No. S062259

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT WALTER SCULLY, Defendant and Appellant.	(Sonoma County Sup. Ct. No. SCR-22969)

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to all respondent's arguments which are addressed in his opening brief. The failure to address or respond to any particular argument, subargument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

ARGUMENT

1

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS FOR A CHANGE OF VENUE DEPRIVED HIM OF A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

In his opening brief, appellant argued that the trial court erroneously denied his motions for change of venue, that appellant's case meets this Court's criteria that establishes when it is reasonably likely that a fair trial could not be had in the county, and that retrospective review on appeal demonstrates that it was reasonably likely that appellant did not receive a fair trial due to the court's refusal to grant appellant's motions. (AOB 82-208.)[1]

Respondent contends that the circumstances of appellant's case supported the trial court's decision to deny appellant's venue motions. Respondent argues that the factors this Court has directed trial courts to consider in determining whether a venue motion should be granted did not weigh in favor of changing venue and that the jury selection process filtered out prospective jurors who, due to the extensive publicity, could not be fair and impartial. (RB 44-72.)

Respondent's assertions are incorrect and its arguments unpersuasive. Respondent minimizes, as did the trial court, the impact from the pervasive media coverage that vilified appellant as a cold-blooded killer

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[1] In this brief, "AOB" refers to Appellant's Opening Brief and "RB" refers to Respondent's Brief. As in the opening brief, the clerk's transcript is cited as "CT" and the reporter's transcript as "RT."

with Aryan Brotherhood associations, who intruded upon the pastoral community of Sonoma County and killed one of its own deputies who had devoted his life to keeping the community safe. Indeed, respondent has not given this Court any reason upon its independent review to find anything other than a reasonable likelihood that appellant could not, and did not, get a fair trial in Sonoma county. The denial of appellant's motions was error requiring reversal of the entire judgment.

A. There Was A Reasonable Likelihood That Appellant Could Not, And Did Not, Receive A Fair And Impartial Trial In Sonoma County

Appellant and respondent agree on the general principles of law that govern a defendant's challenge on appeal of a trial court's denial of a change of venue motion. (AOB 144-145; RB 52-53, 59.) This Court reviews independently both the trial court's determination whether at the time of the motion it was reasonably likely the defendant could not receive a fair trial in the county in which he was charged, and whether it was reasonably likely he did not, in fact, receive a fair trial, and will accept the trial court's factual findings only where supported by substantial evidence. (*People v. Suff* (2014) 58 Cal.4th 1013, 1044-1045; *People v. Rountree* (2013) 56 Cal.4th 823, 837.) Appellant need show only a "reasonable likelihood" that he could not, and in fact did not receive a fair trial. (*People v. Famalaro* (2011) 52 Cal.4th 1, 21.) "Both the trial court's initial venue determination and [this Court's] independent evaluation are based on a consideration of five factors: '(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.'" (*People v. Suff, supra*, 58 Cal.4th at p. 1045, quoting *People v. Leonard*

(2007) 40 Cal.4th 1370, 1394.) The factors are indicators of the potential prejudice from pretrial publicity. (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578.)

Review on appeal is retrospective and requires consideration of, and is analyzed in light of, the responses of prospective jurors who do not ultimately become members of the jury panel as well as those who do. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 29; see also *People v. Williams* (1989) 48 Cal.3d 1112, 1125.) An examination of the voir dire of both the prospective and actual jurors is required to determine whether pretrial publicity did, in fact, have a prejudicial effect. (*People v. Jennings* (1991) 53 Cal.3d 334, 361; see AOB 145; RB 59.) An examination of the jury selection process may well corroborate the allegations of potential prejudice. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1125.) Where media coverage and local prejudice are so pervasive and negative to the accused that it manifestly taints the criminal prosecution and prevents a fair trial, prejudice is presumed and due process compels the transfer of the trial to a different venue. (See *Skilling v. United States* (2010) 561 U.S. 358, 377-378; *Irvin v. Dowd* (1961) 366 U.S. 717, 727-728; see also *People v. Avila* (2014) 59 Cal.4th 496, 509-510.)

Appellant and respondent do not agree, however, as to the application of the law to the facts and circumstances of this case. Respondent contends that appellant has failed to show a reasonable likelihood under any of the factors that he could not receive a fair and impartial trial in Sonoma County. (RB 58.) Respondent is incorrect. Each of the factors in this case supported a change of venue and, in any event, all of the relevant factors viewed in relation to one another compelled a change of venue in this matter. Consideration of these factors leads inescapably to

the conclusion that it was reasonably likely that appellant could not receive a fair trial in Sonoma County, and that it was reasonably likely that he did not, in fact, receive a fair trial.

1. The Trial Court's Denial of Appellant's Pretrial Motion To Change Venue Was Error

a. Nature and Gravity of the Offense

Appellant argued in his opening brief that the nature and gravity of the crime weighed in favor of changing venue. (AOB 147-148.) The trial court agreed with appellant that the gravity of the offense weighed in his favor (18RT:2652; 18CT:3619-3620), but that the nature of the crime did not because it did not involve "bizarre facts." (18RT:2653; 18CT:3619-3620.) While acknowledging that the crime and the sentence sought were grave and that such gravity weighs heavily in favor of a defendant's motion to change venue, respondent appears to contend that not even the gravity of the offense lent support for a change of venue in appellant's case. (RB 53-54.) Respondent is mistaken.

This Court has held that the gravity of a murder charge in which the state is seeking a sentence of death is a "crime of the gravest consequences" to the accused and thus weighs heavily in a determination regarding the change of venue. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 583.) Consistent with this Court's precedent, the trial court correctly found that the case's gravity would suggest, if not warrant, a change of venue. (18RT:2652.) Respondent has offered no authority to the contrary.

Respondent also argues that the nature of the crime did not support a venue change. (RB 54.) The trial court, despite recognizing that the nature of the crime refers to its aspects that bring it to the consciousness of the community, and that the facts here indeed drew it to the attention of the

Sonoma County community, found that its nature nonetheless did not militate in favor of a change of venue because it did not involve "bizarre facts" or an "extreme fact pattern." (18RT:2653; 18CT:3619-3620.) Following the trial court's incorrect lead, respondent argues that the nature of the crime here, a single victim, a crime without prolonged violence, or torture or a physical struggle, was not the type of "multiple and bizarre killings that have been the object of intense media attention," and thus does not support a venue change. (RB 54.) This characterization of the offense's "nature" is too narrow and not supported by this Court's authority. The nature of the offense refers also to aspects of the offense that "bring it to the consciousness of the community." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.)

The media's description of the crime is a critical factor that makes the crime sensationalized or otherwise brings it to the consciousness of the community. (See *Martinez v. Superior Court*, *supra*, 29 Cal.3d 574.) In *Martinez*, the publicity met that criteria by describing the killing as the perpetrator shooting the victim in the back because he thought the victim was a police officer, and describing the crime scene as the "scene of a cold-blooded killing," which this Court noted had the effect of creating the impression of an "'execution-style' murder of the worst sort." (*Id.* at p. 582.) This Court noted that the state's characterization of the crime as little more than a "'nondescript'" bar holdup by a person of no particular status ignored the publicity. (*Ibid.*)

The publicity in appellant's case was markedly similar to that described in *People v. Martinez*, *supra*, and respondent's characterization of the crime – "one victim . . . one shotgun wound . . . instantaneous death" (RB 54) – like the state's characterization in *Martinez*, ignored the

publicity. Press descriptions of the murder as a "cold-blooded" killing, and its perpetrator as an indiscriminate "cop" killer are characterizations that can easily become embedded in the consciousness of the community. (*Martinez v. Superior Court*, *supra*, 29 Cal. at p. 585.) The media in the present case routinely described the homicide of Deputy Trejo as an "execution style" slaying and a "cold-blooded" murder, and used terms that had emotional impact, such as multiple references to appellant as a "cop killer." By the time of appellant's initial venue motion the newspaper reporting alone had at least twenty-one references to the killing as being "execution-style" (see, e.g., 12RT:1435; 14CT:2678, 2688, 2693, 2697, 2670, 2726, 2733, 2735, 2742, 2746, 2763; 15CT:2925, 2944, 2946, 2956); 15CT:2925, 2944, 2946), and articles reporting the killing as "cold-blooded" and defining appellant as a "cop-killer" (see, e.g., 14CT:2675, 2697, 2699, 2705, 2707, 2726; 2733; 15CT:2913, 2942, 2944).

Both the gravity and the nature of the crime weighed heavily in favor of granting appellant's motion.

b. Nature and Extent of the Media Coverage

Appellant argued in his opening brief that the nature and extent of the publicity and its concomitant prejudicial effects weighed in favor of granting appellant's motion, that the publicity had saturated the Sonoma community such that there was a presumption of prejudice warranting a change of venue, and that it was reasonably likely that appellant did not in fact receive a fair trial in the county. (AOB 148-168, 193.)

Respondent disagrees, contending that appellant's characterization of the pretrial publicity is incorrect. Respondent argues that the publicity decreased over time, was largely factual, and was merely typical of the media attention for most capital cases. (RB 54.) Respondent contends that

the extensive reporting was "generally factual, contained no inadmissible or prejudicial material, and the press coverage was predominantly local." (RB 56, citing 18CT:3620.) Respondent's assessment of the evidence and its analysis and application of the facts to the law are unsupported. For the following reasons, the nature and extent of the media coverage warranted granting appellant's motion: (1) the reporting was not generally "factual;" (2) the reporting contained significant prejudicial material inadmissible at trial; (3) the "factual" reporting itself supported a change of venue; (4) the press coverage was predominantly local; and (5) the passage of time did not dissipate the prejudice from the publicity. Moreover, the extensive publicity in Sonoma County would not have followed appellant's case to another venue. A jury from a county geographically removed from the locale of the crime would have been more objective than one drawn from Sonoma County residents.

First, the reporting was not "generally factual." (RB 56.) Publicity that is invidious and inflammatory and which would tend to arouse ill will and vindictiveness is distinguished from that which is "largely factual." (See *Murphy v. Florida* (1975) 421 U.S. 794, 800, fn. 4; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1083, quoting *Beck v. Washington* (1962) 369 U.S. 541, 556 ["[e]ven the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness"].) Media accounts referring to a killing as "cold-blooded" or "execution-style" are characterizations that create a high degree of sensationalism. (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 593.) Coverage that is slanted against the accused is distinguished from that which is generally factual. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 434.) Here, the community was saturated with inflammatory

publicity adverse to appellant that used charged terms and characterizations that engendered hostility toward him. (See AOB 152-167.) The media repeatedly referred to Deputy Trejo's shooting as an "execution style" slaying and a "cold-blooded" murder. (See A.1.a. *ante*.) Stories regularly called appellant a "cop killer" (see A.1.a. *ante*.), and recklessly accused appellant of violent crimes in Sonoma County for which he was not held to answer (14CT:2708, 2754; 15CT:2905). An extraordinary aspect of this case was that the media's vilification of appellant was unaccompanied by any mitigating or humanizing references to or about appellant. The defense expert at the venue hearing testified that he could not recall ever before having worked on a case in which the media failed to report anything about the accused that demonstrated his humanity, noting that there were no references in the media to a witness saying appellant was their friend, no comment by a parent or even a reference to appellant's childhood. (12RT:1464-1465.) Indeed, just seven days after the venue motion was filed, the trial court acknowledged that the media's stories were "highly inflammatory . . . against the defendant." (10RT:1205.)

Second, the reporting contained significant prejudicial material not admissible at trial, including appellant's alleged membership in and affiliation with the Aryan Brotherhood prison gang and other unnamed white supremacist groups (12RT:1463-1464 [38 media references to the Aryan Brotherhood Prison Gang, Aryan Nation, white pride, prison gangs, and/or white supremacists]), statements from the codefendant inculpating appellant (see, e.g., 14CT:2678, 2679, 2688, 2763; 15CT:2925), the extreme security measures the county's Sheriff's Department sought to impose on appellant and allegations of appellant as a security risk at the local jail (see, e.g., 14CT:2697, 2699, 2713, 2714, 2718, 2733, 2753, 2756;

15CT:2903, 2906, 2946). It also included alleged acts of misconduct and accounts of appellant's prior convictions, most of which were not admissible at the guilt phase and a number of which were inaccurately reported to the detriment of appellant. (See, e.g., 14CT:2673, 2676, 2677, 2686, 2687, 2700, 2739, 2756, 2758; 15CT:2894, 2903, 2926, 2946.)

This adverse publicity would likely not have been heard, read or repeated by the county's residents in a new venue, where the crime did not occur. In any event, a new venue would have had far less publicity about appellant and the case where the victim was not a local, popular Deputy Sheriff who Sonoma County honored with a permanent memorial. Moreover, the pretrial proceedings in which the trial court ruled certain evidence inadmissible would have preceded the change of venue, making publication of the material in the new venue less likely. Indeed, a significant number of the prospective jurors referred to the inadmissible material either in their questionnaires or during voir dire. (See generally AOB 115-139.) In some cases, the passage of time may diminish the recall of, or impact from, published material that is never admitted at trial. (See, e.g., *People v. Famalaro*, *supra*, 52 Cal.4th at p. 22; *People v. Suff*, *supra*, 58 Cal.4th at pp. 1048-1049 [passage of three years between intense coverage in months following defendant's arrest and trial may allow prejudice from reporting to attenuate].) On the other hand, where a major crime becomes embedded in the public consciousness, the passage of time will generally not be an efficacious antidote to the prejudice the defendant might have suffered from the publicity. (*Maine v. Superior Court* (1968) 68 Cal.2d 375, 387.) The number of prospective jurors here who retained knowledge of this information indicates the passage of time did not diminish the effect of the publicity here.

Third, there were circumstances in appellant's case that caused even the factual reporting – stories on events that the jurors would eventually learn through presentation of the evidence, in court, subject to testing through cross-examination – to support a change of venue. This is so for two reasons. One, while the publicity here was inflammatory and adverse to appellant, this Court has held that press coverage need not be inflammatory or overtly hostile toward the accused to justify a change of venue. (*People v. Suff*, *supra*, 58 Cal.4th at p. 1048; *People v. Tidwell* (1970) 3 Cal.3d 62, 70 [venue change should have been granted though press coverage was neither inflammatory nor particularly productive of overt hostility].) Even factual accounts, if continuous and extensive enough, can be potentially prejudicial. (*Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 590.) "'When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt.'" (*People v. Williams*, *supra*, 48 Cal.3d at p. 1128 [citations omitted].) Two, keeping in mind that factual reporting that includes the inherently disturbing circumstances of a case does not necessarily result in biased or inflammatory reporting, this Court has found that a change of venue will be required when, in addition to such reporting, other factors "relative to the nature and extent of media coverage" are present. (*People v. Suff*, *supra*, 58 Cal.4th at p. 1048.) The Court continued by comparing the circumstances in *Suff*, to those in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1210-1212, observing that in *Daniels*, in addition to the publicity, the police officer victims had become "posthumous celebrities," the media covered the unveiling of a memorial to fallen officers and the public reacted

passionately to the officers' deaths as demonstrated by the thousands who attended the funerals. (*People v. Suff, supra*, 58 Cal.4th at p. 1048.) The Court added that the media coverage in *Suff* did not similarly transform the victims into celebrities or heroes and that relative to the nature and extent of media coverage, no other factors weighed in favor of a change of venue. (*Ibid.*) As this Court has long recognized, all the factors are indicators of the potential prejudice from pretrial publicity. (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 578.) Here, in addition to the factual reports' unnecessary use of inflammatory language and prejudicial reporting that likely fanned the flames of hostility toward appellant, the circumstances that required a change in venue, like those in *Daniels*, were Deputy Trejo's and appellant's status in the Sonoma County community, and the myriad of articles about the loss to the community from Deputy Trejo's death. (See *Maine v. Superior Court, supra*, 68 Cal.2d at pp. 384-385 [venue change should have been granted where, in addition to the publicity, the defendant was a stranger to the community and the victims were popular and from respected families].)

It is unquestionable that appellant was the quintessential outsider. Deputy Trejo, on the other hand, a popular Sonoma County Deputy Sheriff was, understandably, extolled in the press. News coverage included reports of his numerous law enforcement commendations during his tenure. (See, e.g., 15CT:2928.) He was lauded as a "top performer" in his job and a "highly decorated" deputy. (See, e.g., 15CT:2929.) The press referred to him as Sonoma County's "Fallen Hero." (See 15CT:2927.) In short, Deputy Trejo became a posthumous celebrity. That celebrity was created by the numerous articles about him, his family, his love for his work in law enforcement, and all that he had done for Sonoma County residents.

Editorials and letters to the editor in the local press expressed gratitude to Deputy Trejo for his work; such published acknowledgments particularly weigh in favor of a venue change. (See *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 290; *People v. Hamilton, supra*, 48 Cal.3d at p. 1157.) The Sonoma County community displayed their civic pride by fundraising for Deputy Trejo's family and creating a permanent memorial in his honor, actions which were well-publicized. In sum, unlike in *People v. Suff, supra*, 58 Cal.4th at p. 1048, but paralleling *Daniels v. Woodford, supra*, 428 F.3d at pp. 1210-1212, other factors relative to the nature and extent of the media coverage weighed in favor of a change of venue.

Fourth, respondent appears to claim that the trial court denied the venue motion in part because it found that the coverage was "predominantly local." (RB 56, citing 18CT:3620.) But the trial court did not rely upon the publicity being predominantly local as a factor to deny appellant's motion. Indeed, such a finding would make no sense. As this Court indicated in *People v Famalaro, supra*, 52 Cal.4th at p. 22, extensive publicity about a case must be viewed in context. In *Famalaro*, while there was extensive publicity in the county in which the crime occurred, and where the defendant was to be tried, the impact was dispersed throughout "media-saturated Southern California," such that referring only to the number of stories was misleading. (*Ibid.*) There is no dispute that here the press coverage was predominantly local. The media coverage was not only essentially kept within the bounds of the county, but the pervasive adverse publicity appeared in the one main source of news for Sonoma County residents, the Santa Rosa Press Democrat (Press Democrat), a fact with which the trial court agreed. (18CT:3624.) Unlike *Famalaro*, the publicity was far from dispersed in a media-saturated area, but instead was

concentrated in Sonoma County's one main newspaper, the Press Democrat.

Fifth, contrary to respondent's contention, the passage of time did not dissipate the prejudice from the publicity. (RB 55.) While there may have been less reporting after the first few weeks following the crime, appellant's case remained in the Sonoma County public's eye long after the first few weeks, as the trial court itself recognized. A full year after the crime, the trial court stated that appellant's case remained "of considerable public interest" and there was "a reasonable likelihood that public dissemination by any means of extra-judicial statements relating to [the] case may interfere with a fair trial, and may otherwise prejudice the due administration of justice." (12CT:2321.) The passage of time between the crime and appellant's motions did not diminish the harm from the prejudicial publicity. (See AOB 193-196.) Both the pretrial surveys and the jury selection process substantiated appellant's argument that the continued pervasive adverse publicity weighed heavily in favor of changing venue at the time of the pretrial motion, and demonstrated that it was reasonably likely that appellant was prejudiced by the trial court's error in denying the motion.

Additionally, it is unlikely that the number of adverse reports published about appellant and the death of one of Sonoma County's local heroes would follow the case to any other county in the state, and certainly not to the extent that the crime and appellant were reported in Sonoma County. For cases that are the focus of unusual public attention, the effect of prejudicial pretrial disclosures or widespread community antagonism can be substantially overcome by a change of venue. (*Maine v. Superior Court*, *supra*, 68 Cal.2d at pp. 382-383.) In *People v. Gallego* (1990) 52 Cal.3d 115, 167, the substantial coverage of the crime and the defendant

diminished significantly when the case was moved to a county 50 miles away, as did the publicity regarding the victims, who the press had reported in the county of origin as likable all-American college students. By contrast, in *People v. Davis* (2009) 46 Cal.4th 539, 575, it was reasonable for the trial court to assume that media attention would follow the case to a new venue where there was pervasive publicity throughout the state even two years after the crime. This is because media attention will follow a high-profile case to a new venue where the media coverage has "permeated every corner" of the state. (*People v. Manson* (1976) 61 Cal.App.3d 102, 177.) Here, there was absolutely no evidence to support or even suggest that the extensive media coverage had touched other counties in the state. The publicity was limited to Sonoma County and changing venue to any of the other 57 counties in California would have permitted appellant to have a jury venire that would not have been inundated with the adverse publicity that permeated Sonoma County.

Lastly, a county removed from the locale of the crime would have resulted in a degree of objectivity among the jury pool unattainable in Sonoma County. The death of Deputy Trejo was tragic and would engender some sympathy anywhere. However, it is the passions aroused against the defendant in the county where the crime occurred, in addition to the amount of publicity, that determine whether a fair trial can be had. (See *People v. Davis*, *supra*, 46 Cal.4th at p. 577.) A community's passionate reaction to the death of one of their own officers, as well as the level of community antagonism against the accused, is generally much greater in the county where the crimes occurred. (See *ibid.*) The media's reporting of Deputy Trejo's death understandably inflamed the emotions of the Sonoma County community, and thereby its prospective jurors, resulting in the reasonable

likelihood that appellant could not get a fair trial there. "'In counties geographically removed from the locale of the crime, lack of a sense of community involvement will permit jurors a degree of objectivity unattainable in that locale'" and "'local consciousness of the community's reputation for peace and security will be eliminated.'" (*Ibid.*, quoting *Corona v. Superior Court* (1972) 24 Cal.App. 3d 872, 883.) The emotional impact of the homicide of a law enforcement officer, while always strong, is greater in the community in which the officer worked and lived, where the deceased officer was known to the community and whose accomplishments and personal story appeared repeatedly in local publicity. (12RT:1444-1445 [expert testimony of Dr. Bronson].)

People v. Suff, supra, 58 Cal.4th 1013, provides support for appellant's argument that the nature and extent of the media coverage weighed in favor of a change of venue. This Court compared the circumstances in *Suff*, which did not warrant a venue change, to those in *Daniels v. Woodford, supra*, 428 F.3d at p. 1212, in which the Ninth Circuit found that the trial court erroneously denied defendant's motion for change of venue. This Court in *Suff* noted that among the reasons a venue change was warranted in *Daniels* was that the publicity had turned the police officer victims in that case into "posthumous celebrities." (*People v. Suff, supra*, 58 Cal.4th at p. 1048.) Similar to the police officer victims in *Daniels*, in the instant case, Deputy Trejo became a posthumous celebrity. In *Daniels*, the community named a stadium after one of the victims and the victim officers were also recognized in a memorial for fallen officers. (*Id.* at p. 1048.) This Court in *Suff* highlighted the significance of pervasive civic involvement in *Daniels*, a factor equally present in appellant's case. Community residents raised funds for Deputy Trejo's family, among other

fundraising events in the deputy's honor, and the community created a permanent memorial honoring Deputy Trejo. This Court in *Suff* further observed that the community in the venue where the crimes occurred in *Daniels* reacted passionately to the deaths of the two slain officers, noting that approximately 3000 people attended the funerals and that editorials and letters to the editor advocated execution. (*Ibid.*) Likewise, the Sonoma County community expressed a substantial and passionate outpouring of grief over Deputy Trejo's death. Over 2000 people attended Deputy Trejo's funeral, which was televised and heavily covered in the media. Indeed, as this Court indicated, facts like those in *Daniels*, which appellant's case closely mirrors, establishes that the nature and extent of the media coverage weighed in favor of a change of venue. And as the Ninth Circuit found in *Daniels*, on facts remarkably comparable to those in appellant's case, the trial court's refusal to change venue violated the defendant's right to a fair and impartial trial and thus, his right to due process. (*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1212.) The trial court's refusal to change venue was error and violated appellant's right to a fair trial and to due process.

c. Size of the Community

The size of Sonoma County weighed in favor of granting appellant's motion because the impact of the widespread and inflammatory publicity was not neutralized or diluted in Sonoma County. (AOB 180-183.) Respondent contends that the adverse publicity "could be" absorbed by the populace and that the trial court correctly found that this factor did not support changing venue. (RB 56.) Respondent is incorrect.

The population of a county is relevant, but is not determinative. The critical factor is whether the size of the population is large enough to neutralize or dilute the impact of adverse publicity. (*People v. Proctor*

(1992) 4 Cal.4th 499, 525; *People v. Jennings*, *supra*, 53 Cal.3d at p. 363.)

The size of the community supported changing venue because the evidence at the venue hearing, which was substantiated during jury selection, demonstrated that the negative publicity and its impact remained in the county's public consciousness. (AOB 180-183.) Respondent largely ignores this point and relies exclusively on the population of Sonoma County, arguing that its size alone was enough to weigh against changing venue. Respondent is mistaken. Respondent also argued that the publicity theoretically "could be" absorbed by the populace of Sonoma County. However the record demonstrates that in reality it was not. Jury selection revealed that the impact of the adverse publicity and the community's sense of personal involvement remained in Sonoma County. The community's connection to the case permeated the county. As in *People v. Davis*, *supra*, in which this Court determined that a county more urban than Sonoma County would not experience the "small town" reaction or connection to the 1993 crime that had occurred in that county (*People v. Davis*, *supra*, 46 Cal.4th at p. 577), changing venue was called for here. In sum, because the extensive and inflammatory publicity was not diluted by the size of Sonoma County, this factor weighed in favor of changing venue.

d. Community Status of the Defendant

In his opening brief, appellant argued that his status in the community as an outsider who was vilified in the press warranted changing venue. The local press had assailed appellant who, by the time of appellant's motion, was known in Sonoma County as a "cop-killer," an "animal," "a violent criminal," a member of the Aryan Brotherhood, a white racist prison gang, a "cold-blooded" murderer, an escape risk, and a hostage-taker. (See AOB 173-179; see also 14CT:2694, 2699, 2700, 2716,

2717, 2733, 2756; 15CT:2895, 2906, 2922, 2946.) Respondent does not dispute that appellant was portrayed in the media as an outsider to Sonoma County, and a recent parolee with a long criminal record, but contends that changing venue would not likely produce a less biased pool of jurors because "disdain for such persons is not confined to the borders of Sonoma County." (RB 57, quoting trial court at 18CT:3618.) Respondent believes that appellant, as a recent parolee with a long criminal record, would face no less disdain in any of the other 57 counties in California than in Sonoma County because of the "often universal" unpopularity of criminal defendants. (RB 57.) This simply ignores the negative portrayal of appellant in the Sonoma media and the fact that the citizens would be judging an outsider who killed one of their own.

When the only news coverage about the accused is negative, particularly where the defendant is not a local resident, and nothing positive is written in the media about the accused, the status of the defendant in the community weighs strongly in favor of a change of venue. (See *Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 584-585; compare *People v. Pride* (1992) 3 Cal.4th 195, 224-225 [status of defendant does not weigh in favor of venue change where defendant had ties to the community and negative publicity was tempered with comparable coverage of a sympathetic and positive nature about the defendant].) Such was the case here. The media published numerous stories over the course of the year before appellant's motion, all demonizing appellant and none offering any mitigating or humanizing references. It is true that most people would feel disdain for a defendant with a lengthy criminal record who was a recent parolee and an outsider accused of killing a local deputy sheriff. But both the trial court and respondent fail to acknowledge that by the time of the venue motion

appellant was particularly notorious in Sonoma County because of the extensive, prejudicial publicity, much of which included evidence not admissible at trial. (See AOB 152-163, 173-179; see also 12RT:1464-1465.)

Respondent further contends that the media's portrayal of appellant as a white supremacist prison gang member did not warrant changing venue to another county because any community would be hostile to a defendant so portrayed, and there was no evidence of group hostility to white supremacists particular to Sonoma County. (RB 57.) In support, respondent cites *People v. Price* (1991) 1 Cal.4th 324.[2] Respondent's reliance is misplaced. In *Price*, the media coverage included allegations of the defendant's affiliation with the Aryan Brotherhood, as well as allegations that defendant was not a member of that group. (*Id.* at pp. 391-392.) Whether or not the defendant was affiliated with the group, however, was not an issue that informed the finding that the defendant's status in the community did not weigh in favor of a venue change. That finding was because the defendant was not a friendless outsider. (*Id.* at p. 392.) In contrast, appellant, passing through Sonoma County on his way from prison to his home in Southern California, was the epitome of a "friendless outsider," a fact with which respondent takes no issue. Moreover, any allegations that appellant may have been affiliated with the Aryan Brotherhood were inadmissible at his trial. In *Price*, the defendant's alleged affiliation was part of the prosecution's case and significant evidence regarding the defendant's association with the Aryan Brotherhood

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[2] Respondent states "*People v. Pride*," in its argument (RB 57) but apparently means "*People v. Price*." The date, volume and page references are to *Price*, not *People v. Pride* (1992) 3 Cal.4th 195.

was presented at trial. (*Id.* at pp. 377-379.) Furthermore, unlike in appellant's case in which the media repeatedly maligned and disparaged appellant, the itinerant, white-supremacist outsider, the defendant in *Price* was not a friendless outsider. The media reported that the defendant's mother lived in the county and the defendant had lived with her there. Furthermore, the coverage in *Price* was found to be restrained and balanced. (*Id.* at p. 392.)

Moreover, this Court has frequently framed its discussions regarding the relative status of the defendant and victim in the community as if they were a single factor. (See *People v. Williams*, *supra*, 48 Cal.3d at pp. 1130-1131 [relative status of the victim and the defendant in the community where the accused is the quintessential other and the victim was a local woman from a prominent family]; *Williams v. Superior Court*, *supra*, 34 Cal.3d at pp. 588, 593, 595 [factors examined include "the status of the victim and of the accused" and weigh in favor of a venue change when the victim may have some prominence in the community, while the defendant is but a stranger to and friendless in that same community]; *Fain v. Superior Court of Stanislaus County* (1970) 2 Cal.3d 46, 49, 51 [facts weighed in favor of venue change where victim was a popular high school athlete and the defendant, a resident of the area for only a few months prior to the crimes, had not been integrated into the community].)

Lastly, there is no evidence, and no reason to believe, that the massive local publicity about one of Sonoma County's own deputies being killed by a stranger passing through its borders would have continued in another county to the degree of saturation that it had in Sonoma County.

To the extent that the trial court made any factual findings that appellant's status within the community did not weigh in favor of a change

of venue, those findings are not supported by the evidence. In any event, this Court's independent review will reveal that appellant's status as a friendless outsider in the community supported appellant's motion that it was reasonably likely that he could not receive a fair trial in Sonoma County, and that it was reasonably likely that he did not, in fact, receive a fair trial.

e. Status of the Victim

The popularity and the posthumous celebrity of Deputy Trejo weighed in favor of a change of venue. (AOB 169-172.) Respondent argues otherwise, contending that Deputy Trejo was not well-known before his death and that he became known only because of the publicity that he was an officer killed in the line of duty, a circumstance that would engender sympathy and follow the case to any other county in California. (RB 57-58.) Respondent is correct that such a death will engender some sympathy in any community. But acknowledging that all counties will be sympathetic to the death of an officer killed in the line of duty does not address appellant's arguments or this Court's authority regarding the significance of the status of the victim in determining whether venue should be changed. In addition to the attendant emotions from the loss of an officer in the line of duty, other circumstances existed that supported changing venue from Sonoma County, including the impact from the publicity that resulted in Deputy Trejo's post-crime prominence and the fact that Deputy Trejo was a long-time deputy sheriff in Sonoma County, who protected the very community in which appellant was to be tried. Additionally, local residents were so affected by Deputy Trejo's death that they created a permanent memorial to remind all passersby of their fallen hero. Thus, Deputy Trejo's status as a hero in the community weighed heavily in support of changing

venue.

Respondent contends, echoing the trial court, that Deputy Trejo's status in the community did not weigh in favor of changing venue because it was only his occupation that elevated his status in the community. (RB 58, citing 18:RT:2651.) Respondent, as did the trial court, fails to take into account the attendant publicity, and the civic pride and community involvement that developed in this case.

Respondent recognizes that Deputy Trejo and his family became well-known in Sonoma County, and Deputy Trejo became a "posthumous" hero because of the publicity surrounding his death. (RB 58.) But respondent then contends that Deputy Trejo's notoriety as a posthumous hero would have followed the case to any county. There is simply nothing to support this contention. Deputy Trejo's notoriety resulted from the local media coverage and the pervasive civic involvement of Sonoma County residents who engaged in fundraising for Deputy Trejo's family and built a permanent memorial to keep his memory alive within the Sonoma community.

Had venue been moved, prospective jurors would have been drawn from a community other than the one in which the officer served. The prospective jurors in a new venue would not be members of the community that sent thousands of mourners to Deputy Trejo's memorial service or viewed it on locally-broadcast television. The jury pool in a new venue would not include citizens who either attended or watched the memorial service, or had friends, co-workers or acquaintances who attended or watched. Had venue been moved, the prospective jurors would not have been part of the community who organized fundraisers to help Deputy Trejo's family. It is improbable that prospective jurors in a new county

would have been exposed to the publicity lauding Deputy Trejo for his commendable service to the residents of Sonoma County. They would likely be unaware that in recognition of Deputy Trejo's service to the county, the Latino Peace Officers Association established a Deputy Trejo Scholarship fund for students planning a law enforcement career. There is no reason to believe that a jury pool in a county other than Sonoma would see, read or hear about the permanent memorial erected in Sonoma County to commemorate Deputy Trejo. Respondent's argument that Trejo's special prominence in Sonoma County would have followed the case in another county is unsupported.

Respondent relies on *Odle v. Superior Court* (1982) 32 Cal.3d 932, to support its contention that Deputy Trejo's posthumous celebrity did not weigh in favor of changing venue because the only reason he became a celebrity in Sonoma County was because he was an officer killed in the line of duty, and the fact that he was an officer killed in the line of duty would follow him to any other county in the state. Respondent's reliance on *Odle* is misplaced for two reasons. One, this Court in *Odle* did not find that the status of the victims weighed against a change of venue, or limit the analysis solely to a victim's pre-death status in the community. After noting that the trial court's characterization of the victim officers' status in the community before their deaths was not one of prominence was correct, this Court found that the trial court had failed to take into consideration that the victim officers had become posthumous celebrities in the county where the crime occurred by virtue of the events and media coverage after the crimes. (*Id.* at p. 940.) Respondent and the trial court failed to take into account similar facts in the present case. (RB 58; 18RT:2651.) Deputy Trejo's posthumous celebrity as a fallen local hero was due in large part to the

media coverage and events *in Sonoma County*, where the crime occurred. In other words, respondent essentially ignored the publicity in making its argument that Deputy Trejo's status weighed against changing venue because his status as a police officer killed in the line of duty would follow to any county. As this Court found in *Martinez v. Superior Court*, *supra*, the part that publicity plays must not be ignored in assessing the factors; the factors are indicators of the potential prejudice from pretrial publicity and the publicity informs the assessment of the factor. (See *Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 578, 582.) In *Martinez*, this Court observed that the attorney general in that case, in arguing that the nature and gravity of the offense did not warrant changing venue, had ignored the publicity in its assessment of the evidence regarding that factor. Likewise here, respondent has ignored the Sonoma County publicity that accounted for Deputy Trejo's rise to prominence in that county. Moreover, in *Odle* the publicity was largely concentrated in only one portion of the populous county, and the status of the victims was inconclusive on whether their status weighed in favor of a change of venue. (*Odle v. Superior Court*, *supra*, 32 Cal.3d at pp. 940-941.) In appellant's case, the publicity was in the one main source of news for the county, the Press Democrat, and there is nothing in the record to suggest the publicity was limited or narrowed to only a portion of the county.

The second reason respondent's reliance on *Odle* is misplaced is that prominence derived from one's occupation, when that occupation in part leads to the publicity, is relevant to and should be considered when assessing whether the status of the victim weighs in favor of changing venue. For example, in *Martinez* v. *Superior Court*, *supra*, 29 Cal.3d at p. 584, the victim's prominence in the public eye derived from his

employment as a railroad brakeman for the largest employer in the area, a fact repeatedly published in the media and which "undoubtedly engendered community sympathy," despite the victim not being a "public figure." As a law enforcement officer, Deputy Trejo's prominence derived from his public service in Sonoma County. Killed in the line of duty, his death engendered significant community sympathy precisely because he served in an occupation where he protected the residents of Sonoma County. Thus, Deputy Trejo's status as a law enforcement officer who was killed in the line of duty weighed strongly in favor of changing venue.

Lastly, there is no need to speculate as to the effect from the publicity about Deputy Trejo because the jury selection process substantiated that this factor weighed in favor of granting appellant's motion. Numerous prospective jurors recalled the coverage about the case and the impact it had on them and the community as a whole. Prospective jurors attended Deputy Trejo's memorial service, or watched it on television or spoke with others in the Sonoma Community who had attended the service (see, e.g., 41A-RT:5687, 5704-5705; 2SuppCT:379; 4SuppCT:876; 5SuppCT:1154-1155, 1216-1217; 6SuppCT:1588; 8SuppCT:2177-2178; 13SuppCT:3573; 16SuppCT:4285-4286; 17SuppCT:4596, 4658; 18SuppCT:5060-5061; 19SuppCT:5154-5155; 21SuppCT:5742-5744; 22SuppCT:6052-6053), read about and/or saw the photos of the heavily-attended memorial service in the media, contributed to the memorial funds on Deputy Trejo's behalf, and/or were otherwise well-aware of the community's response to the loss of Deputy Trejo and affected by it (see, e.g., 39RT:5515-5516; 42RT:6090-6091; 1SuppCT:217; 2SuppCT:379, 473, 503; 3SuppCT:690, 782-783; 4SuppCT:875; 5SuppCT:1216-1217, 1279; 6SuppCT:1589; 7SuppCT:1806; 8SuppCT:1991, 2177-2178;

9SuppCT:2302, 2488; 10SuppCT:2673; 16SuppCT:4285-4286; 18SuppCT:5030, 5060-5061; 19SuppCT:5186; 21SuppCT:5742-5744; 22SuppCT:5991-5992, 6052-6053). Indeed, members of the actual jury recalled and could describe the impact the death of Deputy Trejo had on them. Juror 3726 and her brother, who had once wanted to be a police officer, together watched Deputy Trejo's memorial service on television and talked about the service and the case. (See 43RT:6448-6451; 10SuppCT2642-2643.) Juror 4084 recalled the impact that Deputy Trejo's memorial service in Sonoma County had on him, stating that what struck him most was the pictures of the family, "that's the part that . . . brings the emotion out . . . the deceased is gone and the family is there grieving." (See 43RT:6297, 6309.) Juror 4064 recalled the shock that he felt reading about the case. (See 43RT:6372.) The news coverage about Deputy Trejo had saturated the county and its impact had not dissipated.

Deputy Trejo's status in the Sonoma community was unique to the county. Both the community's involvement in fundraising for Deputy Trejo's family and establishing a permanent memorial in his honor demonstrated significant civic involvement. This factor weighed strongly in favor of a change of venue. (See *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 385 [strong indication venue should be changed where local citizens organized a fund to help with the victim's medical expenses and the sum raised demonstrated pervasive civic involvement].) The trial court's finding that this factor did not weigh in favor of a change of venue is not supported by the evidence. Respondent provides nothing from the record that suggests otherwise.

f. Political Overtones Supporting a Change of Venue

Finally, there were political overtones to appellant's case. Following the crime, a long-simmering controversy erupted over the state's procedure that led to appellant being released from prison in Northern California without a law enforcement escort to his home county hundreds of miles away. Opponents of the procedure believed that it left Sonoma county residents vulnerable. Two Sonoma County legislators, before Deputy Trejo's death, had expressed concern specifically about Pelican Bay State Prison, and the state's practice of releasing inmates from that prison without guarded transportation to their home counties, most of which were in Southern California. Their legislation to prevent that practice previously had been vetoed. After Deputy Trejo's death, they reintroduced a bill to ensure that such a tragedy would not be repeated. (AOB 183-185.) This too weighed in favor of granting appellant's motion.

Respondent argues otherwise, contending that the legislative response that resulted from Deputy Trejo's death, to address supervision of a parolee's release from prison, did not constitute a political factor that should be considered in deciding whether venue should be changed. (RB 58). Respondent simply relies on and quotes the trial court's statement that the legislative response to appellant's behavior was not a political factor. (RB 58; 18CT:3626.)

Respondent is mistaken, as was the trial court which limited the relevance of this factor to situations that mirrored the circumstances in *Powell v. Superior Court* (1991) 232 Cal.App.3d 785 and *Maine v. Superior Court, supra*, 68 Cal.2d 375. In *Maine*, the district attorney disqualified the judge, whose seat he was running for, and defense counsel was also

competing for the same judgeship. This Court found that these circumstances favored a change of venue because they could result in the case becoming involved in county politics and that political factors have no place in a criminal proceeding. (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 387.) In *Powell*, the publicity about the political controversy surrounding the case was found to be pertinent to a review of the trial court's denial of a venue change motion where the political fallout had the potential of infecting the potential jurors. (*Powell v. Superior Court, supra*, 232 Cal.App.3d at p. 790.)

Similarly, politics intruded into appellant's criminal proceedings from the long-standing issue of Pelican Bay prisoners being released and passing through Sonoma County and from the Governor's veto of legislation that would have required the Department of Corrections to transport "high-risk convicts" released from that prison to their home counties. (See 14CT:2705; 15CT:2896, 2899.) The political debate was reignited by appellant's arrest, which led to the legislation being reintroduced prior to trial. Media coverage pointed to "cop killer Scully" as the reason for the law's need. (14CT:2705; see also 14CT:2706 ["we are lucky we don't have more Scullys on the loose"].) The legislators advocating for the law stated that Deputy Trejo might very well be alive today had the Governor not vetoed the prison transport legislation. (14CT:2706.) According to the media, the Governor's veto had left Sonoma County vulnerable and in this instance, Deputy Trejo unprotected. Given the publicity about the legislation, the veto, the reintroduction of the bill and the adverse publicity about appellant as epitomizing the reason for the law's need, this political controversy entered appellant's criminal proceedings and further supported changing venue.

In *People v. Tidwell, supra*, 3 Cal.3d at p. 71, the reporting included political debate about the fiscal impact on the county from the trial. This Court noted that the political factors present in *Maine* were different from those in *Tidwell*, but nonetheless expressed concern that the published material indicated that there was considerable political debate concerning the impact of the trial on the county. (*Ibid.*) As demonstrated in *Tidwell*, this Court has not required that relevant political factors are limited to well-publicized county-wide controversy, as in *Powell*, or a case where the prosecutor and defense counsel are competing for the same judgeship, as in *Maine*. The publicized political debate regarding the reintroduced legislation to prevent repeating the tragic situation that resulted in Deputy Trejo's death introduced a political factor into appellant's case and trial. These political overtones further supported appellant's motion that venue should have been changed because it was reasonably likely that he could not, and in fact did not, receive a fair trial in Sonoma County.

In sum, had the trial court made a fair assessment of the evidence at the time of the pretrial motion, appellant's motion would have been granted. This Court has been "[m]indful that trial courts are understandably reluctant to change venue when the parties and witnesses are in place and jury selection has begun." (*Odle v. Superior Court*, supra, 32 Cal.3d at p. 943; see also *Maine v. Superior Court, supra*, 68 Cal.2d at p. 380.) Such reluctance was magnified in appellant's case where, in addition to the factors this Court noted in *Odle* and *Maine*, the trial court had ordered a joint trial for appellant and his codefendant, but with separate juries. Despite repeated pleas from appellant that an attempt to select his jury occur first, or the court would be even less inclined to grant appellant's renewed motion given that the co-defendant's jury would have been

selected and waiting for weeks to begin trial, his co-defendant's jury selection preceded appellant's. Additionally, the county had undertaken a significant expense in modifying the courtroom to accommodate two separate juries. (See AOB 83.) This too would likely add to the trial court's reluctance to grant a renewed motion. While this might be understandable from a fiscal standpoint, such consideration must certainly bow to appellant's constitutional right to a fair and impartial jury.

Each factor supported changing venue. Even if in its independent review this Court finds that one or more factors may have been marginally in appellant's favor, or even neutral, any doubt as to the necessity of removal to another county must be resolved in favor of a venue change. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 585.) It was error to deny appellant's pretrial motion to change venue. As established in appellant's opening brief and below, the trial court's error in denying appellant's pretrial motion was prejudicial. The record shows that it was reasonably likely appellant did not in fact receive a fair trial.

2. The Trial Court's Denial of Appellant's Renewed Motion to Change Venue Was Error and Appellant Established That It Was Reasonably Likely That He Did Not, In Fact, Receive a Fair Trial in Sonoma County

Even if this Court concludes in its independent review of the record that at the time of appellant's pretrial motion the evidence did not demonstrate that it was reasonably likely that appellant could not receive a fair trial in Sonoma County, appellant established at the time of his renewed motion that it was reasonably likely that appellant could not, and in fact, did not, receive a fair trial in Sonoma County. (AOB 185-208.) Respondent contends that the trial court's denial of appellant's renewed motion to

change venue was correct because the trial court's jury selection measures were fair, the jurors who prepared questionnaires had a broad and varied spectrum of opinions regarding the case and appellant, and the twelve members of the jury pool who became appellant's actual jurors did not demonstrate bias. (RB 59-72.) Respondent's contentions are not supported by the record and its arguments should be rejected.

In determining whether it is reasonably likely that a defendant could receive a fair trial in the original venue, and whether the defendant in fact received a fair trial, this Court not only independently reviews the actual jury selected, but also reviews the entire jury venire and the selection process of the available jury pool. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 29; *People v. Williams*, *supra*, 48 Cal.3d at p. 1125.) Appellant need not show actual prejudice; appellant need only show a reasonable likelihood that a fair trial was not had in light of the trial court's failure to change venue. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1126.) This appellant has done.

Respondent does not contest that the prospective jurors' exposure to the publicity in this case was high, or that numerous jurors expressed biases against appellant and had such fixed opinions that they could not judge appellant impartially. Respondent contends, however, that enough prospective jurors claimed that they could lay aside their biases and opinions and be a fair and impartial juror such that changing venue was not warranted. (RB 62-63.) Appellant disagrees.

Assurances of fairness by prospective and actual jurors are not sufficient to deny a motion to change venue where, as here, "the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime."

(*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1211.) The publicity in *Daniels*, like that in appellant's case, saturated the community with prejudicial and inflammatory publicity about the crime, leading the Ninth Circuit to conclude that the evidence supported a finding that prejudice could be presumed. (*Ibid.*) In *Daniels*, the evidence that the Ninth Circuit found to support its findings included that eighty-seven percent of the jury pool recognized the case from the publicity and that two-thirds of those empaneled remembered the case from the press accounts. (*Id.* at pp. 1211-1212.) These numbers are remarkably similar to the recognition rates found in appellant's case, both as to the jury venire and the actual jurors. Eighty-five percent of the venire who underwent general voir dire had knowledge of the case before arriving for jury duty. (51RT:7888, 7894; 21CT:4272-4287.) Seventy-five percent of appellant's jurors who passed judgment on and made decisions about appellant's guilt and sentencing had knowledge about appellant's case before arriving for jury duty. (51RT:7890; see also AOB 141, fn. 57.)

This Court has stated that when a community, and thus the jury pool, remembers the case and the adverse manner in which the defendant was portrayed in the media, "'[t]he relevant question is ... whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant.'" (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31, quoting *Patton v. Yount* (1984) 467 U.S. 1025, 1035.) However, even when the actual jurors all state under oath that they could put aside outside influences and fairly try the case, such assertions of impartiality do not automatically establish that the defendant has received a fair trial. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31.) When, as here, the entire record of voir dire demonstrates that the ubiquitous pretrial publicity had indeed reached all

but approximately 15 percent of the jury pool and had influenced a significant percentage of that pool, the case has become embedded in the public consciousness such that the prospective and actual jurors' attestations of the ability to be fair and impartial cannot be relied upon. (See *ibid.*; see also *People v. Williams*, *supra*, 48 Cal.3d at p. 1129 [case was "deeply embedded in the public consciousness" where half of the prospective jurors questioned knew something about it]; see also Patterson & Neufer, *Removing Juror Bias by Applying Psychology to Challenges for Cause* (1997) 7 Cornell J. L. & Pub. Pol'y 97, 100 & fn. 22 [studies show the inability of jurors to set aside or disregard pretrial publicity or inadmissible evidence]; *Bruton v. United States* (1968) 391 U.S. 123, 128-130; *People v. Aranda* (1965) 63 Cal.2d 518, 525-526 [expectation that a juror can insulate his or her verdict from inadmissible knowledge is unrealistic].)

Respondent argues, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1216, that appellant's case does not fall within the "exceptional" category of cases where the extensive pretrial publicity can create a presumption of prejudice. (RB 70-71.) In *Prince*, the defendant argued the publicity in his case was so pervasive and inflammatory that prejudice must be presumed. (*Ibid.*) This Court agreed that "[i]n exceptional cases,'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,' [citation]....'" (*Ibid.*, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 429.) The Court did not find, however, that the facts in *Prince* warranted a finding of a presumption of prejudice. (*Id.* at p. 1218.) In *Prince* the bulk of the publicity was framed in neutral terms and did not reflect a campaign against the defendant; there were articles and reports concerning the arrest

and potential prosecution of persons other than defendant, including reports that the community remained uncertain as to who the perpetrator was; and even as to the reports about the crime, the publicity merely recounted the facts, the course of the investigation, and the circumstances of defendant's arrest. (*Ibid.*) The media also did not describe or label the defendant using unsavory and emotion-provoking terms or print invidious articles which would tend to arouse ill will and vindictiveness. (*Ibid.*) Moreover, a low percentage of prospective jurors in *Prince* had formed an opinion concerning defendant's guilt. (*Id.* at pp. 1212, 1219.) Indeed, the defendant in *Prince* did not even renew his motion to change venue during or at the close of jury selection, a fact which itself supports a reasonable inference that the defense did not believe that pretrial publicity had prejudiced the seated jurors or rendered them unable to afford defendant a fair trial. (*Id.* at pp. 1215-1216.).

What was missing in *People v. Prince, supra, was* present in appellant's case. Animosity and prejudgment were steeped in the Sonoma County media and it percolated its way to the vast majority of the prospective jurors. (See AOB 110-140; 151-167.) Moreover, unlike in *Prince*, appellant renewed his motion to change venue given the impact from the pretrial publicity as demonstrated during the jury selection process, including that when five of the 12 actual jurors first arrived for jury duty, they either leaned toward the prosecution or recalled the emotional impact of the case from the publicity. (See AOB 186-189.) In sum, there were multiple fundamental differences between appellant's case and the circumstances in *Prince* that demonstrate that the prospective jurors' assurances of impartiality here, even accepting them as sincere, could not be accepted as credible in light of the pervasive, inflammatory and one-sided

publicity that painted appellant as the "cop-killer" who, the press reported, caused their community to become "a paradise lost." Appellant's case falls within the exceptional category of cases in which the extensive pretrial publicity resulted in a presumption of prejudice.

Appellant recognizes that this Court has stated that it is a narrow category of cases where adverse pretrial publicity creates such a presumption of prejudice that a juror's attestations of impartiality, while sincere, are subject to doubt in light of the publicity. (See *People v. Farley*, *supra*, 46 Cal.4th at p. 1086; cf. *People v. Prince*, *supra*, 40 Cal.4th at p. 1216.) Such cases involve more than pervasive and adverse publicity that has reached most of the members of the venire – for example, a lack of solemnity during the jury selection process or a broadcast of the accused's jailhouse confession. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1086, citing *People v. Prince*, *supra*, 40 Cal.4th 1179.) In finding that *Farley* did not fall within the limited class of cases where prejudice would be presumed, this Court noted that the publicity was largely factual and noninflammatory, the record was devoid of evidence that the jury selection process lacked solemnity, and none of the seated jurors remembered much, if anything, about the case. This was not the situation in appellant's case. The publicity was decidedly inflammatory rather than largely factual. (See AOB 151-167.) Furthermore, the adverse publicity exacerbated the harm that flowed from the other four factors that inform whether there was a reasonable likelihood that appellant could not, and did not, receive a fair trial – that appellant was the feared outsider (status of the defendant) who intruded upon Sonoma County and took the life of a community protector and hero (status of the victim). In this case, the extensive adverse publicity and the community's sense of outrage that accompanied appellant's case from the

time of his arrest – indeed even in the hours before his arrest when appellant was captured by a SWAT team outside the home where he had held hostages as he negotiated a surrender – until the day the prospective jurors arrived for jury duty, resulted in a presumption of prejudice such that their assurances of impartiality can not be credited.

Respondent maintains that the actual jurors' assurances of impartiality, like those in the jury venire, showed that they were not biased and that appellant therefore received a fair trial. (RB 63-72.) Appellant acknowledges that the jurors and alternates agreed that they could be fair and impartial. Indeed, had they not, they would have been excused for cause. This is not, however, the end of the inquiry or analysis. Even if all 12 jurors testified under oath that they could put aside outside influences and fairly try the case, it does not necessarily establish that the defendant received a fair trial when the record of voir dire demonstrates that the pretrial publicity had a prejudicial effect. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31.)[3] Such was the case here.

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[3] *People v. Famalaro* is instructive on the caution that must be exercised when assessing the credibility of assurances of impartiality when extensive adverse publicity has preceded jury selection. In *Famalaro*, a number of jurors had given assurances of their ability to be fair and impartial. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 25.) One juror had claimed under penalty of perjury that he knew little about the case and in any event had not prejudged the defendant's guilt or pre-determined the penalty, but it was later learned that he was observed by other prospective jurors, in a "tirade," yelling and calling the defendant "scum." (*Ibid.*) Yet another juror was empaneled and due to be sworn when she interrupted the trial court and admitted that she could not be fair, indeed, stated that she had a "hard time even looking at the defendant." (*Id.* at p. 27.) These jurors exemplify the difficulty of accepting a juror's assurances of impartiality and ability to alter a fixed opinion due to extensive adverse publicity in the

(continued...)

When extraordinary local prejudice will prevent a fair trial, due process compels the transfer of the trial to a different venue. (*Skilling v. United States*, *supra*, 561 U.S. at p. 378.) Respondent's apparent assumptions, that the prospective jurors' attestations of his or her ability to be fair and impartial are tenable, despite their knowledge about the case from outside sources and the pervasive and inflammatory publicity in this case, are incorrect. A juror's declaration of impartiality is not conclusive and while this Court gives weight to the trial court's finding of fairness, it is not bound by those findings. (*People v. Davis*, *supra*, 46 Cal.4th at p. 581.) Research studies have shown that a juror's assurance of impartiality and self-proclamation of objectivity must be viewed with caution. These studies demonstrate that jurors are disinclined to admit bias and are motivated to appear unbiased, and that these inclinations are heightened by the courtroom environment.[4] (See Simon, *More Problems With Criminal Trials: The Limited Effectiveness of Legal Mechanisms* (2012) 75 Law & Contemp. Probs. 167, 187 [jury behavior studies observed the disinclination to admit bias and simulated jurors consistently found to be swayed by extra-evidential factors even as they deny any such influence]; see also Patterson & Neufer, *supra*, 7 Cornell J. L. & Pub. Pol'y at pp. 100, 102 & fn. 22 [admitting to bias perceived as socially undesirable].) This was particularly true in appellant's case where the trial court admitted that it had

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[3] (...continued)
venue in which a defendant is to be tried.

[4] The defense expert at trial explained that "acquiescence bias" – the tendency of a person to give an answer to a question that may be more socially desirable than fully truthful – plays a part in voir dire, unlike in an anonymous survey, where there is no judgment as to one's biases. (12RT:1477-1478, 1502, 1519.)

"badger[ed]" these jurors . . . to keep an open mind." (51RT:7896.)

The nature and extent of the pretrial publicity, paired with the fact that the majority of the actual and potential jurors remembered the pretrial publicity, warranted a change of venue, and the trial court's denial of appellant's motion for change of venue violated his right to a fair and impartial jury and thus, his right to due process. (*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1212.)

Respondent also argues that the jury selection measures that the trial court conducted, and its consideration of the results of that process before denying appellant's renewed motion, were sufficient to ensure that appellant received a fair trial. (RB 63.) Respondent then lists the steps that were taken to select appellant's jury, starting with the county summoning approximately 800 prospective jurors and ending with only 88 after the trial court excused members of that pool for hardship, or based on their questionnaire responses regarding their familiarity with the case from the publicity, their belief in appellant's guilt, their inability to remain fair and impartial, or their opinions on the death penalty. (RB 59-60.) Appellant agrees that the trial court engaged in measures to attempt to find 12 impartial jurors. Those measures were inadequate, however, in light of the prejudicial and inflammatory media publicity about the crime and appellant described in detail in appellant's opening brief and above.

Respondent also takes issue with appellant's argument, based on facts appellant cited from the record which respondent does not dispute, that the substantial number of prospective jurors who were knowledgeable about the case and those who admitted being negatively affected by it, supported a change of venue. (RB 60-63.) Respondent contends that the jurors who prepared questionnaires had a broad and varied spectrum of

opinions regarding the case and proceeds to claim, without citation to the record, that fifty percent had not heard of the case or claimed that they could remain impartial if chosen for the jury. (RB 60.) In support of its argument, and in apparent response to appellant's list of 46 prospective jurors' responses as an example of the significant number who indicated prejudgment from what they had learned before arriving for jury duty (AOB 114-121), respondent gives a list of 12 prospective jurors as its example of the "wide-range of opinions" among the venire. (RB 60-61.) But of these 12 examples, six showed a strong or definite belief in appellant's guilt. Of the remaining, three had heard about the case before appearing for jury duty. In any event, appellant agrees that the members of the venire who answered the questionnaires and participated in voir dire indeed likely gave a wide range of responses to the questions about the effect of the publicity to which they were exposed in Sonoma County, including how it affected them, influenced them to believe that appellant was probably or definitely guilty, or whether, despite the extensive publicity and community and civic involvement in the case, they believed they could remain impartial if chosen. The fact that their responses were different from one another does not diminish the underlying fact established in the record that the recognition rate among the jury venire in Sonoma County was extraordinarily high, as was the number of prospective jurors affected by the adverse publicity toward appellant. The prospective jurors in Sonoma County who admitted to a disqualifying prejudice was significant (see AOB 114-134), such that the reliability of the others' assurances of impartiality are drawn into question.

Respondent does not dispute that the number of prospective jurors, and indeed actual jurors, who had read and heard about appellant's case

before being summoned for jury duty was significant. (See RB 60-61.) Respondent argues, however, that the fact that a majority of the prospective jurors were exposed to the extensive negative publicity is not, in and of itself, sufficient to require a change of venue. (RB 61.) This Court has held, however, that compellingly-high recognition rates among prospective jurors demonstrates the pervasiveness of the news coverage and substantiates that the community awareness of the case is so high that changing venue is warranted. (See *People v. Williams, supra*, 48 Cal.3d at p. 1128.)

Approximately 85 percent of the jury venire indicated some knowledge of the case. (21CT:4273, 4286.) The jury selection from the actual, available jury pool confirmed with remarkable accuracy the high recognition rates found in the pretrial surveys. The trial court found the prosecution and defense venue experts' surveys and their opinions about each others' surveys unhelpful, stating in its order that if the goal of the surveys was to accurately assess how much the potential jury pool in Sonoma County already knows about appellant's case and what percentage may have already formed negative attitudes toward appellant, that goal was not realized. (18CT:3625.) The trial court's assessment of the success of the surveys, however, was clearly wrong as the survey results were remarkably similar to the percentages of the jury pool who knew about the case and who had negative attitudes toward appellant based on the pervasive publicity.[5] In *People v. Tidwell, supra*, 3 Cal.3d at pp. 72-73, this

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[5] There was an 85 percent recognition rate of the 197 prospective jurors who prepared a questionnaire. (21CT:4278-4287.) The pretrial defense survey showed that approximately 83 percent of the respondents

(continued...)

Court found that the circumstances in that case, which included defense evidence provided pretrial that showed the pervasive news coverage of prosecution evidence and county-wide hostility toward the defense, should have resulted in a change of venue. The jury selection process then corroborated the pretrial evidence regarding the extent and effect of the pervasive news coverage and, resolving any possible doubts in favor of a venue change, this Court found that the defendant's renewed motion should also have been granted and reversed the conviction. (*Id.* at pp. 75-76.) As in *Tidwell*, the evidence provided pretrial here, showing the extent with which the publicity had reached an extraordinarily high number of Sonoma County residents, and the impact from that publicity jeopardizing appellant's right to a fair and impartial jury, should have resulted in the trial court granting appellant's pretrial motion. In any event, once that evidence was corroborated by the jury selection process, defendant's renewed motion should have been granted.

This Court's independent review of the record will show that appellant has demonstrated that prejudice should be presumed. The selection process did not result in a panel of jurors untainted by the

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[5] (...continued)
recognized appellant's case (12RT:1482; 51RT:7888-7889), and the prosecution's expert found an approximate 73 percent of Sonoma County respondents recognizing appellant's case (13RT:1716-1717). The prosecution's expert found that 70 percent of his respondents said that appellant is guilty, acknowledging that this high rate was likely from the publicity. (13RT:1731.) Indeed, the prosecution expert's survey results regarding Sonoma county respondents' belief in appellant's guilt were even higher than that found by the defense expert (65 percent) and the prosecution expert noted the closeness of both his and the defense expert's finding. (13RT:1731; 14RT:1799.)

publicity surrounding the case and did not provide appellant with the fair and impartial jury to which due process entitles him. Appellant has shown that it was reasonably likely that he could not, and did not, in fact, receive a fair trial in Sonoma County. The entire judgment must be reversed.

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2

THE COURT PREJUDICIALLY ERRED WHEN IT ADMITTED EVIDENCE OF OTHER CRIMES TO PROVE THE CONSPIRACY AND ATTEMPTED ROBBERY COUNTS

Appellant maintains that the trial court erred when it allowed the prosecutor to present prejudicial evidence of four uncharged prior robberies, purportedly offered to prove the intent element of an alleged attempted robbery of Marian Wilson (Count 4), and a conspiracy to commit a robbery against an unspecified person or people (Count 3). (AOB 209-281.) The trial court admitted this evidence at trial under Evidence Code section 1101, subdivision (b), notwithstanding the fact that, after hearing all of the evidence of the prior crimes at the preliminary hearing, the magistrate found that they were too dissimilar to the circumstances surrounding the alleged offenses to be probative. (9CT:1626-1628.)

The magistrate also found that the evidence of attempted robbery and conspiracy was insufficient to hold appellant to answer for those charges. (9CT:1657.) Nevertheless, the prosecutor refiled those counts and the trial court, over repeated defense objections, permitted the prosecutor to present those weak charges. It was that flawed decision (see Argument 3, *post*) that opened the door for evidence of the irrelevant prior robberies to pour into appellant's trial and prejudice him as to the jury's consideration of the capital charge, which included the prosecution's theory that appellant shot Deputy Trejo on the side of the road during a robbery. The magistrate's original findings were ultimately borne out by the fact that the trial court dismissed the attempted robbery charge for want of evidence (94RT:14931-14933, 14937-14945; 22CT:4609), and the jury could not reach a verdict on the conspiracy charge (129RT:20117).

Appellant has argued that the evidence of the prior uncharged

offenses was inadmissible because (1) while the priors were admitted to show appellant's intent to rob Marian Wilson, there existed no proof that appellant committed a criminal act against Wilson for which his intent was relevant; (2) the uncharged crimes were not sufficiently similar to the charged conduct to be admissible on the issue of intent; (3) the uncharged prior robberies were inadmissible to show a common plan or scheme because the charged conduct did not lead to a similar result and was not markedly similar to the prior robberies; and (4) the probative value of the prior offenses did not outweigh its prejudicial effect. (AOB 235-257.) Respondent disagrees, arguing that the trial court did not abuse its discretion by admitting the evidence for the stated purposes. (RB 86-90.)

A. Evidence Of The Prior Robberies Was Not Admissible

1. The Priors Were Inadmissible to Show Intent Because No Proof Existed That Appellant Committed Any Criminal Act for Which His Intent Was Relevant

As appellant explained in his opening brief, before an uncharged prior offense can be admitted at trial to prove a defendant's intent while committing a criminal act, the prosecutor must make a showing that a criminal act occurred in the first place. (AOB 238-247; *People v. Guerrero* (1976) 16 Cal.3d 719, 722-728; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) Absent the existence of a criminal act, evidence of the defendant's intent is plainly irrelevant to any issue before the jury. Put another way, prior crimes evidence is not admissible to prove a defendant's intent to do a non-criminal act.

Here, at both the preliminary hearing and during pre-trial proceedings, the prosecution failed to show a criminal act from which an attempted robbery of Wilson could be inferred. Absent such evidence,

appellant's intent was irrelevant, the evidence of the prior offenses was inadmissible for that purpose, and the trial court should have excluded the evidence on that ground. At trial, the prosecutor again failed to present evidence of any criminal act towards Wilson, and instead sought to have the jurors supply that missing evidence by reference to the prior robberies, such as: appellant robbed before, so he must have been taking steps to use threat or force to steal from Wilson when he got out of his parked truck. But use of the prior offenses as propensity evidence was unlawful under the plain terms of Evidence Code section 1101, subdivisions (a) and (b), a general proposition on which the parties now agree. (See RB 85.) And the prior offenses were not admitted for that purpose.

Similarly, with regard to the conspiracy charge, the prosecutor failed to present any evidence of an actual agreement between appellant and Moore for which appellant's intent would have been at issue. Instead of presenting evidence of an actual agreement – the sine qua non of conspiracy – the prosecutor sought to have the jurors speculate that appellant and Moore must have agreed to commit a robbery because appellant's prior crimes involved an accomplice. Again, prior crimes evidence cannot be used for this purpose.

Respondent does not address this aspect of appellant's argument. It does not contend that the prosecutor presented evidence of a criminal act amounting to an attempted robbery, or evidence of a conspiratorial agreement, *independent* of the evidence of the prior robberies; it does not argue that the prior crimes were admissible to show the existence of a criminal act of attempted robbery; and it does not argue that the prior crimes were admissible as to the existence of an actual agreement to support the conspiracy charge.

Rather, the entirety of respondent's analysis of this issue is that the evidence of prior robberies and charged conduct were sufficiently similar to show appellant's intent and the existence of a common plan or scheme. (RB 86-90.) But absent evidence of a predicate criminal act of attempted robbery or of a conspiratorial agreement, the prior robberies were irrelevant for those purposes. Accordingly, this Court must find the trial court erred by admitting evidence of the prior uncharged robberies, irrespective of any supposed similarities between those prior crimes and the charged offenses.

2. The Other Crimes Were Not Sufficiently Similar to the Charged Conduct to be Admissible on the Issue of Intent

Appellant also demonstrated in his opening brief that the uncharged crimes evidence was inadmissible on the question of appellant's intent because the charged and uncharged offenses were not "sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402, internal quotes omitted). (AOB 248-251.) Respondent disagrees, arguing that while there were "factual differences" between the prior robberies and alleged conspiracy and attempted robbery of Wilson, sufficient similarities between the prior and charged conduct existed. (RB 87-88.) Respondent is wrong.

First, respondent argues that, "[m]ost notably, the crimes involved robberies of restaurants or bars late at night after they were closed to customers but still had employees inside." (RB 87.) But respondent fails to note that all four of the prior robberies involved appellant and an accomplice entering a restaurant or bar, ordering food and drink, waiting for the establishments to close before drawing weapons, giving orders to the

employees, and then robbing them at gunpoint. None of those activities were present here. While it is true that the prior crimes were committed at night, respondent neglects the fact that the prior offenses occurred in isolated areas where the surrounding businesses were closed. By contrast, testimony in the present case established that numerous businesses in the immediate area of Sushi Hana were still open when Wilson left her place of business for the evening. (73RT:11163-11167, 1171-1175; 74RT:11245.)

Respondent next argues that the prior robberies and the charged offenses all involved surveillance activity from either inside or outside of the targeted businesses. (RB 87.) This is not true. Nobody testified that appellant and Moore stared at, watched, looked into, or otherwise surveiled the Sushi Hana restaurant or any other business. To the contrary, Wilson testified that appellant and Moore's truck was parked around the corner from Sushi Hana, and that one could *not* see the restaurant from where the truck was parked, and vice versa. (2CT:316-317; 56RT:8678.)

Respondent also argues that the prior robberies and charged offenses alike "involved the use or presence of a firearm." (RB 87.) Again, this is simply not true. In each of the prior robberies, appellant pointed a gun at the employees, announced that a hold-up was in progress, and issued orders as he and his accomplice robbed the establishment. No such conduct was alleged, proved or suggested in the charged attempted robbery and conspiracy. To the contrary, Wilson did not see or know of the existence of any weapon. She exchanged no words at all with appellant and Moore, and she admitted that she had no known reason to be scared or nervous because "in actuality nothing had happened." (56RT:8630; 2CT:307 [she felt scared but did not know why].) Moreover, to the extent there was evidence that appellant and Moore had a shotgun in their truck at the time they were

parked on the street around the corner from Sushi Hana, that weapon was not brandished or used against Wilson or any other Sushi Hana employee, a fact which demonstrates a *dissimilarity* between the prior offenses and the charged attempted robbery.

Finally, respondent concludes – without reference to the prior robberies – that "[t]here was also an inference to be drawn from the fact that appellant and Moore had very little money with them and that one purpose of the robbery was to obtain funds." (RB 88.) This argument is inappropriate. It is well-settled that one's poverty or indebtedness may not be used against him or her as a ground of suspicion. (*People v. Wilson* (1992) 3 Cal.4th 926, 938-939.) At any rate, it is unclear why respondent chose to make this assertion here, in a discussion of Evidence Code section 1101, subdivision (b) evidence. There is no evidence that appellant took money from anyone for any reason, much less evidence that he committed an attempted robbery because he was poor or lacked money. And the only evidence about the motive of the prior crimes came from Stephen Jarrett, who testified that he and appellant were drug addicts who committed the robberies to get money for drugs. By contrast, no evidence suggested that appellant or Moore needed to rob Wilson to support a drug habit.

Because the prior robberies shared no common features with the conduct alleged in Counts 3 and 4, they were not sufficiently similar to be admissible on the issue of intent. Accordingly, the trial court erred when it admitted the highly prejudicial evidence of four prior robbery convictions for that purpose.

3. The Prior Robberies Were Inadmissible to Show Common Plan or Scheme Because The Charged Conduct Did Not Lead to a Similar Result and Was Not Markedly Similar to the Prior Robberies

Appellant and respondent agree that increasing levels of similarity between prior and charged conduct are required to prove intent (requiring the least degree of similarity), common plan or scheme (requiring heightened similarity), and identity (requiring the greatest degree of similarity). (AOB 236-237; RB 86.) Appellant maintains that because the prior robberies and charged conduct were too dissimilar to be admissible to prove intent (see section 2, *ante*), the prior offenses were necessarily too dissimilar to be admitted to show a common plan or scheme.

Appellant further maintains that the prior robberies were inadmissible to show a common plan or scheme because the charged offenses did not share a "similar result" with the prior conduct. (AOB 251-255.) To establish a common design or plan between charged and uncharged conduct, this Court requires the evidence to show "not merely a similarity in the results, but 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [citation]." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Here, the prosecutor utterly failed to make this required threshold showing. More specifically, all of the prior offenses presented to the jury resulted in actual robberies of victims at gunpoint, while the charged conduct had no similar result. No threat against or attempted taking from Wilson was shown, and no robbery or attempted robbery of anyone else resulted from the alleged conspiracy. Appellant's past conduct could not substitute for proof of any conduct in the charged offenses. And absent any

independent evidence of a criminal act with a similar result, the prior criminal acts were not admissible to show a common scheme or plan.

Respondent does not address this aspect of appellant's argument.[6] Instead, it relies on the trial court's erroneous observations about the existence of a common plan, and reiterates the same unpersuasive argument that the alleged similarities that made the prior crimes admissible for the purpose of showing appellant's intent, also made the prior crimes admissible to show a common plan or scheme. (RB 88-90.) Appellant has already demonstrated how the charged and prior offenses lacked sufficient similarity to make the prior crimes admissible; he will not repeat that discussion here.

As for the trial court's ruling, nothing that the court concluded alters the fact that there existed no independent evidence that appellant and Moore committed any illegal act vis-a-vis Marian Wilson and the Sushi Hana restaurant. Moreover, the trial court's observations further indicate that it failed to apply the correct standard in considering whether the priors were admissible to show a common plan or scheme.

The trial court stated that the priors were admissible because there were common features that could "negate a random similarity between the

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[6] Appellant also discussed a series of this Court's precedents to demonstrate the heightened degree of factual similarity between the charged and uncharged acts that must be shown before the prior crimes can be admitted to show a common plan or scheme. (AOB 252-255, discussing the facts of *People v. Ewoldt* (1994) 7 Cal.4th 380, *People v. Balcom* (1994) 7 Cal.4th 414, *People v. Archerd* (1970) 3 Cal.3d 615, *People v. Ing* (1967) 65 Cal.2d 603, *People v. Peete* (1946) 28 Cal.2d 306, and *People v. Lisenba* (1939) 14 Cal.2d 403.) This Court's analysis in these cases makes clear the trial court's failure in this case. Tellingly, respondent does not address these authorities.

circumstances of the old and the new [charges] to support the inference that [appellant] was operating under the same plan." (17RT:2566.) But whether similarities between the prior and charged offenses supported an "inference" of a common plan – and they did not – was not the critical issue to be resolved. Rather, in order to admit the prior crimes as proof of a common plan, the trial court was required to consider whether there existed "*markedly similar* acts of misconduct against similar victims under similar circumstances." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 399, italics added.)

By no stretch of the imagination did the prosecution show that there were "markedly similar acts of misconduct" committed against Wilson and the victims of the prior robberies. As noted, each of the victims of the prior robberies was in a closed restaurant and then robbed at gunpoint, while the "victim" of the charged offense, Marian Wilson, specifically testified that, upon seeing appellant get out of his truck, she simply got into her truck and drove away. No words were exchanged, no gun was brandished, and no threat was made. Wilson characterized the event by saying that "in actuality nothing had happened" to her (56RT:8630; 2CT:307).

On this record, it would be unreasonable to conclude that there were sufficient similarities between the charged and uncharged conduct to warrant admission of the prior robberies to show a common plan or scheme. Accordingly, the trial court abused its discretion when it admitted the evidence of the prior robberies for that purpose at appellant's capital trial.

4. The Probative Value of the Evidence Did Not Outweigh its Prejudicial Effect

The trial court also erred by failing to exclude the evidence of the prior crimes under Evidence Code section 352, thereby making appellant's

trial fundamentally unfair and denying him due process and a fair trial. (AOB 255-257.) For the reasons discussed above and in appellant's opening brief, the prior crimes evidence had no substantial probative value with regard to any of the charged offenses. At the same time, the risk of prejudice caused by the admission of prior crimes was great and unavoidable: The evidence of the four prior armed robberies made it more likely the jury would reject appellant's testimony that he had no intent to rob Deputy Trejo and that the shooting was accidental.

Respondent disagrees. (RB 90-92.) It argues that the trial court correctly found that the prior offenses were probative and not "particularly inflammatory such that a jury would necessarily be inflamed by hearing this evidence." (RB 90, citing 17RT:2566.) Also, in respondent's view, while the prior crimes evidence may have been "damaging" to appellant and his case, they were not inflammatory because they "did not uniquely tend to evoke an emotional bias against appellant." (RB 91.) Respondent is wrong.

This Court has held that evidence of uncharged crimes is, in fact, prejudicial and has a highly inflammatory effect on the jury. (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) It is for this reason that a trial court must consider the admission of such evidence with "extreme caution" and resolve any doubt concerning admissibility "in favor of the accused." (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724, internal quotes and citation omitted.) That simply did not happen here, and respondent's contrary view – that testimony about four prior robberies is not inflammatory and has no prejudicial effect at a capital trial where the prosecution proceeds on a robbery-murder theory – must be rejected.

Respondent also argues that the trial court's limiting instruction

about the "damaging" evidence prevented any prejudice to appellant. (RB 91-92.) Again, respondent is mistaken. Evidence Code section 352 provides that a trial court may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... *create substantial danger of undue prejudice*, of confusing the issues, or of misleading the jury." (Italics added.) This Court has explained that the "undue prejudice" that section 352 is designed to avoid is the danger of "prejudging a person or cause on the basis of extraneous factors." (*People v. Howard* (2010) 51 Cal.4th 15, 32, citations and internal punctuation omitted.) Thus, while it is true that "damaging" evidence is not necessarily the same as inflammatory evidence that may result in undue prejudice, even damaging evidence must be excluded as unduly prejudicial when "it creates the substantial likelihood the jury will use it for an illegitimate purpose." (*Ibid.*)

Here, the extensive evidence and testimony concerning four prior robberies created a substantial likelihood that the jurors would use that damaging evidence for an illegitimate purpose, to wit: in considering the prosecution's theory that appellant intentionally shot Deputy Trejo during the course of a robbery. It is true that limiting instructions are often deemed sufficient to offset the inherent prejudice of uncharged crimes evidence. (See, e.g., *Spencer v. Texas* (1967) 385 U.S. 554, 562 [jury is expected to follow instructions limiting evidence to its proper function].) However, the high court has recognized how difficult – sometimes impossible – it is for jurors to follow a limiting instruction. "The government should not have the windfall of having the jury be influenced by evidence against the defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (*Jackson v. Denno* (1964) 378 U.S.

368, 388, fn. 15.) At least one justice called "naive" the "assumption that prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453, conc. opn. of Jackson, J., citations omitted.)

This Court has also recognized that a limiting instruction with respect to an uncharged crime calls for "discrimination so subtle [as to be] a feat beyond the compass of ordinary minds." (*People v. Antick* (1975) 15 Cal.3d 79, 98, superceded on other grounds by constitutional amendment.) The risk that the jury will misuse evidence that reveals a defendant's other crimes may be so great that no limiting instruction can sufficiently protect against it and the evidence must be excluded. (See *People v. Coleman* (1985) 38 Cal.3d 69, 93 [although limiting instruction was given, trial court abused § 352 discretion by admitting letters written by murder victim revealing prior violence by appellant].)

For these reasons and those set out in appellant's opening brief, even assuming evidence of the prior robberies was admissible under Evidence Code section 1101, the trial court erred by failing to exclude the evidence under section 352.

B. The Error Infringed On Appellant's Right To Due Process And Resulted In Prejudice

In his opening brief, appellant discussed at length how the admission of the prior robbery evidence denied him his right to due process and a fair trial. (AOB 257-281.) Respondent does not address the constitutional dimensions of the error, and does not argue – much less carry its burden of proof – that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, respondent does argue that

reversal is not required under state law. It argues that, absent the testimony about the four prior robberies, it is not reasonably likely that the jurors would have found appellant more credible because his version of the events was "simply unsupported by the evidence." (RB 93.) In fact, there was evidence that supported appellant's version of the events.

First, respondent argues that none of the witnesses who claimed to see the shooting saw appellant trip, fall, and consequently shoot Deputy Trejo. This is precisely why appellant's credibility was of grave import at trial, and why admission of his prior crimes was so devastating to his chance to have the jury evaluate his version of events unencumbered by the prejudice inherent with prior crimes evidence. And to the extent that respondent suggests that those who claimed to witness the shooting provided a single narrative contrary to and inconsistent with appellant's testimony, nothing could be farther from the truth.

Five witnesses testified to what they saw on the night of March 29, 1995. Jesus Ramirez testified that he saw appellant shoot Deputy Trejo in the back, which was undeniably wrong. (58RT:9034; 59RT:9163.) But Ramirez also testified that he saw Deputy Trejo laying face down on the ground when the gun went off (58RT:9032), which was *consistent* with appellant's version of events.

Oscar Aguilar saw the events leading up to and after the shooting, but did not actually see the shooting. (61RT:9505; 62RT:9561, 9663-9666.) Onecimo Guerrero also did not see the shooting but at some point heard appellant tell the deputy to "lay down on the ground" (63RT:9772-9775, 9790), which was *consistent* with appellant's testimony.

Rhonda Robbins and Kellie Jones both claimed, at one point, to have seen appellant shoot Deputy Trejo in the face while the officer was

kneeling. (65RT:10136; 70RT:10566, 10569.) But both also testified that they did not see the shooting at all. (69RT:10400, 10458-10459; 71RT:10725.) Robbins also explained that she saw the men wrestle but did not see the shooting because the lights went out. (69RT:10399-10400; 69RT:10451.) She further claimed that, after she saw the men wrestle, she saw appellant getting up off the ground *after* the shooting (69RT:10400), which was *consistent* with appellant's testimony that he stumbled, fell and the gun discharged.

Thus, the prosecution's eyewitness evidence was scattered and inconsistent. But three of the five witnesses that claimed to see some portion of the encounter testified in at least some manner consistent with appellant's version of the events.

Respondent also contends that "the physical and forensic evidence" showed that Deputy Trejo was shot at close range while in an upright position, which undermined appellant's version of events. (RB 93.) This argument is misleading.

While the prosecution's expert opined that Deputy Trejo was likely kneeling when shot (89RT:13908-13910), Peter Barnett, a criminalist with 30 years experience, opined that Deputy Trejo was likely laying on the ground when he was shot. (99RT:15819.) As the prosecution acknowledged, Barnett's testimony was *consistent* with appellant's testimony that Deputy Trejo was in a prone position when accidentally shot. (110RT:17349.) With two contradictory scientific explanations of the physical and forensic evidence, the question came down to how the juror's viewed appellant and his testimony, and whether they were predisposed to disbelieve him because of the details of the prior crimes.

In sum, this was a close case on the issue of first degree murder,

under both the intentional, premeditated murder theory, and the felony-murder theory. Appellant testified to a plausible explanation of how he accidentally shot Deputy Trejo, while the prosecution eyewitnesses presented hazy and starkly divergent accounts of the shooting; appellant was entitled to the benefit of any reasonable doubt. But the evidence of appellant's four prior robberies destroyed appellant's credibility by demonizing him and suggesting that he robbed Deputy Trejo and then deliberately shot him for noncompliance of his orders, which is what the jury had heard that appellant had threatened to do in the past.

On this record, had the trial court not improperly allowed the prosecutor to present testimony about appellant's four prior robberies, there exists a reasonable likelihood that appellant would not have been convicted because one or more jurors would not have rejected his testimony. For the same reasons, the error certainly was not harmless beyond a reasonable doubt. Thus, under either the federal or state standard of prejudice, reversal of appellant's murder and robbery convictions and death sentence is required. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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THE COURT ERRED WHEN IT FAILED TO DISMISS UNDER SECTION 995 TWO COUNTS ON WHICH THE MAGISTRATE HAD FOUND INSUFFICIENT EVIDENCE, AND PREJUDICE RESULTED BECAUSE THOSE COUNTS WERE THE SOLE VEHICLES FOR INTRODUCTION AT THE GUILT PHASE OF PREJUDICIAL EVIDENCE OF PRIOR ROBBERIES

Appellant has argued that the evidence on Counts 3 (conspiracy to commit robbery) and 4 (attempted robbery of Marian Wilson) was so insubstantial that the preliminary hearing judge properly refused to hold appellant to answer on those charges[7] and that, when the prosecutor filed those dismissed offenses in the superior court, that court erroneously denied appellant's motion under section 995 ("995 motion") to dismiss them. Ultimately, the jury deadlocked on Count 3 and the trial court granted appellant's motion for acquittal on Count 4. Nevertheless, due to the erroneous denial of the 995 motion, the prosecutor was allowed to introduce prejudicial evidence of appellant's prior armed robberies, which, as explained in Argument 2, *ante*, impermissibly predisposed the jury to reject appellant's defense that the shooting of Detective Trejo was an accident.

Respondent contends, to the contrary, that there was sufficient circumstantial evidence from which reasonable inferences could be drawn to support each element of conspiracy and attempted robbery.

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[7] In the complaint these were Counts 3 (conspiracy) and 14 (attempted robbery of Wilson). The magistrate also found insufficient evidence for a holding order on Count 15, the attempted robbery of the R&S Bar, and a special circumstance alleging that the murder was committed during the attempted robbery of the R&S Bar. (9CT:1651-1653, 1657.) The trial court granted the section 995 motion as to the attempted robbery of the R&S Bar and no allegations related to the bar count were charged in the amended information. (21CT:4247-4267.)

Respondent's contentions fail, however, in the face of a record so lacking in evidence that a conscientious magistrate judge could not hold appellant to answer on either the conspiracy or the attempted robbery allegations as alleged in the complaint.[8] (9CT:1654, 1657.)

No charges can stand where, as in the instant case, the prosecution has failed to make some showing to support every necessary element of the charged offense. (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124, 127.) Here, there was a complete failure of proof as to the defining elements of conspiracy – an agreement between appellant and Moore coupled with the specific intent to commit a robbery – and as to both elements of attempted robbery – the specific intent to rob the alleged victim and unequivocal acts toward robbing her. (9CT:1657.) Consequently, as demonstrated in appellant's opening brief, the denial of the 995 motion was prejudicial error requiring reversal of appellant's murder and robbery convictions and the sentence of death.

A. The Conspiracy In Count Three Should Have Been Dismissed Because The Evidence At The Preliminary Hearing Did Not Establish Probable Cause To Believe That Appellant And Moore Had Engaged In A Conspiracy To Commit Robbery

It is well-settled that mere association and suspicion of criminal conduct is not enough to establish a conspiracy or even an agreement. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1221.) Rather, in order to establish criminal conspiracy it must be proven that each alleged member of

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[8] At the preliminary hearing, the magistrate judge stressed that it had "listened to all the witnesses," "watched the demeanor of all the witnesses," "noted any inconsistencies in their statements," and "attempted to resolve those inconsistencies," "which is what the Magistrate is supposed to do." (9CT:1651.)

the conspiracy had (1) an intent to agree and an *actual* agreement to commit a crime; (2) the specific intent to commit the elements of that crime; and (3) that one or more of the conspirators committed an overt act in furtherance of the conspiracy.[9] (*People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 403, italics added.)

Addressing each of these elements, appellant argued in his opening brief that there was no direct or circumstantial evidence that appellant and Moore had either an express or tacit agreement to commit a robbery, or that they shared the specific intent to commit each element of robbery, or that either of them committed any overt acts in furtherance thereof. (AOB 294-312.)

Respondent disagrees. Respondent contends that there was sufficient evidence of (1) the commission of overt acts as alleged in the information; (2) the specific intent required for conspiracy; and finally (3) an agreement. (RB 96-100.) However, respondent fails to adduce any evidence of the type of "coordinated group conduct" required to establish that appellant and Moore had entered into an agreement to commit robbery and acted in furtherance of such agreement. (RB 98-99, citing *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575-576.) Indeed, appellant's opening brief fully anticipated respondent's various contentions and demonstrated their inadequacy.

First, in lieu of any solid evidence that appellant and Moore

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[9] Respondent's recitation of the elements of conspiracy is deficient, notwithstanding its citation to apposite authority, in omitting the gravamen of the crime, namely, the actual agreement. (RB 96, citing *People v. Morante* (1999) 20 Cal.4th 403, 416 [conspiracy requires proof of (1) the specific intent to agree; (2) the specific intent to commit the crime; and (3) an overt act].)

committed overt acts in furtherance of the purported robbery conspiracy, respondent merely recites the allegations in the information. That these allegations are stated in the plural is irrelevant and unsupported by the evidence. Notably, the trial court, in granting the 995 motion as to the alleged conspiracy and the attempted robbery of the R&S Bar, reviewed the evidence of alleged overt acts common to both the R&S and Sushi Hana allegations. The court considered the possession of the shotgun, the watchcap and the gloves, as well as appellant and Moore's lack of funds and appellant's prior convictions, and found them insufficient as to the R&S Bar, even though appellant and Moore were parked near the restaurant.[10] (7RT:903.)

By the same reasoning, on the same record, appellant and Moore's parking in the vicinity of Sushi Hana was no more an overt act than their parking across the way from the R&S Bar.

The only fact that distinguishes the Sushi Hana allegations from those twice dismissed with respect to the R&S Bar is that appellant and Moore happened to step out of their truck as Wilson was getting into hers. But they were unarmed, undisguised, walked only a short distance toward the business area and returned to the truck without confronting or speaking to Wilson. That Wilson knew she was carrying the restaurant's daily receipts and was frightened proved nothing. There was no evidence appellant and Moore saw the briefcase, much less knew what it contained,

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[10] Appellant recognizes that, under the standard for reviewing the denial of a 995 motion, no deference is due the trial court's findings of fact. (*People v. Jones* (1998) 17 Cal.4th 279, 301.) Nevertheless, here, the trial judge's analysis of the facts may shed light on the magistrate's reasoning in rejecting the conspiracy and attempted robbery charges.

or that they did anything to cause Wilson's fear other than, as Wilson perceived them, being suspicious strangers.

People v. Powers-Monachello, *supra*, 189 Cal.App.4th 400, is instructive on this point. In that case, the court affirmed the dismissal of a charge of conspiracy to possess cocaine for sale despite the fact that there was ample evidence of regular, suspicious association and mutual unlawful interests among the co-defendants, as well as individual acts of cocaine possession. (*Id.* at pp. 403-404, 411, 412, 419.) The court found this evidence insufficient to establish, among other things, an overt act to carry out the alleged conspiracy. (*Id.* at p. 418.) The prosecution also relied on testimony that the police had observed one of the defendants hand another defendant two boxes at the location where the alleged co-conspirators either lived or visited, and where a safe containing drugs was stored. (*Ibid.*) Because, however, there was no evidence as to the content of those boxes, "which remain[ed] a matter of pure speculation," the court concluded there was no evidence on the record of an overt act. (*Id.* at pp. 412, 418.)

Similarly here, absent pure speculation, there was no evidence that appellant and Moore's fleeting presence near the Sushi Hana restaurant was an overt act to carry out an agreement to rob any restaurant or person that night. (See subsection B, *post*.)

Respondent next contends that there was sufficient evidence of the specific intent required by the alleged conspiracy – here, the specific intent to commit a robbery – because appellant and Moore remained in Santa Rosa for two days after appellant's parole reporting date had passed, were spotted in the late evening parked in the lots of a few closed businesses along

Highway 12 and had only 46 cents when arrested.[11] (RB 97.) Respondent fails to explain, however, how their being temporarily stranded in Santa Rosa with an unreliable vehicle and limited funds remotely supports the inference that appellant and Moore each harbored the specific intent to jointly commit restaurant robberies, as alleged in the information. (Cf. *People v. Powers-Monachello*, *supra*, 189 Cal.App.4th at p. 411 [proof of conspiracy to possess cocaine for sale required showing of an intent to possess cocaine *jointly* as distinguished from similar but distinct intent to possess cocaine *individually*].)

Respondent then restates the allegations regarding the map of Santa Rosa and the items recovered from the field and the truck. (RB 97-98.) With respect to the recovered objects, respondent acknowledges their possible innocuous uses and concedes that each object standing alone "may be unremarkable." (RB 98; AOB 303-308.) Nevertheless, respondent contends that their presence together in Moore's truck and in the field somehow converts them into "artifacts" of a conspiracy to commit robbery. (RB 98.) To the contrary, the very fact that Moore's watchcap and a torn latex glove were left in the truck where they would certainly be found tends to negate any inference that these items were possessed for the purpose of or in connection with a conspiracy to commit robbery.

Indeed, the innocuousness of the items seized from the truck underscores the most serious deficiency in the prosecution's theory of

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[11] Generally, "[e]vidence of a defendant's poverty or indebtedness, without more, is inadmissible to establish motive for robbery or theft because it is unfair to make poverty alone a ground of suspicion and the probative value of the evidence is deemed to be outweighed by the risk of prejudice." (*People v. Clark* (2011) 52 Cal.4th 856, 929.)

conspiracy, namely, the absence of proof of the "very crux" of conspiracy, an agreement between Moore and appellant to rob any business or person on the evening of March 29. (RB 98; *People v. Lipinski*, *supra*, 65 Cal.App.3d at p. 575.)

Respondent is correct that proof of conspiracy may be inferred from coordinated group conduct, or as stated in *People v. Lipinski*, *supra*, "*mutually carrying out a common purpose in violation of a penal statute.*" (RB 98, citing *Lipinski*, 65 Cal.App.3d at p. 575, italics in original.) But these abstract principles do not cure the fundamental flaw in respondent's argument – the total absence of any evidence that Moore and appellant carried out any coordinated conduct from which it could be inferred that they agreed to jointly commit robberies.

In *People v. Powers-Monachello*, *supra*, 189 Cal.App.4th 400, the court also found insufficient evidence of an agreement to possess cocaine for sale notwithstanding the defendants' regular suspicious interactions and each defendant's individual possession of cocaine in an amount sufficient for sale. (*Id.* at p. 418.) The court in *Powers-Monachello* stressed that even "knowing that a person's . . . services are being used for a criminal purpose is insufficient" to establish a conspiracy. (*Id.* at p. 419.) Just as here, merely parking her truck in the Sushi Hana lot and briefly stepping out of the truck were plainly insufficient to convert Moore's lawful agreement to drive appellant to his parole meeting into a conspiracy to jointly rob Sushi Hana, or another business establishment, or any person.

Appellant's opening brief discussed in greater detail the application of the court's reasoning in *Powers-Monachello* to this case. (AOB 295, 297, 300, 302.) It is telling, therefore, that respondent's brief does not even mention *Powers-Monachello*, much less attempt to distinguish it.

Rather, respondent relies on *People v. Dewitt* (1983) 142 Cal.App.3d 146, 151 (*Dewitt*), which appellant has already distinguished and shown to be inapposite. (See RB 100; AOB 298-299.) In *Dewitt*, the court concluded that an agreement to commit robbery could be inferred from evidence that two convicted felons, each of whom possessed a stolen, loaded handgun, in a stolen vehicle which was parked at the entrance to an expensive residence in a remote area, with each defendant either wearing or possessing disguises and having immediate access to gloves and handcuffs. (*People v. Dewitt*, *supra*, 142 Cal.App.3d at p. 151.)

Here, in contrast to the defendants in *Dewitt*, Moore, who was not an ex-felon and owned the truck in which she was driving appellant, parked in publicly-accessible commercial areas and not, as in *Dewitt*, in front of a remote and exclusive gated residence. (*Dewitt*, *supra*, 142 Cal.App.3d at p. 148.) There were no disguises, no handcuffs, and only appellant had a weapon, and there was no evidence that Moore even knew he had it. In short, unlike in *Dewitt*, there was no evidence here to support the inference that Moore and appellant had agreed to commit robberies, as the prosecution charged.

Finally, respondent concludes that the prosecution here satisfied the "low evidentiary standard" required for conspiracy. (RB 100.) Respondent aims too low. To sustain the refiling of the conspiracy count here, there must at least have been some evidence at the preliminary hearing proving each element of conspiracy. Even this less demanding standard requires more than mere suspicion or speculation, which is the most the record of the preliminary hearing supports here. (See *People v. Lowery* (1988) 200 Cal.App.3d 1207, 1218; *People v. Hardeman* (1966) 244 Cal.App.2d 1, 41.) Therefore, because the prosecution failed to show an agreement to commit

robberies, the joint specific intent to commit robberies, and an overt act in furtherance of a robbery, the magistrate correctly refused to hold appellant to answer on the conspiracy count. Conversely, the trial court erroneously refused to dismiss the count when the prosecution refiled it, and because prejudice resulted, reversal is required.

B. Count 4 Should Have Been Dismissed Because The Evidence Did Not Establish Probable Cause To Believe That Appellant And Moore Attempted To Rob Marian Wilson

Attempted robbery and robbery are specific intent crimes requiring proof that the defendant specifically intended to rob the victim, as alleged in the information, not someone else. (See *People v. Kipp* (1998) 18 Cal.4th 349, 376 [attempt]; *People v. Williams* (2009) 176 Cal.App.4th 1521, 1528 [robbery]; cf. *People v. Bland* (2002) 28 Cal.4th 313, 328 [attempted murder requires proof that defendant specifically intended to kill the alleged victim, not anyone else].) As appellant has demonstrated, there was no evidence that appellant intended to rob Marian Wilson or that he committed a direct act toward robbing her. (AOB 287-294.) The only facts presented at the preliminary hearing were that appellant and Moore briefly parked in two different spots in a commercial area, and that they walked in Wilson's direction, without speaking or gesturing to her, during the few seconds it took for Wilson to get into her own truck and drive away. (AOB 288.) Under no circumstances and no standard did these few noncommittal, nonthreatening acts prove that appellant intended or attempted to rob Wilson.

Nevertheless, to support its argument, respondent must contend that the prosecution presented sufficient evidence at the preliminary hearing to sustain the count of attempted robbery of Wilson. (RB 101-102.)

Respondent points to appellant and Moore parking for a few moments at two locations in the vicinity of Sushi Hana and other commercial establishments and characterizes it as "staking out the Sushi Hana." (RB 101.) Apart from being rank speculation, this evidence does not remotely show that appellant specifically intended to rob Wilson. By respondent's own account, there was no evidence appellant ever saw Wilson inside the restaurant or leaving it, or that he knew she had the restaurant's receipts in her possession. Nor was there any evidence that appellant's stepping out of Moore's truck at the same time Wilson was getting into her truck was anything other than a coincidence.

Appellant previously argued that the trial court erroneously substituted Wilson's subjective fear of defendants for direct acts on their part. (AOB 293, fn. 80.) Respondent counters rhetorically that the record suggests otherwise, but then points only to the same evidence of Wilson's subjective reaction to seeing appellant and Moore walking in her general direction. (RB 101-102.) Respondent states that Wilson "tried to drive away," as though appellant and Moore interfered with her leaving. (RB 101.) Not so. Appellant and Moore did not cause Wilson to drive away; that was always her intention. Nor did they impede her in any way. She drove away, and they drove away, and that was the totality of the incident.

In evaluating the sufficiency of the evidence of attempted robbery, the magistrate judge and the trial court relied on *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861. (9CT:1657; 7RT:902.) Appellant's opening brief also discussed *Vizcarra*, as well as a number of other cases demonstrating the utter insufficiency of the proof in this case. (AOB 290-293.) Respondent discusses none of these cases in its brief. Rather, it simply repeats that appellant and Moore exited the truck and walked

towards Wilson – facts from which no criminal intent or criminal act may reasonably be inferred. But, in the end, the deficiency is not in respondent's brief but in the evidence presented at the preliminary hearing which was manifestly insufficient to support charging appellant with the attempted robbery of Marian Wilson.

C. Appellant Was Prejudiced By The Erroneous Denial Of His 995 Motion Because Counts 3 And 4 Were The Sole Means By Which The Jury Heard Extensive Evidence of Appellant's Prior Robberies

As a direct result of the erroneous denial of the 995 motion, the jury was exposed to inflammatory evidence of appellant's prior robberies. Although the jury was instructed to consider the prior robberies only as to count 3, it was patently unrealistic to expect jurors to segregate the evidence in this way – considering it only as to the relatively harmless, collateral conspiracy charge and ignoring it as to the most serious charges in the case. (111RT:17626.) After multiple repetitions, the description of appellant pointing a shotgun at a robbery victim and threatening to kill him became a fixed, indelible image that inevitably influenced the jury's determination of the robbery/murder charges and contributed to its rejection of appellant's defense that the shooting of Deputy Trejo was an accident and that appellant had no intention of taking anything from him. As demonstrated herein, above in Argument 2, and in appellant's opening brief, prejudice flowed from the denial of appellant's section 995 motion, requiring reversal of appellant's robbery and murder convictions, the special circumstance findings, and his sentence. (AOB 257-281; Argument 2.B *ante*.)

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THE ERRONEOUS ADMISSION OF APPELLANT'S REFUSAL TO PARTICIPATE IN A LINEUP DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

Appellant argued in his opening brief that the trial court erred in permitting the prosecution to present evidence of appellant's decision not to participate in a lineup where, as here, appellant admitted that he was the shooter and that he was culpable for Deputy Trejo's death. (AOB 314-322.) Respondent disagrees, contending that evidence of appellant's non-participation in a lineup was properly admitted as circumstantial evidence of consciousness of guilt. (RB 104-107.) Respondent is mistaken and the trial court's error in admitting the evidence violated appellant's federal and state constitutional rights, as well as state statutory law. (See AOB 314-323.)

Appellant maintains that when the prosecutor sought to present evidence of appellant's decision not to participate in a lineup that evidence was no longer relevant to the issues before the jury,[12] and was more prejudicial than probative even if relevant. (AOB 320-321.) Respondent argues that evidence of appellant's decision not to participate in a lineup was circumstantial evidence of consciousness of guilt and properly admitted as it was more probative than prejudicial. (RB 106.) Respondent contends that the prosecution can bolster its case with evidence of consciousness of guilt even when the defendant concedes some aspects of the case against

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[12] The prosecutor argued in his closing argument that "there's never been any question as to the identity of the perpetrator here, folks," noting that appellant was arrested coming out of the Cooper/King house with Deputy Trejo's revolver. (109RT:17308.)

him. (RB 106.)

Appellant acknowledges that when a defendant pleads not guilty, he puts in issue all of the elements of the offense, and even if he concedes his guilt of some form of criminal homicide, the prosecution is still entitled to present evidence to prove its case, including elements that have been conceded. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) This is particularly so when the prosecution is seeking to introduce evidence to prove a fact central to the basic issue of guilt. (*Ibid.*) The Court has also indicated that this rule holds even where the prosecution's evidence in question is offered merely to "bolster" the prosecution's case. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1160.) Nevertheless, even if otherwise admissible, such evidence is still subject to Evidence Code section 352 and in this instance the evidence should have been excluded as more prejudicial than probative. (Evid. Code § 352.)

Respondent offers only a conclusory statement that the evidence was admissible under Evidence Code section 352. (RB 107.) In fact, the prejudicial effect of the lineup refusal significantly outweighed any slight legitimate value it may have had to the prosecution's case. First, the only reasonable inference that a juror can draw from evidence of consciousness of guilt is that the defendant is conscious of "some wrongdoing." (See, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 971; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) In a case where, as here, the defendant has admitted shooting Deputy Trejo and conceded criminal culpability, evidence of a consciousness of wrongdoing is of little evidentiary value because even the defense is based on the fact that such wrongdoing occurred.

Furthermore, the inference of a consciousness of wrongdoing is undercut in this case by the facts surrounding the refusal. The rationale

behind allowing a juror to infer consciousness of guilt from the refusal is that a lineup presents an opportunity for the prosecution to have a witness make either a positive identification of the perpetrator, or to eliminate the accused as a suspect; a defendant who refuses to participate in a lineup can be seen as deliberately denying the prosecution this opportunity, and thereby, in a sense, suppressing evidence (see *People v. Huston* (1989) 210 Cal.App.3d. 192, 218), which in turn theoretically supports an inference that the defendant is conscious of his guilt, because he is behaving in the manner of a guilty person (see, e.g., *People v. Ellis* (1966) 65 Cal.2d 529, 537-538). Here, however, appellant was not even informed by the officer making the first request that the lineup was related to his case, and there is no other evidence indicating he knew the lineup related to his case rather than another case. Sergeant Schwedhelm did not tell appellant the purpose of the lineup (59RT:9203-9204), whether the lineup concerned charges against appellant, or whether he was being asked to participate in a lineup regarding another case. (59RT:9203-9204.) Refusal of a jail inmate to participate in another case's lineup would not support an inference that the inmate was guilty of the charges in his own case. Without evidence that appellant understood that he was being asked to be in a lineup for his own case, the inference that he was behaving like a guilty person is therefore weakened. Subsequently, appellant refused to be in a lineup after consulting with an attorney. The fact that his refusal was informed by the advice of counsel also weakens the inference of a consciousness of wrongdoing. (See *People v. Huston*, *supra*, 210 Cal.App.3d at p.217 [probative value of refusal following attorney's advice is "more questionable" than prior refusal without advice of counsel].)

Additionally, the prosecution had other uncontested evidence of

consciousness of guilt. The prosecution presented evidence that appellant fled from the scene of the shooting. Flight from a crime raises the same inference of a consciousness of wrongdoing as does the refusal to appear at a lineup. (See *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1160; *People v. Ray* (1996) 13 Cal.4th 313, 345-346.) The jury was instructed that flight immediately after the commission of a crime could be considered in deciding whether appellant was guilty of the charged crimes. (111RT:17616; 24CT:4865.) The jury therefore had evidence that appellant displayed a consciousness of guilt before his arrest and thus before he was asked to be in a lineup. Evidence of his refusal to be in the lineup was therefore superfluous. (See *People v. Williams* (1982) 128 Cal.App.3d 981, 988.)

Finally, although consciousness of guilt evidence can be highly prejudicial, it is generally weak evidence of actual guilt. The instructions accompanying evidence that is deemed to suggest a consciousness of guilt inform the jury that such evidence alone is not enough to establish guilt for the charged crimes. (See *People v. Crandell*, *supra*, 46 Cal.3d at p. 871.) On the other side of the ledger, the lineup refusal provided the prosecution with a particularly prejudicial piece of supporting evidence. Appellant's refusal to cooperate with the officers conducting a lineup was consistent with the prosecutor's theory that appellant was motivated by hostility toward law enforcement. It therefore gave support to the prosecution's theory that the shooting of Deputy Trejo was not simply an accident, but was a deliberate and premeditated act of hostility. It was error to allow the prosecution to present evidence of appellant's decision not to participate in a lineup where he admitted that he was the shooter and that he was culpable for Deputy Trejo's death.

Respondent argues that even if it was error to admit the evidence, no harm occurred. (RB 107.) Appellant disagrees and has fully presented in his opening brief the prejudicial impact of the erroneously admitted evidence and maintains that the trial court's error requires reversal of appellant's robbery and murder convictions and the special circumstance findings. (AOB 321-323.)

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THE TRIAL COURT ERRONEOUSLY ADMITTED INFLAMMATORY AND HIGHLY PREJUDICIAL PHOTOGRAPHS

The trial court allowed the prosecution to introduce 18 photographs of Deputy Trejo's body that were taken at the crime scene and at the autopsy. Appellant argued in his opening brief that each of these photographs was irrelevant or more prejudicial than probative under Evidence Code section 352. (AOB 324-353.) Respondent does not address appellant's claims regarding the specific photographs, but argues that the photographs as a whole "did no more than accurately portray the shocking nature of the brutal crime" (RB 112) so that the trial court did not abuse its discretion in allowing the exhibits to be introduced.[13] Respondent is incorrect and its short-shrift response to appellant's argument should be rejected.

A. The Photographs Should Have Been Excluded

Appellant described in detail the 18 objectionable photographs and argued that the trial court erroneously admitted 13 from the crime scene and five from the autopsy, and explained how each photograph was either unnecessary, cumulative or that any probative value that the photograph may have offered was far outweighed by its prejudicial impact. (AOB 324-328, 332-351.) Respondent argues that the trial court properly admitted the photographs, observing that this Court has stated that jurors are "entitled to see details of the victims' bodies to determine if the evidence supports the

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[13] Respondent argues that the trial court carefully considered each photograph. (RB 109-111.) That the court excluded seven photographs, and cropped two others before admitting them, does not mean that it did not err when it admitted the gruesome photographs here.

prosecution's theory of the case." (RB 111.) This does not mean, however, that such evidence is not subject to Evidence Code section 352, which allows a trial court to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (See also *People v. Gurule* (2002) 28 Cal.4th 557, 661-662 [trial courts must ensure that relevant, otherwise admissible photographs are not more prejudicial than probative].) The probative value of evidence is determined by its materiality and necessity. (*People v. Stanley* (1967) 67 Cal.2d 812, 818.) Cumulative evidence is excluded under a rule of necessity. (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) Thus, photographs that show how a victim was killed may be relevant, but still be cumulative and unnecessary if there is adequate testimony regarding the cause of death, the crime scene, and the position of the victim's body. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) The prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant. (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.)

Here, respondent's argument about the probative value of the exhibits (RB 111-112) is made without citation to the record or reference to specific exhibits at issue. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 [appellate argument must be supported by citation to the facts at issue]; see also *People v. Booker* (2011) 51 Cal.4th 141, 171 [Court declined to "hazard a guess on [appellant's] behalf" where he failed to specify which photographs he claimed were cumulative to others].) The photographic exhibits here were used during the trial for different purposes, with different witnesses, rather than being introduced as a single homogenous group. Respondent does nothing more than to make conclusory statements

asserting that the photographs as a whole were more probative than they were prejudicial.

Respondent fails to show that the photographs admitted were necessary to the prosecution's case. That some of the photographs showed that Deputy Trejo was shot at "close range" (RB 112) does not establish their probative value. Experts for both sides agreed that the shot was fired from nine to ten feet away. (89RT:13896-13897 [prosecution]; 101RT:15978 [defense].) The injuries sustained were not disputed. Even assuming that the photographs were probative of the prosecution's theory that the victim was upright when shot (RB 112), respondent has offered nothing in response to appellant's contention that specific photographs were cumulative, unnecessary and unduly gruesome. The issue is not simply what the photographs portrayed, but how they portrayed it, the extent to which the depiction was probative to the issues before the jurors and whether the probative value outweighed their prejudicial impact.

Because respondent does not address the specific photographs that were at issue, appellant need not reiterate his argument pertaining to the individual exhibits here. The opening brief established that the crime scene photographs, which included close-ups that focused on particularly graphic details, provided little or no information that was not established through other photographs or testimony. (AOB 332-341 [Peo. Exh. Nos. 163, 164, 166, 187, 168, 170-173, 175].) Photographs were also introduced that showed the deputy at the crime scene after he had been moved from his front to his back. (AOB 341-344 [Peo. Exh. Nos. 176, 177, 178, and 179].) These exhibits did not provide jurors with the ability to assess either side's expert testimony or to clarify the issues in dispute. The autopsy photographs also were unnecessary to the prosecution's case because they

were cumulative to testimony that was offered or other exhibits, such as x-rays. (AOB 345-347 [Peo. Exh. Nos. 180, 182, 183, 184, and 186].) The cumulative nature of the evidence substantially reduced the probative value of the exhibits admitted by the trial court. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [error to admit photographs that were cumulative to testimony that needed no clarification or amplification].)

Respondent does not dispute that the photographs were gruesome, but mischaracterizes appellant's argument as being that the photographs should have been excluded "solely because they are overly gruesome and inflammatory." (RB 112.) In fact, appellant contends that the photographs were gruesome, unduly graphic and cumulative to other testimony and photographs, and for these reasons should have been excluded. (See AOB 332-334, 339-341, 344, 347-348.) The exhibits included brain matter strewn across the victim's body, large color images of a gaping bullet wound deep into the skull, and autopsy photographs that were extraordinarily graphic. Under these circumstances, this Court should find that the photographs were "unduly gruesome" in light of the testimony and other properly admitted evidence. (Compare *People v. Cowan* (2010) 50 Cal.4th 401, 475-476 [photographs not unduly gruesome because they did not show victim's face, organs, or close-up views of wounds with large amounts of blood].)

Respondent argues that the prosecutor was not limited to proving his case solely from the testimony of witnesses, and was entitled to present graphic evidence without sanitizing it. (RB 113, citing *People v. Roldan* (2005) 35 Cal.4th 646, 713, *People v. Blacksher* (2011) 52 Cal.4th 769, 827, *People v. Booker*, *supra*, 51 Cal.4th at p. 171.) This Court has admonished, however, that although a gruesome offense will beget

gruesome photographs, jurors must "be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome," or that play upon the emotions of the jurors. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1272.)

Appellant also argued that the trial court erred by refusing to reduce the inflammatory nature of the photographs it was admitting over objection, by converting them from color to black-and-white. (AOB 324, 348-349; see also 29CT:4016.) Respondent did not address this argument; thus, no additional argument or reply is necessary.

As appellant has shown, the photographs at issue here were of the kind that are unnecessarily gruesome and should have been excluded. Accordingly, the trial court abused its discretion in admitting them.

B. Admission Of The Photographs Requires Reversal

Respondent states that in any event the admission of the photographs was harmless. (RB 113-114.) Respondent argues that the photographs did no more than corroborate and illustrate testimony and were therefore "not determinative of appellant's guilt," adding that the evidence of guilt was overwhelming. (RB 113.) In fact, the evidence in this case was far from overwhelming. While the cause of death was not at issue, the nature of the shooting was vigorously disputed and the evidence was not as conclusive or as indicative of guilt as respondent implies. Both sides presented experts that drew different conclusions from the physical and forensic evidence regarding the position of Deputy Trejo at the time of the shooting. Although the prosecution's physical and forensic evidence was "consistent" with the prosecution's theory that Deputy Trejo was shot from an upright position (RB 114), the defense theory that the deputy was in a prone

position was likewise consistent with the defense evidence (see, e.g., 99RT:15819, 15822 [testimony of Peter Barnett]).

Moreover, the prosecution's percipient witnesses, most if not all of whom were in various states of intoxication or under the influence of drugs, were far from convincing. (See AOB 263-278 [examining the reliability of the witnesses].) Respondent states that not one witness who observed the shooting saw appellant fall, but this is plainly incorrect. Rhonda Robbins saw appellant fall, along with Deputy Trejo. (See 69RT: 10399-10400, 10451 [testimony of Rhonda Robbins].) Respondent notes that several percipient witnesses saw Deputy Trejo on his knees (RB 114), and not in a prone position, but fails to mention that Jesus Ramirez testified that the deputy was on the ground and shot from behind. (59RT:9158-9163, 9188.) Kellie Jones and Rhonda Robins changed their statements and prior testimony. They first told the police that they did not see the deputy being shot, and testified to that fact under oath. But at trial they both claimed to have seen him shot. (See 70RT:10569, 71RT:10725, 10757-10761, 10791-10792 [Jones]; 69RT:10358-10359 [Robbins]). The evidence of guilt was not either overwhelming or so one-sided for the prosecution that the unduly gruesome photographs had no effect on the outcome. The jurors deliberated for a significant time, beginning on April 3 and ending on April 14. (114RT:18220, 18224.) A verdict was reached only after appellant's testimony was read back to them. (114RT:18150.) Under any standard, this was a close case. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 [jurors deliberated for 26 hours, indicating a difference among them as to guilt]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].)

In this situation, it was crucial for the jurors to have an unbiased view of appellant and his testimony. The jurors' objectivity would have been affected in significant ways by being shown multiple graphic, gory, and powerful images of the crime. (See Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photos during medical examiner's testimony were more likely to vote to convict defendant than those not shown pictures]; Note, *A Picture is Worth a Thousand Words – The Use of Graphic Photographs in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197, 208-209 [same]; Douglas, et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492 [same].) Neither appellant's testimony or that of his expert could counter the type of passion and emotional impact of the photographs that were used against him. This Court should accordingly reverse the judgment in this case.

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6

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON APPELLANT'S DEFENSE THAT HE ACCIDENTALLY SHOT DEPUTY TREJO

Appellant contends that the trial court abused its discretion when it failed to give the jury appellant's requested instructions to explain how his defense – that he accidentally shot Deputy Trejo – would affect the prosecutor's theory that the killing was deliberate and premeditated. (AOB 354-364.) Appellant also maintains that the trial court erred by refusing to instruct the jury on how appellant's defense applied to the robbery-murder special-circumstance allegation. (AOB 364-368.) Respondent disagrees, essentially adopting the trial court's faulty reasons for refusing to provide the requested instructions. (RB 115-125.)

A. The Trial Court Erred When It Refused To Instruct On Appellant's Accident Defense As It Applied To The Prosecution's Theory Of Premeditation And Deliberation

Respondent first argues that appellant's requested pinpoint instruction was an incorrect statement of law, and for that reason it was properly rejected. Respondent claims that whether the shooting was accidental was immaterial to the prosecution's alternative theory of felony-murder theory, and therefore it would have been incorrect to tell the jury that it could reach a verdict of no more than second degree murder if it concluded that the shooting was accidental. (RB 118-119.) Respondent is wrong.

After the prosecutor pointed out this same concern with an *initial* version of the requested instruction, appellant rewrote that instruction by adding an introductory phrase indicating that the proffered instruction

applied only to the issue of premeditated murder. The modified instruction read as follows:

> *In considering the prosecution theory of first degree premeditated murder*, if there is a reasonable doubt of whether or not the killing of Deputy Trejo was an accident, you must resolve the doubt in favor of the defendant and bring a verdict of no more than second degree murder.

(108RT:16980, emphasis supplied.) Another instruction – the felony-murder instruction, which was given to the jurors – would further clarify for the jurors that appellant's accident defense was irrelevant as to the prosecution's theory of first degree felony murder. (See 111RT:17632-17633, 17641 [CALJIC No. 8.21].) Thus, on its face, the requested instruction made it clear that it applied only as to the prosecution's theory of premeditated murder.[14]

Respondent also argues that the requested instruction risked confusing the jurors, claiming without explanation that appellant's defense involved "complex legal principles" not sufficiently articulated in the pinpoint instruction. (RB 119.) This argument is specious. The legal principle at the heart of the defense theory – that an accidental shooting is not a premeditated one – was far less complex than the prosecution's multiple theories of guilt, and the numerous and complicated interlocking instructions that the jury received on those theories. Indeed, the pinpoint instruction clearly and succinctly explained that any doubt as to whether the

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[14] Respondent does not, because it cannot, take issue with the basic tenet of appellant's requested pinpoint instruction: An accidental shooting cannot support a first degree murder conviction on a theory of premeditation and deliberation.

shooting was accidental must be resolved in favor of appellant with regard to premeditation and deliberation.

Finally, respondent argues that the standard first degree and second degree murder instructions given by the trial court, along with the instructions regarding reasonable doubt, adequately informed the jury about how to consider appellant's testimony that the gun accidentally discharged as he approached Deputy Trejo. (RB 119-121.) This argument, too, lacks merit because it ignores a half-century of this Court's precedent stating that even where the standard pattern instructions address the general legal principles relevant to the case, the defendant is *entitled* to requested instructions specific to the defense theory, as long as those instructions correctly state the law. (See, e.g., *People v. Kane* (1946) 27 Cal.2d 693, 698, 700 [error to refuse instruction that was correct statement of law pertinent to defendant's theory of the case and which showed its application to the evidence presented]; see also *People v. Anderson* (2011) 51 Cal.4th 989, 996-997; *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Sears* (1970) 2 Cal.3d 180, 190; accord, *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 577, as amended.)

But more to the point, the standard instructions did not specifically tell the jurors that an accidental shooting cannot legally support a finding of first degree premeditated and deliberate murder. Nor did the instructions specifically state that any doubt as to whether the shooting was deliberate or accidental had to be resolved in appellant's favor. In fact, the only instruction given on the question of an accidental shooting was an instruction that told the jurors that whether the shooting was accidental was irrelevant to the prosecution's theory of first degree felony murder. Failing to provide the requested, legally correct corollary to that instruction – that

an accidental shooting cannot be a deliberate and premeditated one – in order to specifically pinpoint the law relevant to appellant's defense, is the error at issue here.

Turning to the question of prejudice, appellant maintains that the error is reversible per se. "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.) Here, the defense theory was a legally sound one, appellant's testimony and forensic evidence supported the theory, and the trial court's denial of the instruction on appellant's defense violated his constitutional rights, including his right to present a defense (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, §§ 7 and 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294), his right to a fair and reliable capital trial (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), his right to the presumption of innocence and the requirement of proof beyond a reasonable doubt (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503), his right to trial by a properly instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145, 153-155; *People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12), and his right to federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence (U.S. Const., Amend. 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488). Reversal is required.

(*United States v. Escobar de Bright, supra,* 742 F.2d at p. 1201; see *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739, as amended.)

But even if this Court were to conduct a harmless error analysis, reversal is required because respondent has not demonstrated that the federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent first argues that by finding appellant guilty of either premeditated and deliberate murder or felony murder under the legally correct instructions, the jury necessarily found that he killed either intentionally or during the course of a robbery. (RB 124.) But this argument does not address prejudice at all. Rather, it merely reflects what happened *without* the requested pinpoint instruction. That appellant was convicted under the CALJIC pattern instructions does not take into account the fact that the jurors made their decision without guidance that the requested instructions would have given them to understand how to evaluate appellant's testimony and defense.

Respondent also argues that appellant suffered no harm from the omitted instructions because the jurors found true allegations that he personally used a shotgun during the crime (§ 12022.5) and intentionally killed Deputy Trejo while engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (RB 124.) However, as appellant explained in his opening brief, both of these findings were to allegations attendant to the underlying murder charge. And the jury was never informed of the legal significance of the defense theory – specifically, appellant's testimony that the gun accidentally discharged – to the underlying offenses and special allegations. (AOB 363-364.) Instead, as to the defense theory and appellant's testimony, the jurors were told only that whether the shooting was "accidental" simply did not matter. (See, e.g., 111RT:17632, 17633,

17641.) By contrast, appellant's jury was instructed on all aspects of the prosecution's theory of the case. Under these conditions, the jury's findings on the enhancement and special allegations attendant to the charges cannot be viewed as dispositive on the question of prejudice.

Accordingly reversal of appellant's conviction is required.

B. The Trial Court Erred When It Refused To Instruct The Jury On How Appellant's Defense Applied To The Robbery-Murder Special-Circumstance Allegation

During the jury instruction conference, appellant also requested an instruction that pinpointed how his accident defense related to elements of the robbery-murder special-circumstance allegation. More specifically, appellant asked that the jury be instructed that an act committed by accident is not committed "in order to advance an independent felonious purpose," and that he was entitled to the benefit of any doubt as to whether the shooting was accidental. (23CT:4737-4738.) The court refused the instruction, stating that while arguments about the "felony-murder rule" persist, it is the law. (108RT:17078.)

Appellant maintains that the trial court erred by refusing the instruction. While the requested instruction would have been erroneous had it been offered with regard to the "felony-murder rule," as the court noted, here it was offered to pinpoint appellant's defense as it applied to the felony-murder special circumstance allegation. The difference between the two is precisely what appellant's pinpoint instruction would have highlighted for the jury: The special-circumstance allegation requires a finding that the killing was done to carry out or advance the robbery of Deputy Trejo, and if the jurors accepted appellant's testimony that the shooting was accidental, there could be no factual basis on which to conclude that Deputy Trejo was shot for any *purpose* at all.

Respondent disagrees, ignoring the fact that trial court specifically cited the felony-murder rule as its basis for rejecting the pinpoint instruction; once again relying on the mere fact that the trial court instructed the jury with the robbery-murder special circumstance pattern instructions; and asserting that the requested instruction misstated the law. (RB 122-123.)

But as discussed above and in greater detail in his opening brief (see AOB 357-358), even where the standard pattern instructions correctly address the general legal principles relevant to the case, the defendant is entitled to requested instructions specific to the defense theory, as long as the pinpoint instructions correctly state the law. Here, appellant's requested instruction correctly stated the law and went to the crux of his defense. Accordingly, the trial court was required to give the pinpoint instruction. (*People v. Saille, supra,* 54 Cal.3d at p. 1119.)

Indeed, respondent cites no authority for the proposition that an accidental killing can support a robbery-murder special circumstance finding. Nor does respondent explain just how such a killing can qualify as an act committed in order "to advance an independent felonious purpose." (*People v. Green* (1980) 27 Cal.3d 1, 61 [the purpose of the special circumstance is to single out those felony murderers "who killed in cold blood in order to advance an independent felonious purpose"].)[15]

Moreover, appellant is not presently arguing that the special-circumstance pattern instructions were inconsistent with this Court's prior holdings. Those instructions told the jury that to find the special

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[15] Overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3.

circumstance allegation true, it must find that the alleged murder was committed in order to carry out or advance a robbery or facilitate the escape therefrom. (111RT:17638.) The instructions also told the jury that a robbery incidental to a murder does not establish the special circumstance allegation, and that a concurrent intent to kill and to commit an independent felony will support the allegation. (*Ibid.*)

But while those pattern instructions were sufficient to permit a conviction or acquittal on the *prosecution's* theory of guilt – the prosecutor argued concurrent intent – they did not specifically inform the jury about the legal effect of appellant's testimony that the shooting of Deputy Trejo was accidental. Appellant simply sought parity with the prosecution when he requested a pinpoint instruction on his defense and legal theory. And the trial court erred in refusing to give that instruction.

The trial court's refusal to give the requested instruction denied appellant his right to present a defense (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, §§ 7 and 15; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294), his right to a fair and reliable capital trial (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638), his right to the presumption of innocence and the requirement of proof beyond a reasonable doubt (U.S. Const., Amend.14; Cal. Const., art. I, §§ 7 and 15; *Estelle v. Williams*, *supra*, 425 U.S. at p. 503), his right to trial by a properly instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. at p. 302; *Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 153-155; *People v. Sedeno*, *supra*, 10 Cal.3d at p. 720, overruled on other grounds in *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12), and his right to federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by

the evidence (U.S. Const., Amend. 14; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones*, *supra*, 445 U.S. at p. 488). The failure to provide the requested instruction on appellant's defense is reversible per se. (*United States v. Escobar de Bright, supra,* 742 F.2d at p. 1201.)

If this Court were to conduct a harmless error analysis, reversal is still required because the trial court's refusal to give appellant's requested pinpoint instruction left the jury without the necessary legal framework by which to consider how appellant's testimony that the gun discharged accidentally, resulting in Deputy Trejo's death, applied to the robbery-murder special-circumstance allegation. Respondent disagrees, arguing that the jury found true the allegation that appellant personally used a short-barreled shotgun during the crime (§ 12022.5), and found true an allegation that appellant intentionally killed Deputy Trejo while engaged in the performance of his duties (§ 190.2, subd. (a)(7)).

Again, these findings were attendant to the underlying murder conviction, and the jury was uninformed about the legal significance of the defense theory that the gun accidentally discharged. In fact, the jurors were told only that whether the shooting was accidental was irrelevant to its felony-murder analysis, without any clarification at all as to how an accidental shooting would relate to the robbery-murder special circumstance allegation. On this record – where it is clear that the jury wrestled with appellant's testimony that the shooting was accidental (114RT:18150-18152, 18154-18155) – the requested pinpoint instruction would have provided the jurors with accurate and necessary legal guidance as to how to consider appellant's defense to the robbery special-circumstance allegation. Respondent has failed to establish that the

constitutional error here was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal is required.

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7

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON EVIDENCE OF APPELLANT'S FLIGHT AND HIS NON-PARTICIPATION IN A LINEUP AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

Appellant argued that the trial court erred by giving two related consciousness of guilt instructions (CALJIC Nos. 2.06 and 2.52) that allowed the jury to infer appellant's guilt if it found that he suppressed evidence by his non-participation in a lineup, and if it found that appellant left the scene of the crime. The instructions as given embodied an improper permissive inference under the facts of this case and were impermissibly argumentative. The trial court also erroneously denied appellant's requested modifications of the instructions which would have ameliorated some of the unfairness of the instructions. (AOB 369-382.) The errors in giving the instructions, and in refusing the modifications, impermissibly lightened the burden on the prosecution, undermined the reasonable doubt requirement, and denied appellant a fair jury trial, due process of law, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Appellant further demonstrated that the errors were not harmless beyond a reasonable doubt. (AOB 382-383.)

Appellant acknowledged in his opening brief that this Court has previously rejected similar challenges made to these instructions, but provided authority and argument as bases for reconsideration of those decisions. (AOB 370-382.) Respondent relies upon this Court's previous holdings rejecting similar challenges to these instructions, presenting no substantive arguments in support of the challenged instructions (RB 127), except as to appellant's argument that the instructions improperly

duplicated the circumstantial evidence instructions (RB 128-129), to which appellant responds below. As to all other arguments, appellant addressed them fully in the opening brief and no further reply by appellant on those points is necessary.

Respondent argues that the instructions did not improperly duplicate the circumstantial evidence instructions because there was evidence of appellant's non-participation in a lineup and evidence that he left the scene. As such, there was evidence to support the instructions. (RB 127-129.) Respondent misses the point. Appellant does not argue that there was insubstantial evidence to support giving the instruction. Rather, appellant contends that the consciousness of guilt instructions were unnecessary because the jury had already received the standard circumstantial evidence instructions that allowed the jury to infer facts tending to show appellant's guilt from the circumstances of the alleged crimes. (AOB 381-382.) The consciousness of guilt instructions not only repeated the general principle on circumstantial evidence, but they unfairly highlighted facts that invited the jury to draw inferences favorable to the prosecution. (AOB 381-382.) The challenged instructions directed the jury to consider inferences supporting the prosecution while ignoring equivalent inferences favorable to the defense.

Respondent also contends that the instructions benefitted appellant because they include cautionary language. (RB 127.) For this premise, respondent cites *People v. Thornton* (2007) 41 Cal.4th 391, 438. In *Thornton*, the defendant argued it was error to give the consciousness of guilt instructions in light of the defendant's concession to certain elements of the crimes charged. The Court rejected that argument and stated that the cautionary instructions benefitted the defense because they admonished the

jury to be circumspect regarding evidence that might otherwise be considered inculpatory. (*Ibid.*) Despite the cautionary language in the instructions, this Court has consistently held that consciousness of guilt instructions benefit the prosecution. (*People v. Dement* (2011) 53 Cal.4th 1, 53; *People v. Seaton* (2001) 26 Cal.4th 598, 673.) The fact that consciousness of guilt instructions benefit the prosecution is not inconsistent with the fact that such instructions include cautionary language that protect the defense. (*Id.* at p. 53, fn. 27.)

The instructions benefitted the prosecution and were deleterious to appellant as they directed the jury to consider inferences supporting the prosecution while ignoring equivalent inferences favorable to the defense. They were also unwarranted in this case. There was no dispute that appellant was responsible for Deputy Trejo's death or that he fled the crime scene. The instructions shed no light on the issues before the jurors and permitted the jurors to draw irrational inferences. (AOB 375-381.)

Lastly, appellant also argued that it was prejudicial error to refuse appellant's modifications to CALJIC Nos. 2.06 and 2.52, which would have at least focused the jury on an issue they had to decide and thereby minimized the harm from these instructions. (AOB 379-381.) Respondent makes no argument in response. Appellant therefore relies on his points and arguments in his opening brief.

Appellant has addressed the prejudice that resulted from the instructional error in his opening brief. (AOB 382-383.) Respondent argues that there was no error (RB 129), so does not respond to appellant's claim that the instructional errors violated federal constitutional law as well as state law and require reversal of the robbery and murder convictions and

the special circumstance allegations. The issues are therefore fully joined and no further reply is necessary.

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8

THE INSTRUCTIONS DESCRIBING THE PROCESS BY WHICH JURORS WERE TO REACH A VERDICT ON THE DEGREE OF MURDER UNCONSTITUTIONALLY SKEWED THE JURORS' DELIBERATIONS TOWARD FIRST DEGREE MURDER

In his opening brief, appellant argued that the trial court's instructions to the jury on the degree of murder lowered the prosecution's burden of proof and undermined the requirement of proof beyond a reasonable doubt, in violation of appellant's rights to due process and a trial by jury. (AOB 384-399.) The instructional errors were (1) a combination of giving the 1996 revised version of CALJIC No. 8.71 (hereinafter "No. 8.71"),[16] and (2) failing to give CALJIC No. 17.11. These errors, considered individually or together, skewed the deliberative process toward a verdict of first degree murder and lowered the prosecution's burden of proof.

Respondent does not contest that subsequent to appellant's trial this Court disapproved the version of No. 8.71 with which appellant's jury was instructed, and does not contest that it was error for the trial court to fail to give CALJIC No. 17.11. Respondent contends, however, that appellant's challenge to No. 8.71 fails because the jury would not have been confused by, or misapplied, No. 8.71 in light of the entirety of the court's instructions (RB 130); and even if there was error, it was harmless in light of the

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[16] The trial court instructed the jury with the 1996 version of CALJIC No. 8.71 (6th ed. 1996). (111RT:17640; 24CT:4926.) The court had denied appellant's request that the trial court instead instruct using the better, and clearer earlier version of No. 8.71 (5th ed. 1988). (108RT:17052-17053, 17059.)

overwhelming evidence and the jury's findings on the special circumstance. (RB 134-135.)

Respondent acknowledges that this Court, in *People v. Moore* (2011) 51 Cal.4th 386, 411 (hereinafter "*Moore*"), concluded that the 1996 revision of No. 8.71 carries the "potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder." (RB 130-131.) Nonetheless, respondent suggests that appellant's reliance on *Moore* is misplaced because *Moore* stands for nothing more than that the better practice would be for courts not to use the 1996 revision of No. 8.71 because to do so could confuse jurors in deciding between first and second degree murder. (RB 132.) Appellant agrees that giving the 1996 revision of No. 8.71 need not always be error,[17] but this Court's recognition of the potential for confusion by instructing with the "problematic" language in No. 8.71 (*Moore*, 51 Cal.4th at p. 411) supports appellant's argument. (AOB 391-392.)

The harm in appellant's case from the misleading and confusing language in No. 8.71 was exacerbated by the court's failure to instruct with CALJIC No. 17.11. (AOB 388-390.) Respondent does not respond to appellant's argument that the trial court's failure to instruct with CALJIC No. 17.11 was itself error. (AOB 388-390.) The trial court had a sua sponte duty to instruct on the separate degrees of the crime, an obligation the court itself initially recognized (108RT:17102), and its failure to do so here was particularly flagrant as appellant's counsel timely pointed out to the court that it had failed to include CALJIC No. 17.11 in its instructions

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[17] This Court did not decide whether the instruction was erroneous, disposing of the issue on other grounds. (*Moore*, *supra*, 51 Cal.4th at p. 412.)

(110RT:17422-17423). Appellant submits on his opening brief the contention that the trial court's failure to instruct with CALJIC No. 17.11 was error. (See *California Ins. Guarantee Ass'n v. Workers' Comp. App. Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2 [contention raised in opening brief to which respondent makes no reply will be deemed submitted on appellant's brief].)

Respondent argues that the absence of CALJIC No. 17.11 did not contribute to any error, despite appellant's jury being instructed with the confusing and misleading language in No. 8.71, because other instructions essentially told the jury the same thing that they would have learned from CALJIC No. 17.11, which would have dispelled any confusion from No. 8.71. For this theory, respondent relies on *Moore*, *supra*, 51 Cal.4th at pp. 409-412, and on two court of appeal cases. (RB 131-134.) These cases, *People v. Gunder* (2007) 151 Cal.App.4th 412 and *People v. Pescador* (2004) 119 Cal.App.4th 252, decided before *Moore*, concluded that instructions that told the jurors of their duty to decide the case for themselves "adequately dispelled" any confusion which might have been caused by the unanimity-of-doubt language of No. 8.71. *Moore*, however, as respondent acknowledges, did not decide whether the court of appeal in *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425, was correct in concluding that there was no danger of juror confusion from the unanimity language in CALJIC No. 8.71 where the jury had been instructed with CALJIC No. 17.40, but not with CALJIC No. 17.11. (*Moore*, *supra*, 51 Cal.4th at p. 412; see RB 133.) Respondent's position appears to be that any instruction that tells the jurors to decide their verdict individually removes the danger and harm from the problematic language in No. 8.71,

and that it does not matter whether that instruction is CALJIC No. 17.40 or CALJIC Nos. 17.11 *and* 17.40. (RB 132-134.) Appellant disagrees.

Simply telling the jury to reach its decision individually does not dispel the harm that comes from the procedural prerequisite of a unanimous finding of doubt about degree when another instruction conditions a juror's decision in favor of second degree murder on the unanimous agreement of the jurors that a doubt exits as to degree. Whether a jury is told one time, or ten times, to decide the case individually will not fix the error. Another reason that CALJIC No. 17.40 did not provide a fix for the problematic unanimity-of-doubt requirement in the challenged instruction is that it was a general instruction that applied to all issues on which appellant's jury deliberated, and unlike No. 8.71, did not address any particular situation. In contrast, No. 8.71 addressed a specific and complex situation – what the jurors must do when they decide a murder occurred, but are in doubt as to whether it is of the first or second degree.

Respondent also argues that no error occurred because the jurors were told to read the instructions as a whole, that CALJIC No. 8.75 told the jury they must unanimously agree to a not guilty verdict on the greater offense before the jury as a whole may return a verdict on a lesser offense, and were instructed on reasonable doubt generally. (RB 133.) But none of these instructions remedied the confusion injected by No. 8.71 into the process of determining the degree of murder. Unlike No. 8.71, which instructs about the process jurors must go through to determine the degree of murder (see *People v. Pescador*, *supra*, 119 Cal.App.4th at p. 256), CALJIC No. 8.75 focuses on the duties of the jury as a whole when returning a verdict (see *Moore*, *supra*, 51 Cal.4th at pp. 411-412). A juror who has reasonable doubt that the elements of first degree murder have

been proven, and needs guidance, most likely and reasonably will look to the specific language in No. 8.71 on degree-setting, rather than general instructions addressing reasonable doubt in other contexts. (See *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect to element, more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 & fn. 8 [in determining how jurors would understand a series of instructions, "the more specific charge controls the general charge"].)

Respondent has not rebutted appellant's showing that the jury was not properly instructed with regard to setting the degree of murder. The problematic unanimity-of-doubt language inverted the benefit-of-the-doubt mandate to inure to the prosecution rather than to the appellant. In light of the deficiencies in No. 8.71, there is a reasonable likelihood that appellant's jury applied the instruction about the degree of murder using a standard that is less than the constitutional requirement of proof beyond a reasonable doubt in violation of the due process clause of the Fourteenth Amendment. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6 [jury instructions violate a defendant's constitutional rights if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the requirements of proof beyond a reasonable doubt]; *Boyde v. California* (1990) 494 U.S. 370, 380 [when claim is that an instruction is ambiguous and thus subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied

the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence].)

Instructions that told the jury how to resolve doubts as to whether the homicide was a first or a second degree murder were crucial to an accurate and reliable determination of appellant's guilt. Under state law and the federal guarantees of due process and trial by jury, each juror was to give appellant the benefit of any reasonable doubt in deciding whether the homicide the prosecution had proved was first or second degree murder. (*Keeble v. United States* (1973) 412 U.S. 205, 208 [providing jury with option of convicting on a lesser offense ensures defendant the full benefit of reasonable doubt standard]; *In re Winship* (1970) 397 U.S. 358, 364 [the due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute the crime]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-556 [the jury must be instructed that when there is a reasonable doubt at to whether the greater or the lesser offense has been committed, the lesser must be returned]; section 1097 [if a jury has a reasonable doubt as to the degree of an offense, it can convict a defendant only of the lowest degree].)

Whether the homicide was of the first or second degree was the central disputed issue at the guilt phase of appellant's trial. Appellant's defense to the prosecution's circumstantial evidence was that the crime that occurred was at most a second degree murder. Appellant presented evidence of his mental state at the time of the crime, the circumstances of the encounter between Deputy Trejo and himself, and testimony that appellant had not planned or premeditated what occurred and did not have the intent to rob the deputy. (See AOB 38-42; 55-64.) The prosecution's witnesses from the homicide scene, who were in various states of

inebriation from drugs and alcohol at the time of the crime, gave conflicting descriptions of what they had recalled seeing during the encounter between Deputy Trejo and appellant. (See AOB 12-38; 263-272.) Both the prosecution and the defense presented forensic evidence supporting their theories of what had occurred that night. (See AOB 43-55.)

The instructional errors, considered individually or in combination, skewed the deliberations toward first degree murder and lowered the prosecution's burden of proof, violating appellant's federal and state constitutional rights. The errors undoubtedly affected how the jury viewed the evidence and contributed to the verdict of first degree murder.

The instructional errors were prejudicial. The errors affected the fundamental framework of appellant's trial. (See AOB 397-399.) Contrary to respondent's contention (RB 135), the evidence was far from overwhelming. This was a close case on the issue of the degree of murder. The prosecution eyewitnesses presented hazy and wildly divergent accounts of the shooting. Appellant presented evidence establishing a plausible explanation that the homicide was, at most, a second degree murder. The jury's deliberations were lengthy and they requested and were permitted to have readback of all of appellant's testimony. (114RT:18182, 18185, 18187.)

Respondent further argues that in any event the challenged instruction was harmless because the jury found the robbery-murder special circumstance true, and the jury must have therefore found appellant guilty of first degree felony murder, which was one of the two first degree murder theories they had argued to the jury. (RB 135.) Appellant, however, presented multiple arguments in his opening brief that the trial court's errors require reversal of the robbery conviction and that the felony-murder

special circumstance finding cannot stand. (See, e.g., AOB 257-281 [erroneous admission of other crimes evidence]; *id.* at 312-313 [error in denying appellant's section 995 motion]; *id.* at 354, 364-368 [denial of instruction on appellant's defense of accident].) Should this Court agree with but one of these arguments regarding the robbery or felony-murder special circumstance, the harm from the instructional errors requires reversal of the judgment.

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9

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION THAT, BEFORE RETURNING A VERDICT OF FIRST DEGREE MURDER, THE JURY MUST AGREE UNANIMOUSLY ON WHETHER THE CRIME WAS A PREMEDITATED MURDER OR A FELONY MURDER

Appellant argued in his opening brief that the trial court's refusal to instruct the jury that, before it could return a verdict of first degree murder, the jury must agree unanimously whether it was a premeditated malice murder or a felony murder, denied appellant his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense. (AOB 400-409.)

Respondent argues that this Court has rejected similar claims and urges the Court to reject appellant's request to reconsider its prior decisions. (RB 136-137.) Respondent also contends that the prosecution did nothing more than rely on two different theories for a single crime, arguing that a unanimous verdict of first degree murder was all that was necessary (RB 136-137), despite this Court's cases holding that premeditated murder and felony murder do not have the same elements. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Dillon* (1983) 34 Cal.3d 441, 465, 475, 477, fn. 24.) Specifically, as appellant argued in his opening brief, malice is an element of murder under section 187 (malice murder) and it is not an element of felony murder under section 189. Furthermore, premeditation and deliberation are elements of first degree malice murder but not first degree felony murder. It is the fact that these crimes are not simply separate theories of murder, but have separate elements, that is the basis for appellant's argument. (AOB 401-409.) Other than repeating this

Court's decisions that felony murder and premeditated murder are not distinct crimes with different elements (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712), respondent adds nothing new to the discussion. The issues are fully joined and no further reply is necessary.

The jury should have been required to unanimously determine that the crime was either a premeditated (malice) murder under section 187 or felony murder under section 189, before it could return a verdict of first degree murder. Appellant's first degree murder conviction and the entire judgment must therefore be reversed.

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10

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER

In his opening brief appellant asserted that because the information in his case charged him with second degree murder only, in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 410-417.) Respondent asserts that appellant's jurisdictional argument has been rejected by this Court in the past, as well as by the Courts of Appeal, and for that reason, appellant's reliance on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*) is misplaced. (RB 138.) Appellant acknowledged that this Court has previously rejected claims like that raised in his opening brief. (AOB 414.) Appellant's argument is that in this Court's opinions subsequent to *Dillon* it has failed to reconcile the holding in *People v. Witt* (1915) 170 Cal. 104 (RB 138) – that charging the offense of murder in the language of section 187 is sufficient whether the charge is a first degree felony murder, a first degree premeditated murder, or a second degree murder – with *Dillon*, which concluded that section 189, not section 187, was the statute defining first degree felony murder (*Dillon*, *supra*, 34 Cal.3d at p. 472). (AOB 414-416 and cases cited therein.) For this reason, appellant requests that this Court reconsider its prior decisions rejecting claims similar to appellant's.

According to respondent and the cases upon which it relies, malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. (RB138-139.) This position embodies a fundamental misunderstanding of how, for the purpose

of constitutional adjudication, courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. Malice murder and felony murder are two crimes defined by separate statutes, for "each statute requires proof of an additional fact which the other does not." (See *Blockberger v. United States* (1932) 284 U.S. 299, 304; see also *United States v. Dixon* (1993) 509 U.S. 688, 696-697 [*Blockberger* "elements" test determines what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment].) "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).) Here, malice murder requires proof of malice (§ 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission of, or attempt to commit, a felony listed in section 189 and the specific intent to commit that felony; malice murder does not. Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies meant "only that the *elements* of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See also *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Respondent also argues that the information provided appellant with sufficient notice that he might be convicted of a first degree murder.[18] (RB 139.) Without reference to any citation in the record, respondent contends the preliminary hearing in this case demonstrated the prosecution's intent to prove a first degree murder. (RB 139.) In any event, appellant's claim was not that he had no idea that the prosecution was trying to convict him of first degree murder. As respondent well knows, the state was seeking to have appellant executed, a punishment that first requires a first degree murder conviction. Appellant's claim is based on the trial court's lack of jurisdiction, not on lack of adequate notice.

Respondent's argument framing appellant's claim as one of lack of notice is apparently in response to appellant's citation to *Apprendi v. New Jersey* (2000) 530 U.S. 466, which appellant cited for the proposition that when the trial court instructed the jury on first degree premeditated murder and first degree felony murder after appellant had been charged with section 187 only, second degree malice murder, the court violated the pleading requirements of the federal Constitution because the charging document did not include the charge of first degree murder. (AOB 416.) Respondent misunderstood, or misconstrues the principle for which appellant cited

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[18] Respondent also contends that appellant waived any claim of insufficient notice because he did not object below. (RB 139.) First, as stated above, appellant's argument is based on the trial court's lack of jurisdiction, not inadequate notice. Second, this Court has addressed these claims on the merits in the absence of an objection, noting that the forfeiture issue is close and difficult and has refused to find that the defendant forfeited his claim. (See *People v. Tate* (2010) 49 Cal.4th 635, 696, fn. 33, citing *People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6.) Lastly, the claim is cognizable on appeal under section 1259 because the erroneous murder instructions affected appellant's substantial rights.

Apprendi, which was that the crime with which a defendant is charged must be in the indictment or information. *Apprendi* stands for the proposition that due process and a defendant's Sixth Amendment jury trial guarantees require that the crime for which a conviction is sought, in this case a first degree murder, must be charged in the information. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476; see also p. 489, fn. 15, quoting *United States v. Reese* (1875) 92 U.S. 214, 232-233 (Clifford, J., concurring and dissenting) ["[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."].)

Instructing the jury with first degree premeditated murder and first degree felony murder, after only having been charged with second degree malice murder in violation of section 187, violated appellant's constitutional rights requiring reversal of his first degree murder conviction.

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11

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

Appellant argued in his opening brief that there was a reasonable likelihood that a series of guilt phase instructions allowed his convictions based on a standard of proof lesser than that which is constitutionally required. In sections B.1 and B.2 of Argument 11, appellant argued that the trial court erred by giving instructions that undermined and diluted the requirement of proof beyond a reasonable doubt. (See AOB 418-431; 436-438.) Appellant acknowledged in his opening brief that this Court has rejected these arguments in the past, but requested that the Court reconsider its previous rulings upholding the instructions and explained why reconsideration is warranted. Respondent notes that this Court has previously rejected the claims but does not address the grounds for reconsideration set forth in appellant's brief. (RB 141-142.) For the reasons set forth in the opening brief, this Court should find that the challenged instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement to the extent that the reliability of the jury's findings of guilt and the appropriate penalty were undermined.

In section B.3 of this argument appellant argued that instructing the jury with CALJIC No. 2.51 (111RT:17616) shifted the burden of proof to appellant and relieved the prosecution of its obligation to prove every element of the crime beyond a reasonable doubt. (AOB 431-434.) Appellant contended that giving the motive instruction resulted in error when, as here, it was given in conjunction with two other instructions, CALJIC No. 2.52 (consciousness of guilt instruction with regard to flight)

and CALJIC No. 2.06 (consciousness of guilt instruction with regard to non-participation in a lineup). (111RT:17616 [flight]; 111RT17611 [non-participation in a lineup].)

Respondent does not directly respond to this argument. Respondent cites a number of cases, apparently for its position that the Court should not reconsider its prior rulings as to any of the instructional challenges in this argument. (RB 142.) Some of these cases stand for the general proposition that CALJIC No. 2.51 does not violate a defendant's right to proof beyond a reasonable doubt and does not impermissibly dilute the requirement of proof beyond a reasonable doubt when given in combination with other general instructions about reasonable doubt. These cases do not, however, address appellant's point that the motive instruction, when given in combination with CALJIC Nos. 2.06 and 2.52, resulted in error. The only case respondent cites that touches upon this point is *People v. Guerra* (2006) 37 Cal.4th 1067, 1135, in which the Court rejected the argument that the motive instruction informed the jury that evidence of motive alone was sufficient to establish guilt when given in conjunction with the consciousness of guilt instructions in that case. (*Ibid.*) The Court stated that because the jury in *Guerra* was instructed about reasonable doubt, there was not a reasonable likelihood that the jury interpreted the motive instruction as stating that motive alone was sufficient to prove guilt. (*Ibid.*) Appellant's argument, however, is that error occurred because the jury was instructed with the motive instruction (CALJIC No. 2.51) immediately preceding one of the consciousness of guilt instructions (CALJIC No. 2.52), as well as shortly after the other consciousness of guilt instruction (CALJIC No. 2.06). Instructing on reasonable doubt generally did not ameliorate the

danger that would have allowed appellant's jury to determine guilt based only upon a speculative presence of an alleged motive.

The instructional errors that occurred in this case permitted convictions on a standard of proof less than that of beyond a reasonable doubt, requiring reversal of appellant's conviction, special circumstance findings and sentence.

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12

THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTOR'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR 3727

In his opening brief, appellant argued that the trial court erroneously granted the prosecution's challenge for cause to prospective juror 3727. This is not a case of a prospective juror who is "unalterably opposed" to the death penalty. (See *People v. Anderson* (1985) 38 Cal.3d 58, 60; *People v. Fields* (1983) 35 Cal.3d 329, 342-353 (plur. opn.), 374 (conc. opn. of Kaus, J.).) Rather, this is a case where juror 3727, who had previously been a death penalty opponent, found that there were now crimes in which her "knee-jerk reaction" was to give the death penalty. She believed it should be used "sparingly," but nonetheless believed that it was an appropriate penalty in some circumstances. (10SuppCT:2687.) The trial court ruled that it did not believe juror 3727 could fulfill her duties as a juror and return a verdict of death if warranted (46RT:6959), apparently believing that the juror fell into the narrow category of prospective jurors who did not oppose the death penalty but nevertheless would be unable to follow the law and personally return a verdict of death. Appellant contends that the trial court's decision was not supported by substantial evidence. (AOB 439-461.) Indeed, juror 3727 identified herself as "moderately against" the death penalty, forgoing the options of "strongly" or "always" against it. (10SuppCT:2687.)

Respondent believes the trial court correctly determined that the juror was substantially impaired in her ability to fulfill her duties under the standard of *Wainwright v. Witt* (1985) 469 U.S. 412, 424 (*Witt*) because "she repeatedly expressed doubt and equivocated as to whether she could vote for death at all." (RB 150.) The record, however, does not support

respondent's characterization of the court's ruling or support a finding that the juror was substantially impaired under *Witt*.

What respondent characterizes as the juror repeatedly expressing doubt as to whether she could vote for death (RB 152-153) are in fact statements that indicate the juror's personal preference for a sentence of life without the possibility of parole and a general reluctance to serve on a capital case jury. Juror 3727 said she would consider life without parole the better option – that she was 80 to 90 percent in favor of life, but that "it would depend on what [she] had heard about the crime and about the person." (42RT:6264, 6265.) She also said she would not want to be someone who participated in the penalty decision-making; that it would not be good for her mental health. (42RT:6266.)

Respondent's claim that juror 3727 equivocated as to whether she could vote for death is equally weak. In the context of death penalty jury selection, this Court has defined equivocal statements by a prospective juror as "capable of multiple inferences."[19] (*People v. Box* (2000) 23 Cal.4th 1153, 1181; *People v. Cooper* (1991) 53 Cal.3d 771, 809.) Where a juror's statements are equivocal, a reviewing court will defer to the trial court's determination of the juror's state of mind; absent such equivocation or inconsistency the question on appeal is whether there is substantial evidence to support the trial court's finding. (*People v. Bradford* (1997) 14 Cal.4th

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[19] "Equivocate" is often defined in a way to connote deception. For example, "1: to use equivocal language esp. with the intent to deceive. . . 2: to avoid committing oneself in what one says & speak evasively. . . : be willfully misleading esp. by the use of double meanings." (Webster's 3d New Internat. Dict. (2002) p. 769.) To the extent respondent contends that juror 3727 was in some manner being intentionally deceptive or dishonest, the record does not support that argument.

1005, 1047.) Respondent relies on the prosecutor's argument to the court on the challenge for cause for support of its claim that the juror made "numerous equivocal statements" during voir dire. (RB 147, citing 44RT:6593-6594.) In fact, those remarks by the prosecutor are simply another iteration of the juror's statements that it would be difficult for her to impose the death penalty. Thus the prosecutor started his argument noting, "This is a juror who I believe on several occasions indicated that, at best, it would be hard for her to impose a sentence of death." (44RT:6593.) He went on to cite the juror's answers during voir dire:

> The Court asked her at 6261: Could you impose the death penalty? And she responded: I would have a hard time doing that. [¶] At 6262 she states: It would be hard to say that someone should be put to death because then I would be guilty of killing that person. I would be more apt to argue for life.

(44RT:6593.)

The prosecutor then cited the juror's statement that, "I've certainly heard of death sentences and gone, okay, but I wouldn't want to be the one. I don't think it would be good for my mental health." (44RT:6594.)

These remarks are not equivocal. Rather, they show the juror's consistent viewpoint – one that is not disqualifying under *Witt* – that imposing the death penalty would be difficult and she would prefer not to be in the position of making that choice.

The prosecutor also relied on the following exchange between the court and juror 3727 regarding a juror's sentencing discretion at the penalty phase:

> Q. [The Court] I'm not ever going to say you don't have the choice. But in order for you to vote for death you would have to be convinced that the factors in favor of

death substantially outweighed the factors in favor of life without parole, or the instruction is, you couldn't vote for death. That is an instruction. That's an example of one of those guidelines.

A. [Juror 3727] Right.

Q. So the question is: Under those circumstances could you vote to impose the death penalty?

A. No, I don't think so.

(42RT:6262.)

As appellant pointed out in his opening brief (AOB 450-454), the ambiguity of the court's question diminished the significance of the juror's answer (see *People v. Heard* (2003) 31 Cal.4th 946, 967 [prospective juror's answer viewed as product of trial court's unclear questioning]). It is unclear what circumstances the juror is indicating would cause her to be unable to vote for the death penalty, and her response accordingly does not provide solid evidence of equivocation, an inability to return a death verdict, or any substantial reason supporting the prosecutor's challenge for cause.

Respondent also contends that this response by the juror, in combination with her other statements which "showed her aversion to imposing the death penalty" was sufficient to support the court's grant of the prosecutor's challenge. (RB 151.) As support for this point, respondent relies on the principle that even when a prospective juror expresses a willingness to follow the law, she may be excused if other responses furnish substantial evidence of her inability to consider a death verdict. (RB 151, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115.) But this principle has no applicability here, where the juror expressed a willingness

to follow the law, and there was no concomitant substantial evidence of her inability to consider the death penalty. In *People v. Barnett*, *supra*, the prospective juror on at least two occasions affirmatively stated that she could not vote for death. (*Id.* at pp. 1114-1115 & fn. 49.) There was no similar substantial disqualifying evidence in the present case.

Citing *People v. Bunyard* (2009) 45 Cal.4th 836, 845-846, respondent also seems to suggest that the juror's reluctance to serve on a capital jury was a proper basis on which to find her substantially impaired under *Witt*. This too is incorrect. The fact that a juror would find it very difficult to impose the death penalty does not per se prevent or substantially impair the performance of a juror's duties. (*People v. Stewart* (2004) 33 Cal.4th 425, 447; *People v. Avila* (2006) 38 Cal.4th 491, 530; see *People v. Viscotti* (1992) 2 Cal.4th 1, 44 fn. 15 [jurors excused unnecessarily because they expressed reluctance to sit on the case].) In *People v. Bunyard*, *supra*, 45 Cal.4th at p. 845, the juror was excused from serving on a penalty retrial not because of a general reluctance to serve on a death penalty case, but because of "an objection to participating in any kind of sentencing decision when she had not served on the jury that determined defendant's guilt."

Furthermore, nothing in the trial court's ruling indicates that it was basing its determination by either discerning the juror's state of mind from what the court believed were equivocal answers or resolving perceived conflicts in the juror's statements. The court's ultimate ruling, after tentatively denying the challenge for cause, was simply as follows:

> I did not believe that 3727, on a total balanced view of reviewing again all of her answers, indicates that she could fulfill her duties as a juror. I do believe, if not totally prevented, she is substantially impaired and I'm not going to invite further discussion of 3727, who's been discussed

extensively. I just on balance, do not believe that she can do it.

(46RT:6959.)

Without any substantial disqualifying evidence from juror 3727, the trial court could not properly conclude that the juror could not make the decision to impose death if it was warranted. The court's grant of the prosecution's challenge for cause was therefore erroneous. Accordingly, the sentence and judgment of death must be reversed. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Heard, supra*, 31 Cal.4th at p. 966.)

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13

APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ERRONEOUS ADMISSION OF UNADJUDICATED CONDUCT THAT DID NOT INVOLVE FORCE OR VIOLENCE OR AN IMPLIED THREAT TO USE FORCE OR VIOLENCE AS CONTEMPLATED BY SECTION 190.3, FACTOR (B)

Appellant argued in his opening brief that during the penalty phase the trial court erroneously admitted evidence of a battery, under section 190.3, factor (b).[20] (AOB 462-470.) Appellant further argued that should this Court conclude that appellant's conduct was admissible, it was error to deny appellant's request pursuant to Evidence Code section 352 to exclude evidence that the alleged battery was committed using urine. (AOB 472-473.) Appellant argued that the trial court's error in admitting the evidence denied appellant his right to due process and to a fair and reliable penalty determination (AOB 464-473), was prejudicial, and required reversal of his death sentence (AOB 473).

Respondent contends that the trial court properly allowed the evidence under factor (b) because appellant committed a battery that involved an implied threat to use force or violence. (RB 154.) Respondent is incorrect. Respondent also argues that the trial court did not err by permitting the prosecution to present evidence that the battery involved urine because the urine could have exposed the officers to an unknown health risk. (RB 158-159.) Respondent is again incorrect.

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[20] Hereafter, referred to as factor (b).

A. The Trial Court Erred In Admitting Evidence That Appellant Touched Correctional Officers With Urine Tossed From A Small Milk Carton

The facts of the incident that the prosecutor presented are straightforward. Five jail custodial officers approached appellant's cell around 10:00 to 11:00 p.m. to conduct a routine search. (RT:19010-19012.) One of the five officers unlocked the food port on appellant's cell, at which time appellant threw a liquid from a small milk carton that he claimed to be urine and yelled profanity. (RT:19012-19013.) The liquid touched three of the five officers. (RT:19013, 19019.) Appellant thereafter placed his hands through the food port and cooperated with the jail's routine practice. Appellant was handcuffed and secured to a tether, after which the cell door was opened, the officers secured appellant to belly chains and he was escorted to the yard. (119RT:19012, 19014-19015, 19019.) When the incident happened the door of the cell was not open. (119RT:19016.)

1. Appellant's Unadjudicated Conduct Did Not Involve Force or Violence

Appellant argued in his opening brief that his conduct, which at most would amount to a misdemeanor battery, was inadmissible because it was not an act involving force or violence within the meaning of factor (b). (AOB 462-473; see also *People v. Boyd* (1985) 38 Cal.3d 762, 774 [nonviolent misdemeanors are inadmissible under factor (b)]; see also *People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4 [a battery, which may be nothing more than "the least touching," need not be violent or severe].)

Respondent mischaracterizes appellant's argument as being that a battery "cannot be considered under factor (b) absent a quantum of physical violence." (RB 157.) First, appellant's argument in the opening brief was responsive to the prosecution's theory at trial, and consistent with the

court's instructions, that tossing the urine was an *act* of force or violence under factor (b), not an attempted act, or an express or implied threat, of force or violence. Appellant made no argument as to any "quantum of violence" necessary to establish an attempted act or threat under factor (b).

Second, appellant's argument is much narrower than respondent claims. Appellant does not claim, as respondent implies, that a battery can never be a factor (b) crime. Appellant contends only that the phrase "force or violence" under factor (b) has a different – and more restrictive – meaning than it does in the definition of battery under section 242, and that this case illustrates that difference: that while the act of throwing urine at the guards may have been sufficient to prove the force or violence element of a technical battery, it was insufficient to show force or violence under factor (b). (See AOB 464-466.) Not all batteries meet the force or violence requirement of factor (b) and the urine-tossing in this instance was such a case of insufficient force or violence. None of the cases cited by respondent provide authority contrary to appellant's argument.

Respondent's position on the breadth of admissible criminal conduct under factor (b) is both extreme and incorrect. First, respondent contends that the evidence was admissible under factor (b) simply because appellant's conduct constituted an offense proscribed by penal statute. (RB 155-157.) This is clearly wrong. The plain language of the statute limits factor (b) evidence to criminal activity involving "force or violence." This Court has also made clear that evidence of uncharged crimes that does not involve the use or attempted use of force or violence or the express or implied threat to use force or violence is inadmissible aggravating evidence. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 774.) Even respondent, elsewhere in its brief, acknowledges that to be admissible under factor (b)

the evidence of other criminal activity is that "'which involved the use or attempted use of force or violence. . .'" (RB 155, quoting *People v. Phillips* (1985) 41 Cal.3d 29, 70.) The cases cited by respondent (see RB 157-158) illustrate the principle that a violation of a criminal statute is simply a threshold requirement for admission under factor (b); it is still necessary that the crime meet the force or violence requirement under the statute. The prosecution is not free to use evidence of any criminal violation. The unadjudicated conduct must not only violate a criminal statute, it must also involve force or violence.

Respondent also appears to contend, consistent with its erroneous view of the scope of factor (b), that *any* battery constitutes a factor (b) crime, and claims that this Court has "consistently held" that an assault or battery can be considered under factor (b). (RB 157.) In fact, this Court has never held that unadjudicated conduct that meets the requirements of a technical battery can per se be considered under factor (b), or that a simple battery meets the force or violence requirement within the meaning of factor (b), and the authorities cited by respondent do not say otherwise.

Whether the criminal conduct involves force or violence, and thus qualifies as an aggravating factor under factor (b), depends on the circumstances of the crime. (*People v. Dunkle* (2005) 36 Cal.4th 861, 922.) The circumstances in the cases that respondent cites differ significantly from those in the present case. The conduct in those cases either included obviously violent conduct apart from any battery, or involved an assault that constituted an "implied threat" of force or violence within the meaning of factor (b). In *People v. Pinholster* (1992) 1 Cal.4th 865, among the multiple transgressions the defendant committed against custodial officers, was throwing urine. The battery of throwing urine at deputies was not

admitted on the theory that a simple battery qualified as factor (b) evidence, however, but because the battery was part of a series of clearly violent acts – punching, kicking, striking and threatening to kill deputies – that were admissible under factor (b). (*Id.* at p. 961.) The Court held that all crimes, whether violent or not, committed during a continuous course of criminal activity that *did* include the use of force or violence, may be considered in aggravation. (*Ibid.*) Thus, while the Court recognized that throwing a cup of urine at a custodial officer is a battery, it was admissible under factor (b) because it was committed during a series of violent acts, not because the battery itself was violent.

Similarly, in *People v. Hamilton* (2009) 45 Cal.4th 863, 934, the conduct involved a series of violent and threatening acts. Defendant raised his fists in a fighting stance as if to strike officers when they approached him in his cell, struggled with the deputies "as violently as he could" to resist being taken from his cell, continued to struggle when removed from his cell, and ultimately spat on one of the deputies. The defendant contended that this course of conduct was inadmissible under factor (b) because no assault had occurred. This Court disagreed noting that the defendant's conduct, among other threatening acts such as taking a fighting stance, included a violent struggle with the deputies as they extracted him from the cell, and that the deputies testified that the only reason there had not been an actual "fight" was that the defendant was ultimately secured before he could strike them. (*Ibid.*) While the Court noted that a jury could properly have found that one part of this litany of transgressions – spitting at a deputy – was a battery, there is nothing in the case to suggest that the battery was either admitted or to be considered separately as a factor (b)

crime, rather than as one circumstance of an otherwise violent act or acts by the defendant.

Respondent's reliance on *People v. Lewis* (2006) 39 Cal.4th 970, 1053, is similarly misplaced. In *Lewis*, this Court found defendant's conduct could be inferred to be physically threatening where defendant not only threw hot coffee at the custodial officer but followed his act with a statement that he would have thrown additional food at the officer if he had anything left to throw. (*Id.* at pp. 985, 1053.) *People v. Moore* (2011) 51 Cal.4th 1104, 1136, is also inapposite. In *Moore* the defendant claimed his conduct was not a violation of a criminal statute. This Court disagreed stating that the defendant had mischaracterized the evidence as merely throwing some food that touched the officer, when in fact defendant had thrown his entire food tray "*at her.*" (*Ibid.*) Appellant's conduct here is distinguishable from the cases respondent cites in that it was a simple battery, did not involve a series of violent or threatening acts, appellant was compliant after tossing the urine and, unlike the defendant in *Moore*, the conduct did not involve the obviously-violent act of throwing a tray of food directly at the officer – an act clearly capable of inflicting injury.

The misdemeanor battery that occurred here was not a crime of force or violence. (See AOB 464-466, 468-471.) Its admission at the penalty phase was erroneous because, while appellant's conduct was an act of misbehavior, it was not an act of violent criminality. It lacked the use or threat of force or violence required to qualify as factor (b) aggravating evidence. Admission of conduct that constitutes no more than a simple battery would permit the jury to consider "incidents of misconduct and ill temper" that should not "influence a life or death decision." (*People v. Boyd, supra*, 38 Cal.3d at pp. 774, 776.)

2. Appellant's Unadjudicated Conduct Did Not Involve an Implied Threat to Use Force or Violence

Respondent does not contest that the evidence presented at trial was no more than a battery, and does not argue that the battery that occurred here involved the use of force or violence. In contrast to the prosecution's theory at trial,[21] respondent now argues that evidence of appellant's conduct was admissible under factor (b) as an *implied threat* to use force or violence. (RB 156.) Respondent is mistaken and its reformulated theory of admissibility fails.

Appellant agrees with respondent that whether proscribed conduct involved an implied threat to use force or violence, and could thus be admissible under factor (b), is determined by looking to the facts of the particular case. (RB 156; see *People v. Mason* (1991) 52 Cal.3d 909, 955; see also *People v. Jackson* (2014) 58 Cal.4th 724, 759.) Appellant disagrees with respondent, however, that "it can be reasonably inferred" from the circumstances that occurred here that appellant's conduct "involved an implied threat to use force or violence." (RB 156.)

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[21] The record indicates that at trial the prosecution proceeded under the theory that appellant's conduct was admissible because it constituted a battery that involved the use of force or violence, and not on the theory that appellant's conduct was an implied threat to use force or violence. When the jury was instructed about the aggravating circumstances that it may consider, the jury was specifically instructed that evidence was introduced to show that the defendant "committed battery upon custodial officers Basurto, Williams, and Keller." (128RT19862.) The prosecution limited its focus to the three officers, rather than all five who were present, indicating that the prosecutor believed that those three were the only victims. Had the prosecutor been proceeding under a theory of an implied threat to use force or violence, the threat presumably would be to all five officers present. (See 128RT:19904.)

Section 190.3 expressly prohibits admission of "criminal activity by the defendant which did not involve . . . the implied threat to use force or violence." (§ 190.3; see also *People v. Phillips*, *supra*, 41 Cal.3d at pp. 69-72 [factor (b) limits admissibility to evidence that demonstrates the commission of an actual crime that involved the use or attempted use of force or of an implied threat to use force or violence]; see also *People v. Boyd*, *supra*, 38 Cal.3d at pp. 774, 776.)

The evidence here did not establish a crime that involved an implied threat to use force or violence. Instances in which this Court has concluded that conduct prohibited by criminal statute was admissible factor (b) evidence under the theory that it was an "implied threat to use force or violence," most often arise where the defendant illegally possessed a weapon. (See e.g., *People v. Martinez* (2003) 31 Cal.4th 673, 697 ["mere possession of a potentially dangerous weapon in custody involves an implied threat of violence"]; *People v. Harris* (1981) 28 Cal.3d 935, 963, [possession of a wire garrote and a prison-made knife while in jail "clearly involved an implied threat to use force or violence"]; see also *People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127 [implied threat of force of violence within meaning of factor (b) inferred where defendant found with a loaded gun during a parole search and gun's location was such that it was readily available for use at the place and time it was found]; *People v. Michaels* (2002) 28 Cal.4th 486, 535-537 [defendant's illegal possession of knives previously used or similar to the ones used in prior crimes].)

Other conduct that may constitute an implied threat to use force or violence is that from which it can be inferred from the defendant's actions, statements or the surrounding circumstances that he intends to commit an act of force or violence. (See, e.g., *People v. Lewis*, *supra*, 39 Cal.4th at

pp. 985, 1053 [criminal assault was a physically threatening act from which a jury could infer an implied threat of violence, where defendant threatened to throw food at custodial officer, immediately thereafter threw hot liquid and other liquid toward officer, and threatened to continue to throw food had he had more to throw]; *People v. Chatman* (2006) 38 Cal.4th 344, 397-398 [setting fire to an apartment could reasonably be considered an attempt to intimidate the occupant by an implied threat of violence, and was not only a crime against property]; *People v. Stanley* (1995) 10 Cal.4th 764, 824 [car arson was an integral part of the defendant's attempts to frighten and control the victim and therefore "clearly involved an implied threat of violence" against a person]; *People v. Monterroso* (2004) 34 Cal.4th 743, 771 [vandalizing the victim's van with the initials of the defendant's gang was a threat of violence against a person as it was conduct intended to instill fear in the victim and not merely evidence of an act against property].)

The facts of this case do not support an inference of future violence. Officer Basurto testified that when the incident occurred he and four other officers were standing on one side of appellant's cell door and that appellant was in his cell, the door to the cell closed and locked and that consistent with protocol, the only area opened at the time was a small port, the opening through which meals are passed to the inmate, and where an inmate's hands are placed for handcuffing before transporting. (119RT:19011-19016.) Immediately thereafter, appellant placed his hands through the port, he was secured to a tether, the cell door was opened and the officers secured appellant to belly chains and escorted him from his cell, all without incident. (119RT:19019-19020.)

While in other instances it might be possible to infer a threat of violence from an inmate throwing urine at an officer, in essence warning guards that if they entered his cell he would commit an act of violence, appellant's ready submission here makes that implausible. Rather, appellant's conduct appears to be a retort to being roused close to midnight for a "routine" cell search. (See, e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 562, 580, 589-591 [defendant's conduct more appropriately described as a retort to the custodial staff by a defendant who had difficulty submitting to authority where defendant, from inside his locked cell, made death threats against custodial staff and threw a "vile liquid," possibly "urine," against the screen part of his cell].) Indeed, respondent does not explain what aspect of appellant's conduct amounted to an implied threat. Respondent merely recites the uncontested facts and, without citation to cases that support its argument, claims that "it can be reasonably inferred" that appellant's conduct "involved an implied threat to use force or violence." (RB 156.) At most appellant's conduct was repugnant, but it was not threatening.

Respondent also argues that appellant contended that the evidence should not have been admitted under factor (b) because there was no evidence that the substance thrown caused a serious bodily injury. (RB 158-159.) Respondent has misunderstood appellant's argument. The relevance of the substance tossed was not the grounds on which appellant argued his conduct was inadmissible. Appellant argued in his opening brief and above that his conduct was inadmissible under factor (b) because it did not involve force or violence. As respondent notes, appellant acknowledged that section 243.9, enacted subsequent to appellant's trial, permits the state to charge the act of throwing a bodily fluid at custodial

officers, that results in actual contact with a person's skin, as a misdemeanor or a felony. (AOB 466-467.) First, as respondent agrees, at the time of appellant's trial his conduct constituted no more than a battery (RB 158) and the court's instruction to the jury was that the conduct could be considered as an aggravating circumstance only if the jury found beyond a reasonable doubt that it was a battery. (128RT:19862.) Moreover, that the statute permits the state, subsequent to appellant's trial, to choose to file a complaint for an alleged violation of section 243.9 as either a misdemeanor or a felony, does not eliminate the requirement that for evidence of alleged unadjudicated conduct to be admissible under factor (b), the conduct must, in addition to being proscribed by statute, involve the use of force or violence or an implied threat to use force or violence, which the conduct here did not.

A trial court's decision to admit, at the penalty phase, evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1127.) Because appellant's conduct did not satisfy the use of, or the implied threat to use "force or violence" requirement of factor (b), the trial court's erroneous admission of the evidence was an abuse of discretion.

3. It Was Error to Deny Appellant's Request to Exclude Evidence That the Battery Was Committed with Urine

Appellant argued that it was error to deny his request under Evidence Code section 352 to exclude evidence that the battery was committed with urine. (AOB 471-473.) Respondent argues that it was not error under Evidence Code section 352 to admit the evidence of appellant's conduct (RB 159), but that was not appellant's argument. Appellant did not argue that the entire act should have been excluded under Evidence Code section

352, but that pursuant to that section the trial court erred by denying appellant's request to exclude evidence that the battery was committed with urine. (AOB 472-473.) To that argument respondent contends that the fact that appellant said the liquid tossed was urine was "highly probative of the violent nature of the act." (RB 159.) Respondent does no more than quote the trial court's comments denying appellant's request that the jury not be told that the battery involved urine. (RB 159-160.) Respondent has not otherwise addressed appellant's Evidence Code section 352 argument. As appellant argued in his opening brief, the nature of the liquid was not relevant to whether an unwanted touching occurred or to whether the unwanted touching involved violent conduct. (AOB 472.) Evidence that the liquid tossed was urine did no more than inflame the jury while adding minimal, if any probative value to the fact of the battery. Denying appellant's request to exclude evidence that the battery was committed with urine did not further the purpose of factor (b) evidence (see *People v. Anderson* (2001) 25 Cal.4th 543, 588-589 [the relevance of unadjudicated conduct in a capital sentencing trial is to the defendant's history of criminal violence, and not whether the defendant committed the specific elements of an additional criminal offense]), and was contrary to the statutory exclusion of factor (b), which is to prevent the jury from hearing evidence of conduct which "is not of a type which should influence a life or death decision" (*People v. Boyd, supra*, 38 Cal.3d at p. 776). It was error under Evidence Code section 352 to deny appellant's request. (AOB 472-473.)

B. The Erroneous Admission Of The Evidence Requires Reversal Of Appellant's Death Sentence

Appellant's act did not involve the kind of conduct that should be admitted to argue for sentencing a person to death over life. It was error for the trial court to permit the state to present it as factor (b) evidence, and doing so rendered appellant's trial fundamentally unfair and deprived appellant of due process and a reliable death verdict. (U.S. Const., 5th, 8th, & 14th Amends; Cal. Const. art. I, §§ 1, 17.)

The prosecutor introduced this evidence to argue that appellant should die for his capital crime; that is the theoretical purpose of the prosecutor presenting evidence under factor (b). At closing argument, immediately after arguing that the incident was one which should influence the jury's decision to sentence appellant to death, over life, the prosecutor argued that there is "no question about it," appellant is "absolutely" a threat to "anyone around him." (128RT:19903-19904.)

Appellant briefed why the erroneous admission of this evidence was prejudicial in his opening brief (AOB 473), and respondent did not address appellant's argument, going no further than its argument that there was no error. As detailed in his opening brief and above, this error, both alone and when combined with the trial court's multiple erroneous rulings, rendered the sentencing phase of appellant's trial fundamentally unfair and deprived him of due process and a reliable death verdict. (See *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927; *Chambers v. Mississippi*, (1973) 410 U.S. 284, 298, 302-303; *People v. Jackson*, *supra*, 58 Cal.4th at p. 741, fn. 5, quoting *People v. Hill* (1998) 17 Cal.4th 800, 847 ["trial court errors 'created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the

individual errors.'"].) The burden is on the prosecution to show that this error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), and this respondent has not done. The prosecution cannot meet this burden because the inadmissible evidence here undoubtedly caused the jury to feel revulsion toward appellant, thereby unfairly tipping the scale toward death. Reversal is likewise required under the state standard of prejudice because there was a "reasonable possibility" that without the admission of this evidence, at least one juror would have sentenced appellant to a life sentence, rather than to death. (*People v. Brown* (1988) 46 Cal.3d 432, 448; Cal.Const., art. VI, § 13.)

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14

APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE IN AGGRAVATION THAT APPELLANT POSSESSED HACKSAW BLADES IN PRISON

In his opening brief appellant challenged the trial court's ruling admitting his possession of hacksaw blades in prison as section 190.3, factor (b) evidence. Appellant argued that his possession of the hacksaw blades did not violate section 4502, and that even if it did, that crime did not constitute factor (b) evidence because appellant's conduct did not involve an implied threat to use force or violence. (AOB 474-482.)

Respondent contends that a hacksaw blade fits within the statutory framework of section 4502 because it is both a "dangerous weapon" and a "sharp instrument." (RB 161-164.) Respondent is incorrect; the trial court erred by admitting the evidence and the error prejudiced appellant.

A. A Hacksaw Blade Is Not A Sharp Instrument Within the Meaning of Section 4502

Appellant submits, as he argued in his opening brief, that a hacksaw blade is not a "sharp instrument" within the meaning of section 4502 and therefore his possession of them did not violate the statute. (AOB 478-479; 481-482.)

Respondent attempts to recast the issue as being simply whether a hacksaw blade is a potentially dangerous weapon. (RB 162.) But that is not correct. Criminal activity under factor (b) is limited to conduct which violates a penal statute. (*People v. Boyd* (1985) 38 Cal.3d 762, 776-778.) The threshold question therefore is whether possession of a hacksaw blade is a crime under section 4502, the statute which the prosecution claimed was violated by appellant's possession of hacksaw blades. Section 4502 covers the possession of a variety of specific items: those used for striking,

such as blackjacks, billies and metal knuckles; items used for cutting and stabbing, including dirks, daggers and sharp instruments; and traditional weaponry such as firearms, ammunition, explosives and tear gas. (§ 4502.) "Dangerous weapon" is not listed in the statute, and whether or not a particular weapon is dangerous is not relevant to determining if possessing it is a crime under section 4502.

The prosecution's theory was that a hacksaw blade is a "sharp instrument" within the meaning of section 4502. The unadjudicated conduct was alleged to be "Possession of Sharp Instrument by Prisoner" (26CT:5309), and the jury was instructed on the elements of possession of a sharp instrument under section 4502 (26CT:5321). Respondent proposes that such an instrument is "sharp" if it could be used to "slice a victim's throat, wrist, or other vital spot and has a reasonable potential of causing great bodily injury or death." (RB 163.) Respondent offers no authority for this as a definitive test for sharpness, and appellant disputes its legitimacy. Many ordinary tools, such as files and rasps,[22] could inflict damage to human flesh in a manner similar to a hacksaw, but would not ordinarily be considered "sharp." Section 4502 describes a limited set of items that are proscribed. It does not specify hammers and wrenches although such tools could be used as striking instruments like blackjacks and billies, which are listed. That a hacksaw blade can be used to harm a person does not make it a sharp instrument under section 4502. (See *People v. Hayes* (2009) 171 Cal.App.4th 549, 557, 560 [rejecting instruction that defined a sharp instrument as an instrument that can be used to inflict injury].)

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[22] There are cases, some cited below, in which a file has been altered by sharpening to fashion a stabbing instrument, but none where a simple file by itself is a sharp instrument.

Items that have been found to be sharp instruments under the statute include various knives and stabbing instruments made by inmates. For example, in *People v. Custodio* (1999) 73 Cal.App.4th 807, 810, the sharp instrument was an inmate-manufactured stabbing device consisting of a stiff pointed piece of metal, like a sewing machine needle, molded onto the plastic barrel of a ballpoint pen and with a tapered shape. In *People v. Crenshaw* (1946) 74 Cal.App.2d 26, 27, defendant beveled off edges of a six-inch "rat tail" file until it had a "very sharp point." In *People v. Harris* (1950) 98 Cal.App.2d 662, 663, a steel wood chisel was found to be a sharp instrument where the handle had been broken off and had a sharpened point. In the present case, appellant possessed three short hacksaw blades, each approximately four inches in length, which had no handles or other modifications. (119 RT 18942.) They were clearly not stabbing instruments and did not have the keen cutting edge of a knife.

Respondent claims both *People v. Martinez* (1998) 67 Cal.App.4th 905 and *People v. Savedra* (1993) 15 Cal.App.4th 738, as authority for a hacksaw blade being a sharp instrument under section 4502. (RB 163.) But these cases construe whether certain items constitute deadly weapons – not sharp instruments – and under section 4574, rather than section 4502. Furthermore, neither case involved hacksaw blades. In *Martinez*, defendant possessed a knife (*People v. Martinez, supra*, 67 Cal.App.4th at p. 907) and in *Savedra*, the weapon was in inmate-fashioned stabbing device made from a long nail, with a handle made of toilet paper (*People v. Savedra, supra*, 15 Cal.App.4th at p. 741). Neither case is relevant to whether a hacksaw blade is a sharp instrument under section 4502. Respondent has not cited, and appellant has not found, any California cases that have ruled that hacksaw blades are sharp instruments.

Appellant's possession of hacksaw blades did not violate section 4502 as a hacksaw blade is not a "sharp instrument" within the meaning of that section. The prosecutor did not argue that the hacksaw blades were weapons, and focused his argument on appellant's potential for escape with the blades, not assault. (128RT:19901-19902.) Appellant's conduct did not violate section 4502, and it was therefore inadmissible as factor (b) evidence. (See *People v. Phillips* (1985) 41 Cal.3d 29, 71-72.)

B. Possession Of Hacksaw Blades Was Inadmissible Factor (b) Evidence Because Appellant's Conduct Did Not Involve An Implied Threat To Use Force Or Violence

Even if this Court finds that a hacksaw blade is a "sharp instrument," the possession of which violates section 4502, it was nonetheless inadmissible factor (b) evidence in this case. To qualify as a statutory aggravator under factor (b), the conduct must also involve either "the use or attempted use of force or violence" or "the express or implied threat to use force or violence." Appellant's mere possession of hacksaw blades was not an act or attempted act of violence. Respondent claims, however, that it did constitute an *implied threat* to use force or violence. (RB 163-164.) Respondent is incorrect.

Appellant recognizes that the illegal possession of certain weapons may support an inference of an implied threat to use force or violence within the meaning of factor (b). (See e.g., *People v. Jackson* (2014) 58 Cal. 4th 724, 759 [ex-felon in possession of weapon which was loaded and ready to use]; *People v. Clair* (1992) 2 Cal.4th 629, 676 [carrying a knife during burglary was an implied threat to use the knife against anyone who might interfere].) The rationale for this is that illegal possession of weapons may show "'an implied intention to put the weapons to unlawful

use.'" (*People v. Dykes* (2009) 46 Cal. 4th 731, 777, quoting *People v. Michaels* (2002) 28 Cal.4th 486, 536; see also *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [knowing possession, in custody, of the weapon involved, a sharpened knife, involves an implied threat of violence].)

This reasoning does not apply to the evidence here. First, a violation of section 4502 does not inherently involve an implied threat of violence. Section 4502 requires only knowing possession of the contraband item, not an intent to use it to commit an act of violence. (*People v. Steely* (1968) 266 Cal.App.2d 591, 594-595; *People v. Wells* (1968) 261 Cal.App.2d 468, 478-479.) Thus, an inmate whose possession of a knife may be only for self-defense is nevertheless guilty under the statute. (*People v. Wells, supra*, 261 Cal.App.2d at p. 478.) In *People v. Steely*, *supra*, an inmate's defense was that, after a yard incident, he had just picked up a shank and handed it to a correctional officer. The Court of Appeal held that innocent but knowing possession of the shank was not a defense. (*People v. Steely*, *supra*, 266 Cal.App.2d at pp. 594-595.) Therefore, assuming appellant's possession of hacksaw blades in the present case violated section 4502, that conduct by itself did not establish that he had an intent to use the blades for violent purposes in the future. At most, consistent with the prosecution's theory at trial, the hacksaw blades were escape tools, not weapons of violence. Although possession of the items as escape tools would not provide a defense to section 4502, it would negate an inference that possession was an implied threat of violence under factor (b).

Second, the facts of this case do not support an inference that appellant's possession of hacksaw blades constituted an implied threat of violence. Whether a particular instance of criminal activity involved the implied threat to use force or violence for purposes of factor (b) evidence

"can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d, 909, 955; see also *People v. Cruz* (2008) 44 Cal.4th 636, 683-684; *People v. Jackson* (1996) 13 Cal.4th 1164, 1257 (dis. opn. of Mosk, J. [finding lack of substantial evidence of implied threat of violence in escape].) As discussed above and in the opening brief, the prosecutor's theory was that appellant possessed the hacksaw blades as escape tools, not as weapons. Evidence of an escape that does not involve the threat of violence is inadmissible under factor (b). (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 776-777 [re attempted escape].) Therefore, mere possession of tools that could be used to effectuate such an escape should not support an inference that the possessor intended to commit a crime of violence.

Respondent characterizes the hacksaw blades as "dangerous weapons" and argues that as such their possession by appellant constituted an implied threat of violence. (RB 163.) Respondent believes its position is supported by language from *People v. Martinez* (2003) 31 Cal.4th 673, 697, stating that "mere possession of a potentially dangerous weapon in custody involves an implied threat of violence." (RB 163.) Respondent apparently assumes that because a hacksaw blade could be used in a manner to inflict injury, it therefore must be a "potentially dangerous weapon" within the meaning of *Martinez*. Any such assumption, however, is misplaced.

The language in question from *Martinez* can be traced back to *People v. Tuilaepa*, *supra*, 4 Cal.4th 569, where this Court stated, "It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence

defendant used or displayed it in a provocative or threatening manner." (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 589, citing *People v. Ramirez*, *supra*, 50 Cal.3d at pp. 1186-1187, *People v. Lucky* (1988) 45 Cal.3d 259, 291-292, and *People v. Harris* (1981) 28 Cal.3d 935, 962-963.) However, a review of the cases on which *Tuilaepa* relies reveals none that discuss possession of "potentially dangerous weapons." In *People v. Ramirez*, *supra*, 50 Cal.3d at pp. 1186-1187, defendant possessed an eight-and-one-half inch sharpened kitchen knife while confined at the California Youth Authority, a deadly weapon under former section 12020. Possession of the weapon involved an implied threat of violence because it was a "'classic instrument [] of violence'" that was "'normally used only for criminal purposes.'" (*Ibid.*, quoting *People v. Grubb* (1965) 63 Cal.2d 614, 620 and *People v. Wasley* (1966) 245 Cal.App.2d 383, 386.) In *People v. Harris*, *supra*, 28 Cal.3d at pp. 962-963, defendant possessed in prison a garrote and prison-made knife, which this Court simply noted "clearly involved an implied threat to use force or violence." In *People v. Lucky*, *supra*, 45 Cal.3d at pp. 291-292, the defendant in county jail possessed two shanks, six to eight inches long, straightened and sharpened from wire bedsprings. The Court described these shanks as deadly weapons under section 4574. Thus, for the purposes of determining whether an implied threat of violence can be inferred from simple possession of a particular item of contraband by an inmate, a "potentially dangerous weapon" appears to be a "classic instrument of violence."

In *People v. Tuilaepa*, *supra*, 4 Cal.4th at pp. 579-580, 589, the proscribed conduct amounted to a violation of section 4574 – possession of a deadly weapon by an inmate. The weapons the inmate possessed were the remains of broken razors, another two razors plus additional razor blades,

and what prison officials referred to as a "battery pack," several batteries taped together for the inmate to use as a punching device. In *People v. Martinez*, *supra*, 31 Cal.4th at pp. 693-694, which followed *Tuilaepa*, the weapon possessed by the inmate was a homemade metal shank. The weapons in *Tuilaepa* and *Martinez* were all common weapons of violence among inmates, consistent with the "classic instruments of violence" discussed in *Ramirez* et al., which would also support an inference that they were possessed with the intent to use them in the future in their capacity as weapons of violence.

By contrast, a hacksaw blade is not a classic instrument of violence; rather, it is a classic instrument of escape. Appellant's possession of hacksaw blades may have raised an inference of an intent to escape, but it did not raise an inference of a threat of violence. Escape is not a crime of violence. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 776-777.) Furthermore, there was no evidence that appellant possessed these escape tools for the purpose of committing an act of violence. The determination of whether the proscribed conduct involved an implied threat to use force or violence under factor (b) requires looking at the particular facts of the conduct. (*People v. Mason*, *supra*, 52 Cal.3d at p. 955.) Although a hacksaw blade, like many common items, could potentially be used to inflict injury, it does not fit in the category of items from which an implied threat of violence could be inferred, and the particular facts of this case do not otherwise support finding such a threat. Because possession of the hacksaw blades was not violent criminal activity under factor (b), the court erred in denying appellant's objection to its admission.

Respondent also notes that this Court is not bound by the out-of-state authorities cited by appellant in his opening brief holding that hacksaw

blades are not dangerous weapons per se. (RB 163.) Appellant does not argue that this Court is bound by those authorities; rather he contends that such authority can be both instructive and informative. The reasoning in the cases cited by appellant is sound, and support his position that possession of hacksaw blades by an inmate is not a crime of violence under factor (b). Respondent neither refutes the reasoning of these authorities nor offers California law to the contrary.

A trial court's decision to admit, at the penalty phase, evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127.) Because appellant's conduct neither violated section 4502 nor constituted an implied threat to use force or violence the trial court's erroneous admission of the evidence was an abuse of discretion.

The trial court's error in admitting this evidence violated appellant's state statutory rights and his rights under both the state and federal constitutions to due process, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th, and 14th Amends; see AOB 482.) Admission of the evidence violated appellant's Eighth Amendment right to a fair and reliable sentencing hearing (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305) and appellant's Fourteenth Amendment rights to due process (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346).

C. The Erroneous Admission Of The Evidence Was Prejudicial

As appellant argued in his opening brief, the erroneous admission of this evidence prejudiced appellant. (AOB 482-484.) This Court has stated that escape may indeed "weigh heavily" in a jury's determination of

penalty. (*People v. Gallego* (1990) 52 Cal.3d 115, 196; see also *People v. Jackson, supra*, 13 Cal.4th at p. 1232; AOB 483-484.) In *People v. Lancaster* (2007) 41 Cal.4th 50, 95, this Court again recognized that escape evidence may be particularly prejudicial if used to suggest to the jury that the death penalty is the only means of protecting the public from a defendant who poses a significant escape risk. In the present case, the prosecutor, in explaining the significance of the hacksaw blades in support of his penalty phase argument for the death penalty, told the jury that "no bar is going to stop Mr. Scully from doing what he wants to do. There are no bars, because he saws himself out of the cell that he's in." (128RT:19901.)

A jury charged with the responsibility to decide a life or death fate is different in kind from a jury whose responsibility it is to decide guilt or innocence. A penalty phase jury's "role is not merely to find facts, but also – and most importantly – to render an individualized, normative determination about the penalty appropriate for the particular defendant – i.e., whether he should live or die." (*People v. Brown* (1988) 46 Cal.3d 432, 448.) There is a reasonable possibility that had the jury not heard this erroneously admitted evidence, which harm was exacerbated by the prosecutor's argument tying it to an alleged and speculative risk that appellant might escape, the jury would have returned a life verdict instead of death. (*Id.* at p. 447.) Under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, the prosecution cannot show beyond a reasonable doubt that the federal constitutional error did not contribute to the verdict. The death sentence must be reversed.

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15

THE TRIAL COURT ERRONEOUSLY ADMITTED FIVE PHOTOGRAPHS AT THE PENALTY PHASE

The trial court admitted five photographs during the penalty phase over appellant's objections. One depicted an inmate lying on a table after a 1985 assault, looking as if he were in a morgue. (Peo. Exh. No. 32.) Four photographs related to a 1978 sexual assault – three that showed injuries to the victim's face (Peo. Exh. Nos. 25, 26, & 27) and one showed appellant at the time of the crime (Peo. Exh. No. 28). Appellant argued that the photograph of himself was irrelevant and that the remaining exhibits were more prejudicial than probative under Evidence Code section 352. (AOB 485-493.) Respondent argues that the photographs were not unduly gruesome and were sufficiently probative of appellant's crimes to warrant admission. (RB 165-173.) Appellant disagrees.

A. The Moody Photograph

People's Exhibit No. 32 was a photograph of inmate Louis Moody following a May 19, 1985, prison altercation for which appellant was later convicted of assault. It depicted Moody lying on an examination table appearing as if he were in a morgue or close to death. Moody was shown naked, with his eyes closed, and looking ashen and cadaverous. To the trial court Moody appeared "kind of dead lying here," but admitted the photograph since the jury had already seen worse photographs. (120RT:19091-19092.) After the photograph was used to show Moody's injuries, the parties stipulated that the injuries were not life-threatening. (120RT:19129.)

Respondent argues that the photograph was relevant to show the nature of Moody's injuries and was more probative than prejudicial.

Respondent notes that the trial court had excluded another bloody and gruesome closeup of Moody and that the stipulation that Moody did not die from the assault was enough to avoid any prejudicial impact from the photograph. (RB 172.) However, appellant's argument is that the photograph's probative value was outweighed by its prejudicial impact, not that it had no relevance at all. (AOB 489-491.)

Under Evidence Code section 352, cumulative evidence is excluded under a rule of necessity. (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) Thus, photographs may be relevant but still cumulative and unnecessary if there is adequate testimony or other evidence to establish the purpose for which admission is sought. (See *People v. Anderson* (1987) 43 Cal.3d 1104,1137.) Here, in addition to appellant's conviction for assault, three correctional officers presented unchallenged testimony about the assault and described the wounds that Moody sustained. (See 120RT:19104-19110 [Ronald Wolf]; 120RT:19110-19117 [Kent Armbright]; 120RT:19215-19126 [Thomas Arzate].) The photograph was both unnecessary and cumulative as to the nature of the injuries. At the same time, the disturbing photo of Moody's naked body laying on a metal slab had enormous emotional and prejudicial effect. It made the injuries appear far more chilling and cast a death-like pall over the incident. The photograph was unduly gruesome and inflammatory and it was error to admit it. (See AOB 489-490; see also Douglas, et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492 [graphic photographs impact jurors].)

B. The Diane Keogh Photographs

Diane Keogh testified in detail about the sexual assault she suffered in 1978. (See AOB 488-489.) Keogh testified about the injuries to her face and the prosecution was permitted over objection to introduce People's Exhibit Nos. 25, 26 and 27 to show the injuries. (119RT:18916-18917.)

Respondent argues that the photographs of Keogh accurately showed the injuries and demonstrated the violence of the assault. (RB 170-171.) As discussed above, it is not the relevance of the photographs that is in dispute. In light of Keogh's testimony, the photographs were cumulative to other evidence and were not necessary under Evidence Code section 352. (AOB 491.)

Respondent dismisses the graphic aspect of the photographs by citing the trial court's ruling that the exhibits were not "unduly gruesome." (RB 171.) The trial court acknowledged that the photographs were prejudicial, noting that it is why they were being offered, but found that the probative value outweighed the prejudice. (116RT:18640.) The court noted that the jurors had already seen "far worse" photographs during the trial. (116RT:18640.) Thus, the introduction of graphic and gruesome photographs in the guilt phase became the standard by which other prejudicial images would be measured. (See Argument 5, AOB 324-354 and this Reply, *ante*, [erroneous admission of gruesome photographs].)

This Court has cautioned that jurors must "be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome," or that play upon the emotions of the jurors. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1272.) Here, the injuries shown in the photographs depicted multiple views of Keogh's injuries. The images were largely cumulative to each other and reinforced the graphic and prejudicial

qualities of each. In light of the detailed testimony about the assault, this Court should find that the three photographs should have been excluded. The prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant. (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.)

In apparent reference to the photographs of both Moody and Keogh, respondent mischaracterizes appellant's claim as also challenging the admission of the photographs as inadmissible victim impact evidence. (RB 172.) Appellant did not contend that the photographs were impermissible victim impact evidence, but that they were erroneously admitted and used to aggravate the crime under section 190.3, factors (b) and (c).

C. The Photograph Of Appellant

The parties stipulated that Keogh could identify appellant as her assailant. Nonetheless, the prosecution was permitted to present over objection a photograph of appellant at the time of the assault. The photograph depicted appellant as a young man, with long hair and a short beard. (Peo. Exh. No. 28.) It is a typical "mug shot" where a suspect stares somewhat expressionlessly at the camera. The trial court stated that "being assaulted by a person who looks like this" may be relevant to the emotional impact of the attack. (116RT:18643.) Respondent echos the trial court and argues that appellant's appearance could have been considered as a circumstance of the crime. (RB 171-172.) At the time of the hearing, however, the prosecutor did not argue that appellant's appearance had a particular impact upon Keogh and she did not testify to that effect. The trial court's speculation about appellant's looks cannot substitute for the lack of evidence to establish that his appearance actually had an impact upon the

victim. (See *People v. Moore* (2011) 51 Cal.4th 386, 406 [theories of admissibility must not be based upon speculation].)

The trial court's reasoning shows the prejudice inherent in the photograph. If the trial court could assume that a person who looked like appellant would have naturally had an impact upon Keogh, jurors certainly would have regarded the photograph as showing a young man to be feared. What appellant looked like at the time of the crime had no relevance. It did not aggravate the crime further. It was not introduced to explain the crime. It was not needed for identification. Under these circumstances, the trial court erred in admitting the exhibit.

D. The Errors Were Prejudicial

The erroneously-admitted photographs combined to present graphic images, which the trial court itself noted were prejudicial (116RT:18640-18641), and which had the likely result of inflaming the jurors against appellant. (AOB 493.) Respondent does not address appellant's prejudice argument.

Inflammatory photographs present the risk that a verdict is based on an emotional response to the graphic images, rather than a decision about life or death based on a reasoned moral response to the evidence presented. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493.) Indeed, graphic photographs can play a significant role in the penalty phase. (See Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev. 1476, 1497-1499 [noting role photographs played in shaping death-sentencing decision].) The trial court's error in admitting the challenged photographs, both alone and when combined with the trial court's other erroneous rulings, rendered the sentencing phase of appellant's trial

fundamentally unfair and deprived him of his state and federal constitutional rights to due process and a reliable penalty verdict. The death judgment must be reversed.

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16

ADMISSION OF VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE DENIED APPELLANT HIS RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION

Appellant argued in his opening brief that permitting five members of Deputy Trejo's family to testify at the penalty phase about the impact of their loss, and allowing the prosecution to present multiple photographs of Deputy Trejo with his family, violated appellant's right to a fair and reliable sentencing hearing. (AOB 494-516.) Appellant further argued that the trial court erred when it denied his proffered instruction which would have appropriately cautioned the jurors to use reason when deciding whether appellant should live or die, rather than the unbridled emotion that is fostered by victim impact evidence. (AOB 517-520.)

Respondent contends that the victim impact testimony was not unfairly excessive or cumulative, or inflammatory, and was "unique as to each individual's life experience." (RB 179-180.) Appellant disagrees. Five members of Deputy Trejo's immediate family testified: his wife of forty years and his four adult children. Deputy Trejo's four children testified that they missed their father, they were close to him and he was their friend; two of his children testified that they were single parents, that he helped them with childcare and that he was a surrogate father for their children. Two children testified that they lived with their parents, one of whom already had a child and the other of whom became a parent shortly after his father's death and was now left without the guidance his father could have provided for raising his child. They testified about their own loss, and the loss to their current and future children who had lost their grandfather. (121RT:19176-19196.)

Appellant argued that the trial court erred by permitting all four of Deputy Trejo's adult children to testify. Each witness did not provide particularly different testimony from the other, or even a unique perspective about the impact their father's death had on them. Each testified, indeed in fairly similar language, about the emotional and financial help that their father provided to them that they now no longer had, that his absence during the holidays was especially difficult and the impact on Deputy Trejo's current and future grandchildren from the loss of their grandfather. (121RT:19176-19196.) Appellant is aware that this Court has concluded that victim impact evidence need not be confined to the testimony of one witness. (*People v. Montes* (2014) 58 Cal.4th 809, 884-885.) But, even assuming it is constitutionally permissible to allow more than one victim impact witness (but see *Payne v. Tennessee* (1991) 501 U.S. 808, 811-812; *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180), permitting all four of Deputy Trejo's adult children to testify was excessive, cumulative and unduly prejudicial.

As cogently stated by Justice Stevens, "[v]ictim impact evidence is powerful in any form." (*Kelly v. California* (2008) 555 U.S. 1020, __, 129 S.Ct. 564, 567, statement of Stevens, J., respecting the denial of cert.) Courts must proceed cautiously with victim impact evidence and ensure that the evidence is relevant to the jury's deliberations and does not invite a verdict based on sentiment, rather than reasoned judgment. (See *ibid.*) This Court has recognized that victim impact testimony that is from multiple family members may be improper and exceed constitutional limitations when it is cumulative or unduly emotional. (See *People v. Pearson* (2013) 56 Cal.4th 393, 467 [overall number of victim impact witnesses not

excessive where there were two victims and the testimony included three generations of the victims' families]; *People v. Taylor* (2010) 48 Cal.4th 574, 645-646 [victim impact testimony from six family members permissible where their testimony offered the personal perspectives of four different generations and none was cumulative of another]; cf. *People v. Brady* (2010) 50 Cal.4th 547, 576 [testimony from multiple victim impact witnesses cumulative where the repeated information comprises the bulk of the testimony].) In this case, permitting all four of Deputy Trejo's adult children to testify, where each sibling's testimony was cumulative to the other, and none even offered a different perspective on similar subject matters, the heart-felt repeated themes became a mantra with a synergistic effect. In *People v. Trinh* (2014) 59 Cal.4th 216, 246, this Court stated that the number of witnesses permitted to testify about the effect from a defendant's action, to inform the decision as to whether a defendant should live or die, will vary from case to case, and that the trial court should exercise its discretion to control any excesses by excluding cumulative testimony. Here, the trial court failed to control such excess by permitting cumulative testimony from Deputy Trejo's four adult children. This excessive testimony resulted in unduly prejudicial evidence that rendered appellant's penalty trial fundamentally unfair and invited the jury to decide appellant's fate based on an irrational response.

Respondent also argues that the victim impact evidence was not particularly "emotionally overwrought," and thus would not have unfairly swayed the jury to return a death sentence, comparing it to cases in which this Court has upheld the admissibility of victim impact where the evidence was more "dramatic or heart-wrenching" than that here. (RB 180.) Respondent is incorrect. Indeed, the trial court itself stated that Deputy

Trejo's family's testimony was not only "compelling" but was "agonizing." (129RT:20112.)

Appellant also argued that the trial court erred by admitting five powerful and emotionally-laden photographs as victim impact evidence to convince the jury to sentence appellant to death. Respondent, while appearing to recognize that the impact from photographs could result in emotion reigning over reason, argues that it was proper to admit the photographs here because they "served simply to 'humanize'" Deputy Trejo. (RB 181.) Respondent is incorrect. The photographs provided a powerful and emotional punch. None of the photographs were necessary to "humanize" Deputy Trejo. The picture painted of Deputy Trejo throughout trial – one of honor, dignity, and a hero – humanized him. He remained in the forefront throughout the trial. His former colleagues from the Sonoma County Sheriff's Department were in the courtroom daily, dressed in their uniforms, providing the courtroom's security. Deputy Trejo's widow was present in court almost every day. (See AOB 522-523.) And, due to the publicity surrounding the case, members of the jury were familiar with, had read about and seen photos of Deputy Trejo before arriving for jury duty. (See AOB 186-188 & *ante* Argument 1.A.1.e.)

It also cannot be said that there was an imbalance between humanizing, mitigating evidence offered in support of appellant, and humanizing evidence about Deputy Trejo, such that any victim impact was necessary, let alone the number of family witnesses who testified at appellant's trial, to counteract that offered by appellant. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825 [reminding the sentencer of the victim's individuality to counteract the defendant's mitigating evidence].) Not only did Deputy Trejo's humanity and spirit permeate the trial and

courtroom, but little evidence was presented on appellant's behalf from either family members or other witnesses to show appellant's uniqueness as an individual human being.

In sum, it was error to permit all of Deputy Trejo's adult children to testify about the impact on them from their loss, and to allow the prosecution to present photographs of Deputy Trejo with his children, his grandchildren and in his Deputy Sheriff's uniform. The victim impact evidence here invited a verdict based on raw emotion rather than reasoned judgment, and encouraged jurors to decide in favor of death over life on the basis of their emotions rather than their reason, denying appellant a fair and reliable determination of penalty under the state and federal Constitutions. (U.S. Const., 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15, & 17.)

Respondent contends no errors occurred, and does not respond to appellant's prejudice argument. (RB 179-185.) Therefore, no further argument on the point is necessary. The judgment of death must be reversed.

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17

THE TRIAL COURT ERRONEOUSLY ADMITTED VICTIM IMPACT TESTIMONY FROM FRANK COOPER AND KAREN KING

Appellant contends that the trial court erroneously admitted, over appellant's objection, testimony of Karen King and Frank Cooper about how appellant's crimes against them affected their lives. In his opening brief, appellant offered multiple grounds for excluding this so-called victim impact evidence: that in a capital case, victim impact evidence should not be admissible as to non-capital crimes; that the Cooper/King victim impact evidence was irrelevant and inadmissible under either section 190.3, factor (a) or factor (b) [hereafter "factor (a)" and "factor (b)"]; and even if otherwise relevant, this victim impact evidence was more prejudicial than probative under Evidence Code section 352. He also argued that the use of this victim impact evidence increased the risk that the jury would improperly punish appellant for the non-capital crimes against Cooper and the Kings and that some of the evidence presented improperly appealed to racial prejudice. (AOB 525-545.) Respondent claims there was no error and no prejudice.

Appellant's central argument[23] is that the trial court erred in ruling that the Cooper/King victim impact evidence was relevant under factor (a), the circumstances of the capital crime. Respondent agrees that this

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[23] Appellant acknowledged in his opening brief that this Court has held that evidence is admissible in the penalty phase of a capital trial to show the effects of a defendant's violent non-capital crimes introduced as aggravating evidence under factor (a) or (b). Appellant asked the Court to reconsider those decisions. (AOB 531.) No further argument is needed to reply to respondent's perfunctory response reiterating this Court's position (see RB 188, citing e.g., *People v. Price* (1991) 1 Cal.4th 324, 479).

evidence was not admissible under factor (a). (RB 188.) Respondent nevertheless claims there was no error because the evidence was properly admitted as a circumstance of other violent criminal activity under factor (b). This is incorrect.

The evidence was not admitted under factor (b). On August 16, 1996, weeks before jury selection began, the prosecutor filed his notice of evidence in aggravation. (25Supp.CT:6778.) That notice listed numerous acts of criminal violence which the prosecutor anticipated introducing under factor (b) at the penalty phase. No crimes against Cooper or King were listed. (25Supp.CT:6781-6785.) The same pleading listed 71 potential witnesses to prove these acts. Neither Cooper or King were listed. (25Supp.CT:6785-6787.) Cooper and King were listed, however, along with Deputy Trejo's family, as witnesses to the impact of appellant's "present offenses." (25Supp.CT:6787-6788.) The prosecutor subsequently stated that he also intended "to present evidence of the impact defendant's past offenses has had on his prior victims listed in I [factor (c) crimes] and II [factor (b) crimes] above. (25Supp.CT:6788.) Thus at the time the prosecutor gave the statutorily required notice of the evidence he intended to present at the penalty phase, he clearly intended to introduce the Cooper/King victim impact evidence as a circumstance of the crime under factor (a), not factor (b).

The prosecutor's position did not change throughout the trial. When the motion to exclude the victim impact evidence was first heard on April 21, 1997, the prosecutor continued to claim the Cooper/King evidence was admissible as a circumstance of the capital crime under factor (a). (115RT:18443-18444.) Just before the beginning of penalty phase testimony on June 13, 1997, the court heard further argument from

appellant that the Cooper/King victim impact evidence was inadmissible under factor (a), but ultimately overruled the objection. (121RT:19160-19165.) During the argument appellant even argued that the evidence might theoretically be admissible under factor (b), but the prosecution did nothing to alter its theory of admissibility. (121RT:19160-19164.)

Subsequently, the trial court instructed the jury consistent with CALJIC No. 8.86, listing each act of criminal violence under section (b) which the jury could consider as aggravating evidence. The crimes against Cooper and King were not listed. The jury was also instructed, again consistent with the standard language of CALJIC No. 8.86, that the listed acts of violence were the only ones on which it could rely under factor (b). (128RT:19861.) Neither the requested instructions nor the given instructions included the Cooper/King crimes on the factor (b) list. Finally, the prosecutor specifically argued to the jury that it should consider the victim impact evidence as to Cooper and King, with that of the Trejo family, under factor (a). (128RT:19890-19891.) The Cooper/King victim impact testimony was clearly introduced as evidence of the circumstances of the charged crimes under factor (a), not factor (b).

Presumably respondent is not claiming that the Cooper/King victim impact evidence was admitted under factor (b), but the other facts of the underlying crimes could be considered under factor (a). If that were the case, the evidence would simply be irrelevant because it would not explain the effect of a factor (b) crime on the victim. (See *People v. Price*, *supra*, 1 Cal.4th at p. 479.) The crimes against Cooper and the Kings were not used at the penalty phase as factor (b) evidence, so any of the effects of those crimes on the victims could not be relevant under factor (b).

Respondent may believe that the underlying crimes *could* have been used as factor (b) evidence rather than factor (a) and that any error is simply a matter of labeling rather than one of substance. But factor (a) and factor (b) are not fungible categories for other crimes evidence.

Permitting other crimes evidence under factor (b) is not intended to permit the imposition of the death penalty for those non-capital crimes. (*People v. Balderas* (1985) 41 Cal.3d 144, 205.) Rather, such evidence under factor (b) is admissible to show a defendant's propensity for violence. (*Id.* at p. 202.) To establish a factor (b) offense, the prosecutor may introduce evidence of the circumstances surrounding the violent conduct in order "to give context to the episode." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014.) Such circumstances give jurors the opportunity to determine the seriousness of the violent acts. (*People v. Melton* (1988) 44 Cal.3d 713, 757.) The injuries suffered by the crime victims are circumstances that are relevant to showing the seriousness of the violent acts. (*People v. Price*, *supra*, 1 Cal.4th at p. 479.) Accordingly, the effects of a factor (b) crime on the victim are ultimately relevant to an aspect of appellant's character – his propensity for violence.

On the other hand, factor (a) concerns the facts of the crime for which defendant is being sentenced. The circumstances of the crime is among the most significant aggravating factors. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1062.) Those circumstances include the facts surrounding the non-capital crimes related to the capital crime. (*Ibid.*) The meaning of "circumstances" under factor (a) extends to that which surrounds the crime materially, morally, or logically. (*People v. Smith* (2005) 35 Cal.4th 334, 352.) A juror considering the circumstances of the crimes against Cooper and King under factor (a) could have determined that they constituted a

powerful aggravating factor, whereas the same juror considering the same crimes under factor (b) could have decided that they added little to the juror's assessment of appellant's character, particularly in light of the other evidence introduced under factor (b). Therefore, whether the Cooper/King evidence was admitted and considered under factor (a) or (b) was a difference of consequence. It is irrelevant whether the prosecutor might have been able to introduce the victim impact testimony had he used the underlying Cooper/King crimes under factor (b) to show appellant's propensity for violence, because he did not actually do so. He sought instead to use those crimes as a circumstance of the capital crime.

There was an additional basis for excluding one part of Karen King's testimony. King testified that one of the lasting effects on her from the crimes was that she now feared people of appellant's race. (121RT:19173.) In his opening brief, appellant argued that the trial court had erroneously overruled appellant's objection that this testimony inappropriately injected race into the sentencing calculus. (AOB 540-543.) Respondent summarily argues that King's testimony was "unremarkable," and raised no improper inferences that the crimes were "racially-motivated." (RB 189.) But appellant's argument does not depend on showing the evidence suggested a racial motivation for the crime. Rather, appellant simply claims the testimony erroneously permitted an inference that appellant's race was a factor that could be considered in deciding whether or not to sentence appellant to death. (AOB 542-543.) That point has not been rebutted by respondent.

Appellant argued in his opening brief that the evidence should have been excluded under Evidence Code section 352 if it was otherwise admissible. (AOB 539-540.) Respondent contends it was not so

inflammatory or emotionally overwrought to warrant exclusion. (RB 189.) Respondent is incorrect and appellant has described in his opening brief how particularly powerful victim impact evidence can be, and was here. (AOB 539-540.)

Finally, appellant has described in his opening brief how prejudicial this evidence was. (AOB 543-545.) Respondent's perfunctory claim that there was no prejudice needs no response. The trial court erred and the judgment of death must be reversed.

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18

THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS REGARDING THE SCOPE OF AGGRAVATING AND MITIGATING EVIDENCE, THE NATURE OF THE JURORS' SENTENCING DISCRETION, AND THAT MERCY COULD BE CONSIDERED AS A BASIS FOR SENTENCING APPELLANT TO LIFE

In the opening brief, appellant argued that the trial court erred when it refused appellant's proffered penalty phase instructions that clarified and defined mitigation and mitigating evidence and circumstances, explained the limitations on aggravating evidence, explained the scope of the jury's sentencing discretion and weighing process, and explained the role that mercy could play in determining appellant's sentence. (AOB 546-579.)

Respondent maintains that there was no error in the trial court refusing appellant's proposed instructions and that if there was error, it was harmless. (RB 191; 204.) Appellant replies to respondent's arguments using the framework in which respondent replied to appellant's arguments. Appellant notes that respondent did not respond at all to section B in this argument (AOB 561-564), that the trial court erred by refusing appellant's instructions regarding the limitations on aggravating circumstances. This matter is therefore submitted on appellant's argument. (See *California Ins. Guarantee Ass'n v. Workers' Comp. App. Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2 [contention raised in opening brief to which respondent makes no reply in its brief will be deemed submitted on appellant's brief].)

A. The Trial Court Erred By Refusing To Give Instructions Clarifying The Scope Of Mitigating Circumstances

1. Definition of Mitigating Factors

Appellant argued that without the instruction proffered here defining the scope of mitigating circumstances, the jury did not have the constitutionally requisite guidance needed for a reliable jury verdict. (AOB 548-558.) In support, appellant cited empirical evidence demonstrating that jurors routinely misunderstand the meaning of mitigation to the detriment of the defendant. (AOB 548-552.) The proposed instruction here clarified terms essential for the jury to give effect to mitigating evidence as required by the Eight Amendment, and the court's refusal to give the instruction was error. After the court refused appellant's instruction, he proposed several modifications to CALJIC No. 8.88 that would have provided the guidance the jury needed to give effect to his mitigating evidence.

Respondent notes, and appellant acknowledged in the opening brief, that this Court has previously rejected challenges to CALJIC No. 8.88, including challenges based on empirical research that was not subject to cross-examination. (RB 192.) Appellant urges this Court to reconsider the issue given that research continues to demonstrate that instructions with language like that in CALJIC No. 8.88 do not provide guidance to jurors that is needed to comport with the Eighth Amendment. (AOB 550 & fn. 148.) Respondent contends that neither the empirical studies provided by appellant at trial, or those offered as authority on appeal, should cause this Court to reconsider its prior holdings that CALJIC No. 8.88 is sufficient. (RB 192.) Appellant disagrees.

It can be "legitimately argue[d] that the primary function of the judge in a jury trial is to explain the applicable legal principles in such a way as to focus and define the factual issues which the jury must resolve. . . . To perform their job properly and fairly, jurors must *understand* the legal principles they are charged with applying." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) Appellant urges this Court to reconsider its decisions that CALJIC No. 8.88 comports with the Eighth Amendment's requirement of reliability in capital sentencing, given the empirical support substantiating that jurors do not understand the meaning of mitigation or their legally prescribed role in their sentencing decision. Indeed, as recently as 2012, the American Bar Association House of Delegates adopted a Resolution addressing the need for reform in capital jury instructions, including California's, and which specifically addressed jurors' misunderstanding of the term "mitigation." (AOB 550-551; ABA Resolution 101G, pp. 3-4 (February 6, 2012).) Appellant maintains that the empirical studies introduced at trial supported appellant's argument that it could not be presumed that the jurors understood the meaning of mitigation when instructed with CALJIC No. 8.88. (AOB 549.) The empirical research cited in appellant's opening brief (AOB 550) provided additional significant support of this argument for reconsideration of this Court's unsupported and erroneous assumption that the term "mitigating" is commonly understood in the context of a capital trial.

Respondent also asserts that the standard CALJIC No. 8.88 is "adequate and correct" and that appellant has failed to provide a persuasive reason for this Court to reconsider its prior decisions, citing *People v. Souza* (2012) 54 Cal.4th 90; *People v. Boyette* (2002) 29 Cal.4th 381, 464-465; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1160-1161; *People v. Gurule*

(2002) 28 Cal.4th 557, 661-662. (RB 193.) None of these cases address whether CALJIC No. 8.88 adequately defines mitigation.

The empirical research cited by appellant in his opening brief shows that the standard CALJIC No. 8.88 instruction defining mitigation is ambiguous. An *ambiguous* instruction amounts to federal constitutional error where "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.) As noted in the American Bar Association report cited in appellant's opening brief (AOB 550-551), "'[t]he very word 'mitigation' is foreign to most jurors – and indeed a number of the jurors who were interviewed obviously did not understand the term, at times actually confusing it with aggravation." (ABA Criminal Justice Section, Report accompanying Resolution 101G, p. 4, quoting Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse* (2001) 66 Brook. L.Rev. 1011, 1041-42; see also Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials* (Fall 1999 and Winter 2000) 33 U. Mich. J.L. Ref. 1, 39 ["A solid body of research now shows that capital juries frequently misunderstand or ignore instructions on mitigating evidence"]; Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?* (1995) 1995 Utah L.Rev. 1, 2 [noting "disturbing indications" that jurors do not adequately understand instructions on mitigation in death penalty cases].)

The Eighth and Fourteenth Amendments require that a jury must consider the evidence put forward by a defendant in mitigation of his

culpable behavior. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114.) Jurors instructed only with CALJIC No. 8.88 are likely to confuse mitigation with aggravation, resulting in a reasonable likelihood that jurors instructed only with the standard mitigation instructions did not consider appellant's evidence offered to reduce his culpability in violation of his rights under *Lockett* and *Eddings*. Because the federal constitutional error cannot be found to be harmless beyond a reasonable doubt, reversal is required.

2. Scope of Mitigation

Appellant also urged that his proposed instruction explaining to the jury that background, character and personal history could only be used as mitigation was erroneously refused. (AOB 552-555.) Respondent asserts that the jury was adequately instructed with CALJIC No. 8.85 and, citing previous cases from this Court, that it was not necessary for the trial court to inform the jurors which factors were aggravating and which were mitigating. (RB 194-195.) Respondent does not address appellant's argument that this Court has not determined whether the trial court can refuse a defense requested instruction that informs the jury that evidence of a defendant's background can only be mitigating except when it falls under factors (a), (b), or (c). (AOB 555.)

Appellant further argued that the harm from the trial court's refusal to give appellant's proposed instruction, which would have informed the jurors that they could not use appellant's factor (k) evidence as aggravation, was exacerbated because the prosecutor used that very evidence in closing argument to urge the jury to choose death. (AOB 554-555.) Respondent contends that appellant mischaracterized the prosecution's argument. (RB 195.) Appellant pointed out instances in which the prosecutor argued that

appellant's background and history did not warrant giving appellant life. (128RT:19907, 19909, 19911, 19913-19916.) Respondent does not address the points made by appellant; rather, respondent generally characterizes the prosecution's argument as nothing more than that appellant's evidence was less than compelling (RB 194, citing 128RT:19906-19916) and therefore, presumably, that any harm from the trial court's refusal of the instruction was not exacerbated by the prosecutor's argument. Appellant disagrees. The trial court should have instructed the jury with appellant's proposed instruction regarding the scope of mitigation evidence and that such evidence could only be used as mitigation.

3. Pinpoint Instructions – Mental or Emotional Disturbances as a Mitigating Factor

Appellant also showed that the court erred in denying two instructions that would have provided necessary guidance and allowed the jury to give effect to appellant's mitigating evidence. The proposed instructions regarding section 190.2, factors (d) and (h), and alternatively, factor (k), would have clarified for the jury that they could consider his mental and emotional disturbances and impairments as mitigation evidence, even if they were not extreme and did not show that appellant was impaired at the time of the offense. (AOB 555- 561.) Respondent asserts that factor (k) adequately informed the jury that it could consider non-extreme emotional or mental conditions and states this Court has repeatedly rejected similar claims. (RB 197-198, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179 and *People v. Ghent* (1987) 43 Cal.3d 739, 776.) Appellant addressed the Court's prior decisions in his opening brief; no further argument on this point is necessary.

Respondent also asserts that the proposed instructions were argumentative, without pointing out how; and duplicative, without explaining what parts of the standard instruction were duplicated in appellant's proposed instructions. Respondent asserts only that this Court has found CALJIC No. 8.85 is "correct and an accurate explanation of how jurors should consider aggravating and mitigating factors." (RB 199.) Respondent cites cases in which defense-proffered instructions were properly rejected, but not the instructions refused here. In *People v. Virgil* (2011) 51 Cal.4th 1210, 1279, the trial court had rejected proffered instructions clarifying the standard admonitions regarding CALJIC No. 8.85 and mitigating evidence in general. In *People v. Howard* (2010) 51 Cal.4th 15, 38-39, *People v. Lomax* (2010) 49 Cal.4th 530, 593 and *People v. Butler* (2009) 46 Cal.4th 847, 875, the trial court properly refused boilerplate defense instructions that had been repeatedly rejected. None of these cases addressed the specific points included in appellant's instructions regarding mental impairments, mental defects, the long-term effects of chemical addictions and of intoxication, and the impact from long-term incarceration in maximum security prisons, all of which were supported by evidence at appellant's trial. For the reasons set forth in the opening brief, this Court should find that the failure to read the requested instructions violated appellant's rights to due process and a reliable verdict.

B. Scope Of The Jury's Discretion

1. Felony-Murder Special Circumstance

Appellant showed that it was error not to read an instruction informing the jury that the finding of a felony-murder special circumstance is not entitled to greater weight than the finding of any other special circumstance. (AOB 564-566.) Respondent counters first that the

instruction was properly denied as "potentially confusing" and second argues that because the use of a felony-murder special circumstance finding as an aggravating circumstance does not subject the defendant to a greater likelihood of being sentenced to death, the trial court was not required to instruct the jury not to give the felony-murder special circumstance undue weight in aggravation. (RB 200.)

The trial court did not deny appellant's request on the theory that it was confusing. Indeed, the court indicated that it would have given appellant's request greater consideration had felony murder been the only special circumstance found true. (126RT:19684.) The trial court disagreed with appellant's argument for its need, implying that appellant may be better off without such an instruction (126RT:19683), but there is no indication in the record that the trial court found it confusing. Furthermore, the instruction was not confusing. It was a clear statement of law informing jurors that a felony-murder special circumstance was not entitled to greater weight than any other special circumstance. Appellant's instruction would have provided guidance and clarification to the jury to avoid greater weight being given to the felony-murder special circumstance and it was error to deny the instruction. Without such an instruction it is reasonably possible that the jury gave undue weight to the felony-murder special circumstance and that the death penalty was imposed in violation of appellant's right to due process of law and his Eighth Amendment right to a reliable sentencing verdict (*People v. Brown* (1988) 46 Cal.3d at 432, 447-448), and respondent also cannot show that the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24).

2. Life Without the Possibility of Parole

Appellant also requested a special instruction that the jury be informed that death is a more severe punishment than life in prison without possibility of parole. Appellant urged that it was prejudicial error to deny the instruction in this case because a number of prospective jurors had indicated that life without parole seemed the harsher sentence and also because of the evidence introduced at trial of the harsh and cruel conditions at Pelican Bay State Prison. (AOB 567-568.) Respondent argues that CALJIC No. 8.88 is sufficient to inform the jury that death is the more serious punishment. (RB 201, citing *People v. Jones* (2012) 54 Cal.4th 1, 80-81; *People v. Cowan* (2010) 50 Cal.4th 401, 500-501; *People v. Tate* (2010) 49 Cal.4th 635, 706-707.)

Appellant asks the Court to reconsider its position on this issue. CALJIC No. 8.88 is not sufficient to tell jurors that "[u]nder California law, death is a greater punishment than life imprisonment without possibility of parole." (*People v. Thomas* (2011) 52 Cal.4th 336, 361.) In *People v. Tate*, *supra*, 49 Cal.4th at pp. 706-707, the jury, which had been instructed pursuant to CALJIC No. 8.88, came back deadlocked in penalty deliberations and asked for additional instructions as to whether death or life without the possibility of parole was the worst punishment. *Tate* shows that jurors do not understand from the standard instruction that death is the more severe punishment and that CALJIC No. 8.88 is not enough to inform them of California's law on this question. As appellant explained in his opening brief, the portrayal of life in the exceedingly harsh environment of Pelican Bay State Prison could have lead some jurors to view such confinement for one's entire life with no hope of freedom as the worst possible punishment. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 738,

835 [juror believed defendant should sit in prison for the rest of his life as it would be the more severe penalty].) Such jurors would see execution as a merciful escape from that fate. The Eighth Amendment cannot tolerate a person being sentenced to death as a perceived act of mercy.

In light of the evidence about the conditions at Pelican Bay and the fact that potential jurors expressed a belief that life without the possibility of parole was a more severe punishment, the failure to inform the jury that death was the more severe penalty was prejudicial under either the state reasonable-possibility standard (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448), or the federal reasonable-doubt standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24). The death judgment must be reversed.

3. Parole Eligibility

Appellant showed in his opening brief that the trial court erroneously denied an instruction at the penalty phase which would have informed the jury that it should disregard older cases where defendants convicted of notorious murders were eligible for parole, because the law permitting parole for such convicted defendants has been replaced with the sentence of life without the possibility of parole. (AOB 568-570.) Respondent contends otherwise, relying on this Court's previous decisions rejecting similar instructions, and in which the Court has held that CALJIC No. 8.84 adequately informs the jury that a defendant sentenced to life imprisonment without possibility of parole is ineligible for parole. (RB 202-203.)

Appellant urges that this Court reconsider this conclusion in light of empirical evidence, including that cited in the trial court by defense counsel (25CT:5139 [Haney, Sontag and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Soc. Issues No. 2, 149), as well as other studies that demonstrate the

substantial number of prospective jurors in California who believe that a defendant who has been sentenced to life without the possibility of parole will in fact be paroled, and the substantial majority of death-qualified prospective jurors who disbelieve that the phrase "life without the possibility of parole" actually means what it says. (See, e.g., Ramos, Bronson & Sannes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, 42; see also Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, 43, 45 [68.2 percent of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point].) Moreover, the trial court itself recognized the need to inform the jury pool that they should assume that the sentence that the 12 selected jurors will impose will be carried out, and that the current law was different than that in place at an earlier time, when defendants convicted of notorious murders were eligible for parole. The trial court so admonished the prospective jurors when they were first called for jury duty on appellant's case. (See 31RT:4058-4060; see also 123RT:19373-19374 [court recalled having stated to prospective jurors seven months earlier that the sentencing in appellant's case is different than that in effect for Sirhan Sirhan and Charles Manson].) The importance of and need for appellant's proposed instruction for the 12 jurors who actually decided appellant's fate had certainly not diminished from the trial court's seven-month earlier admonition.

It is to a defendant's detriment to fail to clarify the meaning of life without parole and to instruct the jury that it means what it says and that, unlike years previous, a death-eligible defendant sentenced to life without parole would not be eligible for parole. Studies have shown that those

jurors who believe that a capital defendant not sentenced to death will eventually get out of prison are much more likely to sentence a defendant to death. In one study of the death penalty, researchers found that "[u]nderestimating the death penalty alternative evidently encourages a pro-death stand on punishment, more so as the trial progresses." (Bowers & Steiner, *Death by Default: an Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605, 655.) In another study, the real or perceived consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten California juries; four of five death juries indicated one of the reasons for returning a death verdict was the belief that the sentence of life without parole did not really mean that the defendant will never be released. (Haney, Sontag & Costanzo, *Deciding to take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death*, *supra*, 50 J. Soc. Issues No.2 at pp. 170-171.)

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where a defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9, citing Paduano & Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty* (1987) 18 Colum. Human Rights L.Rev. 211, 222-225; Note, *The Meaning of "Life" for Virginia*

Jurors and Its Effect on Reliability in Capital Sentencing (1989) 75 Va. L.Rev. 1605, 1624; Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1; Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions* (1993) 27 Law & Society Rev. No.1, 157, 169-170; see also *Shafer v. South Carolina* (2001) 532 U.S. 36, 52; *Kelly v. South Carolina* (2002) 534 U.S. 246, 256.)

This Court in *People v. Wilson* (2005) 36 Cal.4th 309, 355, distinguished death sentences imposed in California from those imposed under South Carolina law because there the juries were not told that the alternative to a death sentence for a capital defendant was a life sentence where the defendant would be ineligible for parole. In contrast, California juries are instructed they can sentence a defendant to death or "confinement in the state prison for life without possibility of parole." (*Ibid.*) The Court also rejected the defendant's argument that the trial court should have instructed the jury sua sponte on the meaning of the penalty "life without possibility of parole" as the term did not have a technical meaning requiring a definitional instruction. (*Id.* at pp. 352-353; see also *id.*, at pp. 353-354 [record also failed to show that the jurors shared a common and widespread misconception that a sentence of life imprisonment without possibility of parole does not mean what it says].) Appellant submits that this Court's conclusions in *Wilson* must be reconsidered in light of empirical evidence demonstrating that the majority of prospective jurors in California believe that a defendant who has been sentenced to life without the possibility of parole will in fact be paroled. As the empirical evidence cited by appellant shows, the bare words "life without possibility of parole" simply did not respond to the common failure of jurors to understand that defendants

sentenced to life without the possibility of parole are not eligible for release from prison. The effect of the trial court's refusal to give appellant's proposed instruction and the failure of the instruction given to clarify the sentencing options resulted in a substantial likelihood that at least one of appellant's jurors concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that appellant may someday be released if he received any other sentence. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.) The error was certainly not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

C. Mercy Instruction

Appellant argued in his opening brief that the trial court erred in failing to give an instruction on mercy and showed that the court's failure left his jury without a means to give effect to a merciful response to the evidence. (AOB 570-578.) Respondent argues that this Court has consistently held that an instruction that tells the jury it may consider mercy are properly denied, and it should not be reconsidered. (RB 203.) Appellant acknowledged that this Court has rejected similar claims and explained in detail why this Court's rulings on this issue should be reconsidered. (See AOB 576-578.) No further argument is necessary.

D. Prejudice

Respondent asserts that even if there was error in refusing the instructions appellant requested, reversal is not required because there was no prejudice. (RB 203-204.) Appellant has shown above and in his opening brief why the errors were prejudicial and require reversal of appellant's death sentence.

***

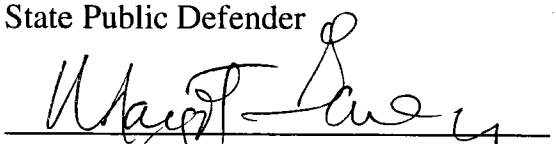
CONCLUSION

For the foregoing reasons, as well as the reasons stated in appellant's opening brief, appellant's convictions and sentence of death must be reversed.

DATED: February 4, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630)

I am the Supervising Deputy State Public Defender assigned to represent appellant, Robert Scully, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is 47,210 words in length.

Dated: February 4, 2015

Margot Garey
Supervising Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

People v. Robert Walter Scully

Supreme Court No. S062259
Superior Court No. SCR22969

I, NEVA WANDERSEE, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

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/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on February 4, 2015, at Oakland, California.

NEVA WANDERSEE