IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	AUTOMATIC APPEAL
Plaintiff/Respondent,	)	No. S058157
v.	)	(Contra Costa Superior Court
MICHAEL NEVAIL PEARSON,	)	No. 951701-2)
Defendant/Appellant.	)	

APPELLANT'S REPLY BRIEF

On Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable RICHARD S. FLIER, Judge Presiding

JEANNE KEEVAN-LYNCH
Attorney at Law, SBN 101710
P.O. Box 2433
Mendocino CA 95460
Tel: 707-964-7162

Attorney for Appellant
MICHAEL NEVAIL PEARSON

Table of Contents

TABLE OF AUTHORITIES

CASES

CONSTITUTION

CALIFORNIA STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. MICHAEL NEVAIL PEARSON, Defendant/Appellant.	)	AUTOMATIC APPEAL No. S058157 (Contra Costa Superior Court No. 951701-2)

APPELLANT'S REPLY BRIEF

I. THE TRIAL COURT'S PRECLUSION OF SPECIFIC INQUIRIES AND MISUSE OF GENERAL DEATH-QUALIFYING QUESTIONS MADE JURY VOIR DIRE INADEQUATE UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Appellant's opening brief argues that the trial court denied him due process of law in refusing to question, and in preventing defense counsel from questioning, the ability of death-qualified jurors to consider capital

case mitigation as such. Appellant's brief identified five instances in which the trial court either expressed the studied belief that such questioning was unlawful or interrupted counsel's questioning so as to enforce the previously-announced prohibition. Respondent acknowledges only the last instance, one in which defense counsel's effort to probe for mitigation impairment was relatively crude and the trial court's response may appear defensible if viewed in isolation. Insofar as the basis for appellant's claim may have been unclear in appellant's opening brief, this reply will begin with short recap of the main events related to this claim.

First, prior to commencing voir dire, the trial court announced "as a general rule, voir dire about attitudes concerning the death penalty must be limited to questions which seek to determine only the view of prospective jurors about capital punishment in the abstract . . . ." (2RT 298-299, AOB 92-93.) The only case-specific voir dire the trial court declared permissible was that which would seek affirmation or denial of willingness to "consider life without possibility of parole if the defendant were convicted of first degree murder involving the deaths of more than one fellow employee." (2RT 299.) Respondent does not acknowledge this ruling.

Second, the trial court declined counsel's request for the court to

conduct follow-up questioning distinguishing capital case mitigation from the circumstances that Juror No. 4's (prospective juror A.H's) questionnaire listed as examples of factors meriting consideration. (14ACT 5415, 5RT 915-916, 5RT 972, AOB 94-97.) This request was made and denied after the trial court used questions about willingness to consider "mitigating circumstances" in rehabilitating members of first panel of prospective jurors who expressed readiness to impose death on everyone who commits premeditated murder. In explaining its refusal to grant counsel's request, the trial court declared, inter alia, "I don't know that I can do that, because I think you are getting into the point then of [sic] he understands there are other matters in mitigation." (5RT 972, AOB 95-96.)

Respondent does not acknowledge this ruling, but defends the trial court's reliance on its own judgment of the insignificance of Juror 4's (A.H.'s) listing of "self defense" and "accidental circumstances" as grounds to refrain from imposing death. In respondent's words, "the court properly found under its discretion that this was neither an exhaustive list, nor an attempt to categorize things that would move the juror to vote either way." (RB 52.) This argument overlooks the precedent of this court, cited in appellant's opening brief (AOB 113), obligating trial courts to clarify or allow counsel to clarify ambiguous answers from prospective jurors the

court does not excuse. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1083-1085.)

Third, after defense counsel's questions to Juror 4 (A.H.) disclosed that any self defense theory would have been rejected in the course of finding the defendant guilty of the charged capital crime, the court interrupted defense counsel's questioning to interject a general inquiry about neutrality. In so doing, the trial court discouraged counsel from informing the panel that the other circumstances cited by A.H. were not present in this case and from asking panelists to respond to a life qualification inquiry after receiving such additional information. (5RT 1017-1018, AOB 97.) Respondent does not acknowledge this interruption, or argue that the line of questioning defense counsel was pursuing at this juncture was unnecessary or improper.

Fourth, when defense counsel attempted to ask prospective juror Aileen Cabral ("A.C.") for her reaction to the statutory mitigating factors, counsel was told the court would not allow the juror to "prejudge factors that way." (5RT 1013, AOB 101-103.) This is the only preclusive ruling that respondent acknowledges as such.

Fifth, when the trial court examined J.S., Alternate Juror 2, a member of a succeeding panel whose questionnaire response declared that

"murder should be paid for with one's own life" and that "some mercy or understanding might be shown" only "if the murderer has suffered repeated and serious sexual abuse at the hands of the victim" (6RT 1270), the trial court did not contrast the stated criteria with the kind of mitigation that penalty jurors must weigh. Instead, the trial court declared that the facts listed were not present "in every case." (7RT 1310.) The court did not tell her that the listed facts were not present in the case at bar or in any case likely to require a penalty trial. After establishing that this juror would not automatically vote for death and "would listen" to whatever was presented in the penalty phase, the court went back to asking its usual overly-general questions, confirming the trial court's persistence in its previous stated belief that "voir dire about attitudes concerning the death penalty must be limited to questions which seek to determine only the view of prospective jurors about capital punishment in the abstract . . . ." (2RT 298-299, AOB 92-93) and that life qualification was established by willingness to "consider life without possibility of parole if the defendant were convicted of first degree murder involving the deaths of more than one fellow employee." (2RT 299.) Defense counsel toed the court's line in his own follow-up examination of J.S./Alternate 2, leaving her to complain that she could not know if she would consider a life sentence without knowing what

mitigation would be offered. In response, defense counsel explained: "It's a real problem I was alluding to. I am not able, allowed at this point to start defending my case. I can't do that. [The prosecutor]'s able to do his because of the structure of things to a certain extent, but I'm not allowed simply now to talk about the defense." (7 RT 1320.)

Rather than responding to appellant's claim that the court's examination of Alternate 2 ("J.S.") was misleading and preclusive, respondent simply argues that the trial court "did not abuse its discretion in questioning" her or other panelists because "these jurors were readily willing to consider the evidence and begin deliberations from a neutral frame of mind." (RB 53.) With respect to Alternate 2, respondent claims she expressed "the sentiment required of the perfect juror in any capital trial: `I would listen to whatever [defense counsel] could present to win the sympathy of the jury over to life imprisonment. . . . I would weigh it as carefully as I possibly could.'" (RB 53.)]

Respondent's arguments rest on the assumption that anyone willing to listen to any form of mitigation is life qualified. That is not the law. The qualification standard operates in the same manner whether the juror's views are for or against the death penalty. (*People v. Cash (2002)* 28 Cal.4th 703, 720-721.) Prospective jurors who can consider all of the

evidence, but impose a death sentence only in circumstances that are not before the court, have a disqualifying bias as a matter of law. (*People v. Carey* (2007) 41 Cal.4th 109, 125; *People v. Cash, supra,* 28 Cal.4th at p. 720.)

To be sure, the class of unqualified jurors must include not only those who are unable or unwilling to consider a life sentence for a defendant convicted of a particular capital crime, but also those able to refrain from imposing death for that crime "only in particularly extreme" circumstances unlike those present those present in the case to be tried. (*People v. Cash, supra,* 28 Cal.4th at pp.720 [noting this court's history of disqualifying prospective jurors who could impose death "only in particularly extreme cases unlike the case being tried" and that "the qualification standard operates in the same manner whether the jurors views are for or against the death penalty].)

The class of unqualified jurors also includes those who are unable to give mitigating effect to a mitigating factor that is likely to be present in the case to be tried. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and *give effect* to that evidence in imposing sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, emphasis added.)

Respondent's position also assumes that the defendant's right to life-qualification voir dire does not extend beyond the issues recognized in *Cash.* In reality, that right extends to all the issues essential to a defendant's "ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." (*Morgan v. Illinois* (1992) 504 U.S. 719, 733.)

Respondent correctly notes that *Cash* differs from the present case in that *Cash* had aggravating facts that could cause an otherwise law-abiding juror to fail to consider mitigation as the law requires. (RB 51.) But respondent fails to note that this case had *mitigating* facts that are known to cause otherwise law-abiding jurors to fail to consider mitigation as the law requires. As a matter of law, "the absence of prior violent criminal activity and the absence of prior felony convictions are *significant* mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past." *(People v. Crandell* (1988) 46 Cal.3d 833, 884.) But most death-qualified jurors do not see that factor as at all mitigating.[1]

---

[1] As noted in appellant's opening brief, research conducted by the Capital Jury Project with funding from the National Science Foundation found that 80% of the capital jurors interviewed for a study of attitudes toward statutory mitigating factors admitted they were not at all moved by lack of prior criminal record. (Stephen P. Garvey, *Essay: Aggravation And Mitigation In Capital Cases: What Do Jurors Think*? 98 Colum. L.Rev.

Uncovering those who cannot give mitigating effect to the defendant's record was not only critical, but obviously so, particularly after defense counsel questioned prospective juror Aileen Cabral ("A.C.") on her reaction to that factor after the court read the statutory list of aggravating and mitigating circumstances. Like questions seeking clarification of a prospective jurors' ambiguous statements (*People v. Bittaker, supra*, 48 Cal.3d 1046, 1083-1085), reasonable inquiry into actual bias against applying controversial legal doctrines relevant to the trial must be permitted. (U.S. Const., Amends 6, 8, 14; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224-1225 [parties must be permitted to examine jurors about willingness to apply specific rules of law that are "material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application."]; *People v. Balderas* (1985) 41 Cal.3d 144, 182-184 .)

Respondent also argues that "the voir dire included sufficient case specific examples which allowed the court to determine whether a juror's views regarding the death penalty – whether for or against – were such that

---

1538.) Only one-fifth of the ostensibly-qualified jurors said they would be somewhat moved toward a life sentence by proof that a defendant had no previous criminal record. Most of those who said this factor was at all mitigating for them felt it was only "slightly" so. (*Id.* at pp. 1562-1563.)

they would substantially impair the juror's ability to impartially hear the case." (RB 49.) Respondent gives no examples, no citations to the record, no authority, no clue what is meant by this sentence. And the point is moot.

As observed in appellant's brief (AOB 112), the trial court gave realistic examples of the kind of evidence that could be introduced in mitigation following a conviction of deliberate and premeditated murder *only in examining one of the later panels*. (6RT 1169.) Even then, the trial court did not retract its previous rulings nor inquire about any juror's ability to give mitigating effect to the kind of mitigating evidence the trial court referenced, much less to any relevant case-specific or statutory mitigating factor. No venire member or panel was informed that insanity, fear of death or great bodily harm, or other circumstances warranting a manslaughter verdict, would have been eliminated as factors before the jury could reach a verdict of guilty of capital murder, much less asked to respond to the qualification inquiry after receiving such additional information. No one was told that any less compelling mitigating evidence, such as the absence of prior felony convictions and any history of violent crime, must be given mitigating effect. The standard instructions the trial court read to appellant's venire during voir dire did not say that the

sentencer must give mitigating effect to any statutory factor. Only at the end of the case, after appellant's counsel objected to misleading prosecutorial argument on the point, was the jury informed that the law requires that jurors treat appellant's record as mitigating. (29RT 5521-5528.) Veniremembers unable or unwilling to follow this aspect of California law had no reason to believe they should answer negatively when asked if they would follow the law as instructed by the court.

Respondent claims that appellant did not "contest the makeup of his jury in general . . . Nor did he raise a specific constitutional challenge to voir dire." (RB 48.) Appellant did not cite the constitution, but he *personally* objected on general fairness grounds to the way the court and the prosecutor had conducted voir dire. He did so shortly before the jury was sworn. (8RT 1594-1595.) His failure to mention the preclusion of case-specific life qualification voir dire is of no consequence, for that too would have been futile. "[F]ailure to object . . . to a practice which [California] had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." (*O'Connor v. Ohio* (1966) 385 U.S. 92, 93.)

Respondent correctly observes that the defense did not exhaust its peremptory challenges, but errs in claiming that peremptory challenges

must be exhausted to preserve a claim that a trial court's general preclusion of appropriately specific life-qualifying questions rendered voir dire constitutionally inadequate. "When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire." (*People v. Bolden* (2002) 29 Cal.4th 515, 537-538.) The cases cited by respondent (*People v. Coffman* (2004) 34 Cal.4th 1, 47 and *People v. Burgener* (2003) 29 Cal.4th 844, 866) are cases in which counsel faced no categorical preclusion on case-specific or fact-specific inquiries.

In the end, respondent rests on the claim that general inquiries about penalty phase neutrality, or willingness to "listen to all the evidence and consider both punishments with an open mind" show that "voir dire has successfully served its purpose. Appellant cannot ask for anything beyond that." (RB 54.) No authority is cited. None known to appellant supports that proposition. On the contrary, the United States Supreme Court has held voir dire constitutionally inadequate where, as here, a juror who would always impose death upon convicting a defendant of deliberate

and premeditated murder, or a juror who would "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require" (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729) "could in all truth and candor respond affirmatively" to all of the qualification questions jurors were forced to answer. (*Id.*, at p. 735.)

II. THE TRIAL COURT'S MID-VOIR DIRE INSTRUCTIONS STATING THAT JURORS WERE NEVER OBLIGED TO IMPOSE A LIFE SENTENCE AND ITS FRAMING OF QUESTIONS IN A WAY THAT CONFIRMED THE POINT CORRUPTED THE JURY SELECTION PROCESS, AND INVITED JURORS TO IMPOSE DEATH UNLAWFULLY IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Respondent argues that appellant's claim – which is based on the trial court's affirmative assertion that jurors are *never* obliged to choose life – fails because California law does not impose a presumption in favor of a life sentence. In furtherance of this argument, respondent frequently misrepresents appellant's claim as one asserting erroneous failure to instruct on a presumption of life. (RB 54-66.) Respondent fights a strawman.

Appellant does not claim that California law imposes any presumption favoring a life sentence, under this heading or elsewhere, nor

complain here of an erroneous failure to instruct on mandatory life sentencing.

Rather, appellant claims (and respondent nowhere denies) that the trial court erred in telling the venire that jurors are never legally compelled to impose a life sentence. As respondent must concede, Penal Code section 190.3 states that the trier of fact *shall* impose a sentence of life without parole if it determines that mitigating circumstances outweigh the aggravating circumstances. This is binding law.

Respondent makes a lengthy "waiver" argument (RB 56-58) which ultimately rests on the premise that appellant's "claim is not one of instructional error" within the meaning of Penal Code section 1259 because the errors occurred during voir dire (RB 58.) The cases on which respondent relies do not deal with judicial misrepresentations of the law, much less say that judicial misstatements of law during voir dire are not instructions affecting substantial rights. In *People v. Medina* (1995) 11 Cal.4th 694, 743, the errors at issue were mid voir dire prosecutorial statements alleged to be incomplete or inaccurate. In *People v. Pinholster* (1992) 1 Cal.4th 865, 918, the error was a brief reference to the governor's commutation power. In *People v. Walker* (1988) 47 Cal.3d 605, 627, it was prosecutorial voir dire asking veniremen if they knew what life without

parole "really means." In *People v. Ghent* (1987) 43 Cal.3d 739, 769-770, the prosecutor made two brief references to the commutation power. In *People v. Box* (2000) 23 Cal.4th 1153, 1198, the trial court correctly described the commutation power and correctly instructed the jury not to consider it, all during voir dire. Contrary to respondent's claim (RB 59), the *Box* court did not find "any voir dire comment . . . cured by penalty phase instructions to the contrary." The corrective instruction in *Box* was given on voir dire. (Ibid.)

Here, no corrective instruction on the duty to vote for life when aggravation fails to outweigh mitigation was given at any point in the trial, much less during the voir dire of the jurors who were "life qualified" on the theory that they would never be obliged to vote for life. As in *People v. Sturm* (2007) 37 Cal.4th 1218, 1231-1232, the trial court never said that the inaccurate statement it made during voir dire was indeed inaccurate. (*Id.*, at fn. 2.) Without a correct judicial statement contradicting the prior one, even a prompt instruction to disregard the trial court's prior statement cannot be curative. (*Ibid.*)

III. THE TRIAL COURT'S MID-VOIR DIRE JURY INSTRUCTIONS ATTACHING THE LABEL "AGGRAVATING" TO "ALL THE CRIME FACTS" PREJUDICIALLY MISLED APPELLANT'S JURY ABOUT CALIFORNIA'S DEATH PENALTY LAW, VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY, AND APPLIED CALIFORNIA LAW IN A WAY THAT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Here again, respondent's argument sets up a strawman in heading its arguments: ("*A Penalty Phase Jury Is Never Precluded from Using the Facts and Circumstances of the Crime*"-- RB 66.) Appellant has not claimed that a penalty jury is precluded from "using" the facts or circumstances of a crime in reaching a penalty decision.

Rather, appellant claims the trial court erred in telling prospective jurors who believe death should be imposed on everyone guilty of premeditated murder that they can treat the killing, the intent to kill, and premeditation, as *aggravating* factors.

Respondent likewise fails to acknowledge the factual basis for appellant's claim. As pointed out in appellant's opening brief, the trial court misinformed jurors repeatedly in the course of its efforts to life-qualify jurors who would impose death on everyone who committed intentional, premeditated murder. Specifically, in qualifying a member of

the first panel, which included Juror No. 9, Juror No. 4, and Juror No. 12, the court declared:

> In phase two you are going to be asked to evaluate mitigating and aggravating factors. *Certainly one of the aggravating factors may be the crime facts themselves, such as whether or not this was deliberate and premeditated murder.* (5RT 881.)

The context of the court's statement underlined its importance. The court was establishing the qualifications of Mr. Shane Blair, whose questionnaire, as described by the judge in open court, said he believed the state should "always" impose the death penalty upon everyone who kills another human being with premeditation and deliberation, and explained, "only if they plan to kill another human being and admits (sic) to it." (5RT 879.)

In qualifying a member of the third panel, which included future Juror No 1, the court attached the "aggravating" label to the element of deliberate and premeditated intent indirectly, but no less effectively. Referring to the standard instructions defining deliberate and premeditated murder the court had begun giving each panel prior to questioning, the court advised as follows:

> Based on the instructions I have just given you, I can tell you that a first degree murder is a murder that is committed with *premeditation and deliberation.* All right. *That is one of the crime facts you consider in the penalty phase of this trial.*

> Do you feel based on your current frame of mind you would be able to evaluate possible *mitigating circumstances as well as the crime facts before you determined what penalty to impose*? (7RT 1367, emphasis added.)

In life-qualifying the panels from which appellant's other jurors were chosen, the trial court attached the "aggravating" label to *all* the crime facts without giving any particular emphasis to deliberation, premeditation or specific intent to kill, and thus made clear that the wrongful taking of human life was, in this trial court's view, a permissible "aggravating" factor if the sentencer wished to treat as such. (6RT 1170, 1234-1235; 7RT 1445; 8RT 1564.)

The panel that included future Juror No. 2 was given the following information while listening to the trial court rehabilitate a another veniremember:

> As you sit here now, as I suggested to you before, one of the factors that you would be entitled to consider as *an aggravating factor, the facts of the crime itself* and that certainly is something that both counsel zeroed in on, but that isn't the end all of the penalty phase.
>
> Do you feel that your mind is in anyway made up going into the penalty phase because you know at least one of the aggravating factors is a given, that there would be these offenses . . .? (6RT 1170.)

The panel that included future Jurors 6 and 11 was told:

> [I] am going to move you into the penalty phase of our imaginary trial and in the course of the penalty phase you did receive *aggravating evidence* which *can include the crime facts themselves as well as mitigating evidence.*
>
> In all honesty you evaluate that evidence and you conclude, gee, the aggravating evidence substantially outweighs the mitigating evidence. Would you be able to vote for the death penalty under those circumstances? (6RT 1234-1235.)

Again, the context of the court's statement elucidates its importance. The court gave this guidance while rehabilitating venireman MacKenzie, whose questionnaire, as described by the judge in open court, said he believed "the State should *always* impose the death penalty on everyone who intentionally kills another human being" as well as upon everyone who kills with premeditation and deliberation. (6RT 1231.)

Venireman McKenzie had also said, "murder, once proven, should warrant the death penalty as a sentence to me. That is a simple question of justice." (6RT 1231.) The trial court's rehabilitation concluded when MacKenzie agreed he could weigh aggravation against mitigation, and follow the law. (6RT 1235-1236.) The court did not address the difference between California law and MacKenzie's belief that "murder, once proven" should "warrant the death penalty," nor distinguish intent to kill from the

aggravation required by law. Nevertheless, the trial court denied appellant's challenge for cause, citing MacKenzie's change from his initial opinions. (6RT 1336-1337.)

The panel that included Jurors No. 3, 5, 7, 8, and 10, was similarly informed that "you will be considering aggravating evidence and *aggravating evidence* can include things like *the crime facts themselves.*" (7RT 1445.) And even more explicitly:

> In the course of the penalty phase you would be asked to listen to evidence of aggravation and mitigation. As I indicated, *the crime facts are certainly considered to be facts in aggravation.* You then are to give the weight or value to these factors in aggravation or mitigation that you feel is appropriate. The law is not going to give you any guidance as to these facts. (8RT 1564.)

Eighth Amendment doctrine prohibits states from labeling as "aggravating" any factor common to all murders or applicable to every defendant eligible for the death penalty. (*Arave v. Creech* (1993) 507 U.S. 463, 474 ["If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."] citing, et. al., *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [invalidating aggravating circumstance that appeared to describe "every murder"].)

Accordingly, this court's decisions construing California's Death

Penalty Law have held that the term "aggravating" was properly defined for the jury when it was said to apply only to factors "above and beyond" the essential elements or constituents of the crime. (*People v. Brown* (2003) 31 Cal.4th 518, 565; *People v. Benson* (1990) 52 Cal.3d 754, 802-803; *People v. Dyer* (1988) 45 Cal.3d 26, 77-78; *People v. Adcox* (1988) 47 Cal.3d 207, 269-270.)

Since 1989, the editors of CALJIC have included this definition in the standard penalty phase "concluding instruction": An aggravating factor is any fact, condition or event attending the commission of a crime which increases [its] guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself.* (1 CALJIC No. 8.88.)

The creators of CALCRIM agree that the definition of "aggravating factor" is so limited, and that juries should be so instructed. CALCRIM 763 states, in pertinent part:

> In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.
>
> An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, *above and beyond the elements of the crime itself*, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

> A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.
>
> Under the law, you must consider, weigh, and be guided by specific factors, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

Innumerable decisions of this court have said that premeditation, deliberation, and willfulness or specific intent to kill, are "elements" of the crime of first degree murder on the single theory of that crime presented in the instant case. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345, 368; *People v. Hansen* (1994) 9 Cal.4th 300, 307; *People v. Cummings* (1993) 4 Cal.4th 1233, 1288.)

Although this court has held that it is inappropriate to instruct jurors that they should not consider as an aggravating factor any fact used to find the defendant guilty of first degree murder unless it establishes something in addition to an element of that crime,[2] this court has not held that any

---

[2] See *People v. Moon* (2005) 37 Cal.4th 1, 40, and cases cited therein. All of them condemn instructions demanding that "the facts of the murder" be "comprehensively withdrawn from the jury's consideration." (*Ibid.*) Yet none say that "the facts of the murder" or the elements of first degree murder should all be considered *aggravating* as a matter of law, much less

element of the crime can or should be considered "aggravating." Even where all the elements of more than one theory of first degree murder were established at trial, this court has been careful to distinguish the proper finding of aggravation in the fact that a killing was "cold-blooded" from a finding of aggravation in premeditated intent to kill per se. (*People v. Millwee* (1998) 18 Cal.4th 96, 167.)

Accordingly, this court refrained from attaching the label "aggravating" to any element of first degree murder when this court held that a penalty jury can find aggravation in "the method of killing or evidence of extensive planning" notwithstanding the fact the same evidence was used to establish first degree murder. (*People v. Coddington* (2000) 23 Cal.4th 529, 640.) Likewise, this court did not say that all of the circumstances of the crime could be labeled or considered "aggravating" when it noted that "[a]ll circumstances of the crime or crime may be considered." (*Ibid.*) Appellant's trial judge was not so circumspect.

Respondent contends that appellant "was obligated to make a timely and specific objection." (RB 67.) Respondent posits that "the focus does not appear to be one of instructional error, but instead, a claim attacking the voir dire process." (RB 67.) But as appellant's opening brief makes

---

that trial court should so instruct the jury.

clear, the focus of appellant's claim is instructional error during voir dire. Instructional error during voir dire is instructional error nonetheless, and must be reviewed for its effect on the defendant's substantial rights. (*People v. Dunkle* (2005) 36 Cal.4th 861, 929; ["Although defendant did not object to this preinstruction or request clarification, we do not deem forfeited any claim of instructional error affecting a defendant's substantial rights. (§ 1259; *People v. Coffman and Marlow* [2004] 34 Cal.4th [1] at p. 104, fn. 34.)"]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 [appellant has right to appellate review of mid-voir-dire judicial misdirection on reasonable doubt standard pursuant to section 1259].)

Respondent goes on to argue that the jury was correctly instructed at some later point and that "appellant fails to show prejudice." (RB 73.) Again, respondent fails to meet the facts of record. The court did not give any instructions informing the jury that intent to kill and premeditation were elements of the charged offense. Even the guilt phase instructions fell short of attaching the label "element" to any mental state beyond malice aforethought. Thus, the jury had no way of knowing that premeditation and intent to kill were "elements" when the court read CALJIC No. 8.88, the standard instruction defining aggravation as a "fact condition or event attending the commission of crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements

of the crime itself." (29RT 5501.)

Moreover, the trial court did not inform the jury that its previous statements on the point, which were hammered in by their use in qualifying inquiries, were in any sense inaccurate or incomplete. This case gives no reason to depart from the general rule that "an instruction plainly erroneous is not cured by a correct instruction in some other part of the charge.' [Citations.]" (*People v. Westlake*, *supra,* 124 Cal. 452, 457; accord *People v. Kainzrants*, *supra*, 45 Cal.App.4th 1068, 1075 [applying the rule to preinstruction of a jury during voir dire].)

Respondent also takes issue with appellant's observation that the prosecutor exploited the trial court's misstatements in his penalty phase closing argument, when he argued that deliberation and premeditation made appellant's crime more worthy of capital punishment than "a lot of special circumstances cases out there where the killing was accidental or intentional, but it wasn't deliberate." (29RT 5518.) Respondent claims these remarks were mitigated by "the surrounding content in which the district attorney specifically recognized that not every fact or piece of evidence was a factor in either mitigation or aggravation. (XXIX RT 5520-5521.)" Respondent does not say, and appellant cannot imagine, how these remarks rectify or mitigate the impact of the prosecutor's argument as quoted by appellant.

More cogently, respondent points out that the "district attorney recognized that aggravating evidence is limited to those details that go beyond the bare elements of malice, premeditation, and deliberation (XXIX RT 5530) . . ." (RB 71.) While the prosecutor may well have recognized that "aggravating evidence is limited" as the People now implicitly concede, the prosecutor did not tell the jury that it was limited. Rather, the prosecutor argued that aggravation included circumstances within and beyond the "element of the offense" and reminded the jurors of the court's (erroneous) instructions, to wit:

> "I also think of something else that actually isn't a part of the elements of the offense because you remember the Court said, and circumstances of aggravation. It's those aggravating circumstances beyond the element of the offense itself. It's all of those other little details that go beyond the fact of killing with malice aforethought, premeditation, deliberation, and includes other things as well.
>
> He wasn't charged with what he was thinking about and what he was doing when he went outside after he went out and killed Barbara. And he said to Janet, Don't worry, baby, I'm not going to shoot you.
>
> But, boy, this is a circumstance in aggravation. This could have been a triple. That's something to consider.
>
> Shirail Burton may feel like she's lucky to be alive, especially after she heard evidence in this case. She probably knows things now, at the time she was running for her life in terms of what Michael was doing after she went out the window. *That's already an element of the case. That's relevant aggravation.* (29RT 5530-5531.)

As in responding to appellant's previous argument, respondent relies on *People v. Box, supra*, 23 Cal.4th at p. 1198, in claiming that this court treats erroneous "instructions" given during voir dire differently from erroneous "instructions" given at the end of trial. (RB 73-74.) Again, respondent has either misread or misrepresented the holding in *Box*. There, the trial court correctly described the commutation power and correctly instructed the jury not to consider it, all during voir dire. (*Id.*, at p. 1198.) Respondent's position also ignores *People v. Sturm* (2007) 37 Cal.4th 1218, 1243, where this court recognized that the trial judge's mid-voir-dire comments indicating that premeditation was a "gimme" (where lack of premeditation was a central piece of the case in mitigation) undermined the defense theory of the case.

Finally, respondent claims there is no prejudice because "the aggravating factors in our case went well beyond the `bare' elements proving the crime" and "there was no evidence that the jury utilized any of the elements in the abstract, or even used the least significant of facts that could have proven each element. Indeed appellant not only killed two people, he was proud of it." (RB 74.)

There is no solid evidence that appellant was proud of his violent episode, and the standard of prejudice applicable to penalty phase error is stricter than respondent assumes. "[W]hen the sentencing body is told to

weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." (*Stringer v. Black* (1992) 503 U.S. 222, 232.)

Furthermore, the error not only skewed the weighing process, but the jury selection process as well. A capital defendant is entitled to a jury selection process capable of identifying prospective jurors whose views prevent or impair their ability to accept the prohibition against treating the elements of the offense as aggravating factors. (U.S. Const., Amends 6, 8, 14; *People v. Johnson, supra,* 47 Cal.3d 1194, 1224-1225 [parties must be permitted to examine jurors about willingness to apply specific rules of law that are "material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application."].) The trial court's use of an overbroad definition of the term "aggravation" in conducting voir dire enabled the court to obtain affirmative answers to qualification questions from veniremembers who were unwilling and unable to follow the restrictive definition of "aggravation" on which they would later be instructed. This error "irremediably tainted the trial by making it impossible for the parties to know whether a fair and impartial jury had

been seated." (*People v. Mello* (2002) 97 Cal.App.4th 511, 517.)

IV. THE TRIAL COURT'S CHOICE OF QUESTIONS TO VENIREMEMBERS WHO EXPRESSED STRONG FEELINGS ABOUT CAPITAL PUNISHMENT EXHIBITED A DOUBLE STANDARD AND BIASED THE JURY IN FAVOR OF CONVICTION AND DEATH IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Relying on *People v. Thornton* (2007) 41 Cal.4th 391, 423 and *People v. Navarette* (2003) 30 Cal.4th 458, 486, respondent argues that the trial court's disparate treatment of jurors pro and con the death penalty should be viewed as an "individualistic assessment of each juror's ability to follow the law" rather than an exhibition of a double standard.

The only disparate treatment examined in *Thornton* and *Navarette* was minimal. In *Navarette*, the defendant's argument was "based solely on a numerical counting of questions." *(Id.,* at p. 487.) In *Thornton*, it was in the way the trial court treated *five* death-leaning jurors and *two* life-leaning jurors challenged by the prosecution. (*People v. Thornton, supra*, 41 Cal.4th at pp. 419-420.)

In the present case, the number of disparately questioned jurors was much larger (see AOB 152-169), and the difference between the type of questions asked of one group versus the other was not merely numerical but

plainly substantive and decisive. In addition to receiving advice on the propriety of finding aggravating circumstances inherent in the intent to commit the capital crime, panelists whose questionnaire responses expressed belief that the state should always impose death on everyone who commits premeditated or intentional murder were greeted with questions about their willingness to consider all the evidence before imposing sentence, and most were not asked whether they could or would ever choose life for someone guilty of capital murder. In contrast, prospective jurors whose questionnaire responses expressed opposition to capital punishment were questioned by the court about their willingness to *impose a death sentence*, not about whether they would consider all the evidence before making a decision. (AOB 152-153.)

Moreover, unlike the *Thornton* and *Navarette* claims, Mr. Pearson's argument requires no finding that any member of either group was improperly questioned, removed or retained by the trial court. Because the trial court conducted large (25 member) group voir dire in open court, every juror ultimately seated had to observe the voir dire of other panelists. The impact of *observing* disparate treatment in judicial voir dire was absorbed by the seated jurors and expressed in the death verdict. Put another way, exposing all potential jurors to judicial voir dire that complies with the law but favors retention of death penalty enthusiasts biases the jury ultimately

seated. As stated in appellant's opening brief:

> Due process violations sufficient to void state criminal convictions have been found when the action of a trial judge created only the risk or appearance of partiality. (See *Johnson v. Metz* (2d Cir 1979) 609 F.2d 1052, 1057 [collecting U.S. Supreme Court decisions on point].)
>
> Accordingly, a trial judge's ability to bias a jury by employing a double standard in questioning prospective jurors pro and con the death penalty was recognized prior to, and in, the *Witherspoon* decision. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 523, citing *Crawford v. Bounds, supra*, 395 F.2d 297, 303-304 ["double standard" in examining jurors pro and con the death penalty "inevitably resulted in a denial of due process."].)
>
> In addition to eliminating death penalty opponents and accepting potential jurors who should be excused, use of a double standard favoring death penalty supporters biases previously neutral jurors who are forced to watch the process. As this court once observed, "[t]he fact that the court dismisses those venirepersons who express unequivocable opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so irrevocable as to disqualify them under *Witherspoon* may feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty. [fn.][3] (*Hovey v. Superior Court*,

---

[3] A footnote (n. 123) at this portion of the *Hovey* opinion states that "insofar as the venirepersons observe the judge dismissing prospective jurors who would automatically vote for the death penalty, the remaining jurors might infer a more symmetrical disapproval on the part of the law, offsetting the prejudicial operation of this particular psychological process."

[1980] 28 Cal.3d [1] at pp. 73-74.)

> "A process which systematically reduces whatever 'doubts about the wisdom of capital punishment' or '[reluctance] to pronounce the extreme penalty' is as constitutionally infirm as a jury from which individuals who hold such views are systematically 'culled.'" Neither jury can "speak for the community." [Citation.] Both juries are "less than neutral" with respect to the choice of penalty." (*Hovey v. Superior Court, supra,* quoting and citing *Witherspoon v. Illinois, supra,* 381 U.S. at p. 520, fn. 18.) (AOB 174-175.)

Respondent does not deny that the judicial questioning observed by appellant's jurors accommodated death penalty supporters and disqualified death penalty opponents, nor that the exhibition systematically reduced whatever doubts about the wisdom of capital punishment or reluctance to pronounce the extreme penalty appellant's jurors brought to the process. Nor does respondent dispute the constitutional significance of that systematic reduction. Respondent's failure to apprehend this key aspect of appellant's claim persists as respondent relies only on inapposite cases to argue that the claim was waived. To quote:

In appellant's case, most of the venire, particularly members of the first panel, saw the trial judge make extremely lengthy, persistent, and highly instructive efforts to rehabilitate panelists who said they would impose death automatically. Panelists who said they would not impose death received no such rehabilitative for from the trial judge, and were dismissed after relatively few impeaching questions. No reasonable juror would infer "symmetrical disapproval on the part of the law" after attending appellant's jury selection proceedings.

> Nor does any federalized nature of appellant's claim assist him. Appellant's right to voir dire is statutory, not based in the Constitution. Thus, although the Sixth Amendment imposes some general obligations of fairness regarding jury selection, it does not extend to this situation, particularly where appellant has not used all of his peremptory challenges. (*People v. Maury* [2003] 30 Cal.4th [342] at pp. 379-380; *People v. Ramos* (2004) 34 Cal.4th 494, 513 [recognizing that 'Legislature may establish reasonable regulations or conditions on the right to a jury trial as long as the essential elements of a jury trial are preserved."]; see *People v. Vera* (1997) 15 Cal.4th 269, 279 [*rejecting* Court of Appeal conclusion that objection not required to preserve *Hicks* statutory claim regarding waiver of right to jury trial for priors]; See also *People v. French* (2008) 43 Cal.App.4th 36, 46 [recognizing that *Vera*'s limitations abrogated following *Apprendi v. New Jersey* (2000) 530 U.S. 466].) Appellant had an obligation in this context to raise his federal claims in front of the trial court to preserve them here. (*People v. Partida* [2005] 37 Cal.4th [128] at pp. 434-435 [distinguishing between specific and general due process claims for purposes of forfeiture, and permitting claim only to the extent state law objection naturally encompassed companion federal fairness claim].) (RB 77, emphasis in original.)

Nothing in any of respondent's cited authorities supports forfeiture of appellant's Sixth and Fourteenth amendment claims. In *Maury*, the claim this court deemed waived was that of error in denying the defendant's challenges for cause, a claim this court has long held to waived by failure to exhaust peremptory challenges. (*People v. Maury, supra,* 30 Cal.4th at pp. 379-380.) The defendant argued "given the large number of prospective jurors who had been exposed to pretrial publicity, it was likely that [the

jurors challenged for cause], who had not been so exposed, would have been replaced with two jurors who were prejudiced by the pretrial publicity." This Court observed that the "defendant fails to give any record support for that claim." (Ibid.) In the present case, because all of appellant's prospective jurors were exposed to the trial court's disparate treatment of jurors pro and con the death penalty, one need not speculate that any juror removed by peremptory challenged would be replaced by one who was also tainted by the exposure. It was a matter of mathematical certainty.

Respondent's reliance on *Ramos* is likewise misplaced. Here, there is no issue as to the constitutionality of Code of Civil Procedure 223, and thus no question as to the "right of the legislature to establish reasonable regulations or conditions on the right to a jury trial as long as the essential elements of a jury trial are preserved." (*People v. Ramos, supra*, 34 Cal.4th 494, 513.) Judicial life and death qualification voir dire can be conducted in the presence of other jurors in an evenhanded manner. The decision of Mr. Pearson's trial judge to engage in disparate life and death qualifying voir dire with 25-member panels was not dictated by any statute.

Finally, respondent cites *People v. Partida, supra,* 37 Cal.4th at 434-435, as "distinguishing between specific and general due process claims for purposes of forfeiture, and permitting claim only to the extent state law

objection naturally encompassed companion federal fairness claim." *Partida* presented the question of whether an objection to evidence as more prejudicial than probative under Evidence Code section 352 was sufficient under Evidence Code section 353 to permit the appellant to argue federal due process grounds on appeal. This court concluded that the federal due process claim was indeed preserved by the 352 objection, and explained,

> "When a trial court rules on an objection to evidence, it decides only whether that particular evidence should be excluded. Potential consequences of error in making this ruling play no part in this decision. [¶] If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence. Specifically, no purpose would be served by requiring the objecting party to inform the court that it believes error in overruling the actual objection would violate due process." (*Ibid.*)

Respondent's reliance on *Partida* is misplaced for several reasons. First, unlike Partida's claim, appellant's claim of error does not involve any claim for which the legislature has demanded a particularized trial court objection as a predicate for appellate review. "An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so. [Citation.] True, it is in fact barred when the issue involves the

admission (Evid. Code, § 353) or exclusion (id., § 354) of evidence. Such, of course, is not the case here. Therefore, it is free to act in the matter. [Citation.] Whether or not it should do so is entrusted to its discretion. (Ibid.)" (*People v. Williams* (1998) 17 Cal. 4th 148, 161.)

Second, unlike Mr. Partida's statutory objection, Mr. Pearson's personally-voiced objection relied exclusively on federal constitutional doctrines of fundamental fairness in jury selection and the right to an unbiased jury, to the extent it relied on any rules of law. Appellant complained that jurors were induced by exhaustion into changing the positions they expressed in their questionnaire responses. (8RT 1591) He complained that the court had sustained prosecutorial objections to defense counsel's questioning as argumentative, while allowing the prosecutor to argue his case for death on voir dire. (8RT 1592.) After the court responded at length, appellant pointed to venire member Mario Tovani's change in position after continued questioning, and summarized his complaint:

> THE DEFENDANT: That's what I am talking about obviously there is something going on that makes him go from one response to another.
>
> I'm saying that it appears to me now the selection process is attempted to be skewed a certain way.
>
> Are you telling me that you don't view that, you don't see it that way?

THE COURT: No, I don't see it that way.

THE DEFENDANT: Okay.

THE COURT: All right. It's my obligation to make sure it's a fair process.

THE DEFENDANT: Judge Flier, I really mean it, it hasn't been fair thus far.

THE COURT: That's from your perspective Mr. Pearson. (8RT 1594-1595.)

Third, appellant's general fairness argument was rejected because the trial court believed that its process had been fair. Any further objection along those lines would have been futile, not only because the trial court had disparaged defense counsel in the presence of the jury before and after defendant made his personal objection, but also because the trial court's response to the defendant's personal objection was conclusive.

/

/

V. THE TRIAL COURT FAILED TO PROPERLY EXERCISE ITS DISCRETION BEFORE EXPOSING EACH PROSPECTIVE JUROR TO THE LIFE AND DEATH QUALIFICATION VOIR DIRE OF 24 OTHERS IN A MANNER THAT INFRINGED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Respondent claims appellant failed to preserve this issue insofar as his counsel's expression of preference for individual voir dire "never broached the subject he now offers on appeal." (RB 85-86.) This argument overlooks the fact that the gravamen of the appellate claim – the disparate treatment of jurors discussed in the previous argument – gradually emerged from the behavior of the trial judge during the voir dire process. After that behavior pattern emerged, appellant personally objected to the way the trial court had handled the voir dire as "skewed" and "not fair." Respondent ignores appellant's citation of those post-voir-dire remarks, and this court's inherent discretion to review federal constitutional errors not preserved by trial court objection. (*People v. Williams*, supra, 17 Cal.4th 148, 161.)

On the merits, respondent begins by claiming the trial court was "aware of its discretion to conduct individualized voir dire, having discussed the matter with both counsel on numerous occasions. (See 1 RT

51, 55, 60, 63.)" (RB 92.) But as shown by the content of those very discussions, counsel and the trial court were underinformed in all pertinent respects, and the prosecutor denied that such discretion existed under current law. To quote:

> THE PROSECUTOR: In fact, — in fact, the Code of Civil Procedure, in some fashion, requires the voir dire to be conducted in the presence of others. I assume the only caveat to that is limitation (sic) is the limitations of the courtroom and the logistics of it, but not with respect to death qualification. I mean, *Hovey* is out. I think that's pretty clear, I think. (1RT 60, emphasis added.)
>
> THE COURT: Yes. It's more of a case where I think in certain circumstances the court is entitled to give some credence to *Hovey*. And I don't know if the publicity generated by this case is one of those circumstances. (1RT 60-61.)

Defense counsel did not contribute any insight on the law. He instead offered what he called a "comment":

> I'm sure there are occasions that where [sic] it seems like the presence of other people is generating information from the group. I don't know how anyone would know to what extent that outweighed what was being kept in. At the same time, I don't know how anybody would know that. And so we all may have different experiences here to draw upon, but it seems to me — I still feel like I did before, that doing it one at a time makes the — at least me, feel like I'm getting more what I'm looking for. (1RT 61.)

The court acknowledged counsels' input, but did not respond to defense counsel's concerns. The next time the trial court discussed group voir dire, the court spoke only of the mechanics of processing numbers of people. The court said it would distribute the questionnaire to veniremembers cleared for hardship, and voir dire them for death qualification, 25 at a time. (1RT 126-128.)

As the People now acknowledge, Code of Civil Procedure section 223 did not limit a trial court's power to sequester jurors for death qualification voir dire, much less limit that power to high-publicity cases, or to cases presenting unusual factors. Rather than declaring group voir dire advisable or inadvisable in ordinary death penalty cases, the statute calls the trial court to determine the advisability of group voir dire in all cases, and to permit group voir dire only if it is, indeed, advisable, considering all the circumstances of the case. (*Covarrubias v. Superior Court (*1998) 60 Cal.App.4th 1168, 1183.)

Moreover, the credence due *Hovey* does not turn on the presence or absence of anything other than a need to effectively examine the death-qualification of jurors while protecting the defendant's right to due process and an impartial jury. *Hovey* defined the risks associated with death qualification of prospective jurors and mandated that trial courts manage the risk the same way in all cases. *Hovey's* mandate as to how to manage the

risk has been abrogated, but *Hovey*'s description of the risk factors has not been discredited or superseded by any statute or decision of this court. The underlying evidence has only grown in recognition and stature since *Hovey* was decided.[4]

Of particular importance here is the *Hovey* court's description of how open-minded prospective jurors are likely to develop a pro-death bias as a result of observing a trial court's dismissive treatment of veniremembers who oppose capital punishment:

> The fact that the court dismisses those venirepersons who express unequivocable opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so irrevocable as to disqualify them under *Witherspoon* may feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty. [fn.][5]

---

[4] See, e.g., Haney, *Violence and the Capital Jury* (July 1997) Stanford L.Rev. 1447, 1482 [noting, inter alia, that systematic exclusion of people who say the state should never impose capital punishment tells all others present that "the legitimate and favored position within the legal system is one supporting imposition of the death penalty."].)

[5] *Hovey v. Superior Court*, *supra,* 28 Cal.3d at pp. 73-74. A footnote (n. 123) at this portion of the *Hovey* opinion states that "insofar as the venirepersons observe the judge dismissing prospective jurors who would automatically vote for the death penalty, the remaining jurors might infer a more symmetrical disapproval on the part of the law, offsetting the prejudicial operation of this particular psychological process."

Appellant's jurors did not see the trial judge dismiss panelists who

The *Hovey* court's observations respecting the desensitizing effects of exposure to death qualification are also very important here. In addition to cultivating belief in the defendant's guilt, exposing jurors to the death qualification process can desensitize them to the intimidating duty of determining whether another person should live or die:

> What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life. (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 75.)

Also important are *Hovey*'s observations respecting the possibility for reducing the risk of desensitizing neutral jurors, and the risk of biasing neutral jurors in favor of death, by adjusting the size of the group and the quantity of the questions. As stated in the study relied upon in *Hovey* and as quoted by this court,

> The more extensive the questioning, the more you would expect to find important differences between the state of mind of jurors who have been through the one process [death-qualification] as compared with those who have been though the other [voir dire without death qualification]. (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 79.)

This court concluded, "[this] proposition implies a corollary: 'the extent to which [these effects] are minimal will be a function of the extent

---

said they would impose death automatically. Instead, they saw the trial judge make every effort to rehabilitate them. No reasonable juror would infer "symmetrical disapproval on the part of the law" as a result of attending appellant's jury selection proceedings.

to which the questioning is minimized.'" (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 79-80.)

Appellant's trial judge's belief that courts were entitled to give "some credence" to *Hovey* only "under certain circumstances" not established in appellant's case might be deemed unimportant if the parties had presented the trial court with new evidence addressing the same issues. But no such evidence was adduced.

Defense counsel's concerns about getting the truth out of jurors were valid and supportable by independent evidence, but he did not adduce any evidence or cite any literature like that considered in *Hovey*. Moreover, defense counsel did not touch upon the risk that death-scrupled jurors would be influenced to appellant's detriment by repeated exposure to other death-qualifying inquiries. The prosecutor's input did not speak to the issues at all, and included an unhelpful assertion that "*Hovey* is out." (1RT 60.)

Thus, the trial court was ignorant not only of what the questionnaires would reveal and what kind of voir dire would be appropriate in light of those revelations, but also of the guidance *Hovey* provides in assessing and managing the risk of biasing and desensitizing neutral jurors. In no sense did appellant's trial court exercise reasonably informed discretion in deciding to conduct death qualification voir dire in the manner was likely to

infringe appellant's due process rights.

After claiming that the trial court was "well-aware of its discretion" respondent reverts to misstating appellant's claims. (RB 92-93.) In pointing up the fact that "[t]he basis for the trial court's decision had nothing to do with the particular circumstances of appellant's case" (AOB 178) appellant distinguishes the reasoning articulated by the trial courts in *People v. Box* (2000) 23 Cal.4th 1153, 1180-1181, and *People v. Waidla* (2000) 22 Cal.4th 690, 713, but never "suggests that individualized voir dire was required were a juror to make an affirmative response that began to discuss sensitive topics involving death or life qualifying matter" (RB 92) or that "the trial court was required to postpone its final decision to conduct group voir dire until it was aware of all the private information disclosed via the questionnaires." (RB 93.) The gravamen of appellant's claim is not the harm of jurors hearing other jurors' answers, but jurors hearing a trial judge engage in questioning that favors those who say they would always vote for death over those who say they would always vote for life.

Onward, respondent declares that "individual voir dire would be required only where appellant could show actual as opposed to potential bias, which was certainly not present here. (See *People v. Vieira* [2005] 35 Cal.4th [264] at p. 289.) ¶ Again, individualized voir dire is required only where practicability concerns – a showing of actual bias – render group voir

dire impossible. (*People v. Vieira, supra,* 35 Cal.4th at p. 289.)" (RB 93.)

In *Vieira,* this court wrote:

> The possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment. (*People v. Vieira, supra*, 35 Cal. 4th 264, 289.)

That is not the same as saying that only a showing of actual bias can render group voir dire impracticable, much less that a showing of actual bias is necessary to reverse a judgment. At most, *Vieira* resolved that a mere possibility that any already-biased jurors might have revealed that bias in sequestered voir dire neither compels sequestration nor reversal of the judgment for failure to sequester. Where, as here, the trial court's questioning of jurors was such as to influence neutral observers to favor a death verdict, the harmfulness of large group voir dire does not turn on whether any juror revealed an actual bias. "A process which systematically reduces whatever 'doubts about the wisdom of capital punishment' or '[reluctance] to pronounce the extreme penalty' is as constitutionally infirm as a jury from which individuals who hold such views are systematically 'culled.'" Neither jury can "speak for the community." [Citation.] Both juries are "less than neutral" with respect to the choice of penalty." (*Hovey v. Superior Court, supra*, quoting and citing *Witherspoon v. Illinois, supra*,

381 U.S. at p. 520, fn. 18.)

Finally, respondent erroneously asserts that this claim is "a reassertion of principles of *Hovey* that were explicitly rejected by the voters in amending Code of Civil Procedure section 223. . .". (RB 96.) What the voters rejected was *Hovey*'s mandate to use sequestered voir dire as a prophylactic measure in all capital cases. The voters did not and could not say that large group voir dire does not offend the constitution where it exposes neutral jurors to any particularly biasing forms of voir dire. Thus, if it can be said the trial court exercised its discretion in exposing jurors to the life and death qualifying examinations of 24 others, that discretion was "abused." Reversal would be required even under the statutory "miscarriage of justice" standard. (Code of Civ. Proc., § 223; *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 ["a disposition that rests on an error of law constitutes an abuse of discretion."].)

VI. APPELLANT WAS DEPRIVED OF EQUAL PROTECTION OF THE LAW, DUE PROCESS, AND THE RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY, UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND STATE CONSTITUTIONAL COROLLARIES BY THE TRIAL COURT'S FAILURE TO APPLY *BATSON* DOCTRINE TO APPELLANT'S *WHEELER* CLAIM

Respondent once again begins by misstating appellant's claim. This claim is not one of prosecutorial "error" in the use of a peremptory strike, nor one in which a technical "error" is merely "compounded" by a trial court's "finding that there was no prima facie showing of systematic exclusion . . .". (RB 96.) Appellant's claim is that the trial court could not and did not evaluate his *Wheeler/Batson* claim under the correct evidentiary standard.

This case was tried in 1996, a year in between the publication of the Court of Appeal decision in *People v. Bernard* (1994) 27 Cal.App.4th 458, and this court's decision in *People v. Box*, *supra*, 23 Cal.4th 1153, 1188, fn. 7, wherein this court disapproved *Bernard*. Thus, the state of California law at the time of trial compelled the trial court to apply the "strong likelihood" or "more likely than not" test rejected in *Johnson v. California* (2005) 545 U.S. 162. (See discussion at AOB 200-203.)

Consequently, when the trial judge said he was denying "the challenge" because "I don't believe there's been a *sufficient showing of*

systematic exclusion" (9RT 1831) one cannot reasonably conclude (as respondent demands) that the trial court was "not employing an inappropriate standard." (RB 99.) The conclusion that the trial court did indeed employ an "inappropriate standard" of proof follows from the presumption that a trial court applied the law as it existed at the time. The trial court's use of the term "systematic exclusion" indicates that the trial court was also applying a test requiring a pattern of improper strikes, which is another error entirely. (See discussion at AOB 196-199.) Even if a majority of this court does not infer that the trial court was demanding multiple strikes from use of the term "systematic exclusion" in denying a *Wheeler/Batson* motion, the "burden of proof" error remains.

Finally, respondent argues that no such error compels reversal where, as here, the reviewing court can "revert to an independent assessment" of the prima facie case. (RB 104.) Not so. Evidence sufficient to permit the trial court to draw an inference of discrimination was before the trial court when appellant made his motion. (See discussion at AOB 203-206.) Nothing more is required to command a fair hearing of the claim before a trial court applying the *Batson* standard. (*Johnson v. California, supra,* 542 U.S. 162, 170.) Review of the record is no substitute for a *Batson* hearing.

VII. THE TRIAL COURT'S REMOVAL OF A PROSPECTIVE JUROR BECAUSE SHE WAS AFRICAN AMERICAN AND CONCERNED ABOUT INEQUITABLE TREATMENT OF AFRICANS AND CAUCASIANS IN THE CRIMINAL JUSTICE SYSTEM VIOLATED THE GUARANTEES OF EQUAL PROTECTION OF THE LAW, DUE PROCESS, AND THE RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY, UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND STATE CONSTITUTIONAL COROLLARIES

This claim is one of race discrimination by a trial judge in deciding a challenge for cause based on expressions of pro-death penalty views. Because respondent only vaguely mentions the facts supporting this claim in a footnote near the end of its argument, appellant begins with a brief review of the facts of record.

On her questionnaire, Katrina Taylor-Prater (called "K.T." in respondent's brief) wrote that the death penalty should "sometimes" be imposed on everyone who kills another human being, and "always" on everyone who intentionally kills another human being or kills with deliberation and premeditation. On the comment line, she explained: "Murders should get death penalty, but I am concerned about the inequity between Africans and Caucasians." (7ACT 2664.)[6]

---

[6] Her questionnaire also asserted that she would vote for the death penalty in all cases in which there is a verdict finding the defendant guilty

At the outset of voir dire, the trial court noted her questionnaire's expression of concern about "the inequity between Africans and Caucasians" and asked "is that going to play some significance in your function as a juror in this case." She replied, "I will think about it, yes." The trial court asked, "Could you tell me how it will impair [sic] your judgment in this case?" Ms. Taylor-Prater said it "would depend upon the evidence." (6RT 1278.) The trial court asked if she felt "that the issue of race would have some significance" to her in this case. She replied, "If I did not find the evidence to be precise or specific." (6RT 1278.) But she affirmed readiness to apply the burden of proof beyond a reasonable doubt just as she would if the defendant were not African-American, and denied that the race of the defendant or the victims would have any significance in general. (6RT 1279.) The court asked if she could say how race would enter into her judgment. The following dialogue ensued:

---

of first degree murder with special circumstances, and added "could be an accidental killing." (7ACT 2665.)

Under questioning by the trial court, she affirmed that she would be able to evaluate "mitigating factors as well as aggravating factors" and asserted that she would not always impose death; her judgment "would depend upon the circumstances." (6RT 1277.) In accordance with the trial court's ruling respecting Juror No. 4, no one questioned or instructed her on the meaning of the term "mitigating factors" to determine if she was prepared to seriously consider a life sentence in a penalty preceding after finding a defendant guilty of deliberate and premeditated murder.

THE JUROR: I would only hope the evidence is very clear, very specific, that would — if it were in the gray area, then race might be a factor.

THE COURT: And how would race be a factor?

THE JUROR: Because I know that sometimes the court system is not fair to African Americans.

THE COURT: That might be true in things like you read in the newspaper and certainly things you've heard descriptions of. . . . ¶ My concern is whether or not you as a prospective juror are going to either consciously — it sounds like consciously more than unconsciously allow race to enter into your decision making in this case?

THE JUROR: Race alone is not going to be the sole factor in my final decision, no.

. . .

THE COURT: So is race really playing a part in your judgment making at all?

THE JUROR: Not a part in my judgment making, but it is a concern.

THE COURT: Could you give me any sense at all of how your concern is going to effect your function as a juror in this case?

THE JUROR: I really don't think it will have an effect as long as I understand the evidence and it's clear.

Under questioning by the prosecutor, Ms. Taylor-Prater said she perceived that the higher representation of Blacks on death row is a product of bias at some point in the system. (7RT 1300-1301.) The prosecutor

asked her if she would "factor in this perception . . . of institutional bias in [the defendant's] favor and say, well, 'I think it's about time . . . for the scale to swing the other way, maybe aggravation outweighs mitigation but you have a social obligation to balance things out a little bit?" She answered firmly: "No. I don't find balance in making the wrong decision. . . ." (7RT 1303.) The prosecutor twice asked if she would factor or use the defendant's race into her penalty decision. She answered, "No, not if he's guilty, no" and "I thought I answered that 'no.'" (7RT 1304.) No further questions along those lines were asked.

Ms. Taylor-Prater was challenged for cause by defense counsel on the grounds that her responses on the death penalty were "all over the map" and some indicated she would be "automatic" for death. The prosecutor said "some of her comments were of some concern to the People" and "frankly, I doubt she will be part of this jury ultimately, but I don't think a case for cause has been made against her." (7RT 1341-1342.)

The trial court "grant[ed] the challenge" and explained: "Part of my concern does not deal with her statement about the death penalty. It deals with her statement that she couldn't quantify in any way just about that race would be a factor in her decision. She couldn't tell me how it would be a factor, but it was a close case. So she said she would vote according to certain feelings she had about race."

"So Mrs. Taylor-Prater *is an African American.* She expressed those views. I was concerned about them in terms of this particular case and I will grant the challenge for cause." (7RT 1342, emphasis added.)

Defense counsel's challenges to the other prospective jurors who gave the same answers Taylor-Prater gave on the rectitude of imposing death on everyone who commits an intentional or deliberate and premeditated murder and the need to consider any "mitigating circumstances" were uniformly denied. (5RT 1031-1034, 6RT 1178-1183, 7RT 1335-1341, 7RT 1417-1419.)

Respondent claims that appellant should be "estopped from raising this issue on appeal" or be deemed to have waived the issue under the authority of *People v. Hill* (1998) 3 Cal.4th 959, 1003 and *People v. Pride* (1998) 3 Cal.4th 195, 228.) (RB 104-105.) In *Hill,* this court held that the defendant waived objection to the granting of the prosecutor's challenge for cause to a juror who his counsel agreed should be removed because of inability to impose death. In *Pride,* this court estopped the defendant from raising a *Witherspoon/Witt* issue on appeal where the trial court adopted an erroneous interpretation of the law urged by defense counsel below. Neither case supports respondent where, as here, the defendant never urged nor acceded to the error raised on appeal, i.e., using a juror's race as a factor in assessing fitness to serve. On the contrary, defense counsel urged

removal of all jurors who said that they would always vote for death upon conviction of the charged crime, never urged removal of any juror on racial grounds, and never suggested or agreed that use of race was appropriate.

Although not on all fours with this case, *United States v. Nelson* (2nd Cir 2002) 227 F.3d 164, is highly instructive. In an effort to diversify the jury, the trial court elicited all counsel's agreement to seat two prospective jurors based on their race. The convicted defendant attacked the arrangement on appeal. The majority found plain error and reversed, rejecting the estoppel argument suggested by the dissent, and noting:

> The difficulty with this argument is that, if it were to be countenanced, parties could always, with the court's consent, empanel a jury that was of precisely the racial and religious mix that they wished. If the court was of like mind, there would be nothing to stop civil litigants from agreeing, for example, that a contract or tort action between them should be heard by a jury composed only of members of their own racial or religious groups. And all Congress's and the Supreme Court's language about "race neutrality in jury selection" as a "measure of the judicial system's commitment to the commands of the Constitution," Powers, 499 U.S. at 416, would be a dead letter. (*Nelson, supra*, at pp. 208-209.)

As to the merits in general, respondent claims "Whether K.T. was excused on Witherspoon/Witt grounds as appellant requested [citation] or sua sponte on grounds of being racially biased (see Code of Civ. Proc., §229, subd. (f); see generally *People v. Memro* (1995) 11 Cal.4th 786

[permitting trial court to excuse biased jurors sua sponte], her answers were, at the very least, equivocal on both subjects. When a juror posts equivocal answers and the trial court finds for removal, the trial court has made a factual finding deserving of a substantial amount of deference." (RB 105-106.)

The general rule of deference on which respondent relies does not apply to governmental decisions expressly based on a person's race. Because the record expressly states that the juror's race was a factor in the trial court's decision, strict scrutiny, not deference, is the appropriate approach. (*Johnson v. California* (2005) 543 U.S. 499, 505-506 [strict scrutiny, rather than the usual deference, must be applied to prison administrative decisions expressly based on race].)

Respondent acknowledges (in a footnote) that the trial court "recognized K.T.'s race as an African American in explaining its decision to grant appellant's *Witherspoon/Witt* challenge . . ." (RB 108, fn. 18), and asks this court to *presume* that the court's decision was not so related to race as to be improper. (RB 108, fn. 18.) No such presumption is possible here. "[P]resumptions are indulged to support [the trial court judgment] on matters as to which the record is silent" (*Denham v. Superior Court* (1970) 2 Cal. 3d 557, 564) but not as to matters on which the record directly speaks.

Mixing facts real and imagined, respondent argues that the trial court "recognized K.T.'s race . . . only in the context of K.T.'s strongly held, but still unquantifiable, views that race would somehow play a role in her deliberations." (RB 108, fn. 18.) But K.T. did not say that race "would somehow play a role in her deliberations." She said that race "might be a factor" in a case where the evidence of guilt was not precise or specific (6RT 1278) but would play no part in her judgment. (6RT 1280.) The trial judge believed that K.T. "said she would vote according to certain feelings she had about race" but the reporter's transcript shows that she said otherwise. The transcript, which is prepared by an official under a duty to record statements, must be presumed correct. (Evid. Code, § 664.)

Respondent goes on to claim that "[a]ppellant contends that this Court has an obligation to treat K.T.'s claims differently because she is an African American concerned with inequities in the legal system. (See AOB 211.)" (RB 108, fn. omitted.) Not so. Rather than urging special treatment of any juror, appellant attacks the trial court's special treatment of K.T., i.e., the demand that K.T. articulate or "quantify" (as described by the trial judge) how her perspective on racial issues would affect her functioning as a juror, and the decision to remove her "for cause" after jurors with similar views on the death penalty were allowed to remain. As stated in appellant's opening brief, "a juror's ethnic background or

concern about systemic inequity cannot justify subjecting him or her to an inquiry in which she is expected to "quantify" (as described by the trial judge) or qualify how her perspective on racial issues will affect her function as a juror." (AOB 211.) As this court recently explained:

> "Jurors' views of the evidence ... are necessarily informed by their life experiences, including their education and professional work." [Citation.] "[D]uring the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. ... [¶] A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct." [Citation.] "[T]he jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution.' [Citation.]" (*People v. Wilson* (2008) 44 Cal. 4th 758, 830.)

Finally, respondent argues that "K.T.'s answers reflect a clear bias – an inability to follow the court's instructions regrading true neutrality – that would impact her deliberative abilities." (RB 109.) Respondent does not cite the record or any legal authority for this claim, and appellant is aware of none. In truth, K.T.'s answers provide no basis for a reviewing court to find that K.T. was unable, unwilling or even impaired in ability to follow any jury instruction The trial court's treatment of K.T. was not so

justified. Appellant's conviction, as well as his sentence, must be reversed due to the trial court's use of invidious racial criteria in the jury selection process. (*Batson v. Kentucky*, *supra,* 476 U.S. 79, 87; *Powers v. Ohio*, *supra*, 499 U.S. 400, 406.)

VIII. THE TRIAL COURT'S FAILURE TO SUSTAIN OBJECTIONS AND RESPOND CORRECTIVELY TO PROSECUTORIAL OVERREACHING RENDERED THE TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Respondent posits that "[t]he trial court did not abuse its discretion in its general evidentiary rulings and *thus could not have rendered the trial fundamentally unfair*." (RB 109) That does not follow. Evidentiary errors that are capable of rendering a trial fundamentally unfair include decisions for which the trial court had no discretion, such as the admission of irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14 [trial court has no discretion to admit irrelevant evidence].) Furthermore, many of the errors discussed under this heading are not "general evidentiary rulings" but rather responses to prosecutorial misconduct unconnected to the admission of evidence. Thus, even if one could conclude that the evidentiary rulings treated here were not so bad as to render the trial fundamentally unfair,

appellant's argument would remain unanswered.

Moreover, erroneous evidentiary rulings are appropriately considered in determining whether further objections and requests for admonition would be futile, without regard to whether those evidentiary rulings themselves rendered the trial fundamentally unfair. (*People v. Hill* (2003) 17 Cal.4th 800, 821.)

And, finally, evaluating the impact of each ruling in isolation, as respondent urges, is inconsistent with the cumulative prejudice analysis that appellant has requested and to which he is entitled. *(Chambers v. Mississippi* (1973) 410 U.S. 284, 290, fn. 3; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922.) As argued under this heading in appellant's opening brief, "[w]ith every bad ruling, the prosecutor gained, and the defense lost, credibility with the jury; the prosecutor was encouraged to push the envelope further, and he did so — very pointedly, and very effectively. The trial court's errors in condoning the prosecutor's conduct and in curtailing the presentation of appellant's defense created a "negative synergistic effect" (*People v. Hill, supra*, 17 Cal.4th 800, 847) rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. (AOB 216.)

A. The court permitted argumentative prosecutorial questioning of a prospective juror concerning the ability of ballistic evidence to establish a shooter's "state of mind"

As usual, respondent's argument sets up a straw man, defending a trial court's discretion to permit "leading questions" about a juror's ability to "utilize circumstantial evidence." (RB 110.) Appellant's claim is that the prosecutor's question was improperly argumentative. Here are the facts:

In the presence of the sworn jurors and all of the potential alternates, the prosecutor began his argument for a first degree murder verdict with a simple question. He asked a prospective alternate juror if he heard defense counsel say, "You don't have to know anything about ballistics." (9RT 1892.) The prosecutor's question misquoted defense counsel,[7] but the prospective alternate said "yes."

---

[7] Defense counsel's actual assertion was that "the questions that you will be confronted with in this case do not have to do with ballistics or who shot what and when." (9RT 1802.) This statement was made in the course of telling the jury that appellant did not dispute having killed two people unlawfully, and that the issues were going to "have to do with the mind." (9RT 1802.) The prosecutor objected to that assertion, alleging that "ballistics could say a lot about what is going on through somebody's head. He is not asking a question. He's arguing his case." (9RT 1802.) The court said it believed it knew where the defense "was going with this," and overruled the prosecutor's objection. (9RT 1802.)

Then, the prosecutor rhetorically asked, "You think it might make a difference if somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?"

Defense counsel objected, but stated no legal basis for the objection. Instead, he disputed the factual assertion. ("Objection. That doesn't sound like ballistics to me. It has to do with medical evidence.") (9RT 1892.)

The judge overruled the defense, finding some unarticulated fault in the grounds stated. ("Is that your objection? I will overrule your objection.") (9RT 1892.)

The judge should have sustained the objection. The prosecutor's question was obviously argumentative as well as wrong on the facts.

A question is argumentative and thus improper when it seeks no new information, but rather assent to the inference suggested by the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168, p. 232; 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9, p. 764.)

The trial court's statutory obligation to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation . . . as effective for the ascertainment of truth, as may be, and to protect the witness from undue harassment . . ." (Evid. Code, § 765) means nothing if

it does not include an obligation to sustain objection to argumentative questioning.

Nonetheless, the prosecutor in the present case was permitted to ask, "You think it might make a difference if somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?" (9RT 1892.)

Respondent contends that the prosecutor's question was only "leading" and "was essentially asking if the juror would follow the law." (RB 111.) If that were a plausible interpretation, there would be no issue here.

Respondent also argues that "the claim is waived" because trial counsel attacked only the specific content of the prosecutor's argumentative question without referencing any body of law. (RB 110.) Respondent relies on Evidence Code section 353 and cases dealing with admission of evidence. This claim is based on trial court error in responding to improper prosecutorial argument, not error in admitting evidence; thus Evidence Code section 353 and cases construing it are inapposite. Instances of prosecutorial misconduct in argument to the jury to which the defendant failed to object or request admonition are appropriately considered in assessing cumulative prejudice and in determining whether

objecting to subsequent instances of prosecutorial misconduct would have been futile. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1076 [assessing cumulative prejudice]; *People v. Hill*, *supra*, 17 Cal.4th 800, 821; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692-693 [futility assessment].)

B. The court allowed the prosecutor to use argumentative and leading questions in examining his own witnesses

Respondent's first claim here is that "the entire claim of prosecutorial misconduct is waived in this instance because at no time, even in connection with the objections that were made, did appellant raise the specter of prosecutorial misconduct." (RB 112.) Respondent cites *People v. Williams* (1997) 16 Cal.4th 635, 673, *People v. Mayfield* (1997) 14 Cal.4th 668, 753 and *People v. Cain* (1995) 10 Cal.4th 1, 48.

None of these cases is on point where, as here, the claim is that a trial court denied the defendant due process of law by repeatedly failing to respond correctively to prosecutorial overreaching. In *Williams*, the prosecutor asked only one impermissibly leading question that this court found to be improper, and the only effect of the trial court's erroneous failure to strike was the admission of some cumulative evidence. (*People v.*

Williams, supra, 16 Cal.4th 635 at p. 673.) In *Mayfield,* "the prosecutor's lengthy cross-examination tested the limits of what is permissible [but] the trial court exercised firm control, and those limits were not exceeded." (*People v. Mayfield, supra*, 14 Cal. 4th 668, 756.) In *Cain,* the appellant argued that several "statements included by the prosecutor in his closing argument constituted misconduct" after making no objection to them at trial. This court found none of the statements improper. (People v. Cain, supra, 10 Cal. 4th 1, 48.)

On the merits, respondent claims that "no possible prejudice could have ensued" from the first instance cited under this heading in appellant's brief, i.e., that in which the prosecutor asked prosecution witness Art Hatchett, "So at least in terms of his performance on the job, Mr. Pearson had no difficulty premeditating and deliberating?" Defense counsel objected on the grounds that the question was leading. The court sustained the objection, but added an explanation that suggested the court found nothing wrong with leading questions per se. ("I don't know what premeditation and deliberation means in terms of job performance so I will sustain it.") (11RT 2265.)

Appellant sees two forms of prejudice from this instance of prosecutorial overreaching and trial court inaction. First, the argument implicit in the question attacked appellant's only defense. "Where the

combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process. [Citation.] *(Parle v. Runnels, supra*, 505 F.2d 922, 932.) Second, the trial court's response encouraged further prosecutorial action of the same sort and discouraged defense counsel from objecting to leading questions per se. The prosecutor subsequently led Hatchett from noting that appellant's "improvement goals" referred to future behavior to the conclusion that Hatchett did not perceive "any defect, mental or otherwise, in the mind of [appellant] that would prevent him from thinking about things in the future." (12RT 2447-2448.) Given the court's comment on defense counsel's previous objection to a leading question as such, interposing that same objection at other appropriate junctures would have been futile.

Accordingly, respondent argues that the prosecutor's subsequent use of leading questions was not improper. Respondent claims that the questions sought more than "mere agreement to a particular point" or "did not suggest a particular answer." (RB 114.) Not so. The prosecutor's use of leading and argumentative questions to argue his mental state theory in his direct examination of former Housing Authority employee Janet Robinson continued along the same improper vein employed with Hatchett. After Robinson told of having discussed current events and literature with

appellant, the prosecutor asked Robinson "did you ever detect any kind of defect or oddity that enabled [appellant] to not really perceive reality at all. . . ." (13RT 2515-2516.) Defense counsel did not object to this question, although it was no less objectionable than that asked of Mr. Hatchett. Defense counsel did, however, object to a non-responsive portion of the answer. (13RT 2516.)

Onward, the prosecutor asked Ms. Robinson if she perceived any kind of "mental defect or something going on inside his brain that made him not be able to communicate with you rationally." (13RT 2516.) Ms. Robinson said no. The prosecutor followed that with "So he seemed to be thinking inside his head about the issues that you were talking." Defense counsel interjected, "It's got to be a leading question. Objection, judge." (13RT 2516.) The prosecutor began another question, without waiting for a ruling. Defense counsel interjected "Objection, judge." The prosecutor offered to rephrase. The court said "okay." The prosecutor asked Robinson, "Did he seem to be speaking with you in an appropriate way about these issues that you talked about?" Defense counsel said, "That's just as leading, Judge. Objection." Robinson proceeded to answer the question affirmatively. The court's response: "I will allow the answer to stand as a leading question, counsel. I will allow the answer to stand based on the earlier comment by the witness." (13RT 2516-2517.)

After the prosecutor asked another leading question of Robinson and defense counsel interjected "That's got to be a leading question," the court asked counsel to approach the bench. The court told defense counsel that the objection is "leading" and chided defense counsel for stating his objection inappropriately. The court also told defense counsel it was going to allow leading questions "when the witness has already testified . . . as being repetition just to clarify the answer under those leading questions." The court also said it would allow "a certain amount of leading questions for purpose of foundational [sic]." (13RT 2519.) The court said it would sustain defense counsel's last objection, and again stated that "the legal objection is, 'Objection. Leading.'" (13RT 2519.)

The court did not admonish the prosecutor or otherwise act to discourage him from persisting in using leading questions outside the stated parameters. The prosecutor subsequently used a series of three leading questions to suggest (to the jury and to Ms. Robinson) that appellant violated office protocol for admitting visitors into a secure work area. After the court sustained the third defense objection, and the prosecutor complained that he did not know how else to ask his question, and "don't see how it suggests the answer" the court said, "All right. I will overrule that objection" and told the prosecutor "another way of posing the question can be whether or not." (13RT 2526.)

The court then allowed the prosecutor to ask the same question embellished with a suggestion that there were times when the witness "would look up all of a sudden much to [her] surprise an applicant would be standing there." Defense counsel's objection to this leading question, which was as valid as the objections previously sustained, was overruled. (13RT 2526.)

Respondent claims that the trial court simply and properly "allowed the prosecutor some degree of latitude in asking leading questions to clarify prior statements or to provide foundation for further questions." (RB 115.) Whatever the trial court's intentions, the use of leading and argumentative prosecutorial questions that the court actually permitted was not so limited. When the prosecutor asked one of his witnesses if publicity about the killings at 101 California was ongoing at the end of appellant's employment, and then stated his question meant that those killings "affected a lot of people" (17RT 3343) the prosecutor was not clarifying anything said by the witness, or laying a foundation for another question; the prosecutor simply used this examination of a lay witness to prepare the jury to accept his penalty-phase claim that appellant wanted to, and did, commit killings that would affect the lives of a lot of people with "tremendous shock waves" and linger like "radiation." (29RT 5533, 5536, 5542, 5596.)

Finally, respondent defends the "latitude" the trial court gave to the

prosecutor in leading Dr. Paul Berg as an exercise of judicial discretion to allow leading questions of an expert witness. (RB 118.) But as pointed out in this context of appellant's opening brief, the defense received no such latitude in the examination of the defense mental health expert about the meaning of test results suggesting a "psychotic level of organization." When defense counsel asked Dr. Walser if having a psychotic level of organizations means the person "misperceives reality on a regular basis," the prosecutor objected to the question as leading. (18RT 3579.) The court said, "I will begin to sustain these, Counsel. The witness can testify as to the meaning of these matters. The Court is exercising its discretion. So you can ask the witness to testify what it means." (18RT 3580.) In addition to being fundamentally unfair to the defense, uneven treatment of the two parties' leading questions in the examination of experts confirms that the trial court would not or could not control the prosecutor. Like seeking to have the prosecutor admonished, claiming "prosecutorial misconduct" in this trial court would surely have been futile.

C. The court permitted and condoned the prosecutor's demeaning treatment of defense counsel's effort to expose the complaints about management that were circulating before appellant was hired

Respondent begins and ends by suggesting that the prosecutor and the trial court were entitled to behave as they did because the evidence

defense counsel sought to present was "prejudicial, irrelevant and unreliable hearsay" (RB 119) and "the court had significant discretion in this area." (RB 124.) Respondent is correct insofar as the trial court had discretion to exclude relevant evidence under Evidence Code section 352, but incorrect in calling evidence of other employees hostility toward Housing Authority management previous to appellant's employment "irrelevant." Evidence that hostility toward management was expressed prior to appellant's tenure and that the people against whom the hostility was expressed were never effectively disciplined had "some tendency in reason" (Evid. Code, §210) to prove that the place was still rife with resentment during appellant's tenure.

Moreover, no representative of the state has discretion to attack defense counsel as both the trial court and the prosecutor did here. If "objections constitute misconduct only if they go beyond the charge of legal or procedural violation and directly or by clear inference, question the motives or integrity of opposing counsel" (*People v. Price* (1991) 1 Cal.4th 324, 448; RB 120) both the prosecutor and the trial judge committed misconduct here.

As detailed in appellant's opening brief (AOB 230-231), defense counsel's efforts to expose the complaints about management that were circulating before appellant was hired elicited not only numerous speaking objections defying the trial court's prior rulings, but speaking objections

attacking defense counsel's honesty ("disingenuous" – 12 RT 2362) and his motives ("defense counsel is trying to prejudice the jury") blessed by the trial judge ("Seems to be." – 15RT 2934-35), who occasionally echoed the prosecutor's assessment ("If you are not worried about whether or not they are true, it sounds like so much rumor mongering" – 12RT 2378) and lectured defense counsel with sarcasm ("[C]ounsel, we're dealing with a case here, it's not relevant." – 12RT 2407).

Defense counsel objected to this treatment shortly after it began (12RT 2408-2409), but the trial court continued to tolerate the prosecutor's behavior and defended admonishing defense counsel in front of the jury. (12RT 2409-2410, 15RT 2934-2935, 16RT3101.) Requesting admonitions would have been futile. (*People v. Stitely* (2005) 35 Cal.4th 514, 559–560, fn. 21, citing *Hill, supra*, 17 Cal.4th at pp. 820–821.)

D. The court permitted improper accusatory questioning of defense witness Cecilia Gardner

As detailed in appellant's opening brief (AOB 233-234) appellant alleges that the trial court erred in failing to respond correctively after the prosecutor committed misconduct in asking defense witness Cecilia Gardner whether she was aware of the existence of a warrant for her arrest insofar as the prosecutor had no "reasonable grounds to anticipate an

answer confirming the implied fact" and was not "prepared to prove the fact by other means." (*People v. Price* (1991) 1 Cal.4th 324, 481, Cf. *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1221-1222; *People v. Warren* (1988) 45 Cal.3d 471, 480; *People v. Perez* (1962) 58 Cal.2d 229, 240-241; *People v. LoCigno* (1961) 193 Cal.App.2d 360, 388.)

Respondent begins by misstating appellant's claim so as to imply that proof that Gardner was aware of a warrant indeed existed, and the prosecutor simply neglected to offer that evidence to save time. ("[A]ppellant contends that the prosecutor committed misconduct by asking Ms. Gardner whether she was aware of the existence of [a warrant for her arrest] *without later attempting to admit proof* of the warrant or of the underlying charges for which Ms. Gardner failed to appear.") (RB 124.) This suggestion that the prosecutor had proof, and simply neglected to try to adduce it, is unfounded. At a hearing outside the presence of the jury after the damage was done, at which time the trial court reminded the prosecutor that Gardner denied awareness of any warrant for her arrest, the prosecutor admitted he had no "independent ability to prove" that Gardner was aware of any warrant. (17RT 3385.)

Respondent goes on to suggest that accusatory questioning of Gardner was proper because the "record suggests that the prosecutor was reading the charges from a computer printout (i.e., a `rap sheet'), and,

although the witness denied awareness of the warrant, her unsolicited comments during the hearing at least implicitly recognized the existence of the charges. (See XVII RT 3385 [WITNESS: `Wasn't they suppose to notify me or something? I mean, I didn't know nothing about it because I never been in trouble with the law.'].)" (RB 125.) Respondent does not explain how "I didn't know nothing about it" can be said to imply knowledge of the charges, and no such inference was drawn by anyone in the trial court. And contrary to respondent's claim, *People v. Steele* (2000) 83 Cal.App.4th 212, 223, does not hold that a "rap sheet provides sufficient evidence to show a good faith basis for impeachment." (RB 127.) In *Steele* a rap sheet *plus* opposing counsel's confirmation that the witness had admitted the charge listed on the rap sheet was deemed sufficient to support a good faith belief that the witness had suffered a conviction on the charge. (Id., at pp. 222-223.) Where, as here, the witness was not convicted of anything, by admission or otherwise, nor arrested or cited for an offense, the rap sheet could provide only hearsay evidence of a charge. Unlike a conviction, a charge is not proof that the person charged committed a crime, nor that the witness is aware of a charge pending against her.

Respondent also alleges that appellant's failure to object on "prosecutorial misconduct" grounds constitutes a waiver of the claim. (RB 124-125.) At the time of appellant's trial, claims of prosecutorial

misconduct based on asking questions implying facts harmful to the defendant without the ability to prove those facts could be deemed waived only "if the defense does not object, and the prosecutor is not asked to justify the question" insofar as the reviewing court is thus unable "to determine whether this form of misconduct has occurred." *(People v. Price, supra,* 1 Cal. 4th 324, 481.) Here, the inability of the prosecutor to prove the implied fact is well established: after appellant objected that "a warrant out for her arrest is not conduct" and the trial court questioned the prosecutor's proof, the prosecutor told the court that he had *no ability to prove* that Gardner was aware of any warrant for her arrest. (17RT 3385.) Use of the term "prosecutorial misconduct" in pressing the objection was not necessary to develop the facts under these circumstances. And, given the trial court's ruling on the objection, a request to admonish the prosecutor would have been futile.

Finally, respondent claims that appellant was not prejudiced by the prosecutor's action or by the trial court's error in overruling appellant's objection at the time it was entered. Notably, respondent does not dispute appellant's claim that the initial ruling enabled the prosecutor to complete the assault by asking Gardner if she indeed committed the crime to which the alleged warrant related. Nor does respondent deny that such questioning of a witness is particularly pernicious where, as here, the actual

content of a leading question suggested to everyone present "that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

Rather, respondent contends that any error was harmless because Gardner was impeached by her own admission that she was suspended from the RHA for giving family members priority on the waiting list for housing, and ultimately terminated because she was found in possession of stolen laundry tokens." (RB 128.) This argument overlooks the fact that Gardner was able to respond to those accusations, but not the phantom perjury and theft charges, which were followed by a judicial *Miranda* warning and request for legal counsel that was never provided. A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf. (*In re Martin* (1987) 44 Cal.3d 1, 30; *People v. Warren* (1984) 161 Cal.App.3d 961, 971; *Berg v. Morris* (E.D. Cal. 1980) 483 F.Supp. 179, 182.) Such interference exists when a prosecutor tells the jury and the defense witness that the witness is charged with a crime and ought to be advised of her rights, and the witness declines to defend herself as a result.

Respondent's argument also overlooks the impact of the court's

failure to control the prosecutor's improper questioning of Cecilia Gardner separate from Gardner's credibility. Gardner's direct examination testimony about Lorraine Talley's mistreatment of her as an employee went to the question of whether Talley was likely to have demeaned appellant without good cause. The prosecutor's position was that Talley's treatment of Gardner was justified by Gardner's misconduct and bad character. When he besmirched Gardner's character, he besmirched appellant's as well. Gardner was, according to the prosecutor's closing argument, "the personification of the defense case." (26RT 4963.)

E. The court permitted argumentative prosecutorial questioning of Dr. Walser

Respondent again begins by misstating the basis of appellant's claim. The prosecutor did not ask Dr. Walser "whether she and the other two mental health experts had corroborated their findings ..." (RB 128.) As stated in appellant's opening brief (AOB 238-239) the prosecutor cross-examined Dr. Walser as follows:

> MR. JEWETT: Essentially the three of you were getting your stories together before you formalized [sic] in a report, is it not?
>
> MR. VEALE: That's truly objectionable. I object to. [sic]

MR. JEWETT: It's a question.

THE COURT: I will overrule the objection. You could answer the question if you have an answer.

MR. JEWETT: You were all getting your diagnoses, your opinions, whatever you want to call it together so everybody lined up saying basically the same thing before any of you wrote a report; isn't that true? (21RT 4149.)

Later, on re-cross examination, the prosecutor questioned Dr. Walser as follows:

MR. JEWETT: So the points that I've tried to bring up during a fairly lengthy cross-examination at every opportunity you've taken, you have taken, described of [sic] a defensive posture to protect your opinion, right?

DR. WALSER: No, I feel like I'm trying to explain what I understand. And at times the questions have only offered me or tried to have me offer only a part of it and it's an inaccurate representation.

What I am dedicated to is making sure that it's my opinion and the test data and everything that I have done are represented accurately.

* * *

MR. JEWETT: When Mr. Pearson actually went about the process of killing people, he actually did it very efficiently, didn't he?

MR. VEALE: That's argumentative. Argumentative, Judge, objection.

THE COURT: Overruled.

> MR. JEWETT: It was actually a very efficient job in his — job in his mind, it was to kill people, he actually did it in a very organized and efficient way, didn't he?
>
> DR. WALSER: I guess I would have to think about the word efficient. (21RT 4216.)

Respondent does not deny that the prosecutor's questions were argumentative in that they sought no factual information but rather assent to an inference favorable to the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168, p. 232; 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9, p. 764.) But respondent contends that "the claims" are not preserved for review because appellant "did not claim either prosecutorial misconduct or that the questions caused a fundamental breakdown in the trial process." (RB 129.)

Respondent asks the court to "see *People v. Carter[2003]* 30 Cal.4th [1166] at p. 1207; *People v. Partida, supra,* 37 Cal.4th at p.435." Neither case is on point here. As previously noted, *Partida* relied on Evidence Code section 353, which limits the power of reviewing courts to set aside judgments "by reason of the erroneous admission of evidence" absent specific objection in the trial court. (*People v. Partida, supra,* 37 Cal. 4th 428, 433.) Appellant does not here claim that the court's tolerance of the prosecutor's argumentative and accusatory questioning resulted in an "erroneous admission of evidence." Rather, it is the implications of the

questions themselves and the trial court's tolerance of the improper questioning that forms the basis of appellant's claim. (AOB 239-240.)

In *Carter,* the defense raised a relevancy and prosecutorial misconduct objection on appeal after having raised only a "misstating evidence" claim at trial. (*People v. Carter, supra*, 30 Cal.4th at pp. 1206-1207.) Here, appellant raises the same objection here that he raised in the court below. Whether the prosecutor's improper questioning is viewed as "prosecutorial misconduct" or simply as argumentative questioning is of no moment. The issue is whether the trial court's failure to sustain defense counsel's objections, including but not limited to this one, discouraged other appropriate objections and, in cumulative effect, denied appellant due process of law.

Respondent contends that the claim fails on the merits because the prosecutor's questions "while somewhat blunt and accusatory, were not out of line . . . . A prosecutor has wide leeway to ask questions that raise reasonable inferences on cross-examination ...". (RB 129.) Respondent suggests the court "see" *People v. Bonilla [2007]* 41 Cal.4th [313] at pp. 337-338, which concerns the propriety of remarks made by a prosecutor in closing argument. The remarks at issue here were made when the prosecutor was supposed to be asking questions, not engaging in argument. The trial court's failure to sustain appellant's objections and keep the

prosecutor from arguing his case at inappropriate intervals is the gravamen of appellant's claim. The impact of that failure may be seen not only in the damage done to the credibility of Dr. Walser; but in the degree to which the prosecutor pushed and exceeded the bounds of propriety afterwards.

F. The court permitted the prosecutor to make inappropriate remarks in earshot of the jury

Respondent claims that appellant cannot show prejudice from the trial court's failure to reprimand the prosecutor about making inappropriate remarks within earshot of the jury absent proof that the remarks specified by defense counsel were in fact heard by the jury. (RB 131.) This is absurd. Although the trial court agreed that the prosecutor's "voice may have carried further" as a consequence of his stepping away from the bench while speaking, the court issued no reprimands or other expressions of concern with the prosecutor's behavior. (21RT 4159-4160.) Because the prosecutor suffered no judicial rebuke in this instance and in his previous envelope-pushing adventures, he continued to act accordingly, and defense counsel was discouraged from making further objections, particularly in the presence of the jury.

The court's inaction was "but another example of how the trial court failed to place reasonable limits on a prosecutor who often approached the

line between proper and improper argument, and who many times crossed that line." (*People v. Hill, supra*, 17 Cal.4th 800, 831, fn. 3.) Here, as in *Hill,* the trial court's errors in condoning the prosecutor's conduct created a "negative synergistic effect" (*People v. Hill, supra*, 17 Cal.4th 800, 847) rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.

G. The court permitted the prosecutor to adduce irrelevant evidence of how Rodney Ferguson interpreted appellant's post-crime head-nodding and how other people whose mental states were not at issue experienced fear of appellant prior to the shooting

Respondent's argument on this point defends the admission of a lot of testimony from Rodney Ferguson, Janet Robinson and Shirail Burton. Most of that testimony is not at issue here. This is the part that matters.

1. Ferguson's speculation about appellant's thought when appellant sat in a police car and nodded

The prosecutor asked Rodney Ferguson if he received any kind of communication from appellant when he saw appellant sitting in the back of a police car after the shooting. at that time, precipitating this exchange:

> FERGUSON: Yeah. He looks at me, you know, turns his head, his arms are behind his back, you know, in

custody. . . . As I remember, *he turns his head and kind of like nods like this, and I mean it was like, you know, I said I was going to do it, and I did it.*

DEFENSE COUNSEL: Object to that as speculation.

PROSECUTOR: It was a nonverbal communication.

THE WITNESS: I don't know, I mean that's the idea I had.

DEFENSE COUNSEL: Objection.

THE WITNESS: I don't know –

THE COURT: Okay. So what you saw was you looked in, and he nodded at you?

THE WITNESS: Right.

THE COURT: All right. That particular portion of the answer will stand. The remainder will be struck.

Your next question, Counsel.

THE PROSECUTOR: Was it your sense in your mind that the nodding of the head referred back to the conversation that you had with him before?

DEFENSE COUNSEL: Objection. It's irrelevant and speculation.

THE COURT: *Overruled.* You could answer the question.

THE WITNESS: That was what was in my mind, and I can't really describe how I felt. (12RT 2480-2481, emphasis added.)

Appellant's opening brief argued that Ferguson's state of mind about appellant's purpose in nodding his head was of no relevance to any issue in the case. (AOB 242.) Respondent does not disagree. Respondent's lengthy argument (RB 133-136) instead posits that Ferguson's interpretation of appellant's mental state was admissible because it was probative of appellant's state of mind, i.e., to show that "appellant smugly gloated about [the killing] in a non-verbal communication to Ferguson." (RB 135.) But as defense counsel correctly pointed out to the trial court in objecting to the prosecutor's first query into Ferguson's interpretation of appellant's nod, Ferguson's interpretation of appellant's nod was speculative. (12RT 2480.) "Speculative inferences are, of course, irrelevant. [Citation.]" (*People v. Stitely* (2005) 35 Cal. 4th 514, 549-550.)

Respondent also argues that "appellant's failure to raise the issue of prosecutorial misconduct waives the claim." (RB 135.) Appellant's brief does not argue that this instance of prosecutorial overreaching and trial court error amounted to misconduct. As noted in connection with another instance of improper prosecutorial questioning, whether the prosecutor's questioning or the trial court's rulings are viewed as "misconduct" is of no moment. Again, the issue is whether the trial court's failure to sustain defense counsel's objections, including but not limited to this one, discouraged other appropriate objections and, in cumulative effect, denied

appellant due process of law.

Finally, respondent argues that any error was harmless because appellant "conceded he killed the victims, that he did so with specific intent, and that he premeditated the murders. Numerous witnesses saw him kill the victims, and several testified that appellant looked smug." (RB 135.) No citation is provided, and none supporting such claims can be found. Appellant admitted the killings, but not the alleged mental states. Moreover, numerous witnesses saw appellant immediately after the crime, but only one, Pat Jones, said she thought his look was "smug." (14RT 2832.) Art Hatchett thought appellant looked "really hurt. . . . [H]e was still teary-eyed." (11RT 2324.) To Hatchett, appellant's words and tone of voice made it "obvious he was really hurt." (11RT 2324.) Isaiah Turner asked appellant, "What happened, what went wrong?" Appellant said something like, "I'm sorry, but it just wasn't right." (11RT 2323-2324.) Even Rodney Ferguson did not say appellant's look was smug, but only that he thought appellant was recalling their earlier talk about killing his boss. (12RT 2480-2481.)

Respondent's next spin is that "appellant had threatened to kill for weeks, and then, in a lengthy confession after the crimes, boasted about leaving those alive who did not `screw with' him. (See Defense Exh. 41 at time marker 9:35:35.)" (RB 135.) Hatchett characterized appellant's

statements about "101 California" as a "threat," but none of the witnesses testified that appellant was boastful about anything. Ironically, the only boasting recalled by anyone at trial was that of victim Talley, whose tone of voice in reprimanding appellant struck Eric Spears as the tone of a person who was displaying or boasting about authority rather than using it appropriately. (13RT 2641.) If appellant truly appeared boastful during his videotaped confession, the prosecutor would have let the jury see it. Instead, the prosecutor opposed appellant's request to show the entirety of the tape to the jury, and never sought to offer any part of it on the theory that it showed appellant boasting about the crime.

Moreover, none of respondent's arguments on the matter of prejudice addresses the impact of the trial court's error on the prosecutor's readiness to continue pushing the envelope, much less on defense counsel's credibility with the jury and his sense of futility in making proper objections. A defense attorney whose meritorious objections to improper questioning and inadmissible evidence are repeatedly overruled must take the burden of that history with him as he continues on with the trial.

2. Fear of appellant

Respondent contends that appellant failed to preserve his claim of trial court error in allowing the prosecutor to ask Janet Robinson if victim Barbara Garcia had expressed fear of appellant before Robinson related

appellant's remark on "101 California." (12RT 2540-2541.) Appellant objected to the question on hearsay grounds. In response to appellant's hearsay objection, the prosecutor affirmed, and the trial judge approved, his intention to offer Robinson's testimony about Barbara Garcia's fear of appellant simply to prove Barbara Garcia's fear of appellant. The court declared this purpose relevant because Garcia was, in the trial court's view, "an interested party in this particular proceeding." (13RT 2541.) The fact that Garcia's state of mind was not actually relevant to any of the issues in the case was – in the trial court's view of the law – of no moment. In light of the parameters of that ruling, and the other erroneous rulings that preceded it, defense counsel's failure to object on hearsay and relevance grounds to the next prosecutorial question of that sort – i.e., whether Garcia told Robinson she believed appellant would kill her, may be excused as futile.

That futility is further evident when Robinson went on to add (non-responsively) that she believed appellant was serious about, and capable of, "doing that," and the trial court overruled defense counsel's motion to strike. (13RT 2544.) The prosecutor then continued to expand on Robinson's fears of appellant, adducing her affirmation that she was afraid he would kill her if he found out she "told anybody" what he said (13RT 2545), that Barbara Garcia bought mace because appellant was going to kill

her, that Garcia was terrified, and that the day appellant was to be fired "was a day of fear. We just — we were there waiting to die." (13RT 2554.) Shortly thereafter, the court allowed the prosecutor to ask Shirail Burton about her own state of mind after she heard appellant was going to be fired. Predictably, Burton said she was very afraid and very nervous. (14RT 2875.)

Respondent relies on *People v. Valencia* (2008) 43 Cal.4th 268, 302, where the prosecutor asked an assault victim about his previously expressed concern for his own safety in connection with reporting the assault to police. The defendant pursued the same issue on cross examination, and then made a motion to strike and sought a mistrial on the ground that the defendant had done nothing to cause the victim's fear. This court held that the evidence of the witness's fear was relevant to his credibility. (Ibid.) *Valencia* is not even remotely on point where, as here, the person alleged to have been fearful is deceased and her credibility is not in issue.

The other cases cited by respondent are cases is which a victim's state of fear or perception of a threat was admissible because the victim's state of mind was in issue. *(People v. Lancaster* (2007) 41 Cal.4th 50, 82 [threat showed kidnaping victim did not accompany defendant voluntarily]; *People v. Guerra* (2006) 37 Cal. 4th 1067, 1114 [fear of defendant relevant to rebut claim of consensual sex]; *People v. Waidla, supra,* 22 Cal.4th at p.

723 [fear showed lack of consent to entry in burglary case].) These cases are not helpful where, as here, no one has posited a guilt-phase issue to which the fearfulness of Garcia, Burton or Robinson was relevant.

Respondent also points out that the trial court gave a "limiting instruction" which the jury presumably followed. (RB 138.) The limiting instruction that the trial court gave declared that "this is not being offered for truth of the matter asserted but merely to indicate a state of mind for a person who is an interested party in this particular proceeding." (13RT 2540-41.) Respondent does not explain how the jury might be expected to understand this instruction in a way that was helpful or in any way indicative of a proper use of the testimony.

Finally, respondent claims that appellant was not prejudiced in that "this was not a case in which the prosecutor attempted to play on the jury's sympathies." (RB 138.) No other prosecutorial purpose is apparent here. Moreover, the good or bad intent of the prosecutor is not material to the determination of prejudice. What matters is whether there exists a reasonable possibility that the cumulative impact of the trial court's erroneous rulings determined the result of the trial. When one considers the potential impact of emotional evidence on a jury, as well as the impact of the trial court's error on the prosecutor's readiness to continue pushing the bounds of propriety, defense counsel's credibility with the jury, and his

sense of futility in making proper objections, these errors cannot be held harmless.

H. The trial court silently permitted the prosecutor to misstate and misapply the "deliberation" element of deliberate and premeditated murder in closing argument

On the decisive issue of the meaning of the deliberation element of deliberate and premeditated murder, respondent claims that defense counsel "invited error" by arguing that the mental state issue framed by the evidence ("the question" for the jury) was whether appellant's disorganized thinking amounted to "careful thought." (27RT 5041.) Insofar as defense counsel's argument had not yet been made when the prosecutor made the statements at issue here, the defense cannot be said to have led the prosecutor astray. At most, the state may argue that defense counsel's failure to object and request that the jury be admonished forfeited the present claim. But as detailed in appellant's opening brief, the futility of asking appellant's trial judge to contradict his prosecutor on a point of law is readily apparent. Like defense counsel's previously-discussed efforts to get the court to rein in the prosecutor, defense objections to the prosecutor's closing argument were not well received. [8]

---

[8]At the outset of closing argument, the trial court overruled defense counsel's objections and his request to admonish the prosecutor after the prosecutor alluded to facts of "most murder cases." The court said simply,

Next, respondent claims that Penal Code section 189 does not, unlike the standard definitional instructions, actually require that the slayer have considered the reasons against killing in order to be deemed guilty of wilful, deliberate and premeditated murder. This argument ignores the decisions of this court construing the adjective"deliberate" to mean the product of "deliberation" and declaring that "[d]eliberation means careful consideration and examination of the *reasons* for and *against* a choice or measure. [Citation.]" (*People v. Steger* (1976) 16 Cal.3d 539, 545; *People v. Honeycutt* (1946) 29 Cal.2d 52, 61; *People v. Bender* (1945) 27 Cal.2d 164, 183; *People v. Thomas* (1945) 25 Cal.2d 880, 899, emphasis added.)

Respondent does not say that those standard instructions and decisions are wrong, just that "other cases have even omitted the `for and

---

"It's argument at this point, Mr. Veale. I will allow the statement to stand. Proceed counsel." (26RT 4881.) Later, after the prosecutor argued that the defense mental health experts were untrustworthy in part because they did not produce their reports until four weeks ago, defense counsel objected and complained of unfairness in that the prosecutor had insisted on setting the trial date before the defense was ready. The court said simply "It's argument, gentlemen. Your objection is noted. You may proceed, Mr. Jewett." (27RT 5055.) Likewise, when defense counsel objected to improper penalty phase argument and asked the trial judge to tell the jury that the prosecutor was wrong, the court refused, even though the court agreed that defense counsel's objection should have been sustained and that the prosecutor's subsequent argument was misleading. (29RT 5545-5546, 5557-5582.) And even if futility is not apparent to this court, this court can and should exercise its discretion to review the claim on the merits for the reasons stated in appellant's opening brief.

against' language, defining the term `deliberation' as a `careful weighing of considerations in forming a course of action .... " (*People v. Young* [2005] 34 Cal.4th [1149] at p. 1182; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.)" (RB 140.) In those cases, the court did not have to decide whether `deliberation' requires weighing of the considerations against a course of action; the issue in *Young* was whether the crime actually committed – the shooting of a random victim inside a crack house – had been planned. In *Halvorsen* and *Cole,* the issue was whether there was sufficient evidence of motive, i.e., a consideration in favor of committing the crime. All three cases attribute the shortened definition to *People v. Koontz* (2002) 27 Cal.4th 1041, 1080, which likewise presented no issue involving the "for and against" language. None of these opinions gives any indication that this court intended to alter the operative definition of deliberate, much less alter it to eliminate the `for and against' language. "[C]ases are not authority for propositions not considered. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Third, respondent claims that "the prosecutor defined `deliberation' in terms of considerations both for and against killing. His statement, "It's the thinking about am I going to do it? Am I *not* going to do it' (XXVI RT 4883, emphasis added), is the epitome of considerations `for and against'." (RB 140, emphasis in RB.)

On the contrary, the prosecutor's example of deliberation is the inner dialogue of a man who does not believe he has the ability to control what he will do, and assumes that his actions will be decided by still-unknown events. While it is possible that a person who asks himself "am-I-going-to-do-it" will, at some other time, see that he can decide what he will do based on considerations pro and con, he is not thinking in that mode while asking "am-I-going-to-do-it".

Respondent reminds us to consider the prosecutor's initial statement on the meaning of the deliberation in the context of the entirety of the prosecutor's argument. Appellant has done so. As detailed in appellant's opening brief, every time the prosecutor spoke about the meaning of the term deliberation, he implicitly denied that it required any consideration of the reasons against killing. (See AOB 245-246.) In the final portion of his summation, the prosecutor argued that any internal dialogue about killing would suffice in the absence of rage. The prosecutor quoted Rodney Ferguson telling police that appellant said "I could shoot her" in a manner Ferguson described as "almost as if he wasn't talking to me. It was almost like he was talking to himself. It was like a self query." The prosecutor said, "That is deliberation. The self query. That's what it is." (26RT 4952.)

On the matter of prejudice, respondent points out that the prosecutor's statements on the meaning of deliberation "constituted a small portion of the

prosecutor's overall summation of evidence and the jury was subsequently – and correctly – instructed on the law." (RB 142.) But the percentage of oral argument devoted to misstating the law does not indicate the impact of the misstatement on the jury. "The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People v. Brophy* (1954) 122 Cal.App.2d 638, 652 citing *People v. Talle* (1952) 111 Cal.App.2d 650, 677.) And because the prosecutor's argument on the point was not contradicted by the defense argument, the jury had no cause to scrutinize the court's definitional instruction, and no reason to give weight to language that neither counsel saw fit to mention.

Finally, respondent claims to see "overwhelming" evidence that appellant "carefully weighed the considerations for and against killing" in "that appellant committed two separate murders almost five minutes apart, that he planned and threatened the murders for weeks in advance and went to the shooting range on the night before, that he left numerous potential murder victims alive while he still had ammunition, and that he confessed to the murders immediately after and explained how he picked and chose among his victims depending on who screwed with him (see Defense Exhibit 41 at time marker 9:35:35), appellant – after having brutally executed Barbara Garcia – specifically reminded Janet Robinson that he remained true

to his previous promise not to kill her." (RB 142.) While these characterizations of the evidence undermine any claim that appellant was unconscious or lacked intent to kill, none evinces a weighing of the considerations against killing the people he killed under the circumstances in which he killed them.

Moreover, respondent fails to address the evidence that appellant did not weigh considerations against killing the people he killed. The fact that appellant committed those killings in the presence of people who knew him, without an "exit strategy," evinces his failure to see or consider, as a reason against killing, the likelihood of criminal sanctions. Evidence that appellant failed to consider this uniquely important reason against killing is evidence that he considered no reasons against killing whatsoever. Additional evidence that he considered no reasons against killing inheres in defense expert testimony respecting appellant's mental impairments. As recounted by Dr. Walser, appellant's Rorschach results showed impairment in his "quality of information processing. . . . [H]e was unable to process things in a fully mature, helpful way for himself." Technically speaking:

> He had an information processing style known as 'under incorporation,' which means that he just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were not consistent. They were haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment. (RT 3592.)

Furthermore, Dr. Walser testified that anger diminishes the ability to think constructively. It tends to disorganize thinking and reduce whatever ability for logical thinking an individual ordinarily has. (RT 4208.) Appellant's Rorschach results showed that he "had extremely poor reality testing." (RT 4189.) The score that was most closely related to "reality testing" — the ability to see "things as they are" (RT 3554) was equivalent to the mean score of people with schizophrenia. (RT 4189.)

Viewed in the context of the evidence in this case, the prosecutor's reduction of the concept of deliberation eliminated appellant's only defense. Moreover, the record gives no indication that the prosecutor would have obtained a first degree murder verdict had he not misled the jury about the law. The prosecutor's response to defense counsel's presentation of the issue in his new trial motion simply and incorrectly contended that any consideration of circumstances under which appellant would not kill, or of reasons against killing people he did not attempt to kill, would suffice for consideration of reasons against killing the people he killed. (31RT 5678.) That was as good an argument as the prosecutor could make on the state of the evidence. The trial judge's response simply cited the evidence of premeditation and declared that he could "find nothing in the evidence that would support the evaluation that you want me to make regarding his lack of deliberation and premeditation." (31RT 5683.)

"An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.) The issue of whether appellant's intent was deliberate and premeditated was such an issue. The jury's tainted determination of this one issue not only produced the first degree murder conviction, but rendered appellant eligible for the death penalty. The prosecutor's tainting of that determination with misleading argument obscuring the law's requirements cannot be held harmless.

I. The trial court silently permitted the prosecutor to make emotional appeals and demean defense counsel in his guilt phase closing argument

1. Emotional Appeals

Respondent denies that the prosecutor was making an emotional appeal in making the jury look at pictures of the shoes Housing Authority employees left behind in and commenting on their style. (26RT 4917-4918.) In respondent's view, "the prosecutor used the shoes simply as an example of the type of person the witness was; to remind the jury of her demeanor on the stand." (RB 143.) Respondent does not identify any relevance or materiality in the "type of person the witness was" or "her demeanor on the stand" but seeks to justify these acts as attempts to "humanize" witnesses as

was "fitting" after "appellant's `slanderous' attacks on the RHA and the credibility of some of the prosecution's witnesses. (See XXVI RT 4926.)" (RB 143.) Respondent offers only these same justifications for the prosecutor opining on the emotional damage witnesses suffered in a four-page-long discussion of their observations of the shooting, and for concluding his rebuttal argument by saying, "don't worry, baby," words Janet Robinson attributed to appellant. (27RT 5064.)

Respondent does not deny that asking jurors to consider or sympathize with the feelings of survivors and witnesses is impermissible in a prosecutor's guilt phase closing argument. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1129-1130.) But respondent says any claim "was truly waived" by appellant's failure to object at trial. (RB 144.) Appellant's counsel objected to other aspects of the prosecutor's guilt phase closing argument, but never succeeded in getting the court to admonish the prosecutor or tell the jury that the prosecutors behavior was improper. Objection would have been futile.

2. Demeaning Defense Counsel

Respondent begins by misstating appellant's claim. Contrary to respondent, appellant has not argued that "the prosecutor was not entitled to point out that appellant called only one of the three experts who worked on his defense, and that Dr. Walser, the witness who was called, was not

qualified to read an MRI ...." (RB 144.) Appellant takes issue only with the prosecutor arguing that defense counsel was attempting to mislead the jury, i.e, that he decided to "put a neuropsychologist who didn't even know how to read an MRI *to try to leave you with the impression now this variant in the brain has something to do with behavior*." (26RT 4911.)

Respondent does not deny that a prosecutor commits misconduct when he attacks "the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Wash* (1993) 6 Cal.4th 215, 265.) An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation.].)" Nor does respondent deny that it is reasonably likely that jurors would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury. There is no serious question that misconduct is established by such facts. (See *People v. Cummings, supra*, 4 Cal.4th 1233, 1302.)

Nor is there any basis for respondent's claim that defense counsel's failure to object to this misconduct should be governed by a rule of forfeiture created for a defendant who would "sit silently by, listening contentedly to what he considers errors then gamble on the jury's verdict, thinking all the while that he has a trump cared up his sleeve . . .." (RB 144.) For the reasons previously stated, plus the unlikelihood of any admonition curing an

attack on defense counsel's honesty, objection would have been futile.

J. The court refused to order the prosecutor to remove his victim photographs from areas visible to jurors while appellant was presenting his own evidence and arguments in the penalty phase

Respondent again begins by misstating appellant's claim. This is not about prosecutorial misconduct. It does not challenge the rectitude of this court's decisions allowing photographs of the victim in life to be placed in evidence during the penalty trial. This is about judicial error in failing to order the prosecutor to refrain from displaying photographs of the victims during the defense case. (See AOB 255-260.)

And, contrary to respondent's claim, the prejudice analysis cannot be limited to the visibility of the photographs after the court asked the prosecutor to remove them from counsel table during the defense case. Because the trial court refused to issue the order that defense counsel requested, defense counsel had to concern himself with the display and with the trial court's disinclination to confront the prosecutor while defense counsel was trying to make his case for life.

The right to a fair trial, guaranteed by the federal Constitution, includes the right to present a defense. (U.S. Const., 6th & 14th Amends.; *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) The right to fundamentally

fair and reliable sentencing proceedings includes the right to present mitigating evidence and arguments without government interference or obstruction. (U.S. Const., 8th & 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 686.) For the reasons stated above and in appellant's opening brief, these rights were denied by the trial court's failure to order removal of the photographs when requested by the defense.

K. The court permitted the prosecutor to misstate the law, mislead the jury, deride statutory mitigation, and impugn defense counsel's motives, in his penalty phase argument

1. Lack of prior violence or convictions

As detailed in appellant's opening brief, the prosecutor's penalty phase argument first stepped over the line when the prosecutor told the jury that appellant's lack of violent criminal history and felony convictions was neither mitigating nor aggravating, but neutral. Defense counsel objected. The court sustained the objection, and informed the jury of the contrary law, but said nothing to discourage the prosecutor from further adventure.

The prosecutor then proceeded to characterize the law spoken by the judge as a call to determine "how much you should favor [appellant] because he didn't have a felony conviction. How special he could be because of that,

how many blue ribbons you want to paint on his chest because he doesn't have a felony conviction or he didn't commit a crime of violence." (29RT 5528.) Defense counsel did not object. The prosecutor went on to say that this mitigation "was not worth very much" and would move a scale "about the width of a hair away from the middle." (29RT 5529.)

Respondent does not claim that these lines of argument were proper, but rather that appellant's failure to request an admonition means that he has waived any claim. To the contrary, the trial court's treatment of defense counsel's prior objections and other requests for corrective judicial action show that any request for admonition would have been futile.

2. Mental Impairment

As detailed in appellant's opening brief, the prosecutor attacked the application of "factor (h)" — the impairment of ability to conform conduct to the requirements of the law, a mitigating factor codified in Penal Code section 190.3, factor (h). The prosecutor asserted that factor (h) "is the definition of insanity" and Dr. Walser (the defense mental health expert) had conceded that appellant was not insane. (29RT 5545-5546.)

Defense counsel objected as soon as the prosecutor said that Dr. Walser had said appellant was not insane. (29RT 5546.) "Overruled" was the court's only word at that point. The prosecutor immediately went on to define insanity accurately, as though he knew defense counsel was right and

that he had indeed misstated the law. (29RT 5546.)

The prosecutor then proceeded to offer more subtle misstatements of the law, further misleading the jury with respect to the application of factor (h) to this case. He asserted that factor (h) was "an insanity thing, maybe it's not quite there, but pretty close. You can still consider the evidence, though it doesn't rise to the level of insanity." (29RT 5546.) He contrasted factor (h) with "the mental duress or emotion, the stress" that appellant's defense had established, which he said was "already covered under (d)" and "if one thing applies to two separate things, you just consider it where it best belongs." (29RT 5546.)

Defense counsel did not interrupt with further objection until the prosecutor began telling the jury about evidence "typically" found in the penalty phase of a capital murder trial and what "you usually would hear" and that such evidence is what defense counsel "was trying for." Defense counsel's repeated objections to that line of argument were overruled by the trial court, which repeatedly noted, "It's argument." (29RT 5548-5549.)

And so the prosecutor continued to assert his expertise respecting defense counsel's motivation in presenting the evidence he presented, and to tell the jury the inferences he expertly drew from the absence of "typical" penalty phase mitigation. (29RT 5549.)

Respondent, after implicitly conceding that the prosecutor's attack on

the application of factor (h) to this case was improper, claims that its impropriety did not demand a corrective response defining any evidence as mitigating. (RB 150.) This argument fails to meet the facts. Appellant did not ask the trial to define his mental impairment evidence as mitigating. He asked that the trial court directly contradict the prosecutor's claim that factor (h) had no application to this case. To quote:

> I made a request yesterday, Your Honor. I stick by that request. I think the Court should indicate the objection was properly made and should have been sustained at that time, that the District Attorney, his comments misled this jury into believing that factor H had no application in this case when, in fact, it does because *there is evidence of impaired mental capacity in this case. That is what I now request the Court ton say to the jury. (30RT 5574, emphasis added.)*

Later in the discussion, counsel repeated his request, and explained:

> [I] believe that when I objected properly and was overruled, that something else goes on in a moment like that, beyond the simple words now written on the page and that is that the defendant here and his lawyer are wrong about a certain issue. It then actually provides impetus and strength to the prosecution's argument. It does that.
>
> I am asking the court to redress that more than I am asking the court to redress his misstatement of the law. What the jury might well have thought when the District Attorney was — finished his comments, was that factor (h) has no application in this case. Whether or not they care to provide one ounce of weight to factor (h) in this case is entirely and completely up to them to say which is what he did and which is wrong and which I did not object to as he was saying it with each sentence, and that is my problem, obviously, *what he said was*

> *that factor (h) had no application in this case, which is to say that there is no evidence of it in this case. That is the state of the record which I believe the court needs to redress and that is what I am asking the court to do.* (30RT 5576, emphasis added.)

The trial court's response – a declaration of inability "to tell a jury that this evidence is aggravating, this evidence is mitigating" (30RT 5576) was incorrect (some evidence is, and can only be, mitigating as a matter of law) and unresponsive to defense counsel's modest request. The trial court need not have said that the evidence of mental impairment that appellant had presented was "mitigating" in saying that factor (h) is not, as a matter of law, inapplicable to this case as the prosecutor had claimed.

Respondent goes on to claim that "appellant was by no means retarded" and "the record clearly showed that appellant did not suffer from any type of mental disease or defect at the time he committed his crime that somehow reduced his culpability." (RB 151.) This is silly.

A capital defendant does not have to be "retarded" to have the deficits in impulse control and information processing that reduce his moral culpability to the level of a man with a IQ of 75 or less. The "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" (*Atkins v. Virginia* (2002) 536 U.S. 304, 320) associated with metal retardation were among

the many facts established by Dr. Walser's testimony respecting appellant's impulse control disorder and Rorschach results showing "extremely poor reality testing" (21RT 4189) and impairment in his "quality of information processing." (18RT 3592.)

Appellant was entitled to have his jury consider this evidence as the law requires. Here, the prosecutor's claim that Dr. Walser's testimony should not be considered under factor (h), and the trial court's failure to respond correctively, deprived the jury of a meaningful basis to consider his mitigating evidence. (Cf., *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233; 127 S.Ct. 1654, 1672 fn. 21, ["prosecutorial argument dictating that such consideration is forbidden" denies Eighth Amendment right to have the sentencer give mitigating effect to mitigating evidence].) This is not harmless error.

L. Due Process was denied

Due process of law (U.S. Const., 14th Amend.) is denied when a prosecutor's efforts to gain a conviction or sentence of death infringe upon the defendant's rights as enumerated in the Bill of Rights, and where they otherwise "infected the trial with unfairness." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Here, the prosecutor's misconduct was pervasive, and infected every phase of the trial with unfairness. As specified above, the prosecutor's conduct infringed appellant's right to

counsel, jury trial, compulsory process, a reliable penalty determination, and the right to present a defense. (U.S. Const., 5th, 6th, 8th & 14th Amends.) The trial court's failure to respond correctively to the misconduct, and the trial court's own repeated disparaging of defense counsel, compounded the constitutional violations, and denied appellant his due process right to even-handed application of the law. (U.S. Const., 14th Amend.; *Wardius v. Oregon* 412 U.S. 470, 474.) Cumulatively if not singly, these errors were prejudicial.

Respondent's counterpoint is that "this case is not *People v. Hill, supra*, 17 Cal.4th 800" in that it is "far removed from the genre of `example' cases" ... Our case involved a temperate professional district attorney who has dedicated his life to fighting crime. That our adversarial system requires him to `fight the good fight' from time to time is as much a credit to the system as it is a fault." (RB 152.)

This is not about fighting "the good fight." Like the prosecutor in *Hill*, the "temperate professional[9] district attorney" who prosecuted this case

---

[9] The habitual "mad dog"and "anything to win" manipulative behavior of appellant's prosecutor, Harold Jewett, is described by a newspaper reporter in a declaration under penalty of perjury filed in this court in the matter of Richard Bert Stewart on Habeas Corpus, S102580. Appellant plans to seek judicial notice of petitioner's exhibit 91 in that matter. Appellant's research has uncovered no evidence that anyone (other than respondent's counsel) would describe Mr. Jewett as "temperate."

too often crossed the line of propriety, and ultimately misled the jury on the points of law most important to the case. While it may be difficult to persuade juries to choose death in minimally aggravated cases like this one and *Hill*, that difficulty does not make "the fight" a good one. "Our adversarial system" does not require any prosecutor to seek death in such cases, much less require that courts refrain from enforcing the rules in order to ensure that prosecutor's continued success.

IX. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN SUSTAINING AND IN ECHOING THE STATED BASIS OF THE PROSECUTOR'S SPEAKING OBJECTION TO QUESTIONS SEEKING DR. WALSER'S ACKNOWLEDGMENT OF PROOF THAT APPELLANT THOUGHT ABOUT COMMITTING HOMICIDE BEFORE DOING SO

The issues discussed under this heading evolve from a ruling that not only precluded the introduction of certain testimony, but also informed the jury that thinking about homicide before committing it is premeditation and deliberation per se. Respondent contends that both the ruling and the trial court's statement on the requisite mental state were correct. Appellant takes each point in turn.

A. The trial court erred in reading Penal Code section 29 to preclude the defense mental health expert from acknowledging that appellant thought about killing beforehand

Penal Code section 29 provides a limited exception to the general rule of Evidence Code section 805 allowing expert testimony on the ultimate issue:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged.

Attentive to the language of the statute, this court has long held that a defense expert's opinion about a defendant's mental state is not excludable under Penal Code section 29 unless it asserts that the defendant had or lacked a mental state constituting an element of a charged crime. (*People v. Smithey* (1999) 20 Cal.4th 936, 958-961 [evidence that a defendant had the mental element]; *People v. Coddington*, *supra*, 23 Cal.4th 529, 582 [evidence that defendant lacked the mental element].) This rule accords with the plain language of the statute.

Citing *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 and *People v. Ramos* (2004) 121 Cal.App.4th 1124, 1205, respondent claims that a trial court has "broad discretion" to admit or exclude mental health expert

opinion. (RB 153.) Neither of the cited cases addresses an exclusion under Penal Code section 29; both involved testimony challenged as unreliable. More helpful to respondent is *People v. San Nicolas* (2004) 34 Cal.4th 614, 663, where this court suggests that an abuse of discretion standard of review may be applied to "a claim of state statutory error" involving Penal Code section 29. The suggestion is, however, mere dicta. "Those portions of the testimony that were excluded ... fell directly within the prohibitions of section 28 and 29." *(Ibid.)*

Respondent goes on to misstate the nature and purpose of the question at issue here. No one was "asked to opine on whether appellant could actually have been thinking about killing when he made the prior `101 California' comments" nor on the distinction between such thoughts and premeditation or deliberation. (RB 154.) Defense counsel repeatedly stated, and no one denies, that his purpose was to have his expert acknowledge "the existence of the thought" as distinct from "the ultimate conclusion." (21RT 4207.)

Finally, as in the beginning, respondent insists that there is no distinction between thinking about killing prior to killing someone and the mental element of deliberate and premeditated murder. (RB 152, 154, 158.) This argument ignores the decisions of this court construing the adjective "deliberate" to mean the product of "deliberation" and declaring

that "[d]eliberation means careful consideration and examination of the *reasons* for and *against* a choice or measure. [Citation.]" (*People v. Steger* (1976) 16 Cal.3d 539, 545; *People v. Honeycutt* (1946) 29 Cal.2d 52, 61; *People v. Bender* (1945) 27 Cal.2d 164, 183; *People v. Thomas* (1945) 25 Cal.2d 880, 899, emphasis added.) The definition of deliberation established in those decisions is enshrined not only in CALJIC No. 8.20, but in CALCRIM as well.

As stated in appellant's opening brief, holding homicidal thoughts prior to committing a killing may evince premeditation of an intent to kill, but evidence of such thought is not dispositive. The thought of committing homicide does not necessarily end in the formation of an intent to kill, let alone involve the "deliberation" required to render the intent "deliberate" within the meaning of the statute. Therefore, a question calling for a defendant's mental health expert to acknowledge that the "thought" of committing homicide "existed" in the defendant's mind before the date of the charged crime does not call for the expert to opine that the defendant had, or did not have, any mental state amounting to an element of deliberate and premeditated murder.

Moreover, a defendant's call for his expert to acknowledge proof of homicidal thoughts in aid of his efforts to distinguish the finding of such thoughts from the required finding of premeditation and deliberation does

not pose a risk of supplanting the jury's role in deciding the ultimate issue. On the contrary, this call is for clarification of the expert's position in a manner that distinguishes and highlights the issue that the jury must decide.

In construing the exclusionary rule so broadly as to prohibit the defendant from showing the jury that his expert acknowledges that he had homicidal thoughts, the trial court rendered that statute unconstitutional as applied. (U.S. Const., 6th, 8th & 14th Amends.; *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690 [6th Amendment compulsory process clause and 14th Amendment due process clause right to present a defense]; *In re Winship* (1970) 397 U.S. 358, 364 [relieving burden to prove elements beyond a reasonable doubt offends due process clause]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 ["rules that diminish the reliability of the guilt determination" in capital case violate 8th Amendment].)

Finally, respondent concludes that the trial court's ruling was somehow acceptable because appellant "carefully planned this murder, bragged about it for weeks beforehand, and then picked and chose among his victims." (RB 158.) No citation is provided. None will be found. There was no careful planning, no bragging before or after the crime, no picking or choosing. Respondent's position rests on non-existent facts.

B. **The trial court misinstructed the jury and made impermissible comment on the evidence when it told everyone present that defense counsel's question "calls for one of the elements" of the offense**

As stated in appellant's opening brief, even if the trial court was technically within its rights in precluding defense counsel from asking his expert if appellant had homicidal thoughts prior to being fired from his job, the way the trial court explained the ruling in the presence of the jury was erroneous and extremely prejudicial. In echoing the prosecutor's assertion that the question "calls for one of the elements of the offense" (21RT 4207) the trial court appeared to be agreeing with the prosecutor's argument equating homicidal thought with premeditation and deliberation as a matter of law.

Respondent's claims the court's comments did not "equate homicidal thought with proving the elements of premeditation and deliberation, but instead simply affirmed that, if the appellant indeed thought about committing a `101 California', the jury could use this information as proof of premeditation and deliberation." (RB 155.) This makes no sense. In stating its ruling, the trial court said the question "calls for one of the elements " not that the question calls for information that is simply useful as proof on an element. (21RT 4208.) Information that was simply useful as proof of premeditation and deliberation, including expert testimony, was

allowed into evidence throughout the trial. Reasonable jurors would naturally understand that the trial court meant exactly what it said, and infer that the court equated homicidal thought with those key elements of the charged crime and that the court saw no merit in the distinction urged by defense counsel.

At minimum, there is a "reasonable likelihood" that the jury drew this conclusion respecting the trial court's views. (*People v. Sturm, supra,* 37 Cal.4th 1218, 1231-1232 [trial court's jury voir dire statements that premeditation was not in issue require reversal because they undermined and severely damaged penalty phase defense].) Judicial comment expressing judgment on a jury issue infringes the jury trial right, even when followed by an instruction directing the jury to exercise its independent judgment on the issue. (*People v. Sturm, supra*, 37 Cal.4th 1218, 1234.) "In these circumstances there is a great danger that a jury which may wish to escape its responsibility to determine the facts will give weight to the comment of the judge without considering the evidence and the instructions." (*People v. Brock* (1967) 66 Cal.2d 645, 652, overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413; [judge's comment on state of the evidence directed a verdict for the prosecution, though accompanied by instructions admonishing jury to exercise its independent judgment].)

Finally, respondent argues that the evidence showed "abundant deliberation" in that, inter alia, "appellant planned this murder over a long period of time, getting the gun and going to the range and even securing his apartment in a manner that precluded conventional entry." (RB 157.) There is in these facts no evidence that appellant had decided to kill anyone before acquiring the gun, going to the range, or leaving home for work in the morning. As the prosecutor had to concede, the evidence showed only that intent to kill was formed soon after appellant was told that his employment was terminated; the planning or preparation did not follow, but rather, preceded any decision to kill.

Moreover, not every decision to kill someone is preceded by weighing of the considerations against killing that person, as appellant's behavior readily shows. The fact that appellant committed homicide in the presence of people who knew him, without an "exit strategy," evinces a failure to see or consider, as a reason *against* killing, the likelihood of criminal sanctions. Failure to consider the "reasons against" killing is a failure to engage in the deliberation required for the offense. (CALJIC No. 8.20.) Additionally, as recounted by Dr. Walser, appellant's Rorschach results showed "he had extremely poor reality testing." (21RT 4189.) They showed impairment in his "quality of information processing. . . . [H]e was unable to process things in a fully mature, helpful way for himself. . . .

[H]e just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were . . . haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment." (18RT 3592.) Dr. Walser added that anger diminishes the ability to think constructively; it tends to disorganize thinking and reduce whatever ability for logical thinking an individual ordinarily has. (21RT 4147.)

Additionally, respondent claims that "appellant's decision to pick and choose among his victims itself showed that he was deliberating who to kill. See *People v. Lenart* (2004) 32 Cal.4th [1107] at p. 1127.)" (RB 157.) Nothing in *Lenart*, and no logic, suggests that a defendant who decides not to kill one person must have considered the reasons against killing the people he ultimately killed.

Finally, respondent points out that the trial court did not preclude appellant from distinguishing appellant's homicidal thoughts from the mens rea of the crime. True, defense counsel could have argued to the jury a distinction that the trial court had rejected, but that does not make the court's error harmless. "An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald, supra*, 37 Cal.3d 351, 376.) The issue of whether appellant's intent was deliberate and premeditated was such an issue.

X. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES IN ALLOWING THE PROSECUTOR TO DISCREDIT THE DEFENSE WITH TESTIMONY FROM A MEDICAL IMAGING EXPERT ON A SUBJECT OUTSIDE HIS AREA OF ESTABLISHED EXPERTISE

The issue appellant presented is whether a radiologist, having been qualified as an expert only in medical imaging (22RT 4307), may go on to testify, over objection, that a brain tissue abnormality had *no effect* on a person's functioning. Appellant pointed out that expertise "must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient. [Citations.]" (*People v. Hogan* (1982) 31 Cal.3d 815, 852.)

Respondent skirts this issue, contending "a fully licensed general medical practitioner" is more qualified than an ordinary lay person to address "medical questions." (RB 160.) Such generalities do not meet appellant's claim. As noted in appellant's opening brief, "[t]he competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited. [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)

Notably, respondent's argument about the qualifications of physicians has been squarely rejected where seriously considered. "[G]iven the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question. Such a rule would ignore the modern realities of medical specialization." (*Broders v. Heise* (Tex. Supr.1996) 924 S.W.2d 148, 152.)

Although respondent asks this court to use an abuse of discretion standard in reviewing the trial court's ruling, respondent necessarily relies on what Dr Hoddick said about his work on cross examination, i.e., *after* the trial court overruled appellant's objection, to support that ruling *nunc pro tunc*. There, respondent finds solace in Hoddick's assertion that "we need to know a lot of the medicine to be able to do medical images" and in his affirmative answer to defense counsel's query as to whether he would, in his radiology practice, "say there's this thing . . . and that's going to mean this to this person's behavior or health." (22RT 4315-4316.) While a radiologist who observes a brain tumor on an MRI can, based on his general medical knowledge, tell the patient that the tumor is problematic, that is not the same as saying that his opinions on the impact of less dramatic variations in brain tissue are sought or relied upon by others in his radiology practice. If the prosecutor had reason to believe that Dr. Hoddick's

experience qualified him as an expert in the effect of all brain conditions observable by MRI, the prosecutor surely would have developed the evidence on that point and would have offered him as expert on such points. But as the prosecutor well knew, Hoddick was qualified only in radiology.

Respondent also claims that the issue on which Hoddick testified "was not one of predicting appellant's behavior based on the results of the MRI, but explaining whether appellant's behavior was consistent with those results." (RB 164.) Hoddick did not testify that appellant's behavior was consistent or inconsistent with appellant's MRI results. Rather, he testified that the MRI results were not clinically significant and, ergo, that no behavior or symptoms could be *attributable* to the conditions revealed by those results. (22RT 4318-4319.) Respondent recalls this testimony accordingly in a succeeding paragraph, where respondent argues that Hoddick opined that the "dead brain tissue" shown on the MRI "was not the type of abnormality that would impair function." (RB 164.) Still, respondent points to no evidence establishing that Hoddick had such expertise in how the brain functions as would enable him to render a reliable expert opinion declaring that the brain abnormalities previously detected have no clinical significance.

In assessing the effect of allowing Hoddick to render such "expert" testimony, it is important to observe two things that respondent overlooks.

First, the interpretation and use of Hoddick's testimony by the prosecution at trial: Dr. Hoddick's testimony was used by the prosecutor in guilt phase closing argument to give the lie to the neuropsychological testing that established that appellant had neuropsychological deficits, discredit the entire defense by discrediting defense counsel, whose opening statement spoke of the brain scans as evidence of brain dysfunction, as well as Dr. Walser, who testified that the brain tissue abnormalities were usually accompanied by neuropsychological impairment. To quote:

> You heard Dr. Hoddick. He was an extremely credible witness. He told you what the truth was of that [sic] *there is no organic brain damage*. It's all a bunch of smoke and mirrors.
>
> They make assertions. Just because the defense attorney says doesn't make it true. Okay. They don't have foundation for the assertions they are making. . . . (26RT 4911.)

Thus, Hoddick's testimony was used to discredit defense counsel as well as Dr. Walser on issues beyond that of whether appellant's impairment was organic in origin.

Secondly, when Hoddick denied that there was any clinical significance in the abnormalities shown on the MRI, he went much further than claiming (as respondent does now) that those findings cannot alone explain plotting, executing or gloating over a `101 California' style killing

spree. (RB 164.) Putting aside for a moment the fact that appellant did not plot, execute or gloat over a killing spree of any sort, much less commit the indiscriminate mass slaughter of innocent strangers that occurred at 101 California, the central question for the guilt-phase jury was whether appellant was so mentally impaired as to do what he did without deliberating, i.e., without weighing the reasons for and against killing before committing his crimes. The defense expert gave the jury evidence from psychological and neuropsychological test results indicating that appellant was so impaired. Jurors who believed what the prosecutor asserted, i.e., that the Hoddick had reliably ruled out organic impairment, or even that the MRI results did not correlate with any functional impairment, would no doubt have great difficulty accepting the defense expert testimony. "An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald, supra*, 37 Cal.3d 351, 376.) The issue of whether appellant's intent was deliberate and premeditated was such an issue. The trial court's failure to sustain the defense objection to Hoddick offering expert opinion on the significance of brain tissue abnormalities was such an error.

XI. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN APPLYING EXCLUSIONARY RULES TO DEFENSE EXPERT TESTIMONY THAT WERE NOT APPLIED TO THE PROSECUTION'S EXPERTS, DESPITE APPROPRIATE OBJECTIONS FROM THE DEFENSE

Under this heading, appellant's brief describes in detail the differences in the way the trial court dealt with defense and prosecution expert witnesses, from the qualification process on through the application of hearsay and other exclusionary rules. Respondent claims the differential treatment was justified on various grounds.

First, respondent claims Hoddick was, "a `mini expert' on whatever condition he was called upon to observe." (RB 168.) No citation follows this claim, and none can be found. As noted in replying to respondent's previous argument, Hoddick said he had to know "a lot of the medicine" involved in the conditions he observed, but he did not claim to be an expert in any of those conditions, much less make that claim in response to defense counsel's objection. The trial court's failure to demand a showing of Hoddick's expertise in the neurological impact of brain abnormalities after demanding that showing from Dr. Walser cannot be explained or justified by respondent's imaginative spin on Hoddick's resulting testimony.

Second, respondent claims that the court sustained objections to

expert opinion from Dr. Walser only when she "ventured back into the areas of neurology and radiology – for which she admitted no expertise." (RB 169.) Not true. The prosecutor objected to Dr. Walser's qualification to opine on the clinical significance of the brain tissue abnormalities on appellant's brain scans, and the court strictly applied the governing law, and facilitated close examination of her qualifications on each point. (18RT 3516, 3532, 3611-3614, 3617-3619, 3628-3629, 3633-3636.)

Third, respondent claims that appellant was prejudiced by the differential treatment of Hoddick and Walser only insofar as Hoddick's testimony "was, in fact accurate." (RB 170.) Not so. The trial court's failure to police Hoddick's testimony as it policed Walser's allowed Hoddick to appear qualified to render all the opinions he rendered, and implied that the trial court believed that Hoddick was obviously qualified and that Walser was not. Thus, the prejudice lay in the unequal rulings by the court which tended to endorse Hoddick's opinions over Walser's and to imply to the jury that they were more accurate, regardless of their actual merit as evidence.

Fourth, on the matter of applying the *Campos* rule[10] to Dr. Walser

---

[10] *People v. Campos* (1995) 32 Cal.App.4th 304, 308, held that an expert witness may not on direct examination reveal the content of reports prepared or opinions expressed by non-testifying experts.

but not to the prosecution's pathologist expert, respondent says the trial court did not "preclude" testimony as appellant claims. (RB 169, 173.) Respondent is wrong.

As stated in appellant's brief, after the trial court heard the prosecutor's argument on the *Campos* rule, and the court struck Walser's re-direct examination testimony that Dr. Wilkinson found no evidence of malingering on a "Ray 15-Item Test" for malingering that he gave appellant, and forbade her testimony about what Dr. Caldwell told her in explaining how he came to conclude that the MMPI results were valid. (25RT 4754-4755.) She was allowed to say that her communications with the other doctors did not change her opinions about the validity of the tests, but she was not allowed to say why not. (25RT 4755-4760.

Fifth, respondent claims that the trial court's failure to apply the *Campos* exclusionary rule to the testimony of the prosecution's pathology expert means only that the court "properly differentiated between two different levels of reliability." (RB 170.) Respondent cites cases supporting the application of the business record exception to the hearsay rule (Evid. Code, § 1271) to *some* cause-of-death conclusions expressed in autopsy reports, but none suggesting that the business record exception applies to *all* of the specific conclusions or opinions expressed in the autopsy report and repeated by the pathologist who testified in this case.

(Compare RB 172-173 with RT 3018-3019 [crime reconstruction].) Furthermore, none of the cited authorities supports respondent's claim that trial courts can or should admit the conclusions or opinions expressed in pathology reports offered by the prosecution on the theory that they are more trustworthy or occupy a higher "level of reliability."

Sixth, respondent claims that the trial court';s refusal to allow defense counsel to ask Dr. Walser about whether appellant's Rorschach results showed disorganized thinking was not attributable to its uneven application of the *Campos* hearsay rule, but to counsel's use of a "leading" question and previous coverage of "the entire area on direct." (RB 173.) While it is true that counsel's question was leading, and that counsel said he hoped he had covered the area on direct, it is not true that defense counsel had done so. The pages respondent cites as covering the "entire area on direct" (RT 3580-3590) are those of Walser's testimony about appellant's level of psychological organization, tendency to misperceive reality, history of disorganized behavior, Rorschach administration and scoring procedure, and Rorschach depression scores. The question of whether there was evidence of "disorganized thinking" in Dr. Kincaid's Rorschach results was covered only on defense counsel's cross examination of the prosecutor's expert, Dr. Paul Berg, who denied that any of the psychological test results provided any evidence of disorganized thinking (RT 4420-4447, 4468-

4469.) The prosecutor asked Walser many questions about the Rorschach results on cross examination, but did not ask whether they indicated disorganized thinking, and would not likely bring out results favorable to appellant's defense if they were there. (RT 4186-4215.)

Seventh, respondent defends the trial court's decision to allow the prosecutor to offer psychologist Paul Berg as an expert in, among other things, "work place violence." (22RT 4372-4374.) Respondent argues that Berg was qualified "beyond question", and work place violence was relevant. (RB 174.) But like the trial court and the prosecutor below, respondent does not articulate a theory of how work place violence or the attributes of other people who have committed work place violence were relevant to any issue in the case. In seeking repeated affirmation of his suggestion that a person who engages in work place violence is not necessarily delusional or psychotic, the prosecutor's questions soon revealed that his purpose in adducing evidence that Berg had studied other cases of work place violence was simply to confirm Berg's qualification to argue his theory of the case. (22RT 4374.)

Eighth, respondent asserts that the trial court was correct, if uneven, in allowing the prosecution's expert, but not the defense expert, to opine on the "dymanics" of the homicides and appellant's mental state because the two experts had different qualifications and gave different testimony. (RB

174-175.) But as close review of the facts reveals, those differences cannot justify an inequality in trial court rulings that allows only prosecution mental health experts to give opinions on the defendant's mental state that bear upon the ultimate issues.

Nor is the issue "waived" by a failure to object. It was over defense objection referencing the court's rulings preventing Dr. Walser from opining on the dynamics that produced the homicide that the trial court allowed Dr. Berg to opine that the termination of appellant's employment and what appellant "believed was going to be happening to him for weeks before that" explained the crime to the exclusion of "anything delusional or hallucinatory." (22RT 4368.) Likewise, defense counsel's objection and motion to strike, referencing "the court's earlier ruling" was overruled when Berg denied that any of the personality disorders Berg believed appellant had "in any way prevent a person from committing deliberate and premeditated murder." (22RT 4378.)

The court's rulings restricting Dr. Walser's testimony were indeed severe in comparison. In addition to ruling out defense counsel's questions eliciting her acknowledgment of evidence that appellant thought about killing before his employment was terminated, the court sustained prosecutorial objections and struck Dr. Walser's opinion on points indistinguishable from those reached by Berg.

When Dr. Walser said that Lorraine Talley's refusal to meet alone with appellant after terminating him "tipped the balance," the court sustained the prosecutor's "impermissible opinion" objection, and struck the testimony, which the court told the jury was "an attempt to describe the state of mind at the time of the incident." (19RT 3708-3709.)

Her response to defense counsel's inquiry about her reasons for believing that appellant was psychotic at the time of the killing was cut off in mid sentence by another sustained "impermissible opinion" objection after she said appellant's description of his own mental state "seemed to be a reactive kind of state, rather than . . . cold and calculated." (19RT 3706.) Without saying which portion of her lengthy answer was being stricken, the court told the jury "that portion will be struck, ladies and gentlemen, as inappropriate opinion. The description will be allowed to remain only for the purposes of forming the previous stated opinion, and you can proceed with your next question." (19RT 3706-3707.)

Her testimony that appellant "didn't seem to know what he was doing" rendered in response to defense counsel's query as to whether appellant had planned to commit suicide, was struck as well. (19RT 3719.)

And as previously noted, defense counsel was not allowed to ask Dr. Walser leading questions. When defense counsel asked Dr. Walser if having a psychotic level of organizations means the person "misperceives

reality on a regular basis," the prosecutor objected to the question as leading. (18RT 3579.) The court said, "I will begin to sustain these, Counsel. The witness can testify as to the meaning of these matters. The Court is exercising its discretion. So you can ask the witness to testify what it means." (18RT 3580.)

Furthermore, the court sustained the prosecutor's objection and admonished the jury to disregard "that last comment" after Dr. Walser said that appellant's "impairment needs to be taken into consideration here. It's part of why he couldn't handle the stress he was under." (21RT 4202.) Dr. Walser gave this answer in response to defense counsel's two-part query as to whether the characterization of neuropsychological impairment as "moderate" meant that it could not interfere with the deliberation of a homicide. (21RT 4201.)

After Dr. Walser's testimony concluded, the court received from juror #1 a note complaining of being forced to "pick out pieces here and there to arrive at a cohesive 'opinion'" from Dr. Walser and inquiring "Did she ever state her opinion?" (Court Exh. 14, 1ACT 266.)

When the prosecutor made his closing argument, he reminded the jury of his success in making clear his own expert's opinion on what he claimed was the ultimate issue, by way of telling the jury that mental health expert testimony ought not be decisive. In the prosecutor's words, "Dr.

Berg has some pretty obvious opinion about the depth of the premeditation of Michael Pearson at the time that he murdered two people." (26RT 4980.)

The federal due process guarantee requires that the defense be permitted to appear and defend, that proceedings to determine sentence be reliable, and that both parties to a criminal case be treated equally in the interpretation and application of evidentiary rules. (U.S. Const., 6th, 8th & 14th Amends.; *Wardius v. Oregon*, *supra*, 412 U.S. 470, 474.) Here, the trial court's rulings created imbalance in expert testimony, and reduced the coherence of the defense.

Finally, respondent falsely states that "appellant does not even offer a showing of prejudice." (RB 178.) In addition to pointing out the impact of the individual rulings, appellant's opening brief points out that the mental state issues to which the expert testimony related were critical and closely balanced. Given appellant's lack of any prior felony convictions or violent crime, and the People's reliance on "the circumstances of the crime" as aggravation, neither the inequality in the application of the law, nor the rulings themselves, should be held harmless.

XII. THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO CROSS EXAMINE DR. BERG ABOUT HIS MEDI-CAL FRAUD CASE VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

The unique issue appellant has presented under this heading is the constitutionality of precluding a defendant from cross examining a prosecution expert witness about how he obtained a dismissal and finding of factual innocence on the criminal charges he faced in a Medi-Cal fraud case. (See AOB 298, 23 RT4580.)

Appellant claims that he was entitled to develop through cross examination a claim that Berg was biased as a result of any possible link between Berg's service as an expert witness and the favorable resolution of his own criminal case. (U.S. Const., 6th & 14th Amends.) .

Here, in contrast to *People v. Sapp* (2002) 31 Cal.4th 240, the appellant's claim of error does not depend upon his right to prove the truth of the charges that Dr. Berg faced. Even if Berg was not guilty, his remarkable success in obtaining suppression of the fraud evidence, dismissal of fraud charges, and a finding of factual innocence, could well be linked — in his own mind if not in the minds of the prosecuting agency and the courts that provided the relief he sought — to his service as a witness

for the prosecution.

Respondent defends the preclusion of such questioning on the grounds that the "insinuations" are "libelous" and supported only by "Dr. Berg's assertion of a Fifth Amendment privilege, his later, successful motion to suppress, and his subsequent finding of factual innocence. (See XXIII RT 4574-4575.)" (RB 182.) There is more support than respondent acknowledges in waging this particular argument. A few pages *ante*, respondent discloses that dismissal of charges was sought by the District Attorney, a fact no doubt evident in the Attorney General's files on the Berg case. (RB 179.) A few pages later, respondent discloses that "the prosecution . . . had afforded [Berg] the equivalent of mea culpa apologies." (RB 185.) Obviously, the proceedings resulting in the finding of factual innocence were not adversarial. Respondent cites no case, and appellant knows of none, requiring extrinsic evidence of a "deal" or an assumption of "quid pro quo" before the defense may question a prosecution witness about the disposition of his own criminal cases in non-adversarial proceedings.

On the contrary, where the defense has notice that a government agency has disposed of a prosecution witness's criminal case under circumstances that might give the prosecution witness a bias in favor of the state, defense counsel must assert the defendant's right to explore the matter

on cross examination. (*Hyman v. Aiken* (4th Cir 1987) 824 F.2d 1405, 1414 [defense counsel ineffective in failing to assert defendant's right, under *Giglio v. United States* (1972) 405 U.S. 150, 154-155, to cross examine prosecution witness about circumstances surrounding acquisition of pardon].) "[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (*Napue v. Illinois* (1959) 360 U.S. 264, 269.)

Respondent also asks this court to construe Penal Code section 851.8, subd. (f), so as to render defense counsel's attempted cross examination of Berg a violation of that statute. (RB 182-183.) That is not easily done. Subdivision (f) states that "the law enforcement agency having jurisdiction over the offense or court shall issue a written declaration to the arrestee stating that it is the determination of the law enforcement agency having jurisdiction over the offense or court that the arrestee is factually innocent of the charges for which the person was arrested and that the arrestee is thereby exonerated." But according to subdivision (i) of the same statute, any finding of factual innocence "shall not be admissible in evidence in any action." Indeed, the only exclusionary rule provided by the statute is for findings of factual innocence.

Respondent also suggests that the finding of factual innocence might

be worthy of "collateral estoppel" if such a finding is challenged. (RB 183.) However, appellant's effort to develop the circumstances surrounding the factual innocence finding as a source of pro-prosecution bias did not challenge the finding per se. To meet the threshold requirements for collateral estoppel, "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding" and, inter alia, "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citations.]" (*Tennison v. California Victim Compensation And Gov't Claims Board* (2007) 152 Cal.App.4th 1164, 1174 [factual innocence finding does not have collateral estoppel effect with California Victim Compensation Board].) Respondent's argument does not meet the threshold requirements, let alone show that the doctrine should trump a criminal defendant's Sixth Amendment rights.

Respondent also argues that the trial court had discretion to preclude all cross examination of Berg respecting his Medi-Cal fraud case on the theory that the defense would have had to prove the Medi-Cal fraud charges, or some scandalous "collusion" necessitating a "mini trial" and "undue consumption of time." (RB 185.) Not so. As respondent well knows from having access to the sealed records, and declares in argument, "the prosecution and the courts had afforded [Berg] the equivalent of mea

culpa apologies" (RB 185) in giving him a declaration of factual innocence where the evidence of his guilt was not discredited but merely suppressed. All defense counsel had to do was to establish from Berg's own testimony the fact that the prosecution declined to oppose his factual innocence motion in order to establish support for his theory of prosecution bias.

The United States Supreme Court has held that a defendant's Confrontation Clause rights have been violated when he is "prohibited from engaging in otherwise appropriate cross-examination . . . and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." (Ibid.) "Accordingly, the defendant has met his burden when he has shown that `[a] reasonable jury might have received a significantly different impression of [a witness'] credibility had . . . counsel been permitted to pursue his proposed line of cross-examination.'" (*Slovik v. Yates* (9th Cir. 2008) 545 F.3d 1181, 1186.

Finally, respondent claims any error was harmless because the evidence of guilt is overwhelming, and Berg simply impeached a defense

mental health expert whose testimony was, in respondent's view, "unbelievable." (RB 186.) But the evidence of guilt is not overwhelming, and the defense mental health expert whose testimony Berg attacked was a qualified neuropsychologist whose testimony on neuropsychological issues was both critical and credible on its face. Moreover, Dr. Berg's importance to this case is not limited to his impact on the credibility of Dr. Walser, nor to guilt phase issues. His churlish opinions and characterizations of the facts, which included describing Talley's killing as an "assassination," supported the prosecutor's call for the death penalty, as well as the prosecutor's theory of guilt.

Moreover, Berg's claim that a "faking expert" who looked at appellant's neuropsychological test scores applied the "Mittenberg faking formula" and concluded that appellant was either faking impairment or at most mildly impaired, was particularly damning. (22RT 4395-4397, 24RT4673-4674, 4677.) In addition to undermining the credibility of appellant's mental health expert and related defense theories, this evidence that appellant sought to contrive the appearance of mental disability supplied a new, independent, emotionally compelling and unlawful impetus to impose death.

Considering the closeness of the question of whether the killings were "deliberate" as well as premeditated, and the impact of Dr. Berg's

testimony on both the penalty and guilt determinations, the unconstitutional restriction of counsel's impeachment effort appears clearly prejudicial. That prejudice was compounded by the trial court's false admonition to the jury ("There was no factual basis for those questions"), which discredited defense counsel and bolstered the credibility of Dr. Berg. The effect of the error may be seen in every sector of the trial in which the credibility of the prosecutor and defense counsel was important. The error was not harmless beyond a reasonable doubt.

XIII. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN PRECLUDING AND LIMITING INTRODUCTION OF DEFENSE EVIDENCE RESPECTING COMPLAINTS ABOUT HOUSING AUTHORITY MANAGERS CIRCULATING BEFORE APPELLANT WAS HIRED, AND TESTIMONY ABOUT HOW THOSE MANAGERS TREATED OTHER EMPLOYEES PRIOR TO APPELLANT'S TENURE

As noted in the discussion of prosecutorial misconduct (Argument VII, ante), the trial court ruled that complaints about management made to Housing Authority Director Art Hatchett prior to the time appellant began working for the Housing Authority were irrelevant or unduly prejudicial and consumptive of time. (12RT 2375-2376, 2381.) This ruling was applied in sustaining objections to evidence from other witnesses, except

Toni Lawrence, who was permitted to testify about past events if within her personal knowledge, insofar as they "bore on her credibility." (22RT 4279.) The evidence that was excluded was important to appellant's defense — particularly on the penalty phase issue of whether he perceived some moral justification or necessity for his crimes — in that it tended to illuminate what he was likely to have heard and believed about the Housing Authority employees with whom he had hostile interactions.

Respondent concedes that "evidence showing the poisonous authority [sic] at the RHA could have been presented, as appellant contends, to show some sort of moral justification for the murders. (See Pen.Code, 190.3, subd. (f).)" But, respondent contends, "appellant never offered this particular evidence during the penalty phase, nor . . . did he suggest any link when the evidence of which he complains was excluded during the guilt phase." (RB 189.)

Any second offer made at the penalty phase would likely have appeared futile, given the basis for the trial court's guilt-phase ruling. When the evidence was offered, the defense faced objections based upon hearsay and character evidence exclusionary rules. Defense counsel stated his purpose was to show the poisonous quality of the atmosphere in order to better explain how appellant perceived the people to whom he showed hostility. (12RT 2373-2374.) The trial court did not find appellant's

perceptions immaterial to guilt phase issues. Rather, the court simply took the position that the accusations and "gossip" circulating before appellant was hired were insufficiently probative of the atmosphere extant during appellant's tenure. In the court's words, "I'm going to exercise my discretion under 352. I don't believe that that has anything to do with your concerns . . . and I feel that the probative value of this particular matter is far outweighed by the possible inappropriate effect it may have on the evidence. ¶ I just think under 352, to go back even before Mr. Pearson was employed at the agency is far afield, and I don't see that these is any relevance to it." (12RT 2375-2376.)

Respondent mistakenly asserts that defense counsel's failure to state a federal constitutional claim in the trial court means his present federal constitutional claims are "waived" under *People v. Partida,* "except in the most general sense." (RB 188, fn. 29.) On the contrary, *Partida* is among the leading decisions permitting a defendant to argue a specific "legal conclusion" not argued in objecting or offering evidence below, including the conclusion that the evidentiary decision violated specific federal and state constitutional guarantees. (*People v. Partida, supra*, 37 Cal.4th at pp. 437-438 [constitutional due process claim preserved by 352 objection]; *People v. Yeoman* (2003) 31 Cal.4th 93, 133, [Eighth Amendment claim that admitting certain evidence rendered the death sentence arbitrary and

unreliable was adequately preserved by due process and equal protection arguments in trial court].)

Respondent also asserts that "the evidence was simply not favorable to appellant" but does not support that assertion as to the evidence at issue here. Rather, respondent argues that *the excluded videotape of appellant's confession*, was not favorable to appellant. (RB 189.) The excluded videotape of appellant's confession is discussed at length *infra*. For now, suffice to say that it discloses how appellant perceived the situation at the Housing Authority. It dovetails with the excluded evidence of statements other people made about the Housing Authority prior to appellant's tenure. However, the excluded evidence of statements other people made about the Housing Authority prior to appellant's tenure was never dependent upon the videotaped confession for its significance. Respondent's discussion of the excluded confession in this context is puzzling.

Similarly unsupported (and nonsensical) is respondent's claim that "the only type of `moral justification' the jury could reasonably have considered here was that appellant erroneously thought he was being fired because of his poor performance at work, when, in fact, appellant was really being fired for making the threats that he later carried out." (RB 190.) There is no evidence that appellant thought he had performed poorly at work, much less that he believed he had been fired for that reason. Mr.

Hatchett testified that he told appellant that he was being terminated because his work was unsatisfactory, but not that appellant believed any such thing. As detailed early on in appellant's confession to police, appellant believed that he had performed his job admirably if not perfectly. He attributed Hatchett's expression of a contrary conclusion to his blind acceptance of misinformation from Talley.

Finally, respondent claims that there was "no shortage of evidence admitted for appellant to argue that such a poisonous atmosphere existed." (RB 190.) Although testimony from people with personal knowledge of Burton and Talley's behavior during appellant's tenure at the Housing Authority gave the jury some insight into how appellant could see them as abusive, the jury did not get to hear all of the poison appellant likely heard "through the grapevine" about their mistreatment of other employees.

The jury was precluded from hearing if there was "some talk" about how Shirail Burton obtained her position (12RT 2358-2359); whether Donald Richmond, a "close friend" of appellant who served as Director of Personnel Administration and in other positions for the City of Richmond before appellant was hired, had received a report from the Inspector General working with HUD that said Lorraine Talley and a coworker "did not possess the skills, knowledge, ability to be in their jobs" (22RT 4283-4284, 4290-4291, 4292) and that employees who worked under Shirail

Burton and Lorraine Talley spoke to Toni Lawrence about problems they were having and led her to conclude that Talley was letting Burton get away with doing "virtually little or no work" because of their friendship. (16RT 3100.) The jury was not allowed to hear testimony from Connie Taylor about favoritism in the Conventional Housing Authority (17RT 3261-3265) nor the testimony of City of Richmond Information Director and former union representative Mark Hamilton about complaints he received about Talley's treatment of people that she supervised. (22RT 4271.) Documentation of Ronald Keeton's and Sylvia Gray-White's 1994 complaint about Pat Jones and about Hatchett's failure to follow rules in giving her the supervisory position was likewise excluded.

As a consequence of this error and that of precluding the jury from hearing all of appellant's videotaped confession, the jury did not have an accurate or complete picture of appellant's state of mind, nor of the circumstances of the offense. Most pointedly, jury could not reliably determine "whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct" as required by Penal Code section 190.3, factor (f). In light of appellant's prior record, and the State's reliance on the circumstances of the offense, the exclusion of this evidence was not harmless.

XIV. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN REFUSING TO ALLOW THE JURY TO VIEW THE ENTIRETY OF HIS VIDEOTAPED CONFESSION

Appellant contends that the trial court violated appellant's fundamental rights in precluding appellant from showing the jury the entirety of the videotape police made of his post arrest interrogation session. Respondent claims the trial court's approach was proper in that appellant did not articulate any "cogent theory of admissibility for the evidence."(RB 192.)

In so arguing, respondent ignores the obvious non-hearsay relevance articulated by the prosecutor himself in his cross-examination of appellant's mental health expert, to wit:

> Here you have Mr. Pearson talking rather candidly about things surrounding the commission of the crime, it's visual, it's not reading a transcript, it's his reflection of voice. How come you didn't review that? . . . Why wouldn't it be important to you? I mean you have evidence of his demeanor within hours of the offense, whether he is saying things, I shot him with a banana, what his voice inflection is, whether he is yelling, whether he appears to be particularly distraught, how, for instance, he performs on the Miranda admonishment, whether he is understanding the legal principles . . . ." (RT 3937.)

Indeed, this portion of the prosecutor's cross-examination of the defense mental health expert not only articulated the non-hearsay relevance

of the videotape, but also created a need to show to jury the tape from beginning to end to establish that no portion of it undermined the defense theory of appellant's mental state or supported the prosecution theory. Defense counsel subsequently had his expert review the whole tape and confirm that it did not alter her opinion of his mental state, and *then* sought to show the whole of the tape during his cross-examination of the prosecution's mental health expert. The trial court's decision to preclude the defense from showing the jury the whole tape allowed the prosecutor to suggest (as does respondent here) that some aspect of the tape never shown was inconsistent with the defense theory of the case.

Facing the trial court's firm and repeated refusal to allow the entire tape to be shown, defense counsel asked the court to permit him to show appellant becoming emotionally distraught in recognizing the hurt he had caused after his odd questions about Lorraine's present whereabouts produced the news of her death. (24RT 4701-4703.) Reading from a transcript of the videotape that defense counsel had previously (but unsuccessfully) offered to the trial court, defense counsel quoted words that began with "I'm truly sorry" but showed more emotion than was literally expressed. (24RT 4702.) The prosecutor called this "an impermissible appeal to the sympathies of the jury" and hearsay. As in the past, defense counsel affirmed that he was not offering it for the truth of the matter, but

rather to support his expert's opinion over that of the prosecution, and to avoid leaving the jury with the false impression of appellant that would be left by the excerpts that the court had agreed to show. (24RT 4702-4705.) But rather than focusing on the aspects of the statement that were clearly not hearsay in that they did not directly declare a mental state but only evinced appellant's state of mind circumstantially, the court persisted in focusing on the verbal expression of remorse and insisted that the tape was therefore being offered for the truth of the matter. (24RT 4705.) Defense counsel pleaded:

> "There are two things going on, Judge. One of them is that he says some things – those I don't care about – the way he acts, his demeanor at the time he says them, I believe are important. And those are the relevant aspects of it. Any kind of limiting instruction the Court wants to give, obviously I've agreed to it when it has been made." (24RT 4705.)

Without further explanation, the court stated it would not change its ruling. (24RT 4705.)

Hearsay is an out-of court statement offered at trial to prove the truth of the matter asserted in the statement. (Evid. §1200, subd. (a).) Evidence of a declarant's statement is not hearsay if it relates facts other than declarant's state of mind and is offered to circumstantially prove the declarant's state of mind. (1 Jefferson, Cal. Evidence Benchbook (2d ed.

1982) § 1.5, p. 67.) Very little of the proffered videotape shows appellant directly declaring himself to be sorry or to have any other state of mind. Insofar as the trial court applied the hearsay rule, it did so incorrectly.

Furthermore, respondent's brief demonstrates that the trial court's ruling also violated Evidence Code section 356[11] and related federal constitutional guarantees.[12] Respondent avers that the portion of the tape that the jury heard "depicted appellant as a rational person engaged in an ordinary conversation, who also happened to have just killed two people." (RB 193.) Respondent states the portion shown at the prosecutor's request "showed a bitter, vindictive person who intentionally, and with deliberation and premeditation, killed two people because they `screwed with him.'"

---

[11] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

[12] U.S. Const., Amend. 5; *United States v. Walker* (7th Cir. 1981) 652.F.2d 708, 713 [right to remain silent violated if the omission paints a distorted picture . . . which [the defendant] ... is powerless to remedy without taking the stand"]; U.S. Const., amends. 6, 8, 14; *Green v. Georgia* (1979) 442 U.S. 95, 97 [exclusion of evidence highly relevant to a critical issue violates due process] *Gardner v. Florida* (1977) 430 U.S. 349 [defendant must be given an opportunity to explain evidence offered in aggravation].

(RB 193.) If so, that portion was misleading. Defense counsel was correct: the jury needed to see the whole videotape, or at least the outpouring of grief recorded on the tape shortly after that "ordinary conversation," pursuant to the rule of completeness.

Respondent's "harmless error" argument fails for related reasons. The tape as a whole shows appellant's mental and emotional frailty, and thus enhances the plausibility of the defense theory of the case.

Prior to the first excerpt shown to the jury, the tape shows appellant emotionally overwrought in describing what he experienced in attempting to work under Talley and her friends at the Conventional Housing Authority. (See Court Exhibit 1A[13] or Defense Exhibit 41 between time markers 8:32:55 – 9:27.) His account of his interactions with Talley and of his consultations with advisors displays his pitiful inability deal with what he considered false accusations of misfeasance and other efforts to make him appear unworthy of his job. Consistent with Dr. Walser's description of the neuropsychological impairments manifested in appellant's test results, his discussion of his own efforts to save his job reveals an inability to anticipate or understand reactions to his interoffice memoranda. (See, in

---

[13] Court exhibit 1-A is a videotape of the confession containing all the material on defense exhibit 41. It was supplied to the court by the prosecutor in prior to trial and viewed by the trial court at that time. (RT 238-239.)

particular, 8:42:14 to 8:53.) He began to weep shortly after that, i.e., at 9:00:11, as he told the officers, "I'm not happy about what has happened today. . . . Cause my mom, I mean, my family, . . . I'm sure are distraught. I mean, I'm crying now because I know that my mother's hurting. . . . Do you know that I was talking to God about this? . . . I was literally asking God how to resolve this. . . ." (9:00:04 to 9:01:05.) All through the recorded interview, appellant is emotionally labile.

Even in the part of the videotape that was shown to the jury at the prosecutor's request, i.e., 9:33:45 – 9:35:45, the tape shows nothing that justifies respondent's claim that appellant was "bent on boasting about his actions" (RB 192) or "seemed to be gloating" or that he "picked and chose among his victims." (RB 193.) Over and over again, at various points in the session, he weeps when he voices his belated recognition of the harm the shooting brought not only to himself and to his own family, but also to the families of the decedents, and to Janet Robinson. (9:05:45 -- 9:05:55; 9:10:45 -- 9:11:06; 9:35:10 – 9:35:35; 9:36:05 – 9:36:45; 9:59:46 – 10:01:20; 10:10: 44 – 10:10:59; 10:14:05 – 10:15:00.) Contrary to respondent's claim, appellant never said he *picked or chose* or even decided to shoot anyone. He spoke only of his past experiences with the people at the scene, his feelings and perceptions of them, and his perception of himself as having "defended himself" in whatever he did after following

Talley into the conference room. He said he could not recall when he took hold of the gun, what actions he took after Talley entered the conference room, or where he went after shooting Talley and why. (9:13:00-9:26:45; 9:42:20 – 9:42.40; 9:56:43 – 9:58:10; 10:07:14 – 10:08:05; 10:10:44 – 10:10: 59; 10:11:33 – 10:12:18.)

For example, when asked if Barbara Garcia was "just as bad" as Lorraine, appellant said Barbara "got caught up in it because she wanted so much to be their friends and them to like her because . . . they had just booted this other lady, Cecilia Gardner. They fired her. And Cecilia had been made, passed her probation, and they booted her. . . . My point is that when it's a collaborative thing, they get together and that's the way they operate . . .". (10:07:14.) When one of his interrogators suggested that appellant was "very selective" during the sequence of events he could not recall, appellant asked his interrogators, "Why? . . . I know that you view me as a sick son of a bitch but why would I do someone that hasn't done anything to me?" (10:11:33 – 10:12:18.)

Finally, respondent claims "appellant could have taken the stand and testified had he wished the jury to hear him say he was sorry for killing Talley and Garcia." (RB 197.) This is true, but irrelevant. The videotape was not offered as an apology, but to show appellant's emotional and mental state when he was interviewed for the first time after the killing, and

in turn, the implausibility of the prosecution's theory of deliberate and premeditated murder. The trial court's refusal to let the jury see it for themselves was not harmless.

XV. UNLIMITED VICTIM IMPACT EVIDENCE AND IMPROPER USE OF SUCH EVIDENCE VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Most of respondent's lengthy argumentation on this issue is answered by appellant's opening brief. The one paragraph that requires comment here is that which alleges that "appellant was attempting, through the murders, to maximize the impact on specific persons who he believed had wronged him. (See XXIV RT 4678; see Defense Exh. 41.)" (RB 203.) Nothing in the record supports the inference that he wished to "maximize the impact" of anything on anyone. Defense Exhibit 41, a videotape of appellant's confession, casts grave doubt on the theory that appellant wanted to cause the damage he caused.. Contrary to respondent's oft-repeated claim, appellant never said he "chose his victims." He never "threatened his coworkers that he would `do another 101 California if he was fired.'" Rather, he told only people he thought of as friends that he felt he could or would commit such a crime at the Conventional Housing

Authority. Fortunately, he was wrong. Appellant did not shoot, like the killer at 101 California, people who simply happened to be on the scene at the time. Respondent's repetition of the prosecutor's effort to punish appellant for the greater crimes of another man at 101 California is reprehensible. Indeed, respondent's citation of the prosecutor's argument as proof that appellant "let it be known in no uncertain terms that his actions were meant to send a shockwave to the community" (RB 204) is revelatory. Respondent is repeating old lies, betting that the lies will become more believable with each telling.

XVI. THE TRIAL COURT'S REFUSAL TO PERMIT THE PENALTY JURY TO SEE ANY OF THE 33 LETTERS THAT PEOPLE ACQUAINTED WITH APPELLANT WROTE ON HIS BEHALF VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Respondent defends the trial court's refusal to allow the jury to see any of the proffered letters on the theory that their content would be hearsay, notwithstanding defendant's contrary offer of proof. (28RT 5436.) Respondent argues that the jury could only find mitigation in the contents of the letters if the contents were taken for the truth of the matter stated. (RB 210.) No authority is cited, and none is likely to be found.

As previously noted, evidence of a declarant's statement is not hearsay if it relates facts other than declarant's state of mind and is offered to circumstantially prove the declarant's state of mind. (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 1.5, p. 67.) Thus, the letter composed entirely of adjectives beginning with the letters of the defendant's name was properly offered as evidence that the writer was fond of appellant; the jury need not believe that defendant was indeed "mature, mannerly, mild-mannered, matchless, magnanimous" etc., in order to draw the inference that appellant was fondly remembered by at least one his coworkers in a letter written six months after the killings. (Exhibit 43, 1ACT 213.)

Likewise, the letter from the Oakland Ensemble Theater declaring appellant to have rendered valuable service as a volunteer for the theater group is not hearsay when offered to show that the writer thought enough of appellant to write such a letter on his behalf. Like all expressions of human affection for a capital defendant, it provides circumstantial evidence that the capital defendant has positive aspects of his character. The jury would not have to believe that the writer has accurately stated the behavior of the defendant in order to know that the writer was touched by the defendant in a way that militates against a death sentence. As defense counsel argued (28RT 5436), any concerns about the jury using the content

of the letter as proof of the literal truth of matters stated should have been addressed by a limiting instruction rather than by exclusion of evidence.

Finally, respondent argues that the "evidentiary purpose of the letters – to show their existence rather than their content – was fully satisfied through the testimony of appellant's mother." (RB 212.) Appellant's mother did not testify to the content of the letters. Defense counsel asked the court to let the jury see the content of the letters. (28RT 5435-5436.) The jury needed to see the content of the letters to draw the appropriate inferences about the writers' feelings for appellant and about his humanity in turn. The jury made a specific request to see the content of the letters. (3ACT 1026.)

This error was not harmless. This was one more part of a one-sided trial, where the prosecution's theories, evidence, and arguments were given full scope while the defense was repeatedly silenced, distorting the trial process and leaving largely uncontroverted the prosecution's one-sided view of who appellant was and why he committed these crimes.

XVII. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN EXCLUDING DEFENSE COUNSEL'S TESTIMONY RESPECTING APPELLANT'S REMORSE DUE TO COUNSEL'S FAILURE TO CREATE A WRITTEN DESCRIPTION OF HIS COMMUNICATIONS WITH HIS CLIENT TO ASSIST THE PROSECUTION IN PREPARING FOR TRIAL

Fighting another strawman, respondent defends at great length (RB 212-218) the right of a trial court to sanction a defendant for failing to timely disclose witness statements that were conveyed to counsel in some manner other than a written report.

We do not have those facts. Here, defense counsel made the requisite disclosure as soon as he realized he needed to take the stand. The trial court accepted that the decision to testify was "last minute" and that counsel had no notes of his conversations with appellant. (29RT 5458-5459.) The trial court did not, and could not, make a finding that defense counsel had violated, in letter or in spirit, the defense discovery duties established by the Penal Code.[14] The court simply determined that counsel

---

[14]Penal Code Section 1054.3 provides in relevant part that "[t]he defendant and his ... attorney shall disclose to the prosecuting attorney: [¶] (a) The names and address of persons ... he ... intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the

could or should have done more, to wit:

> All right. I think *there are certainly things if you anticipated you were going to be a witness on this matter that you as a witness could have prepared for the other side so that they would know the scope and nature of your testimony regarding these matters*, rather than just some sort of free-flowing state of consciousness type of situation. I believe that's only fair. That's appropriate. (29RT 5459, emphasis added.)

The trial court was out of bounds. Penal Code section 1054 et seq., defines and delimits trial court authority with respect to discovery of defense evidence in criminal cases. (Pen. Code, §1054.5 subd. (a); *In re Littlefield* (1993) 5 Cal.4th 122, 129.) It requires pretrial *disclosure* of any statements made by witnesses the defense intends to call, but it does not require that either side create written statements or otherwise make the necessary disclosure in writing, much less a writing detailing every statement the witness may have made.

The two cases on which respondent relies in urging this court to find a discovery law violation are almost inapposite. In *People v. Lamb* (2006) 136 Cal.App.4th 575[15] and *Roland v. Superior Court* (2005) 124

---

results of physical ... examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Italics added.)

[15]In *People v. Lamb, supra,* 136 Cal.App.4th 575, defense counsel's accident reconstruction expert created, but failed to turn over to counsel, notes about interviews with witnesses, calculations to determine the cause

Cal.App.4th 154[16], the appellate court resolved that defense counsel must *disclose* to the prosecutor oral statements as well as written statements of witnesses. Neither case supports respondent's claim that defense counsel's oral disclosure of a witness statement was insufficient.

In addition to the phantom discovery law violation, respondent argues that the excluded testimony was either unknown or unreliable hearsay (RB 218-219) and that "[c]ounsel stated only that appellant was `unable to continue conversations' because he would break down and cry `and talk about how he is so `tore up' during their meetings." (RB 219.) But defense counsel said more than that. Defense counsel also said he would describe *when* the breakdowns occurred, i.e., in every one of his first several meetings with appellant. (29RT 5455.)

---

of the accident, and notes about his inspections of the vehicles. The expert conveyed his opinion and other information to defense counsel orally, without a written report. None of this information had been disclosed to the prosecution before trial began. (Id., at p. 580.) The Court of Appeal rejected the defense claim that the absence of a written report justified the non-disclosure of the expert's statements. "As previously noted, section 1054.3 requires a defendant to disclose not only written reports, but also `any reports or statements of experts made in connection with the case.' . . . Defense counsel failed to disclose the `statements of experts made in connection with the case' as required by the express language of section 1054.3. [Citation.]" (*Id.*, at p. 580.)

[16]In *Roland v. Superior Court, supra*, 124 Cal.App.4th 154, the appellate court found that the defendant was required to disclose oral witness statements that defense counsel received either directly from the witness or from a defense investigator.

Thus, defense counsel's offer of proof disclosed the "context" respondent claims was missing, and shows why the evidence was important: it shows appellant grieving relatively soon after the crime. The trial court had declined to allow the defense to show evidence of remorse in the videotaped confession. Defense counsel's testimony was obviously intended to inform the jury of what it would not be allowed to see firsthand.

Respecting the prosecutor's hearsay objection, defense counsel agreed to limit his testimony to what he "saw." (29RT 5457.) The prosecutor said that counsel's promise was "not good enough" because the prosecutor wanted to know "everything he saw" and everything that was said and "I would need days." (29RT 5457.) The trial court declared the lack of discovery to be decisive, but did not order or invite defense counsel to provide the prosecutor with any information. (29RT 5458.) The trial court simply precluded defense counsel's testimony about appellant's remorseful behavior in those initial meetings. Thus, for factual as well as doctrinal reasons, respondent misplaces reliance on cases in which the evidence of remorse was excluded or excludable as hearsay. Even non-hearsay was excluded under the court's phantom-discovery-rule-based ruling.

Additionally, respondent falsely suggests that the court actually allowed defense counsel to give some testimony about appellant's remorse

in that "the court permitted defendant [sic] to testify to 'the two meetings initially described by counsel' (AOB 332) and appellant does not explain what more there was out there or why it prejudiced him not to get it in." (RB 220.) But as set out on pages 87 and 332 of appellant's opening brief, the testimony from defense counsel that the court allowed concerned meetings in September, i.e., five months after the crime, in which appellant was showing *anger*. This testimony was offered to establish the immediate circumstances surrounding appellant's use of the offensive terms noted by Dr. Kincaid and brought out by the prosecutor in cross examination of Dr. Walser. It did not and could not show the jury that appellant had previously shown only remorse and grief. (29RT 5458-5459.)

Finally, respondent argues that any error was not of federal constitutional magnitude insofar as any remorse appellant displayed could have been "caused entirely by concern for his own predicament." (RB 222-223.) Respondent cites the prosecutor's argument as evidence that "appellant's remorse was more of a ploy, that appellant thought his actions were justified . . . . after he described his own alleged sorrow, he expressed his feelings of justification for his actions." (RB 223.) But the prosecutor was not a sworn witness let alone a neutral observer of appellant's behavior; his closing argument is not evidence that the videotaped confession supports his theory. Because the trial court precluded the jury

from hearing or seeing the whole videotape, the prosecutor could make any claims he wanted without fear of being undermined by juror recollections of what the jury knew to be mere excerpts of a long tape. Moreover, respondent exceeds even the prosecutor in misleading characterizations when respondent declares that appellant "proclaimed that the victims `had it coming.'" (RB 223.) Appellant proclaimed no such thing. He never said anyone had anything "coming." Respondent's position rests on fiction.

XVIII. THE TRIAL COURT'S ULTIMATE FAILURE TO INFORM THE JURY SUA SPONTE, PRIOR TO OR DURING DELIBERATIONS, THAT DELIBERATE AND PREMEDITATED INTENT TO KILL WAS AN "ELEMENT OF THE OFFENSE" AND THUS NOT AN "AGGRAVATING FACTOR" UNDER CALIFORNIA LAW ERRONEOUSLY PERMITTED THE JURY TO USE MID-VOIR DIRE INSTRUCTIONS TO TREAT THAT ELEMENT AS AN AGGRAVATING FACTOR, AND VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Once again, respondent begins by misstating appellant's claim. Appellant *does not* contend that any law precludes juries from considering *the facts proving* the elements of first degree murder in aggravation. Rather, in this claim (AOB 337-338) and in Claim III (AOB 136-139) appellant has pointed out that *the elements* of first degree murder--

including the premeditated and deliberate intent to unlawfully kill – are not themselves circumstances in aggravation. (AOB 136-139.) Respondent does not, and cannot, disagree with that position. Respondent simply muddies the water with two pages of argument on a fictionalized claim and related theories. (RB 223-227.)

As set out in appellant's opening brief and nowhere disputed, the trial court instructed the jury prior to penalty phase deliberations that aggravation excludes the essential "elements of the offense" in the language of CALJIC No. 8.88. The court also told the jury that it was instructing "on all the law that applies to the penalty phase of this trial." (29RT 5491.) But the court did not give any instructions informing the jury that intent to kill or premeditation were elements of the charged offense. The instruction defining the crime of murder (CALJIC No. 8.11), which was given only at the guilt phase, said the mental state element of that offense was malice aforethought, express or implied. The instruction defining deliberate and premeditated murder (CALJIC No. 8.20) did not use the term "element" at all.

Innumerable decisions of this court have said that premeditation, deliberation, and willfulness or specific intent to kill, are "elements" of the crime of first degree murder on the single theory of that crime presented in the instant case. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th 345, 368;

People v. Hansen, *supra*, 9 Cal.4th 300, 307; *People v. Cummings*, *supra*, 4 Cal.4th 1233, 1288.)

Appellant's jury was given no such information, nor otherwise informed that the court had erred in its mid-voir-dire instructions asserting that all the crime facts, particularly premeditation, could be considered "aggravating." Thus, the only fully understandable instructions the jury received on the definition of "aggravating" in relation to premeditation and deliberation were the instructions rendered during voir dire.

The closest respondent comes to addressing the issue here is to declare that the prosecutor's closing argument "told the jury not to use the bare elements but to use only `those aggravating circumstances beyond the element of the offense itself.' (XXIX RT 5530.)" This prosecutorial argument is the only cited basis for respondent's claim that the jury "was aware" and "understood" (RB 227) that premeditation was not an aggravating circumstance. That prosecutorial argument does not, however, include any statement informing the jury that it could not use premeditation, deliberation, or malice aforethought as aggravating circumstances. Here is the prosecutor's two-sentence argument on the point, in context:

> I think of Shirail Burton. Not just the loss of – I shouldn't say just – the godmother of her children, of her maid of honor, of her best friend.

> I also think of something else that actually isn't a part of the elements of the offense because you remember the Court said, and circumstances of aggravation. *It's those aggravating circumstances beyond the element of the offense itself. It's all of those other little details that go beyond the killing with malice aforethought, premeditation, deliberation, and includes other things as well.*
>
> *He wasn't charged with what he was thinking about and what he was doing when he went outside after he killed Barbara"* (29RT 5530, emphasis added.)

Thus, rather than conceding that the elements he listed were elements of the offense that could not be treated as aggravating circumstances under the court's instruction, the prosecutor was emphasizing the jury's right to find aggravation "in other things as well" as he urged the jury to find aggravation in the intent to kill Shirail Burton. This prosecutorial argument only augmented the need for clear and correct judicial instructions on the point.

/

/

/

XIX. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY SUA SPONTE TO WEIGH IN FAVOR OF DEATH ONLY THE AGGRAVATING FACTS THAT ALL JURORS AGREED WERE PROVED BEYOND A REASONABLE DOUBT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT UNDER THE UNITED STATES SUPREME COURT'S DECISIONS IN *APPRENDI, RING, CUNNINGHAM* AND *BLAKELY.*

Respondent's position on this claim is that "there is simply no requirement in a California capital case that the aggravating circumstances be proved beyond a reasonable doubt." (RB 228.) That is "simply" not true as to one of the aggravating circumstances urged by the prosecutor here, i.e., the never-adjudicated charge of attempting to murder Shirail Burton. Yet the trial court did not render CALJIC No. 8.87 or any other instruction requiring the jury to find that allegation true beyond a reasonable doubt. Although raised in appellant's opening brief (AOB 341) and protected by the Fourteenth amendment due process clause (*Hicks v. Oklahoma* (1980) 447 U.S. 343) this California rule of penalty-phase procedure is never mentioned by respondent.

Respondent nevertheless argues that any error was harmless because "the evidence" as to all the charges "referenced in the prosecutor's closing argument and highlighted by counsel on appeal (see AOB 348), including appellant's racial bias against Hispanics, his desire and efforts to murder a

third victim during the killing spree, and his intent to send `shockwaves' by perpetrating the murders, that evidence was overwhelming." (RB 230.)

In truth, there was substantial evidence only for one of those arguments, i.e., that appellant intended to, and took steps toward, killing a "third victim," Shirail Burton. The prosecutor's claim that appellant viewed Barbara Garcia as a "wetback" is supported only by Janet Robinsons claim that appellant said he did not like "those people" who were, *in Robinson's words*, "wetbacks, Mexicans, Latinos." (RT 2523.) The claim that appellant wanted his crime to send "tremendous shock waves" that lingered like "radiation" (RB 231) has no supporting evidence whatsoever. The "`101 California' comments" on which respondent now relies never included any statements about shock waves, radiation, or any other impact of the killings committed at that location, never suggested that appellant wanted to commit such a crime but only that he felt he could be impelled to do so, and were made only to people with whom appellant had a friendship rather than a desire to threaten.

Finally, contrary to respondent's claim, nowhere in appellant's confession to police can one find appellant "seeking some sort of moral acceptance for killing only those who `screwed' with him." (RB 232.) Appellant said that what he did in the conference room – where Talley was shot – was "defend himself." The interrogators asked appellant "how' he

defended himself but did not ask what kind of threat he felt he faced at that time. Instead, one of the police interrogators declared that appellant's failure to shoot bystanders demonstrated something good about him. ["I'll tell you something that is a reflection on you as a person. There were three people in that room. One person got shot. As bad as it is to take a life, you spared the lives of two other people." – Time marker 9:34:55-9:35:20.) Choking up, appellant showed only dismay at the officers' apparent assumption that he might have killed bystanders. ["Why would I screw them when they never screwed me? I'm not that kind of guy." – Time marker 9:35:10 - 9:35:35.] A similar exchange occurs later in the session, when one of the interrogators declared that appellant was "very selective" during the sequence of events he could not recall, appellant asked his interrogators, "Why? . . . I know that you view me as a sick son of a bitch but why would I do someone that hasn't done anything to me?" (10:11:33 – 10:12:18.) Again, appellant wept, and talked about how he felt about the two other people in that room and his present realization of how he might have hurt them unintentionally. (10:14:05 – 10:15.) This is not a man who wanted to hurt people whom he believed to be innocent, by radiation, shock waves, or otherwise. The prosecutor's claim would not have withstood examination under any standard of proof.

XX. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL AND A DEATH JUDGMENT THAT MUST BE REVERSED UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Respondent begins by quibbling with the authority cited for cumulative error denying someone a fair trial. (RB 232-233.)

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-03 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [stating that Chambers held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 n.15, ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

If there is any merit in respondent's claim that some of the errors raised in appellant's opening brief do not amount to federal constitutional error, or that no claim of constitutional error was properly preserved, those errors should nonetheless be considered in determining whether cumulative

error denied appellant his federal constitutional right to due process. *(Chambers v. Mississippi, supra*, 410 U.S. at 290 fn.3.) Where the combined effect of individually harmless state and federal errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. (*Id.*, at pp. 302-303.)

In determining whether the combined effect of multiple errors rendered a criminal defense "far less persuasive" the overall strength of the prosecution's case must be considered because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *(Strickland v. Washington* (1984) 466 U.S. 668, 696; *Parle v. Runnels, supra,* 505 F.3d 922, 928.)

Contrary to respondent's claim, the support for the first degree murder and death verdicts was weak. In addition to having no history of violence, appellant had neuropsychological impairments and killed only in response to a long course of provocation. The jury's ability to understand and give effect to the evidence of neuropsychological impairment, provocation, and lack of prior criminality, was curtailed where not altogether foreclosed by the trial court's rulings and related prosecutorial and judicial pronouncements to the jury. This was not a fair trial. Both guilt and penalty judgments should be reversed.

XXI. APPELLANT'S SENTENCE MUST BE REVERSED BECAUSE CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Appellant respectfully relies on the briefing of this claim presented in appellant's opening brief.

CONCLUSION

The conviction and sentence were obtained through a fundamentally unfair trial and must be reversed.

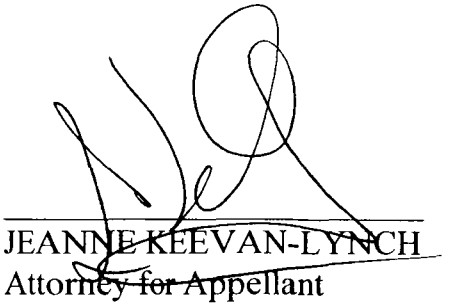
DATED: Feb 8 2009

Respectfully submitted,

JEANNE KEEVAN-LYNCH
Attorney for Appellant
MICHAEL NEVAIL PEARSON

CERTIFICATE OF COUNSEL

The foregoing reply brief on appeal was produced in 13 point proportional Times Roman typeface and contains 37,793 words as counted by WordPerfect version 12.



JEANNE KEEVAN-LYNCH
Attorney for Appellant

PROOF OF SERVICE BY MAIL

RE: People v. Michael Pearson, No. S085157

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached appellant's reply brief by placing same in a sealed envelope addressed as indicated below, and causing same to be mailed with postage thereon fully prepaid.

Ms. Linda Robertson
Attorney at Law
California Appellate Project
101 Second Street Suite 600
San Francisco CA 94105

Ms. Susan Garvey
Attorney at Law
Habeas Corpus Resource Center
303 Second Street Suite 400 South
San Francisco CA 94107

Clerk, Superior Court
Contra Costa County, for
Delivery to Hon. Richard Flier
725 Court Street
Martinez CA 94553

Mr. Gregg Zywicke
Office of Attorney General
State of California
455 Golden Gate Avenue, Suite 11000
San Francisco 94102-3664

Mr. Michael Pearson
K35004, SQSP
San Quentin CA 94974

District Attorney
Contra Costa County
725 Court Street
Martinez CA 94553

Executed under penalty of perjury under the laws of the State of California on February ___2009.

JEANNE KEEVAN-LYNCH