facts presented in weighing aggravating factors against mitigating factors. Only after evidence deemed relevant and if relevant not unduly prejudicial is admitted, can a jury then assign

subjective weight to the evidence. (See *People v. Turner* (1990) 50 Cal.3d 668, 671.) Thus, when Respondent argues that intensely emotional or inflammatory evidence is admissible at the penalty phase because that phase requires a subjective evaluation of the evidence, Respondent is wrong. Indeed, in view of the necessity that a death judgment be based on deliberation as opposed to passion, and reason as opposed to caprice or emotionalism, the court's ability to admit emotionally charged evidence is more, rather than less, circumscribed at the penalty phase as distinguished from the guilt phase.

In Appellant's case the objective probative value of the victim's bloody clothing was extremely limited. The coroner described the cuts inflicted upon the victim, and the bloody shirt added nothing of substance to this testimony except to emphasize the gruesomeness of the offense, in a highly inflammatory, emotional and calculated way. As noted above, importantly, it is absolutely clear that not all of the cuts were inflicted by Appellant. Thus, the graphic depiction of the cuts, coupled with the bloody display, was not merely inflammatory but unduly and unnecessarily prejudicial, on an objective, factual level. (*People v. Coffman and Marlowe* (2004) 34 Cal.4th 1, 43 [marginally involved defendant might suffer prejudice from joiner with a defendant who participated much more actively].)

Respondent's contention that any "shock" value of Exhibit 65 was ameliorated by the fact that the jurors were aware that the shirt as presented did not accurately depict its appearance at the scene of the offense (RB 50),

entirely misses the point of prejudice analysis in cases involving this type of evidence. Here, the jurors knew full well that the blood depicted on the shirt was that of the victim, however the blood was configured. The fact that blood had seeped from the body onto the shirt, over time and as a result of the body being moved, did nothing to detract from the "shock" value of the exhibit; and Respondent fails to explain his conclusion to the contrary.

Against the cumulative nature of the evidence in question and its limited probative value, the trial court was required to weigh the inherently, highly inflammatory and emotional nature of the evidence. Similar to the court's finding in *People v. Blue*, *supra*, though arguably the "bloody clothing" evidence admitted at Appellant's penalty trial had some minimal probative value, its highly inflammatory nature caused it to cross the line between proper and improper penalty phase evidence. (*People v. Blue, supra*, 724 N.E. 2d at p. 934.)

Respondent impliedly concedes the prejudicial nature of the offending "bloody clothing" evidence in *Blue* where it was found to be inadmissible due to its inflammatory nature, yet still attempts to distinguish it from the facts in Appellant's case. (RB 49, 51.) The attempt fails. Respondent tries to distinguish *Blue* on grounds that the court's ruling was applied to the admission of evidence at the guilt phase, whereas in the present case, the bloody clothing was offered at the penalty phase. (RB 50-51.) As previously indicated, this argument fails because the emotional impact of highly inflammatory evidence is a factor militating against admissibility in the penalty phase just as in the guilty phase; and indeed, greater scrutiny

must be afforded such evidence at the penalty phase so as to ensure that a resulting judgment of death is based on reason and reliable evidence, not caprice or emotionalism, and deliberation not passion. (*Gardner v.* Florida (1977) 430 U.S. 349, 358; *Sampson, supra*, 335 F.Supp.2d at p. 187, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 836.)

Here, Respondent seems to find significance in the *Blue* court's language that the clothing in that case was unusually prejudicial because it contained bits of brain matter, which was not a factor with Exhibit 65. This argument is highly misleading. There is no indication that the exhibit in *Blue* contained visible bits of "brain matter" identifiable as such and distinguishable from blood; the reference to "brain matter" was merely a statement that the shirt symbolized the brutality of the crime, during which the victim was shot in the head. The jury knew that there was brain matter on the victim's bloody shirt which reminded it that the victim was shot in the head. Appellant contends that the offense in the present case was no less gruesome than the offense in *Blue*, notwithstanding the fact that the victim in this case apparently did not suffer a head wound. In both cases, the bloody clothing stood as a symbol and reminder of the brutality of the crime. (See *Sampson, supra*, at p. 185.) Juries in both cases were aware of the facts of the crime before them, "brain matter" or not. Respondent's attempt to distinguish the facts, and analysis, in *Blue* on this basis is specious.

Finally, unlike *Blue,* a single-defendant case and as previously noted, not all of the carnage documented by the bloody shirt in Appellant's case was even perpetrated by Appellant. This is a highly material distinction from

the facts of *Blue*, ignored by Respondent. If anything, the offending exhibit in the present case was even more inflammatory, and less probative, than the evidence found to be improperly admitted in *Blue*. *(People v. Blue, supra,* at p. 934.)

From the foregoing analysis, it is clear that Exhibit 65 was unduly inflammatory and should not have been admitted. The basis of the error, *i.e.*, that the admission of this evidence created an undue risk that the penalty verdict would be based on emotion, not reason and reliable evidence, is also the basis for the conclusion that the error was prejudicial. Here, the offending exhibit was manifestly calculated to inflame the jury against Appellant, clearly an improper purpose. There is no principled argument that the prosecution, who bears the burden of doing so, can demonstrate that the error could not possibly have affected the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24). This is particularly true given the prosecution's "victim impact" presentation, which by its nature was highly emotional and inflammatory, and for the most part inadmissible. (See, Argument VII, *infra.*)

For all of the above reasons, and for the reasons set forth in Appellant's Opening Brief, the judgment of death must be reversed.

B. The Coroner's Testimony And The Other Guilt Phase Evidence Served No Valid Purpose And Was Admitted Solely To Aid The Prosecutor 's Unfounded Speculation Regarding The Victim's Suffering.

In his Opening Brief, Appellant argued that the coroner's testimony purporting to describe the suffering experienced by the victim prior to his

death was improperly admitted. (AOB 208-209, 220-221.) Relying on *People v. Love* (1960) 53 Cal.2d 843, 856, Appellant contends that the actual probative value of this testimony was minimal as a result of the coroner being unable to confirm the extent to which the victim actually suffered based upon the wounds inflicted. (AOB 220-221.)

Assuming arguendo that the evidence was minimally relevant, nevertheless, the risk of unfair prejudice was extremely high. The prosecutor exploited the coroner's testimony for purposes of emphasizing the brutality and gruesomeness of the crimes and effectively thrust responsibility for all of the victim's wounds and suffering, on Appellant. Prior to the coroner's testimony, extensive testimony had already been presented that Appellant had inflicted some of the wounds and the coroner's testimony added nothing to this fact already established. In particular, the coroner could not offer testimony on the question of which and how many of the wounds were inflicted by Appellant. Accordingly, the coroner's testimony and its use by the prosecutor was gratuitous, cumulative, and of little if any *actual* relevance, and nonetheless, highly inflammatory and *unduly* prejudicial.

Appellant also challenged the admission of Exhibit 67-K, the photograph of the victim's "stun-gun" burn, ostensibly offered by the prosecution to demonstrate the suffering inflicted on the victim. The

defense objected on grounds that Appellant did not inflict this wound; and notwithstanding that fact, such evidence was highly inflammatory and cumulative, and therefore gratuitous and unnecessarily inflammatory. (AOB 208-209, 221.) Respondent counters that the jurors knew that Appellant did not inflict all of the wounds on the victim and though he did not inflict the stun-gun injury, it was a circumstance of the offense, therefore admissible on that basis; and that the photograph depicting the stun-gun injury was not particularly gruesome. (RB 51-52.)

Respondent's claim that the emotionally charged nature of the coroner's testimony was ameliorated by the fact that the jury knew Appellant did not inflict all of the wounds is in error. Similar to the harm created by admission of the "bloody shirt" evidence (Argument VI A, *supra*), the emotionally charged nature of the coroner's testimony was not overcome by the jury's knowledge that Appellant did not inflict the stun gun injury. When they viewed the photograph depicting burns on the victim caused by the stun-gun, Appellant's jury did not know the disposition of the co-defendants' cases, and likely cast blame for the burn injuries on Appellant, whose case was before them; a purely emotional, albeit understandable response.

Regarding the "stun-gun" evidence, Appellant demonstrated in the previous sub-argument that the mere fact that an item of evidence was

described as "circumstance of the offense" does not render such evidence admissible if it is unduly inflammatory and of minimal probative value. (Argument VI A, *supra,* noting that the penalty phase determination must be based on reason and reliable evidence and not emotion or caprice, citing *United States v. Sampson*, *supra*, at p. 186; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358; see also *Payne, supra*, at p. 836 (death judgment must be based on *deliberation*, not *passion*.) Though the evidence of the stun gun injury was less gruesome and bloody than the "bloody shirt" evidence, its admission does not suggest a contrary conclusion. At most, the distinction is one of degree only. While not bloody or gruesome when compared to the "bloody shirt" evidence, the stun gun evidence was nevertheless highly inflammatory as it invoked images of terrible suffering.

Here, since Appellant did not inflict the stun gun injury *and* because the stun gun burn mark photograph (Exhibit 67K) was cumulative and therefore unnecessary for any admissible purpose, *any* incidence of the jurors casting blame on Appellant for this injury was inappropriate. Singly or combined, the error in admitting the challenged coroner's testimony, Exhibit 65 (victim's actual "bloody shirt"), and Exhibit 67K (burn mark photograph) was significant. Coupled with the improper and highly inflammatory "victim impact" evidence which far exceeded the scope of authorities permitting admission of such evidence at a penalty trial ostensibly as "circumstances of the offense," (Argument VII, *infra*), the challenged

evidence was a significant contributor to an unconstitutional penalty verdict based on emotion, not reason. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

Accordingly, the judgment of death of death must be reversed.

VII
THE TRIAL COURT'S ADMISSION OF EXCESSIVE, IRRELEVANT AND HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

In his Opening Brief, Appellant contends that the scope of the victim impact presentation in his case vastly exceeded the limited constitutional authorization of the United States Supreme Court in *Payne v. Tennessee, supra,* 501 U.S. 808. (AOB 146.) The sheer quantity of evidence was sufficient to violate due process and to undermine the fundamental fairness required in capital sentencing, and the content was overwhelmingly prejudicial. Certain categories of evidence and testimony were irrelevant; they were not "circumstances of the capital crime" under California's death penalty statute according to any reasonable definition of the term. Other evidence, although arguably relevant according to the decisions of this Court in this area, was unduly prejudicial and ought to have been excluded or substantially limited according to clearly established state law.

The victim impact presentation here was excessive, cumulative,

unduly and unnecessarily emotional and inflammatory. It went far, far beyond the "quick glimpse of the life which [defendants] chose to extinguish" envisioned by the *Payne* Court in authorizing the limited use of victim impact evidence at penalty trials. (*Payne, supra*, 501 U.S. at p. 822.) It included descriptions of the screams of the victim's wife upon learning of her husband's death; descriptions of her ongoing depression, day-to-day inability to function and physical symptoms as a result of James Madden's death; descriptions of day-in, day-out trauma experienced by the victim's daughter, Julie, especially her continuing panic reactions to virtually every situation, her deteriorating performance in school, her inability to be away from her mother, etc.; and descriptions of the general depression and withdrawal exhibited by the victim's grandmother. It presented what amounted to a glowing tribute to the victim, more appropriate at a memorial service than at a penalty trial in a capital case. (See, AOB 204-205; 83 RT 22025,22026, 22031-22032, 221991-21992, 22027.)

These matters were presented in excruciating detail with numerous witnesses often describing the same event so as to add to the emotional impact. If the victim impact presentation in this case was proper, then there are indeed no limits on the admissibility of such evidence, nor standards governing it. Clearly, this was not what the United States Supreme Court had in mind when it found victim impact evidence admissible at a penalty

trial. (*Payne v. Tennessee, supra,* at p. 822.) That opinion expressly conditioned its ruling on the assumption that the states would diligently monitor proffers of victim impact evidence so as to assure that the admission of such evidence would not violate Eighth Amendment and due process standards (See, *United States v. Sampson, supra,* 335 F.Supp.2d at p. 187.) Unfortunately, in California, this assumption has not yet translated into reality.

Respondent, with minimal analysis, concludes that the victim impact presentation in this case was admissible as "circumstances of the offense," did not consume a large number of pages in the transcript; and was "not unduly inflammatory." (RB 45.) Respondent also asserts that the jury's exposure to the victim's bloody shirt, and evidence of "tasering" the victim (*not* perpetrated by Appellant) cannot be considered by this Court in determining the nature and extent of the emotional impact of the victim impact presentation on the jury. (RB 47.)

Respondent is wrong on all counts.

"Victim impact" evidence is not necessarily admissible as "circumstances of the offense" (Penal Code sec. 190.3(a).) While this is the theory of admissibility for such evidence, the fact remains that it is *in*admissible if it is unduly prejudicial and/or inflammatory. Authorities holding that such evidence is facially admissible do not alter the principle

that a penalty phase determination must be based on *reason and reliable evidence and not emotion or caprice*. (*Sampson, supra*, at p. 186; *Gardner v. Florida, supra*, 430 U.S. at p. 358. See also *Payne, supra*, at p. 836 [death judgment must be based on *deliberation*, not *passion*].) Thus, such evidence is clearly inadmissible when the victim impact evidence will produce an undue risk that the penalty phase determination will be based on "emotion or caprice."

Respondent's claim that the disputed forensic evidence in this case cannot be considered as part of the emotional impact of victim impact evidence is erroneous. Case law recognizes that indeed, the relationship between "victim impact" evidence and forensic evidence may be so intimate as to be inextricable. This was recognized in *Sampson*:

> At one point, when McCloskey's bloody shirt was displayed in open court, but not in the presence of the jury, there were audible gasps from the gallery. In this context, the court feared the repetition of the events described in *State v. Steele*, 120 Ariz.462, 586 P.2d 1274, 1277-1278) (1978). In that case, during the display of a murder victim's clothing, his widow became so overwrought that she rushed from the courtroom, creating a disturbance which was noticed by all the jurors. The defendant objected, saying that the prosecution was "in effect, 'waving the bloody shirt.'" On appeal, the Supreme Court of Arizona agreed, saying that the shirts had been introduced "only to arouse and inflame the emotions of the jury." *Id.*
>
> For these reasons, the court ruled that the bloody shirts of victims McCloskey and Rizzo were not admissible.

(*United States v. Sampson, supra,* 335 F.Supp.2d at p. 185.)

The foregoing passage illustrates well the principle that the prejudicial impact of inflammatory forensic evidence and victim impact evidence may exacerbate each other. It also provides a hornbook example of *im*proper victim impact evidence; *i.e.*, evidence affecting the jury in such a way that an undue risk is created that the jury will use such evidence to reach a penalty verdict based on *emotion* rather than *reason*. This undue risk applied to virtually the entire victim impact presentation in Appellant's case.

Furthermore, to the extent that specific guidelines exist to structure the admission of victim impact evidence, the presentation in the present case fails miserably. In *Salazar v. State* (Texas Crim.App. 2002) 90 S.W.2d 330. 336, the Court followed articulable standards previously enunciated n *Solomon v. State*, 49 S.W. 3d 356, 366 (Tex.Crim.App.2001.) specifically, the *Salazar* court in determining whether challenged victim impact evidence would tend to have an undue and improper emotional and inflammatory impact on the jury, followed the following guidelines enunciated in *Solomon*:

(1) how probative is the evidence;

(2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way;

(3) the time the proponent needs to develop the evidence; and

(4) the proponent's need for the evidence.

(*Salazar v. State, supra*, 90 S.W. 3d 330, 336.)

These *Solomon* guidelines provide meaningful standards for determining "how much is too much," so to speak; that is, for weighing the likelihood that the proffered evidence will be used by the jury for *im*proper as opposed to proper purposes; *i.e.*, to make the determination of life or death based on emotion as opposed to deliberation, reason and reliable evidence. (*Gardner v. Florida, supra,* at p. 358; *Payne, supra*, at p. 836.) As submitted, they are preferable to the vague standards that prevail in California, which have the practical effect of allowing the admission of highly charged victim impact evidence virtually without limit.

This is out of line with federal authority and violates federal due process and Eighth Amendment proscriptions because a criminal defendant cannot possibly present a rational defense to an *ir*rational emotional response. Obviously, such circumstance violates the defendant's right to marshal evidence to meet the prosecution's case in aggravation, and to be free of the arbitrary and capricious imposition of a judgment of death. (*Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio* (1078) 438 U.S. 586); U.S. Const., Amends. VIII; XIV; Cal. Const., Art. I, secs. 15, 17.) This Court should adopt the *Solomon* guidelines or ones similar to them so as to ensure that California's jurisprudence is in line with federal constitutional requirements on this issue.

Appellant is mindful that this Court has stated it is not bound by *Salazar*. (See *People v. Booker* (51 Cal.4th 141, 190-191, citing *People v. Kelly* (2007) 41 Cal.4th 763, 797-799.) Nevertheless, the guidelines set forth therein are, at a minimum, instructive. Moreover, to whatever extent the Court found *Salazar* inapplicable because it was distinguishable on its facts, such distinguishing factors are absent in Appellant's case. For example, in *People v. Kelly, supra*, the Court in distinguishing *Salazar* noted that "this is not a case of one witness after another giving repetitive victim impact testimony." As is clear from the discussion that follows, Appellant's case, indeed, is such a case.

Similarly, in *People v. Prince* (2007) 40 Cal.4th 1179, 1290, this Court stated, "[u]nlike the material presented in the *Sampson* and *Salazar* cases, the videotaped interview of Holly Tarr did not constitute an emotional memorial tribute to the victim." In Appellant's case, as will be demonstrated, the prosecution's victim impact presentation was nothing if not "an emotional memorial tribute to the victim."

When the *Salazar/Solomon* standards are applied to the victim impact presentation in this case, it is clear that the victim impact admission in its entirety was inherently inflammatory and thus erroneous and inadmissible. Because of the inflammatory nature of the improperly admitted evidence, and the highly inflammatory and prejudicial nature of

other penalty phase evidence improperly admitted (Argument VI, supra), the prosecution cannot meet its burden of showing beyond a reasonable doubt that the error could not possibly have affected the penalty verdict. (*Chapman v. California, supra*, 386 U.S. 18, 24.) The judgment of death must therefore be reversed.

By applying the four-prong *Solomon* test, the prejudicial impact to Appellant is clearly exposed. First, with regard to the "relevance" prong of the *Solomon* test, the prosecution's victim impact presentation, taken as a whole, was only marginally relevant and admissible. Though some evidence presented which described the impact of the victim's death on surviving family members was relevant and admissible, other victim impact evidence was irrelevant and inadmissible. Even if deemed relevant, by its very nature most of the victim impact evidence was inherently inflammatory and thus inadmissible. (*Payne, supra*, at p. 847, Marshall, J., dissenting.) Therefore, great care and scrutiny was required to ensure that the line between proper (deliberate, reasoned and reliable evidence) and improper (emotion, passion and caprice) penalty phase evidence was not crossed. (*Payne, supra*, at p. 836; *Gardner, supra*, at p. 358.)

To begin with, testimony about Sissy Madden, the victim's wife's immediate response to coworkers, was improper. Testimony that she screamed "like a wounded animal . . . " was "flailing around physically . . ."

and "[s]creamed for a long time . . . it was pretty awful . . . Everybody in the building heard it . . ." was purely emotional, highly inflammatory and therefore, inadmissible evidence. (82 RT 21888-21889; see AOB 164.) In this regard, the following observation of the Court in *United States v. Sampson, supra*, bears repeating because it illustrates a proper exercise of discretion by a court when the court is presented with comparable evidence:

> At one point, when McCloskey's bloody shirt was displayed in open court, but not in the presence of the jury, there were audible gasps from the gallery. In this context, the court feared the repetition of the events described in State v. Steele, 120 aariz.462, 586 P.2d 1274, 1277-1278 9Alriz. 1978*). In that case, during the display of a murder victim's clothing, his widow became so overwrought that she rushed from the courtroom, creating a disturbance which was noticed by all the jurors. The defendant objected, saying that the prosecution was "in effect, 'waving the bloody shirt.'" On appeal, the Supreme Court of Arizona agreed, saying that the shirts had been introduced "only to arouse and inflame the emotions of the jury."*

(*United States v. Sampson, supra,* 335 F.Supp.2d at p. 185; emphasis added.)

This type of evidence is impossible to address as a criminal defendant. Whether predictable or not, such reactions are purely emotional and therefore not amenable to a rational countervailing argument. This violates the Eighth Amendment because the defense cannot defend against such aggravation evidence. (*Lockett v. Ohio, supra*; *Eddings v. Oklahoma, supra.*) In addition, multiple witnesses offered lay opinions on Sissy

Madden's state of mind, which generally is inadmissible. (See, *e.g., People v. Miron* (1989) 219 Cal.App.3d 580, 583-584.) These non-family member testifying witnesses also presented evidence of their own emotional reactions to the news of the death. The relationship between their second-hand emotionalism to the life versus death calculation is extremely attenuated, if not nonexistent. It too created undue and unnecessary prejudice.

Further, the long-term reactions of Sissy Madden — including her ongoing depression, need for therapy, inability to function on a day-to-day basis and physical symptoms—were described by multiple witnesses. This same testimony by multiple witnesses presented several problems. One, the evidence was unnecessarily cumulative. As suggested in Appellant's Opening brief, one or two witnesses describing the essential effects of the victim's death on Sissy Madden would have sufficed. Additional descriptions crossed the line between proper and improper considerations and rendered the penalty phase an exercise in pandering to inevitable emotional reaction of the jury. Even if the cumulative evidence is deemed relevant, the evidence by its very nature was highly emotional. By offering the same emotional testimony through multiple witnesses, the prosecution successfully created an increased and unnecessary exposure to this inherently inflammatory testimony; thus increasing the risk of undue prejudice to Appellant. *(Payne, supra,* at p. 847.)

In addition to the repetitive testimony concerning Sissy Madden's state of mind, the foregoing analysis applies to the repetitive testimony concerning the impact of the victim's death on the victim's daughter and grandmother. Multiple witnesses described in great detail the trauma suffered by Julie Madden, the victim's daughter. The testimony related that Julie Madden suffered ongoing fear, panic attacks, nightmares, and terror induced simply by her surroundings. Such testimony, if not carefully monitored, does more than inspire sympathy for the surviving victim; it inspires outrage in general and against the perpetrator in particular thus creating a created a high risk that the penalty imposed by the jury would be based on caprice, emotion and passion rather than deliberation and reason. (*Gardner v. Florida, supra*, at 430 U.S. at p. 358; Sampson, supra, 335 F.Supp.2d at p. 187, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 836.)

Such was the case with descriptions of Julie's reactions. The same may be said of the testimonial descriptions of the reactions of the victim's 91-year old grandmother. Witnesses testified as to her depression and withdrawal as a result of the victim's death. Particularly in light of the subject's age, such testimony, if not carefully monitored presented a high risk that the jury would consider it beyond mere information about the survivor (and the expected sympathetic reaction to the survivor's plight) and be incited to inflammatory reactions of rage, and outrage, both improper

bases upon which to ground a judgment of death. (*Gardner v. Florida, supra*, at 430 U.S. at p. 358.)

As to all of these survivors, the inflammatory nature of even relevant evidence was unduly emphasized by excessive detail and unnecessary repetition. Some of the witnesses had emotional reactions *to their own testimony*. These reactions were irrelevant as "circumstances of the offense." They were necessarily inflammatory and improper, and, multiplied by the number of witnesses presented, detracted from any relevance of the victim impact presentation. They compromised the relevance of otherwise relevant victim impact evidence. Multiple lay opinions as to the state of mind of surviving family members were of dubious relevance but undoubtedly inflammatory and inherently prejudicial in nature. In short, such evidence was of infinitesimal relevance as victim impact evidence was nevertheless extremely inflammatory and prejudicial.

Finally, as discussed in detail in Appellant's Opening Brief, the prosecution's evidence regarding the character of the victim was clearly excessive and more akin to a memorial service than a reasoned and deliberate vehicle to inform the jury of the stellar qualities of the victim. (AOB 204-205.) The prosecution also presented testimony and photographs detailing every detail of the victim's life, including his childhood. (AOB 179-183; 83 RT 21987-21990, 22025-22026.) This created a high (and

totally unnecessary) risk that the testimony would not only provide information to the jury on relevant matters, but also inflame the passions of the jury against Appellant for his hand in the demise of a victim who was represented as one of spotless and irreproachable character; a hero to both his family and society. As a representative example, photographs of the victim with his daughter Julie at Christmastime were selected from the Madden family album and presented to the penalty jury. (See, AOB 190.) These were not only unduly emotional and inflammatory, but also exacerbated the unfair prejudice created by descriptions of Julie Madden's trauma. (See, AOB 190.) The message was clear: anyone who would cause the death of a person of James Madden's caliber certainly deserved to die regardless of any mitigating evidence that might be presented. (AOB 203-204.) Such a result, of course, is the product of undue and improper passion and emotionalism as opposed to reason and a deliberative analysis. (*Payne, supra*, at p. 836; *Gardner, supra*, at p. 358.)

The second prong of the *Solomon* test, *i.e.*, the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way, was effectively and thoroughly discussed above in relation to the test's first prong analysis regarding a relevance finding. To be clear, Sissy Madden's initial reactions to her husband's death and her uncontrolled screams and other emotional and physical manifestations of grief in the

short-term clearly fit into this second category. Testifying witnesses' own emotional reactions to their own emotional testimony, and lay opinions of such witnesses as to the state of mind of surviving family members, are also obvious examples of evidence used to impress the jury in some irrational way. The sheer number of witnesses exacerbated the problem by adding unnecessary and potentially prejudicial information and by emphasizing inherently inflammatory material. The inappropriate (at a capital penalty trial) and unnecessary lionization of the victim clearly had the potential "to impress the jury in some irrational, but nevertheless indelible way." (*Salazar, supra*, at p. 336.) Accordingly, the potential for unfair and undue prejudice, i.e., the undue risk that the penalty verdict would be based not on reason and deliberation but on caprice, emotion and passion and thus leave an irrational and indelible impression on the jury, far outweighed the relevance of even the probative bits and pieces of the prosecution's victim impact presentation.

Factor three of the *Solomon* analysis: the time spent by the proponent to develop the evidence, also weighs heavily against its admissibility in this case. The suggestion of the *Solomon* court in formulating this factor appears to be, that the greater the time required to present the victim impact evidence, the greater the potential for unfair emotionalism; *i.e.*, prejudice. This is certainly true in Appellant's case. Preparation of the prosecution's

victim impact presentation was longer than reasonably necessary due to the number of witnesses prepared by the prosecution and presented and the detailed descriptions of the surviving family members' ordeals, as well as the life story of the victim. The repetitive nature of most of the victim impact testimony failed to provide additional relevant details.

As stated previously, the risk of undue prejudice increased greatly in this case as a function of the number of witnesses presented for purposes of describing the travails of each family member discussed. Further, presentation of family photographs took considerable time, as did the presentation of every detail of the victim's life. Again, this evidence increased the danger of improper emotionalism because among the photographs generated for purposes of the victim impact presentation was the photograph of the victim and his daughter Julie at Christmas (AOB 190), a depiction fraught with the risk of harm by itself; and one that dramatically increased the potential for inflaming the jury, as a result of the multiple and detailed descriptions of the trauma and day-to-day terror suffered by Julie as a result of the victim's death. In this connection, the contrast between the present case and *People v. Roldan* (2005)35 Cal.4th 646, merits mention.

In *Roldan*, this Court pointed out certain characteristics of the prosecution's victim impact presentation that demonstrated a lack of undue prejudice. This Court considered the quantity of victim character testimony

and the overall size and scope of the victim impact presentation, and found no undue prejudice. A single witness testified in *Roldan*, and the jury saw only one photograph of the victim and his children. (*Roldan, supra*, at pp. 732-733; see, AOB 194-195.) Jurors in Appellant's penalty phase, by contrast, heard from nine witnesses, viewed multiple photographs, and were subjected to a gruesome and disturbing exhibit in the form of the victim's bloody shirt. (82 RT 21897-21903; AOB 209.)

The fourth prong of the *Solomon* test, the need for the evidence, has been addressed previously and, again, weighs heavily against the admissibility of the victim impact presentation in this case. In *Salazar*,at p. 336, the Court noted that "*victim impact and character evidence may become unfairly prejudicial through sheer volume.*" (*Id.*; emphasis in the original.) As argued herein, to convey the desired information to the penalty jury, only a fraction of that presentation was actually necessary. Everything else was gratuitous and dramatically increased the risk of unfair passion and emotionalism and thus, unfair prejudice. The short and long term impact of the victim's death on Sissy Madden and the effect of his death on Julie Madden and Madden's grandmother could have been described by a single witness and in far less detail. (*Roldan, supra*, at pp. 732-733; see, AOB 194-195.) The prosecution exceeded these logical boundaries at his peril. In sum, each of the foregoing criteria militates heavily against the

admissibility of the prosecution's victim impact evidence as presented here. Even if bits and pieces of the prosecution's victim impact evidence was admissible, significant portions were not; and the presentation as a whole was inadmissible as proffered due to the unacceptable high risk of undue and improper emotional impact on the penalty jury in Appellant's case.

Prejudice from the admission of improper victim impact evidence is patent. As discussed, the presentation here was calculated to be, and was, a highly emotional one. The prosecution therefore succeeded in securing a judgment of death grounded upon passion and emotionalism. This violated Appellant's due process rights, and his rights to be free of cruel and unusual punishments and an arbitrary and capricious judgment of death.

Moreover, in view of the extraordinarily prejudicial nature of the 'bloody shirt" evidence, it cannot be said that the improper admission of aggravating evidence in this case, of which the victim impact presentation was a significant part, could not possibly have affected the death verdict. (*Chapman v. California, supra*, 386 U.S. 18, 24.) One highly emotional response may trigger another (*e.g., United States v. Sampson, supra*, at p. 185) and the combined impact of individual, highly inflammatory pieces of evidence may have the ultimate effect of overriding any proper function of the evidence as a purveyor of relevant information. (*People v. Blue, supra,* 724 N.E.2d at p. 934.) This is particularly true where the evidence is

specifically calculated to provoke an emotional response in the penalty phase jurors, as occurred here. (RB 49-50.)

For all of the foregoing reasons, the judgment must be reversed.

VIII
THE PROSECUTOR'S INFLAMMATORY CLOSING ARGUMENT DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND WAS MISCONDUCT UNDER CALIFORNIA LAW.

In his Opening Brief Appellant cites numerous instances of prosecutorial misconduct occurring throughout the prosecutor's closing argument. (AOB, Arg. VIII.) Appellant reiterates that the prosecutor's argument shows a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084 [767 P.2d 619, 255 Cal.Rptr. 352]; *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436.].) Reversal is required under California law because these repeated instances of misconduct demonstrate "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Haskett*, ~~*supra*~~, 30 Cal.3d 841, 866, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955 [523 P.2d 672, 114 Cal.Rptr. 632].)

In response, Respondent offers superficial arguments and in some cases mischaracterizes the record. Respondent's arguments will be addressed

seriatim.

A. Diminishing the Penalty Jury's Sense of Responsibility for the Penalty Determination Burden by Arguing That Society Demands a Death Verdict

Diminishing the jury's sentencing responsibility by placing it on society's demand for a death verdict, was the underlying theme of the prosecutor's penalty phase argument. It had the effect of removing the jurors' moral responsibility in deciding whether Appellant was to live or die, by transferring that responsibility to the community and state and framing the jurors as merely the proxies of the community and state for purposes of carrying out the ministerial task of imposing the death penalty on behalf of society. This clearly abrogated the jurors' responsibility as penalty phase jurors, which was to weigh aggravation and mitigation and provide an *individualized* determination of the weight to be afforded those factors; and, based on that determination, to make an *individualized* decision as to the penalty to be imposed. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329, 336.)

As stated at AOB page 228, the due process and jury trial clauses of the federal Constitution are violated when a prosecutor urges a jury to return a verdict based on perceived community feeling. (See, e.g., *Viereck v. United States*(1943) 318 U.S. 236, 247 [improper for the prosecutor to tell jurors, "The American people are relying on you"]; *United States v. Solivan* (6th Cir. 1991)

937 F.2d 1146, 1151, 1155 [prejudicial appeal to jury to act as the community's conscience and to send a message of zero tolerance for drugs]; *United States v. Johnson* (8th Cir. 1992) 968 F.2d 768-770 [exhorting jurors to "stand as a bulwark" against the proliferation of drugs]; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441 [prosecutor may not urge jurors to convict a criminal defendant in order to protect the community's values].)

Respondent, citing *People v. Ghent* (1987) 43 Cal.3d 739, 771, concedes that such arguments as complained of here may be inflammatory and improper, but are not misconduct if they are isolated and do not form the principle basis for advocating for the death penalty. (RB 56.) Respondent contends that the arguments in question were not inflammatory and did not form the principle basis of the prosecutor's argument. (RB 56.) In support of his argument, Respondent cites a single incident of the prosecutor's reference to "a moral evaluation and weighing as mandated by law." (RB 55; 86 RT 22318.)

In response, a recap of the offending arguments is appropriate. Review of the text of those arguments demonstrates that the offending references were frequent, highly inflammatory, did form the principle basis for advocating for the death penalty, and, indeed (from a practical standpoint), the only basis for the prosecutor's advocacy for the death penalty. According to the prosecutor, society expected a death verdict in this case and nothing less would satisfy the

jurors' sworn duty. Jurors were sternly advised that choosing a life sentence would be taking the "easy way out," and if they did not recommend a death sentence for Chris Spencer, they would be shirking their duty as a sworn juror.

> You, ladies and gentlemen, the few, have been selected as representatives of the community in this case to decide first the question of guilt, which you have done, and now the question of penalty. ***The jury verdict here will reflect the conscience of this community*** on the ultimate question of penalty for what this defendant, Christopher Spencer, has done.
>
> This is a solemn responsibility and not one to be taken lightly, ***nor is this responsibility one of taking the easy way out by voting for life without parole*** simply because the alternative is too difficult to contemplate. That wouldn't be right, either.
>
> I know that this is not something that any of you actively sought. Nevertheless, all of ***you have now become a part, and a very crucial part, of the law and of justice in operation here.***
>
> As you recall from what now seems so very long ago when you came into this courtroom, when you filled out the jury questionnaire, when you came in and you answered questions in voir dire, ***each and every one of you agreed to accept this responsibility and you each raised your hand and took an oath to do it.*** That's why you're all here.

(83 RT 22310 [emphasis added].)

Before discussing each of the statutory factors in mitigation, the prosecutor again expressly equated the jurors' duty with community expectations: "[I]f your verdict is death in this case, this verdict will act as a considered expression of condemnation of the defendant's conduct and will truly be imposed out of a sense of justice in light of what he has in fact done to

Jim Madden, to his family and to the societal community in which we live." (83 RT 22313.) The prosecutor again made clear that nothing but a death sentence would suffice. According to the prosecutor, the oath taken by each juror was a binding promise to return a death verdict. The choice of life imprisonment was repeatedly characterized as "taking the easy way out," in abrogation of the jurors' duty. (See, *e.g.*, 83 RT 22040; 22310; 22317; 22377.)

The prosecutor amplified the prejudicial effect by combining these comments with remarks made to diminish the jurors' sense of personal, moral responsibility for the penalty decision. Jurors were told to disregard any sympathy for Appellant or "misplaced feelings of guilt." (83 RT 22312.) Instead, they were told that a death verdict was their legal and moral obligation: "There is no guilt in performing one's duty, especially a duty required by law, passed by your fellow citizens and affirmed by the courts of this state and country." (*Id.*) According to the prosecutor, the jurors need not be overly concerned about the penalty decision because the responsibility for a death verdict belonged to the State of California, the legal system, and the defendant, Chris Spencer. The closing argument conveys the impression that the penalty phase is merely a formality; following the guilt phase, a death verdict is the jury's only viable option. Further excerpts from the prosecution's closing argument bears repeating:

The only guilt here rests squarely on the defendant's

> ***shoulders, guilt for what he has done, guilt for what he must face. As he bears the guilt, so must he bear the punishment.***
>
> Now, during the jury selection process some of you expressed concern about imposing the death penalty upon someone unless you knew that person was truly guilty. Well, let's be very clear on that point. The guilty verdict entered at the conclusion of the guilt phase of this trial means that the defendant, Christopher Spencer, has been found guilty beyond any reasonable doubt of the murder of Jim Madden, as well as of the other crimes and the two special circumstances and a personal use of a knife enhancement. Those were also found to be true.
>
> The presumption of innocence has evaporated and guilt has been conclusively established. Chris Spencer is no longer an innocent man. ***You don't need to worry about imposing the ultimate penalty on somebody who is not truly and undeniably guilty***.

(83 RT 22312-22313, emphasis added.)

In concluding his first closing address, the prosecutor again told jurors that they were morally bound to return a death sentence on behalf of society, the legal system and the prosecutor himself.

> I submit that for what this man has done he deserves the death penalty. He has brought that on himself. And I submit that if you're honest with yourselves you will agree with that, each and every one of you. ***The issue is whether you have the courage, the strength, the conviction to impose what is required here*** by the facts and circumstances of this most horrible crime.
>
> Remember, we, as individual members of society, have given up our right to take the law into our own hands, having entrusted the state and our system of justice to apply it.
>
> ***A free society requires of its citizens, of its jurors, vigilance,***

> ***courage and strength and resolve in making the hard decision that you're going to have to make. What I'm asking you to do*** is follow the law, consider the evidence and render a just verdict appropriate for this man for what he has done.
>
> Ladies and gentlemen, on behalf of the District Attorney's Office of Santa Clara County, as well as on behalf of the People of the State of California, I would ask that you return, each and every one of you, a verdict of death against the defendant, Chris Spencer, for what he has done.

(83 RT 22354-22355, emphasis added.)

These themes were repeated even more forcefully in the final closing argument, where the prosecutor played on the jurors' fears as well as invoking their loyalties to police and to the legal system. According to the prosecutor, the community's safety depended upon the jury's willingness to impose the ultimate penalty in this case.

> What it gets down to, ladies and gentlemen, I submit is that everyone in a civilized society has a right to make sure that the law theoretically and ideally is carried out as it's supposed to be because each of us have given up our personal rights to do that ourselves.
>
> The instinct for just retribution is part of the nature of every human being. Channeling that instinct to the administration of criminal justice serves an important purpose in a promoting the civility of a society that is governed by law, a society that is governed by law and order.
>
> When people begin to believe that an organized society is unwilling or unable to impose on criminal offenders the punishment that they truly deserve for what they've done for the most horrible of crimes, then it seems clear that they are in effect are seeds of anarchy that are being sewn for people to

engage in self-help.

> Where certain crimes are concerned and I submit this is one of those few. Where certain crimes are concerned retribution is not a forbidden consideration or one inconsistent with society's respect for the very dignity of man, of humanity. Certain crimes are in and of themselves so grievous and an affront to humanity that the only appropriate response can be the penalty of death. And I submit this is one of those. Like it or not, ladies and gentlemen, retribution is still a part of being human and of being a human being.
>
> When the State of California if you determine that in this case Mr. Spencer deserves the death penalty for what he's done, if you if you determine that and enter such a verdict, when the State of California executes Chris Spencer, if it does in this case, it is recognizing the worth of the life of his victim and of the lives of his victim's families the victim's family that he left behind and who he has harmed forever. It's recognizing the worth of those lives.
>
> And Mr. Mantell may say, well, it doesn't really recognize the worth of a life, but I say that given the facts of this particular case, given what was done here that refusal to apply capital punishment in a case as serious and aggravated as this in effect cheapens all of our lives.

(83 RT 22401-22404.)

The foregoing disposes of any contention that the challenged arguments were merely isolated or not the principle basis of the prosecution's demand for a judgment of death. Also refuted is Respondent's contention that the prosecutor's arguments were not an improper expression of personal opinion because such argument "was fairly grounded in the facts in evidence." (RB 56, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 804.) Respondent is wrong

and such a statement is belied by the record. As stated at AOB page 231, "These were not simply isolated remarks about community vengeance in an otherwise proper argument." (*People v. Wash* (1993) 6 Cal.4th 215, 262.) Instead, jurors were browbeaten with the message that they owed it to the victim's family, to the *prosecutor*, to the legal system, and to society to condemn Chris Spencer to death. This form of misconduct in the closing argument is serious enough to justify reversal of the penalty decision by itself, and reversal is clearly appropriate when this instance is considered in combination with the other misconduct. (*People v. Cornwell, supra,* at pp. 92-93; *People v. Lucas, supra,* 12 Cal.4th 415, 475.)" (AOB 231, emphasis added.)

B. Improper Appeal to Jurors' Emotions

Appellant in his Opening Brief (AOB 235, 237) assigned error to the prosecutor's arguments (1) inviting the penalty jury to show the same sympathy for Appellant that Appellant showed for the victim in this case; and (2) inviting the jurors to place themselves in the victim's position in determining the penalty to be imposed. Both of these arguments address the jury being asked to internalize the trauma and harm inflicted on the victim and then to utilize the resulting emotional response, *e.g.*, shock, rage, outrage, need for retribution, to determine the penalty to be imposed on Appellant.

Respondent counters that prosecutorial "reciprocity" arguments such as those challenged here have been sanctioned by this Court. (RB 57, 59, citing

People v. Kennedy (2005) 36 Cal.4th 595, 636, and *People v. Jackson* (2009) 45 Cal.4th 662, 692.) However, to the contrary, Respondent's contentions notwithstanding, these and other relevant authorities do *not* hold that these arguments are categorically admissible. In fact, these arguments have been criticized by this Court, see, *e.g., Jackson, supra,* at p. 692; *People v. Haskett* (1982) 30 Cal.3d 841, 863-864 .) Such authorities note that these types of arguments by the prosecutor are only admissible when they are not unduly inflammatory. (*People v. Haskett, supra,* 30 Cal.3d 841, 863-864; see also, *Gardner v. Florida, supra,* at 430 U.S. at p. 358; *United States v. Sampson, supra,* 335 F.Supp.2d at p. 187, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 836 [judgment of death is based on reason and reliable evidence, not caprice or emotionalism, and deliberation, not passion].)

In Appellant's case, the prosecutor's equivalency or reciprocity arguments, especially when viewed in context with the accumulation of other prejudicial penalty phase evidence, were manifestly inflammatory and unfair. Here, the prosecution's penalty phase presentation consisted mainly of highly emotional, repetitive, cumulative and unnecessary "victim impact" evidence, which the equivalency or reciprocity arguments exploited. As a result, the "victim impact" evidence became "juror impact" evidence, inherently emotional, inflammatory and prejudicial and unauthorized by Penal Code section 190.3, subdiv. (a) or any case authority of this Court or the United States

Supreme Court.

As noted at AOB page 241, the prosecutor's argument was rendered particularly egregious, and prejudicial, by both its timing and by the nature of the prosecution's penalty phase evidence. The penalty jury here was told, *in advance* (during *opening statement*), to take what it was about to hear and apply it to their *own lives* in making the *moral judgment* as to the punishment to be imposed. The prosecutor then presented a heartrending tale of profound, prolonged and indeed, incapacitating despair, mourning and sadness. This was coupled with the bloody and gruesome spectacle of photographs of the victim ostensibly admitted to show the circumstances of the offense and victim's "suffering." As each piece of testimony and evidence was presented, the jurors were encouraged (by the prosecutor's prior comments), to apply the facts to their *own lives*. This personalized the prosecution's already highly emotional case in a way that was obviously unfair, improper and manifestly prejudicial.

In a previous argument, Appellant contended that the nature and sheer volume of this highly emotional and highly charged evidence went far beyond acceptable limits so as to render the penalty judgment in his case fundamentally unfair, arbitrary and in violation of his due process rights. (Argument VII, *supra.*) Appellant maintains that position here. But apart from the question of whether such evidence, by its very nature, rendered Appellant's penalty trial

unfair, it cannot be denied that it was in fact highly charged emotionally, and certainly calculated to induce the jury to vote for death. To whatever extent such highly charged emotional evidence was "relevant" as argument on victim impact evidence (*Payne v. Tennessee, supra*, 501 U.S. 808), it was highly and unduly prejudicial.

Significantly, *Payne* and its progeny do *not* state that victim impact evidence is admissible because it is non-prejudicial. As discussed above, victim impact evidence, particularly that presented in the present case, is, and was herein, highly prejudicial. The essence of *Payne* is not that such evidence is not non-prejudicial but that it is not *unfairly* prejudicial because it is relevant and admissible as "circumstances of the offense." evidence. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.)

In Appellant's case, as suggested above, the prosecution's argument personalized the penalty phase evidence in a way that was manifestly improper. While *Payne* and its progeny approved the use of victim impact evidence, it said nothing about allowing impact evidence that clearly focused on placing the *juror* in the victim's shoes, i.e., *juror* impact evidence.

Indeed, *Payne* did not purport to address the imagined impact of a defendant's offense on an individual juror, as if the murdered victim had been a loved one of such juror; or the imagined impact on surviving family members. Considerations such as these are utterly irrelevant as "victim impact" evidence

or "circumstances of the offense" because, obviously, the imagined events never took place. Yet in Appellant's case, the highly prejudicial impact remained and in fact was exacerbated by the invitation to each individual juror to apply the events that befell the Madden family to their *own* loved ones and family members. To that extent, the prosecutor's improper argument removed the prosecutor's penalty phase evidence, which was indisputably and highly calculated to provoke an emotional and highly prejudicial response, from the protective umbrella of *Payne*. This renders the impact of the evidence, *unduly* and *unfairly* prejudicial.

Here, unfair prejudice from the "juror impact" evidence was, inherently, far more prejudicial than in the typical case in which the "golden rule" argument has been presented (e.*g.*, *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, at p. 761 [personal injury case]); yet in the latter cases, the error has mandated *reversal.* (*Id.*, at p. 770.) The prejudicial impact was exacerbated, of course, by the prosecutor's penalty phase argument, during which he made repeated references to the victim's holiday gatherings, events, etc. (86 RT 22409.) And it was not limited to the effect of the victim's absence on family members. The gruesome nature of the offense, untethered as it was (for purposes of the exhortation to the jurors to consider how they would feel if such an event were to befall a loved one) to any relevant purpose, was worse than prejudicial, it was inherently, and unduly, inflammatory. (*See,*

e.g., Godfrey v. Georgia (1980) 446 U.S. 420, 433, fn. 16 [in finding "heinous, atrocious and cruel" special circumstance unconstitutional, Court states "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as a murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of sec. (b)(7) [of the Georgia death penalty statute] so as to include all murders resulting in gruesome scenes would be totally irrational.].)

This Court's own authority strongly supports Appellant's position. In *People v. Edwards, supra*, 54 Cal.3d at p. 836, this Court reaffirmed the reasoning of *Haskett, supra*, and acknowledged that victim impact evidence carries a high risk of unfair and improper prejudice. This Court listed considerations for purposes of ensuring that such evidence, found admissible in principle in *Payne*, does not cause unfair prejudice in a given case:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its pro*per role or invites an irrational, purely subjective response should be curtailed.*

(*People v. Edwards (1991) 54 Cal.3d 787,* 836, fn. 11.)

When viewed as *juror* impact evidence and argument, the prosecution's penalty phase case fails to meet the above formula for preventing undue prejudice, on *every point.* A juror imagining what life would be like had the charged offense occurred to him or her and his or her family, would not be "fac[ing] its obligation soberly and rationally," and would be put in the position of allowing "emotion [to] reign over reason." Such a juror would not be deciding punishment on "relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." To the contrary, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response [would not] be curtailed." (*Edwards, supra*, at p. 836.)

Thus, even if the prosecution's penalty phase evidence was properly considered as "victim impact evidence," a position Appellant disputes in the strongest possible fashion, and even assuming the jury could properly consider that highly emotional presentation in determining the appropriate punishment in Appellant's case, such circumstances would not detract from the improper prejudicial and inflammatory impact of such evidence as *juror* impact evidence. There is nothing about the use of the penalty phase evidence as "victim impact" evidence that served to diminish or neutralize the unduly prejudicial effect of such evidence as *juror* impact evidence. To the contrary, the opposite is

probably true. The danger identified by the Court in *Edwards, supra*, at p. 836, is that irrelevant, inflammatory and unduly prejudicial considerations will overwhelm any "proper" considerations. In sum, nothing in *Payne* or in its progeny in any way mitigates the improper prejudice that occurred in the present case.

C. *Griffin* Error

Respondent contends in substance that there was no *Griffin* error (*Griffin v. California* 1965) 380 U.S. 609) because the prosecutor did not expressly state that Appellant had not taken the stand to express sympathy, charity or compassion for the victim. (RB 61.) (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1174.) Respondent's argument exalts form over substance and if accepted would completely eviscerate the *Griffin* holding prohibiting prosecutorial comment on a defendant's exercise of his right to not testify.

The challenged arguments read as follows:

> Mr. Mantell's argument no doubt will be eloquent and emotional, but it won't change the facts. What Mr. Mantell won't be able to speak of is any sympathy or compassion or charity that his client, Mr. Spencer, showed Jim Madden.
>
> He won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you. No remorse, of course, unless it's in his statement where he speaks of himself: "What am I looking at? How long am I going to have to serve? I know I was wrong. I know I'm stupid. Oh, fuck. There went my life. Where will they send me?" "I don't know. I really don't know." "Not even on a first time offense?" His last words in the confession: "Chris,

you fucked up."

Anywhere in there does he say that he's sorry for what he's done? Does he express feelings for Mr. Madden for what happened here?

(83 RT 22347-22348.)

Here, the prosecutor can only be referring to Appellant's failure to testify. This is clear from the fact that the prosecutor informed the jury the only place to look for remorse is in Appellant's statement to the police and there was no remorse shown there. This argument insinuates that Appellant made no other statements (i.e., testimony) in which he might have expressed remorse to the jury. Craftily, the prosecutor suggested if Appellant were to offer statements of remorse to the jury, he would have testified, but no such statements were forthcoming.

This is the plainest interpretation (and therefore the most obvious to the jurors) for the prosecutor's statement "[defense counsel] won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you." The remark is squarely within the prohibition of *Griffin* as was surely apparent to an experienced trial prosecutor. This prosecutor's conduct justifies reversal of Appellant's sentence. (*Griffin, supra,* 389 U.S. at page 615.)

D. Inciting Prejudice by Describing Appellant as a Monster or Wild Animal

Relying on cases such as *People v. Brady* (2010) 50 Cal.4th 547, 586, and *People v. Duncan* (1991) 53 Cal.3dth 955, 977, where arguments comparing the defendant to a wild animal were found to not be misconduct, Respondent contends that likewise no misconduct occurred in Appellant's case when the prosecutor during his closing argument likened Appellant to a "monster" and a "wild animal." (RB 63 citing *Brady, supra*, at p. 586, and *Duncan, supra*, at p. 977 [references to defendant as a Bengal tiger]; see also, *People v. Edelbacher* (1989) 47 Cal.3d 983 1030 [snake in the jungle]; *Darden v. Wainwright* (1986) 477 U.S. 168, 180 [animal].)

These authorities do not end the inquiry. Numerous courts, including this one, have criticized or at least questioned the practice of likening the defendant to an animal to the extent such appellations may be interpreted as racial slurs. (*E.g., People v. Brady, supra*, 50 Cal.4th at p. 586; *People v. Duncan, supra*, 53 Cal.3dth 955, 977 *State v. Blanks* (Iowa Ct.App. 1991) 479 N.W.2d 601 [prosecutor's reference to film "Gorillas in the Mist" was improper in the criminal trial of an African-American defendant].) Even in cases such as the present case in which the reference to the defendant as an "animal" or a "monster" does not contain racial overtones, such references are improper for the similar reason that they serve to demean the defendant and present him to

the jury as subhuman. As the Court observed in *State v. Blanks, supra:*

> Additionally [*i.e.*, apart from racial overtones], the comparison of a defendant to gorillas, apes, other animals or demeaning descriptions by itself may constitute reversible error. *See, e.g., Volkmern v. United States*, 13 F.2d 594 (6th Cir. 1926) new trial granted where prosecutor's closing argument referred to accused as a "skunk"; an "onion"; a :weak-faced weasel"; a "cheap, scaly, slimy crook"); *see generally,* Annotation, *Prosecutor's Appeal to Prejudice*, 70 A.L.R. 4th 664 (1989); Annotation, *Due Process-Prosecutor's Statement*, 40 L.Ed. 2d 886 (1975).

(*State v. Blanks, supra*, 479 N.W. 2d at p. 603.)

The risk created by such appellations in a capital penalty trial is obvious: By characterizing the defendant as some sort of subhuman "monster," not "one of us," the prosecution is suggesting to the jury that the defendant, while biologically and technically a human being is not entitled to the same protections and considerations of a *real* human being. This clearly diminishes the jury's sense of moral responsibility for the penalty decision and thus, violates the Eighth Amendment. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329, 336.)

E. Appellant's Claims Should Be Heard On Their Merits Notwithstanding Appellant's Failure to Object at Trial

Appellant is mindful that ordinarily, a failure to object and to request an admonition to disregard the claimed impropriety results in the waiver of any claim of impropriety on appeal. (*People v. Green* 27 (1980) Cal.3d 1, 27 *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Appellant in his Opening

Brief, previously demonstrated that this general rule. (*People v. Hill* (1998) 17 Cal.4th 800, 820) should not be applied to the instant claims of prosecutorial misconduct. (AOB 246, 249.)

In sum, this is not a case in which requests for an admonition would have cured the error. (*People v. Hill, supra*, at p. 820-822; *People v. Arias* (1996) 13 Cal.4th 92, 159.) The references were not made to superfluous evidentiary matters but to topics that were highly charged emotionally. The invitation to jurors to consider what the impact of the horrible, gruesome events comprising the present offense, would have had on *their* lives had it happened to *them* (juror impact); as well as argument implicating the intense moral responsibility attached to making the life-or-death determination facing each juror, are not subjects that may be summarily dismissed or wiped from the psyche merely by an admonition to do so.

Once the prosecutor broached these subjects, it was impossible to "unring the bell." (*People v. Wein* (1958) 50 Cal.2d 383 423.) Once the prosecutor uttered his comments, it became a practical impossibility for the jurors to not think about what effect such an offense would have had on his or her life, had it occurred to them. Likewise no juror could resist the temptation to absolve oneself of the individualized responsibility for the penalty determination by instead imposing *society's* vengeance and retribution on the subhuman defendant (Appellant), regardless of any "admonition."

Similarly, in view of the prosecution's penalty phase evidence and arguments appealing to emotion, the prosecution's implication that Appellant should have taken the stand to explain his position, but did not, and that such failure should be held against him, could not have been erased by an "admonition." The prosecutor's suggestion that a crime of this nature cried out for an explanation from the defendant, may have had the ring of truth to the jurors. It is fanciful to believe that the jurors by any mechanism could be spontaneously caused to forget about this suggestion.

Finally, this Court is obviously empowered to reach the merits of Appellant's claims notwithstanding any failure to object on Appellant's part. (See, *e.g., People v. Arias, supra*, 13 Cal.4th at p. 159-160; *People v. Hill* (1998) 17 Cal.4th 800, 847.) The Court should do so in this case because the record shows that with or without an objection, Appellant was denied a fundamentally fair trial. (*E.g., Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *People v. Hill, supra*, at p. 847.)

In *People v. Hill, supra*, this Court, in addressing the multiple incidents of prosecutorial misconduct before it, stated

> The sheer number of instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that the flowing from the sum of the individual errors . . . we conclude defendant was deprived of that which the state was constitutionally required to provide

> and he was entitled to receive; a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects.

(*People v. Hill, supra*, 17 Cal.4th at p. 847.)

Here, with or without a defense objection, Appellant was deprived of his right to a fundamentally fair trial. There is no rationalization for this Court to enforce the "waiver" rule and wait for some future court to grant relief. The interests of judicial economy dictate that this Court reach the merits of Appellant's claims, rather than leave that task to some later reviewing court; and order Appellant be granted a new trial "free of these defects."

For the above reasons, and for the reasons set forth in Appellant's Opening Brief, the judgment below must be reversed.

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

In his Opening Brief, Appellant showed that the California Death Penalty Law has numerous constitutional defects that this Court has consistently refused to acknowledge. (AOB 255-290.) Respondent disagrees, finding this complex statutory framework to be flawless. (RB 63-67.) Appellant relies on the arguments and legal authorities set forth in Argument IX of Appellant's Opening Brief to support his constitutional challenge to the death penalty and to rebut Respondent's opposition to

Appellant's arguments.

CONCLUSION

Appellant's sentence must be reversed due to the overwhelmingly prejudicial effect of inflammatory victim impact evidence, physical evidence and prosecutorial misconduct. The prosecution's penalty phase as a whole was specifically calculated to appeal to the jurors' emotions and to overwhelm any possibility of a reasoned and rational penalty judgment. Such evidence and misconduct far exceeded the permissible bounds of a civilized society, let alone the bounds of the Eighth and Fourteenth Amendments. Additionally, Appellant was found guilty based on an invalid confession; was tried by a jury which was unfairly prejudiced against him at the outset in view of *Witt/Witherspoon* error, and has been denied his right to meaningful appellate review.

For all of the above reasons, and for the reasons set forth in Appellant's Opening Brief, the judgment must be reversed in its entirety.

DATED: October 11, 2014

Respectfully submitted,

EMRY J. ALLEN
Attorney at Law

Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Emry J. Allen, declare that I prepared the attached Appellant's Reply Brief in *People v. spencer, S057242,* on a computer using Word Office 2010. According to that program, the word count of said brief, excluding tables, cover, attachments and this certificate, is 16, 293 words.

Dated: October 11, 2014

_____

EMRY J. ALLEN

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Christopher Alan Spencer**
Case Number: **Crim. S057242**
Santa Clara County Superior Court No. 155731

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is PMB 336, 5050 Laguna Blvd., Suite 112, Elk Grove, CA 95758. On the date shown below, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Elk Grove, California, with postage thereon fully prepaid.

Mr. Christopher Alan Spencer
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San Jose, CA 95110

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

Executed on October 11, 2010, at Elk Grove, California.

Emry J. Allen