IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

IVAN JOE GONZALES

Defendant and Appellant.

Case No. S067353

San Diego County
Superior Court No.
SCD114421

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

The Honorable Judge Michael D. Wellington

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I.

THE EXCLUSION OF APPELLANT'S PROFFERED EVIDENCE OF THE UNUSUAL DISCIPLINARY TECHNIQUES USED IN VERONICA GONZALES'S FAMILY OF ORIGIN WAS GRAVELY ERRONEOUS AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court excluded the evidence that formed the crux of appellant's defense. Appellant sought to present evidence of the bizarre methods of discipline that were utilized in the home in which Veronica Gonzales was raised. Those strange disciplinary techniques were remarkably similar to the abusive methods used against Genny. Contrary to respondent's assertion, it was the similarity in disciplinary techniques—not the generic fact that abuse took place in Veronica's family of origin—that vested the proffered evidence with its probative value. Respondent's assertion that the proffered evidence's only purpose was to present evidence of Veronica's character is incorrect. The court excluded, on Evidence Code section 1101 grounds, evidence with a non-character purpose that was highly probative toward demonstrating Veronica's third-party culpability. That ruling was erroneous and violated appellant's constitutional rights to present a defense, present mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing determination.

A. Evidence Code section 1101 Did Not Bar the Proffered Evidence

1. Appellant Did Not Seek To Introduce Character Evidence

The trial court erred in concluding that the evidence of abusive techniques in Veronica's family of origin only constituted character evidence and thereby excluding the evidence. The evidence was not

character evidence—or, at the very least, had a non-character purpose—and was admissible evidence of third-party culpability.

In the proceedings at the trial court, defense counsel articulated the purpose of, and the logical chain of relevancy undergirding, the proffered evidence. As detailed in its offer of proof, the defense sought to produce evidence of the types of abusive techniques used in Veronica's childhood home. That evidence included Utilia Ortiz (Tillie) burning, beating, and confining her daughters, and pulling their hair. Tillie's acts against her daughters had unmistakable parallels to the abuse perpetrated against Genny. The burn in the bathtub was Genny's fatal injury, and the abusive behavior began around the time Genny sustained a burn to her head and neck. Genny had bruises that appeared to have come from beatings. Genny's arms were tied up, and she had been bizarrely confined to small, strange spaces, including the bedroom closet and the wooden box. Also, her hair had been pulled. The defense sought to elicit Dr. Patricia Perez-Arce's testimony explaining social-learning theory, which postulates that people often model their behavior after their parents' behavior. According to social-learning theory, someone could be expected to utilize the disciplinary techniques learned from one's parents.

Appellant sought to introduce evidence of excessive disciplinary techniques in Veronica's family of origin to show that Veronica experienced or observed such acts, learned how to use those techniques, modeled her behavior after her mother's, and applied those techniques against Genny. The weird ways in which Genny was victimized raised the question who conjured up the strange methods used against her. Evidence elicited by both the prosecution and defense suggest that things went awry while efforts were made to prevent Genny from picking at the scabs that

resulted from the burn to her head and shoulders.[1] Accordingly, determining which person devised the idea of tying up Genny's arms so she could not pick at her scabs was a critical step toward identifying the sole or primary perpetrator and the mastermind of the offense against Genny.

For this reason, whether a potential perpetrator experienced or observed children getting tied up and burned by their adult caregivers was highly probative toward determining who came up with the idea of tying Genny's arms together behind her back so she could not pick at her scabs and of putting her in a small box in the bedroom closet or a confined space behind the bedroom door. Significantly, none of that probative value is derived from an impermissible character inference. Rather, the evidence of what excessive disciplinary techniques a potential perpetrator observed and experienced is probative because it shows which person learned the techniques that were similar to those used against the victim, was more likely to have devised the strange, similar disciplinary techniques used in this case, and, thus, more likely to have been the mastermind and the sole or primary perpetrator of the offense.

The strangeness and similarity of the disciplinary techniques used in Veronica's family of origin and in appellant and Veronica's apartment—not the mere fact that abuse took place—provided the proffered evidence with its probity. Two hypothetical fact patterns further illustrate this point. In

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[1] Although a prosecution expert witness opined that this burn was intentional, there was also evidence that she sustained the burn accidentally. (8 CT 1770.) There was undisputed evidence that appellant and Veronica treated the burn with ointment and homemade bandages and that they planned to take her to the doctor after receiving Genny's Medi-Cal card from Tillie and, thus, becoming able to pay for a doctor's appointment. (56 RT 7068-7069, 7072; 95 RT 12074-12076; 98 RT 12597; 8 CT 177.)

both hypotheticals, a child victim was abused and killed in the exact manner in which Genny had been victimized. Also, the victim's two adult caregivers are the two potential perpetrators in both hypotheticals. In Hypothetical 1, Defendant A was raised in a home in which the children were not abused or subjected to excessive discipline. Defendant B and his siblings were abused by their father, who would shoot his misbehaving children with a bb gun. In this hypothetical, Defendant A could not elicit evidence of the physical abuse in Defendant B's family of origin. The disciplinary techniques used in Defendant B's family of origin and those employed against the defendant were dissimilar. Accordingly, there was no basis for inferring that Defendant B utilized the disciplinary techniques he had learned in his family of origin. The only probative value in the abuse in Defendant B's family of origin would be derived from the mere fact that abuse took place in Defendant B's childhood home, which, according to the child-abuser profile, makes him more likely to be a child abuser than someone who was raised in an abuse-free home. In Hypothetical 2, Defendant Y had the same background as Veronica Gonzales, and Defendant Z had the same background as Defendant B. In this hypothetical, Defendant Z could elicit evidence of the disciplinary techniques used in Defendant Y's and Defendant Z's respective families of origin in order to show that the abusive techniques perpetrated against the victim were much more like those used in Defendant Y's family of origin than Defendant Z's and that, therefore, it could be inferred that Defendant Y was applying the abusive techniques against the victim that he had learned at home. From that inference, the factfinder could conclude that Defendant Y was the sole perpetrator, ringleader, or mastermind of the crime. Those conclusions would be reached without the factfinder making

an impermissible character inference. Indeed, a factfinder with knowledge of the child-abuser profile would conclude that Defendants Y and Z both likely have dispositions to abuse children. Thus, the dispositions of Defendant Y or Defendant Z play no role in the analysis of whether Defendant Y or Defendant Z was the primary perpetrator, ringleader, or mastermind.

Respondent's description of appellant's argument is reductionist and misleading. In its brief, respondent characterizes appellant's argument as follows:

> [Appellant's] proffered evidence was that, because Veronica had witnessed abuse in her home, it should be inferred that she, not [appellant] was the one who tortured and murdered Genny. In other words, that because of her childhood, Veronica was predisposed to abuse Genny.

(RB 44.) That is a gross oversimplification of appellant's argument; respondent omits several steps in the logical chain of relevancy. Respondent adds:

> The relevance of the evidence was that based on her background, Veronica, and not [appellant] abused Genny. [Appellant] claims it was to show Veronica applied the disciplinary techniques she learned at home "and applied those techniques against Genny." (AOB 52.) Regardless of how [appellant] phrases it, the inference he is seeking is that Veronica abused Genny because she was predisposed to do so, based on her background.

(RB 45.)

Respondent's argument in support of the trial court's exclusion of the proffered evidence proceeds from the premise that there is no distinction between the inferences appellant sought to make and the inferences forbidden by Evidence Code section 1101. Respondent's premise is wrong,

and the erroneous premise undermines respondent's argument.

Although the logical chain of relevancy for the excluded evidence contains several steps, respondent omits all of the intermediate steps in order to attempt to claim plausibly that appellant seeks only to use the evidence to show that Veronica had a disposition to abuse children and base his third-party-culpability defense on that purported disposition. The logical chain of relevancy that defense counsel articulated was more than an alternate phrasing, as respondent posits: It was an entirely different logical chain that sought to prove something altogether distinct from disposition.

Boiled down to its essence, respondent argues that appellant must be seeking to use the excluded evidence to prove disposition because events from Veronica's background comprise it. (RB 43-51.) Respondent writes:

> The nature of the proffered evidence was character evidence, regardless of how [appellant] now attempts to characterize it. The proffered evidence was only relevant if it tended to show that because of her background, Veronica had the disposition to commit the crime.

(RB 43.) Respondent categorically claims that Veronica growing up in an abusive home is a trait of her character. (RB 44.) Respondent states further: "[Appellant] cannot escape the purpose for which he sought the admission with semantics. It is improper character evidence." (RB 50.) Evidence of a person's background, however, does not necessarily constitute character evidence. If the evidence is probative for a purpose other than proving a person's disposition and showing that she engaged in conduct consistent with the disposition, the evidence is generally admissible. (Evid. Code, § 1101.)

The possibility that a factfinder may make the forbidden inference does not render evidence of past acts or events inadmissible. (See *People v.*

Ewoldt (1994) 7 Cal.4th 380, 401-403.) In countless cases, the prosecution elicits evidence pertaining to a defendant's background for purposes other than disposition. This Court routinely upholds the admission of other-crimes evidence that the prosecution introduced ostensibly for non-character purposes. (See *People v. Davis* (2009) 46 Cal.4th 539, 602-603 [intent and common scheme or plan]; *People v. Soper* (2009) 45 Cal.4th 759, 778-779 [intent]; *People v. Lindberg* (2008) 45 Cal.4th 1, 22-26 [intent]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1001-1005 [identity]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 203-205 [intent and absence of mistake].)

The non-disposition inferences defendant sought to make in this case are similar to those alternate inferences undergirding the admission of the other-crimes evidence in this Court's recent decisions involving Evidence Code section 1101. In *People v. Davis*, *supra*, 46 Cal.4th at pp. 602-603, this Court upheld the admission of evidence of the defendant's prior assaults, some of which were of a sexual nature, to prove the defendant's intent to commit a lewd act. In *Davis*, the prosecutor sought to use events from the defendant's background to establish his guilt for capital murder. But, because proving intent did not require making inferences involving the defendant's character, that did not render the prior-act evidence inadmissible. Likewise, contrary to respondent's suggestion, the excluded evidence in this case is not inadmissible character evidence merely because the evidence bears on events from Veronica's background.

This Court in *People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1001-1005, upheld the admission of the defendant's similar, but not remotely identical, acts in order to prove identity. Undoubtedly, the jury could have used the prior offense to conclude that the defendant was a homicidal sex

offender and thereby infer that he perpetrated the charged offense. For that reason, the trial court gave a limiting instruction in an effort to foreclose a finding of guilt through the forbidden inference.

The logical chain of relevancy for the identity inference in *Hovarter* is analogous to the non-disposition inferences appellant sought to make in this case. To make the identity inference to prove a defendant's guilt, the prosecution shows that the defendant committed the uncharged offense and that the charged and uncharged offense are so much alike that it can be inferred from the similarities that the defendant committed the charged offense. (See *People v. Balcom* (1994) 7 Cal.4th 414, 425.) When making this inference, the prosecution uses another event in the defendant's life to demonstrate that he committed the charged offense. Yet, the defendant's disposition plays no role in the logical chain of relevancy. For that reason, if the defendant argued, as respondent does here, that "[t]he nature of the proffered evidence was character evidence, regardless of how [the prosecution] now attempts to characterize it," a court would rightly reject the argument.

In *People v. Evers* (1992) 10 Cal.App.4th 588, 598-600, the Court of Appeal upheld the admission of the defendant's two prior acts of child abuse against his children to show the defendant's knowledge that child abuse could cause serious injury or death and that the victim's death was not accidental. The trial court admitted evidence of the prior act of burning the victim's feet although he killed the victim by violently shaking him. The court also admitted evidence of the defendant similarly shaking the victim's sister violently; the victim survived but was rendered a quadriplegic. Once again, the introduction of the evidence of prior acts of abuse in *Evers* could have led a factfinder to infer guilt from the

defendant's disposition. Nevertheless, the trial court admitted the evidence, albeit with a limiting instruction.

As these cases show, the subtle distinctions between logical chains permitted by Evidence Code section 1101(b) and the forbidden inference are extraordinarily important. Unless another evidentiary provision bars the evidence, the existence of a viable alternate chain of relevancy renders the evidence admissible. In light of the importance of the subtle distinctions, respondent's repeated conclusory assertions that appellant only seeks to infer guilt from Veronica's disposition—the rhetorical equivalent of banging on the table—are inappropriate and unconvincing.

The intermediate steps in the logical chain of relevancy for the excluded evidence mirrored the logical chain of relevancy of the slaughterhouse evidence in *People v. Griffin* (2004) 33 Cal.4th 536. In *Griffin*, the trial court admitted evidence of slaughtering techniques and evidence that the defendant had worked in a slaughterhouse to support the following set of inferences: The defendant worked in a slaughterhouse, watched animals get slaughtered, learned slaughtering techniques, utilized that knowledge against the victim, and, therefore, the defendant slaughtered the victim like a livestock animal. (*Id.* at pp. 581-582.) Concluding that the slaughterhouse evidence was probative toward demonstrating the defendant's deathworthiness, this Court upheld the trial court's admission of that evidence. (*Id.* at p. 583.)

Respondent, however, contends that *Griffin* is inapposite. (RB 47-48.) Although the ultimate inference the prosecutor made in *Griffin* differs from the ultimate inference appellant sought to make from the proffered evidence, the intermediate inferential steps in the two cases are virtually identical. Contrary to respondent's assertion, the non-disposition series of

inferences that appellant seeks to make is indeed legitimate. In *Griffin*, the prosecutor used the slaughterhouse evidence to show that the defendant slaughtered the victim like an animal without making any inferences pertaining to whether the defendant was a slaughterer. Likewise, in this case, appellant's proffered third-party-culpability evidence did not make any inferences to or from any purported disposition to abuse children that Veronica may have had.

Accordingly, *Griffin* undermines respondent's argument. Respondent's principal assertion is that appellant sought only to infer Veronica's guilt from her disposition—not that the prejudice from a disposition inference would overwhelm the probative value of appellant's alternative inferences. Thus, *Griffin* shows that appellant's non-disposition intermediate inferences are legitimate and thus defeats respondent's key contention.

Although appellant seeks ultimately to have the jury infer Veronica's identity as the perpetrator, he should not have to demonstrate that Veronica committed a signature crime as a prerequisite for introducing the evidence. Because Veronica did not commit a prior child-abuse offense, it would be impossible for appellant to make a signature-crime inference, which establishes identity through the identicalness of the prior crime and charged offense. The logical chain of relevancy for the proffered evidence differs from the logical chain used to demonstrate identity through a signature crime. Moreover, the purpose of the high threshold for admitting other-crimes evidence to prove identity—to ensure that the probative value of the signature-crime inference outweighs the potential for prejudice stemming from the factfinder improperly making the propensity inference—does not exist in this case. As explained in the opening brief and conceded by

respondent, there was no danger of the jury making the forbidden propensity inference in this case because Veronica did not have a history of abusing children. In addition, the absence of evidence of the child-abuser profile limited the likelihood that the jury would improperly infer Veronica's guilt from her disposition. Lastly, because Veronica's trial was severed from appellant's, there was no risk that she would be prejudiced if the jury made the forbidden inference. For these reasons, appellant should not be required to fit the square peg of the proffered evidence into the round hole of signature-crime-evidence jurisprudence.

Even if this Court concludes that appellant needs to meet the most stringent requirement in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403, the trial Court nevertheless erred by excluding the evidence. As this Court recently illustrated in *People v. Hovarter*, *supra*, 189 Cal.4th at pp. 1003-1004, California law does not require that a so-called "signature crime" have unique characteristics before admitting other-crimes evidence to prove identity. Rather, a significant similarity between the uncharged crime and the charged crime suffices. In *Hovarter*, none of the common elements in the charged offense and the other crime was inimitable. The trial court admitted the evidence despite concluding "that many of the points of alleged similarity 'are common to the classes of crime charged.'" (*Id.* at p. 1003.) This Court nevertheless upheld the admission of the other-crimes evidence because the charged offense and the other crime shared several similarities. (*Id.* at p. 1004.)

The similarities between Tillie's excessive disciplinary techniques and the techniques used against Genny were sufficiently similar to meet the *Hovarter* standard. In both instances, the perpetrator victimized vulnerable girls. The incidents occurred at home and took place while the victims'

cousins were present inside. The perpetrators burned the victims, and the most severe burns were to the victims' lower extremities. The victims never received medical attention for their injuries. The perpetrators tied up the victims. As a result of the binding, the victims were unable to protect themselves. In addition, the victims were bruised from the beatings that they sustained. Lastly, the perpetrators pulled the victims by their hair. The similarities between the disciplinary techniques used against Veronica and her sisters more than suffice to permit a factfinder—without making the forbidden inference—to conclude that the perpetrator of the offense against Genny implemented the techniques she learned from Tillie.

Furthermore, the excluded evidence was admissible to show the perpetrator's motive. Other-crimes evidence of motive may be used to establish identity without having to show a signature crime. (See *People v. Daniels* (1991) 52 Cal.3d 815, 858.) The similarities in disciplinary techniques suggests that the abusive techniques shared a common motive: excessively disciplining children. It appears that Tillie's motive for burning and binding her children was to impose discipline. Likewise, at the outset of the pattern of similar abuse against Genny, it can be inferred that there was a similar motive of imposing discipline.[2] Appellant and Veronica

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[2] Although the prosecution presented expert testimony that the burn to Genny's head and neck was intentionally inflicted, the jury could reasonably have rejected that expert opinion. Even if the initial burn had been inflicted intentionally, the jury could have inferred that Veronica told appellant that Genny had accidentally burned herself with the water on the stove and appellant believed her. Moreover, Ivan Jr.'s allegation made in his preliminary hearing testimony, which was admitted into evidence at the guilt phase of the first trial but not at the penalty retrial, that appellant and Veronica burned Genny's head and neck in the bathtub was unreliable and

(continued...)

wanted to get Genny medical care; however, Tillie did not give them Genny's Medi-Cal card, and they could not afford to take her to a doctor without it. After the burn failed to heal, things went awry. Evidence of a disciplinary motive was probative toward appellant's defense in two ways. First, the pattern of abuse against Genny being exclusively or primarily bizarre efforts to discipline her rebuts the intent-to-kill and intent-to-torture elements of the special circumstance and reduces appellant's deathworthiness. Second, because Veronica primarily cared for Genny, it could have been inferred that she was the person who sought to disturbingly discipline Genny for impeding the healing process.

Despite the presence of these inferential chains that do not pertain to Veronica's disposition, respondent, agreeing with the trial prosecutor and trial court, asserts that this case is controlled by and indistinguishable from *People v. Walkey* (1986) 177 Cal.App.3d 268.[3] Respondent bases its argument on the incorrect premise that appellant seeks only to prove Veronica's guilt through her disposition. (RB 45-47.) As explained above at length, appellant did not seek to make any inferences regarding Veronica's disposition. As such, this case is quite different from *Walkey*. Respondent contends, however, that the proffered testimony of Dr. Perez-Arce was the functional equivalent of profile evidence. That assertion incorrectly disregards the distinction between the mere existence of abuse

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[2](...continued)
uncorroborated. (See *post*, at pp. 29-30, 110-113, 116-118.)

[3] Respondent states that *Walkey* court found the evidence inadmissible because it was character evidence, not because it was profile evidence. (RB 46.) That is a distinction without a difference. Profile evidence is a subset of character evidence. (See *post*, at pp. 15-16.)

and specific bizarre disciplinary techniques. Inferences involving the techniques steer clear of disposition and are thus permissible under Evidence Code section 1101. Thus, contrary to respondent's assertion, appellant did not seek to admit evidence of Tillie's disciplinary techniques to show that Veronica fit a child-abuser profile or had the disposition to abuse children.

People v. Abilez (2007) 41 Cal.4th 472, which this Court decided after appellant filed his opening brief, further demonstrates that the trial court erred by excluding the evidence. One defendant in *Abilez* sought to introduce the co-defendant's juvenile adjudication for unlawful intercourse with a minor to show that the co-defendant perpetrated the burglary-robbery-sodomy-murder. Because the lone basis for the admissibility of the other-crimes evidence was to show the co-defendant's propensity or disposition to commit sex offenses, this Court upheld the exclusion of the third-party-culpability evidence. (*Id.* at 498-502.) Although the trial court excluded the evidence on remoteness grounds, this Court concluded that the strongest basis for excluding the evidence under Evidence Code section 1101 was the lack of similarity between the other crime and the charged offense. (*Id.* at p. 501.) By implication, other-acts evidence of a co-defendant or an alleged alternative perpetrator would be admissible if there exists a sufficient similarity between the other act and the charged offense. In this case, appellant does not claim that the proffered evidence is probative based on the mere fact that Veronica and her sisters were abused. Rather, appellant asserts that the similarity in abusive techniques supports the non-disposition inferences that point to Veronica as the sole or primary perpetrator.

The failure to appreciate the distinction between inferring identity through disposition from the mere fact of abuse in Veronica's family of origin and inferring identity through the similarity of excessive disciplinary techniques constituted the critical error made by the trial court. The trial court did not rule that abusive techniques were not sufficiently similar or that the potential prejudice from the forbidden inference would overwhelm the probative value of the non-disposition chain of relevancy. Instead, the trial court concluded that appellant did not seek to introduce the evidence for any bona fide non-disposition inference and accordingly excluded the proffered evidence under Evidence Code section 1101. This was an abuse of discretion per se. (See *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 ["a disposition that rests on an error of law constitutes an abuse of discretion"].) Although the trial court alternatively ruled that the evidence should also be excluded under Evidence Code section 352, that determination was tainted by the court considering only the probative value from character-evidence inferences and not the probity of inferring identity through similarity. Respondent urges this Court to make the same facile and flawed analysis that the trial court undertook. This Court should resist the urge to grasp onto false simplicity, carefully consider the logical chain of relevancy that appellant put forth when attempting to introduce the proffered evidence, and conclude that the trial court erred by excluding the evidence under Evidence Code section 1101.

2. Even If It Is Deemed Profile Evidence, the Trial Court Erred by Excluding the Proffered Evidence

In the event that this Court concludes that the excluded evidence constitutes profile evidence, *People v. Smith* (2005) 35 Cal.4th 334 would nonetheless require that the evidence be admitted. In *Smith*, this Court,

explaining that profile evidence is "inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative," upheld the use of profile evidence to prove that the defendant acted in conformity with the profile. (*Id.* at pp. 357-358.) Respondent, however, contends that *Smith* permits the admissibility of profile evidence, but not character evidence. That is a false distinction: Profile evidence is character evidence. (See Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box* (1997) 46 Am. U. L. Rev 747, 782.) Profile evidence seeks to show that a person fits a profile and thus has a certain disposition. Inferences are then made to show that the person acted consistently with that disposition—the category of inferences that a literal reading of Evidence Code 1101(a) appears to address. Accordingly, when this Court upheld the use of profile evidence in *Smith*, this Court permitted the prosecutor to make inferences from a defendant's disposition that had been determined through a profile.[4]

Furthermore, this Court should not exclude the proffered evidence under Evidence Code section 1101 because exclusion of the evidence

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[4] That the prosecution in *Smith* sought a different ultimate inference than the ultimate inference appellant seeks to make with the proffered evidence does not undermine the key point that the prosecution inferred the defendant's motivation for the crime and the significance of his methods and the physical evidence from a sexually-sadistic-pedophile profile. (*People v. Smith*, *supra*, 35 Cal.4th at p. 353.) This Court in *Smith* did state that profile evidence is insufficiently probative when used to infer guilt from a person fitting a profile. (*Id.* at p. 358.) In this case, however, the proffered evidence was more probative than a mere he-fits-a-profile case because of the similarity of excessive disciplinary techniques used by Tillie and those used against Genny. Thus, even if the proffered evidence is deemed profile evidence, the proffered evidence shows more than the mere fact that Veronica fit a profile.

would not advance the policies undergirding that evidentiary rule. Because Veronica was tried separately, she could not have been prejudiced by the admission of the evidence. In addition, the excluded evidence did not involve a crime that Veronica had committed. Also, appellant never sought to elicit evidence of a child-batterer profile. Significantly, appellant relied on much more than the mere fact that abuse took place in Veronica's family of origin to show that Veronica was the sole or primary perpetrator. For these reasons, the rationales for excluding evidence under Evidence Code section 1101(a) are not present in this case. (See *post*, at pp. 19-21.)

B. The Exclusion of the Proffered Evidence Violated Appellant's Constitutional Rights

The excluded evidence was the keystone of appellant's defense. The exclusion of the evidence violated appellant's constitutional rights to offer testimony, present a complete defense, present relevant mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing determination.

1. The Exclusion of the Evidence at the Guilt Phase Infringed Appellant's Rights to a Defense

As appellant recognizes, a trial court's evidentiary rulings rarely implicate a defendant's constitutional rights. (AOB 63-65.) Appellant and respondent thus agree that garden-variety evidentiary rulings do not give rise to meritorious constitutional claims. This, however, is one of the rare cases in which a trial court's exclusion of defense evidence infringed the rights to a defense that are protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution.

The United States Supreme Court has repeatedly held that the exclusion of defense evidence under state-law evidentiary rules violates a defendant's constitutional rights to present a defense if it infringes a defendant's weighty interest and is arbitrary or disproportionate to the purposes the evidentiary bar was designed to serve. (See *Holmes v. South Carolina* (2006) 547 U.S. 318, 324.) As explained in the opening brief, exclusions of defense evidence infringe the constitutional rights to a defense if the evidence is exculpatory and critical to the defense,[5] so long as the state lacks an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence.[6] (AOB 64.)

The proffered evidence in this case was both exculpatory and critical to the defense. Evidence that Tillie used excessive disciplinary techniques that paralleled the methods of abuse used against Genny stood at the heart of appellant's defense. Due to the absence of reliable evidence regarding who did what behind the closed doors of appellant and Veronica's apartment, any evidence that pertained to the identity of the primary or sole perpetrator was vital.

Over the course of the proceedings in this case, the prosecutor and trial court, and now respondent, have mischaracterized the excluded evidence and thus minimized its probative value and its importance to the defense. Indeed, the court denied the constitutional claim in part on the

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[5] Barring evidence that is exculpatory and critical to the defense infringes the defendant's weighty interest.

[6] Significantly, respondent does not contend that this rights-to-a-defense test inaccurately explicates the law.

basis of its misperceptions of the evidence's probity.[7] The trial court determined that the probative value was weak because character evidence is inherently weak. When balancing appellant's interests to elicit purportedly infirm evidence against the state's interest to enforce its evidentiary rules, the trial court held that appellant's constitutional rights to a defense could not override the court's application of Evidence Code section 1101. (49 RT 5810-5813.) The trial court's failure to recognize that appellant sought to use the proffered evidence without making inferences pertaining to Veronica's disposition—a mistake that respondent urges this Court to repeat—pulled the rug out from under appellant's argument that his rights to a defense required the admission of the proffered evidence. As explained above, the similarities in the abusive techniques, not the mere fact that Tillie abused Veronica and her sisters, provided the proffered evidence with its probative value. The balancing test for appellant's rights-to-a-defense claim cannot be valid if the key to the excluded evidence's probity is disregarded.

Barring the proffered evidence in this case is disproportionate to the purposes that the Evidence Code section 1101 evidentiary bar was designed to serve. Although Evidence Code section 1101 by its terms applies to criminal defendants and others (RB 56), its core is the common-law propensity rule, which barred prosecutors from using a defendant's prior crimes to prove his disposition and his guilt therefrom. (See *People v. Alcala* (1984) 36 Cal.4th 604, 630-631 [discussing Evidence Code section

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[7] As respondent notes (RB 53), the trial court did not conclude that the proffered evidence lacked probity. Nevertheless, the court's undervaluation of its probity impacted the trial court's application of the constitutional-override balancing test.

1101's common-law roots]; cf. *United States v. Aboumoussallem* (2d Cir. 1984) 726 F.2d 906, 911 [explaining common-law origin of propensity rule and contrasting character evidence introduced against a defendant and by a defendant].) Barring third-party-culpability evidence against a separately tried alleged alternative perpetrator lies at the periphery of the evidentiary rule barring character evidence.[8] Likewise, excluding evidence of a prior act for which the alleged perpetrator was a victim and witness, rather than the culprit, also falls at the periphery of Evidence Code section 1101. Moreover, proscribing evidence for which the proponent does not seek to make any inferences regarding the alleged alternative perpetrator's disposition and does not attempt to lay a foundation for any inferences regarding the alleged alternative perpetrator's character falls far from the core of the bar on character evidence.[9] Because the exclusion of the evidence, at best, falls at the outer limits of Evidence Code section 1101, the state's interest in enforcing the trial court's interpretation of Evidence Code section 1101 is not nearly as strong the state's interest in enforcing a

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[8] For this reason, several circuits of the United States Court of Appeals apply a lower threshold for admissibility of third-party-culpability evidence than prosecution evidence under the federal analog to Evidence Code section 1101, though the evidentiary rule's plain language does not differentiate between third-party-culpability evidence and prosecution evidence. (See *United States v. Aboumoussallem, supra*, 726 F.2d at pp. 911-912; *United States v. Stevens* (3d Cir. 1991) 935 F.2d 1380, 1404; *United States v. McClure* (5th Cir. 1977) 546 F.2d 670, 673; see also, *United States v. Cohen* (11th Cir.1989) 888 F.2d 770, 777 ["When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent."].)

[9] Indeed, such evidence does not come within the orbit of Evidence Code section 1101; thus, excluding the evidence under that provision was erroneous. (See *ante*, at pp. 1-17.)

core application of the evidentiary rule against a rights-to-a-defense claim.[10]

Appellant's interest to present the heart of his defense outweighs the state's interest in applying Evidence Code section 1101 to exclude evidence pertaining to a separately tried co-defendant that did not involve a prior bad act that she had committed and was offered for purposes unrelated to her disposition. Consequently, in this case, this state's evidentiary rule must yield to appellant's constitutional rights. Thus, the trial court's exclusion of the proffered evidence violated appellant's rights to a defense.

Respondent claims that this Court should uphold the rejection of appellant's constitutional claims as it had with supposedly similar evidence in *People v. Abilez*, *supra*, 41 Cal.4th at p. 503. Despite the superficial similarities between this case and *Abilez*, the constitutional claims in this case are much stronger here than in *Abilez*. Unlike this case, in *Abilez* the defendant sought to use a co-defendant's dissimilar prior offense to prove the defendant's propensity. (See *id.* at pp.498-502.) Because the only possible use for the other-crimes evidence in *Abilez* was to prove propensity, the excluded evidence in *Abilez* was not particularly probative and implicated a core purpose of Evidence Code section 1101. In this case, the defense interest in introducing the evidence was stronger and the state's

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[10] Respondent mischaracterizes appellant's argument when stating "If [appellant's] argument were accepted, Evidence Code section 1101 would only apply to evidence of a defendant's character." (RB 56.) Appellant has not argued that Evidence Code section 1101 should be limited to a bar of the prosecution using prior-crimes evidence to show a defendant's criminal propensity during the case-in-chief. Rather, appellant has argued that, under the rights-to-a-defense balancing test, the state's interest in enforcing peripheral applications of Evidence Code section 1101 is weaker than the state's interest in enforcing a core application of the evidentiary bar on character evidence.

interest in applying its evidentiary rule was weaker than in *Abilez*. Accordingly, though the rights-to-a-defense balancing test favored the prosecution in *Abilez*, the balancing test in this case shows that the trial court's evidentiary ruling should have yielded to appellant's constitutional rights to a defense. As such, holding that the trial court infringed appellant's rights to a defense would be entirely consistent with *Abilez*.

Respondent nevertheless contends that this Court has a long line of precedent holding that excluding defense evidence does not violate a defendant's constitutional rights and urges this Court to adhere to that purported line of precedent. With the exception of *People v. Cudjo* (1993) 6 Cal.4th 585 (see *post*, at p. 23), this Court has never made a blanket pronouncement that the misapplication of an evidentiary rule to exclude defense evidence does not violate a defendant's constitutional rights to a defense. Rather, aside from *Cudjo*, this Court's decisions rejecting defendants' constitutional claims were fact-specific determinations that followed the well-settled rule that evidentiary rulings excluding defense evidence rarely implicate the constitution. Although respondent insinuates otherwise, appellant agrees that most exclusions of defense evidence under state-law evidentiary rules are constitutional. Appellant, however, contends that this is one of the rare cases in which the rights to a defense must trump the trial court's application of an evidentiary rule. Accordingly, appellant does not ask this Court to cast aside a long line of precedents; instead, appellant urges this Court to adhere to United States Supreme Court precedent.

Respondent's argument that exclusions of defense evidence under the Evidence Code cannot violate the United States Constitution must fail. In several cases, the United States Supreme Court has held that the

exclusion of defense evidence through the application or misapplication of a state's evidentiary rules violated the rights to a defense. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at. 328-441; *Crane v. Kentucky* (1986) 476 U.S. 683, 689-691; see generally, *Skipper v. South Carolina* (1986) 476 U.S. 1, 7 [holding trial court's ruling excluding defense evidence, if inconsistent with precedent, had the effect of a state-law rule and thus is subject to constitutional analysis as if a state statute explicitly excluded defense evidence].) In respondent's zeal to have this Court upheld the judgment below, respondent essentially invites this Court to flout United States Supreme Court precedent and violate the supremacy clause of the United States Constitution. This Court must reject respondent's argument.

As explained in the opening brief, this Court wrongly rejected the constitutional claim in *People v. Cudjo*, *supra*, 5 Cal.4th at p. 611. This Court's pronouncement in *Cudjo* that a trial court's misapplication of evidentiary rules cannot infringe the rights to a defense is flatly inconsistent with United States Supreme Court precedent. (AOB 72-75.) Respondent claims that appellant has not articulated a compelling reason for this Court to overturn this portion of *Cudjo*. Appellant vehemently disagrees. Appellant cannot think of a more compelling basis for overruling a case than its inconsistency with binding United States Supreme Court precedent. Under the supremacy clause, this Court cannot continue to adhere to *Cudjo* in the face of conflicting United States Supreme Court decisions interpreting the Sixth and Fourteenth Amendments to the United States Constitution.

Assuming *arguendo* that the trial court did not abuse its discretion when excluding the proffered evidence, the exclusion of the evidence still violated appellant's constitutional rights to a defense. Even if the trial court

did not err, the rights-to-a-defense balancing test tips in appellant's favor. The excluded evidence was essential to the defense. (See *ante* at pp. 18-19; see also AOB 65-68.) Moreover, it was more probative than a typical case in which the defendant seeks to admit character evidence of an alleged third-party perpetrator. In the prototypical case, a defendant accused of a sexual offense seeks to create a reasonable doubt by eliciting evidence of a neighbor's prior sex offenses to show the neighbor's propensity to commit sex crimes. (See, e.g., *United States v. DeNoyer* (8th Cir. 1987) 811 F.2d 436, 440 [upholding exclusion of third-party-culpability evidence offered only to prove neighbor's propensity to commit sex offenses].) In this case, appellant proffered the evidence for a purpose that did not involve making inferences involving Veronica's disposition. In addition, evidence of Veronica's opportunity to commit the offense could not have been stronger. For these reasons, the proffered evidence in this case was far less speculative than the third-party-culpability character evidence that is routinely excluded without violating a defendant's constitutional rights. Because the proffered evidence was substantially more probative than typical third-party-culpability character evidence, the likelihood of an erroneous acquittal resulting from the admission of the evidence was significantly lower in this case than in the run-of-the-mill cases. Moreover, the state's interest in enforcing its evidentiary rule was lessened because the excluded evidence does not fall within the core of Evidence Code section 1101. (See *ante*, at pp. 19-21.) Consequently, in this case, appellant's interests in eliciting the proffered evidence outweighs the state's interest in applying its evidentiary rule. Accordingly, the exclusion of the proffered evidence infringed appellant's rights to a defense even if the trial court's exclusion of the evidence under Evidence Code section 1101 did not

constitute state-law error.

2. The Continued Exclusion of the Proffered Evidence at the Penalty Retrial Violated Appellant's Sixth, Eighth, and Fourteenth Amendment Rights

The exclusion of the proffered evidence at the penalty retrial further violated appellant's rights to a defense. It also infringed additional constitutional rights, including the rights to present relevant mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing determination. First of all, the exclusion of relevant mitigating evidence is per se error under *Skipper v. South Carolina* (1986) 476 U.S. 1, 7. The excluded evidence was indisputably relevant; neither the trial court nor respondent has found or claimed that the evidence was irrelevant. Even if this Court does not hold that the exclusion of relevant mitigating evidence is *Skipper* error per se, the exclusion of the evidence nonetheless violated appellant's Eighth and Fourteenth Amendment rights. The evidence-rule-override balancing test at the penalty phase is more favorable to appellant than the balancing test for appellant's rights to present a guilt-phase defense. The proffered evidence is more probative of relative culpability than it is of guilt. Furthermore, appellant's life is at stake. Thus, appellant's interests are stronger than they are for his guilt-phase rights-to-a-defense claim. On the other side of the coin, the states's interest is weaker. There was no risk of an erroneous acquittal at the penalty retrial. Moreover, evidence is typically more freely admitted at a penalty phase than at the guilt phase of a capital case. So, whether this Court uses a per se *Skipper* error standard or employs a balancing test, the exclusion of proffered evidence infringed appellant's Eighth and Fourteenth Amendment rights.

Respondent nonetheless urges this Court to reject appellant's Eighth and Fourteenth Amendment claims. But, respondent's argument collapses under the weight of two faulty premises: one, that the lone purpose for the proffered evidence was inferring Veronica's guilt from her purported disposition; two, that the trial court properly excluded the evidence under Evidence Code section 1101. Contrary to respondent's insinuation, appellant recognizes that the ordinary application of the rules of evidence do not violate a capital defendant's constitutional rights at the guilt or the penalty phase. Only in rare circumstances must a state's evidentiary rule yield to a defendant's constitutional rights. This is one of those cases.

C. The Exclusion of the Proffered Evidence Was Reversible Error

Excluding the evidence of the similar disciplinary techniques that were utilized in Veronica's family of origin cut out the heart of appellant's defense at the guilt phase and penalty retrial. Although respondent claims otherwise, the evidence against appellant was hardly overwhelming. With respect to the conviction, the special-circumstance finding, and the death sentence, the exclusion of the proffered evidence was not harmless, and the judgment below must be vacated in full.

Due to either the state-law errors or the infringements of appellant's constitutional rights, appellant's first degree murder conviction cannot stand. The evidence was too probative and central to the defense (see *ante*, at pp. 18-19), and the prosecution evidence was too weak for the errors to be deemed harmless.

Respondent claims that any error was harmless because the evidence against appellant was overwhelming; however, respondent's harmlessness argument reads like a sufficiency claim. The harmlessness question for

appellant's constitutional claims is not whether the jury might have convicted appellant if the trial court had not erred; it is whether the jury might not have convicted appellant absent the error.

The evidence that appellant perpetrated the offense was not remotely compelling. The brutality of the crime, with which respondent attempts to buttress its harmlessness argument, is immaterial to whether appellant committed the crime. A prosecution witness testified that Genny's injuries could have been inflicted by any adult of any gender. (53 RT 6526; 93 RT 11653.)

Appellant presented evidence that the fatal burn was inflicted after appellant had left the apartment. Respondent suggests that the prosecution definitely established that Genny was killed long before appellant was seen walking out of his apartment. (RB 58-59.) However, the evidence was not nearly as clear cut as respondent suggests. Appellant may have been out to the store at the time Genny sustained the final burn. After appellant had left, appellant's neighbor Alicia Montes heard water running in appellant's apartment for a long period of time. (57 RT 7087-7088.) That could very well have been the sound of Veronica running the scalding-hot bath in which Genny was burned. The only evidence that, if true, definitively disproved appellant's proposed timetable was firefighter John Miller's testimony that Genny's jaw had rigor mortis when he attempted to do CPR after arriving at 9:25 pm; because of the time it would have taken for death to occur and rigor mortis to set in, Miller's testimony rebutted the defense theory that Veronica inflicted the fatal burn after appellant was seen leaving the apartment at dusk. Miller, however, did not take contemporaneous notes of the incident, and a neighbor's nephew who attempted CPR testified that rigor mortis had not set in. (50 RT 6008; 56 RT 7023; 93 RT 11766;

95 RT 11939.) The jury could reasonably have concluded that Miller's recollection was faulty, or have had doubts about its accuracy. Moreover, even if Genny had been burned in the bathtub while appellant was in the apartment, appellant's mere presence would not have been a sufficient basis for the conviction. (See *People v. Durham* (1969) 70 Cal.2d 171, 181.)

Appellant's admissions were limited and may have been untrue. The jury could reasonably have concluded that appellant, during his interrogation, was trying to protect Veronica. To the extent that the admissions were true, the suggested inference that appellant victimized Genny was hardly inevitable. For example, appellant putting up the hook or placing Genny in a box to scare her does not prove that appellant brutalized her. The jury could reasonably have concluded that appellant did not intend to seriously hurt Genny. There is a difference between giving oneself the potential to make a troublesome threat and carrying out a disturbing deed. The jury could reasonably have concluded that appellant merely sought to make idle threats. Similarly, appellant's admission that he bought handcuffs as a sex toy is minimally probative of participation in torture. Respondent's assertion is akin to arguing that a defendant, because he bought a kitchen knife, must have been the person who stabbed the victim with it. Likewise, appellant's admission to disciplining his children with a belt fails to show participation. Hitting children with a belt bears little resemblance to what was done to Genny. In addition, the undisputed evidence showed that appellant's children had not been abused. Thus, it appears that by inferring appellant's guilt of the offense against Genny based on appellant's admissions to disciplining his own children, respondent is making the very type of forbidden character inference that it decries. Moreover, the jury could reasonably have reached the opposite

conclusion: When appellant disciplines children, he does so reasonably.

Although appellant allegedly told exculpatory lies during the interrogation, the jury could have reasonably concluded that appellant was dishonest because he was trying to protect Veronica. The consciousness-of-guilt inference is permissive, not mandatory. Accordingly, the jury could have found, but was not required to find, that appellant's alleged untruths suggested that he was guilty. Moreover, the jury could reasonably have found have found that appellant's apparent admissions were efforts to shield Veronica—his wife and the mother of his children—from being found guilty and that Veronica, who was familiar with the bizarre abusive techniques used against Genny, was the sole perpetrator. In addition, the jury could reasonably have concluded that appellant unknowingly stated some untrue things to the police based on what Veronica told him. For example, if Veronica had intentionally burned Genny's head and neck with a hot liquid and later told appellant that Genny had burned herself, appellant telling the interrogators that the initial burn was accidentally inflicted did not indicate any consciousness of guilt.

Furthermore, respondent's claim that the prosecution evidence was overwhelming relies heavily on Ivan Jr.'s highly unreliable preliminary hearing testimony.[11] Respondent unquestioningly assumes that the factfinder would inevitably have believed Ivan Jr.'s fanciful allegations. Respondent's approach is inappropriate for harmless-error analysis; unlike a sufficiency claim, this Court cannot view the evidence in the light most favorable to the prosecution. Significantly, while he was cross-examined

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[11] The testimony's questionable veracity may have been why the prosecutor did not introduce Ivan Jr.'s prior testimony at the penalty retrial.

gently, Ivan Jr. backpedaled away from many of the serious allegations he had made during his direct examination. Most importantly, he retracted his direct-examination testimony that he saw appellant and Veronica giving Genny a bath on the day she was burned in the bathtub. In addition, Ivan Jr.'s most inventive allegations, such as appellant and Veronica ordering the children to throw hard balls at Genny and forcing Genny to eat feces, lacked corroboration. For these reasons, the jury could have reasonably rejected all of Ivan Jr.'s testimony as incredible, or at least rejected the uncorroborated testimony. Consequently, this Court should accord Ivan Jr.'s prior testimony with little or no weight when conducting harmless-error analysis.

In its harmless-error argument, respondent attempts to minimize the impact of the grievous errors by grossly distorting the nature of the excluded evidence. By considering the excluded evidence to be run-of-the-mill propensity evidence, respondent misperceives the probity of the proffered evidence, which respondent terms "speculative and weak." (RB 61.) Unlike the mythical evidence supposedly put forth by the straw man that respondent has created, the evidence that appellant actually proffered was highly probative.

Yet again, respondent mischaracterizes the inferences that appellant sought to make with the proffered evidence. Respondent wrote that the excluded evidence "would require speculation that just because Veronica grew up in an abusive household, she was the one who perpetrated the abuse against Veronica." (RB 62.) To reiterate, that is not the inference appellant wanted to make. Appellant sought to establish that Veronica was the sole or primary perpetrator from the similarity of abusive techniques—not the mere fact that "Veronica grew up in an abusive household." (RB 62.)

Appellant sought to present convincing evidence of abusive techniques in Veronica's family of origin. Although Alexandra Krahelski, the social worker, had no independent recollection of her investigation of the abuse in Veronica's family of origin, she kept contemporaneous records that would have been admissible and could have refreshed her recollection. Beverly Ward's limited recollection of the specific abusive techniques Tillie had used eighteen years earlier does not weaken the proffered evidence; she made contemporaneous statements to Krahelski. In any event, Ward remembered that Tillie pulled Veronica, Mary, and Anita's hair—an abusive technique Tillie utilized that mirrored what was done to Genny. Paul Becerra would have testified about the battering and burning, two additional types of overlapping abusive techniques. Shirley Leon could have testified about Veronica and her sisters telling her how Tillie wasb burning and otherwise abusing them. The absence of evidence that Veronica specifically had been victimized was not material for appellant's proffered inferences; Veronica would have learned the abusive techniques whether she experienced or merely observed them.

The inferences appellant sought to make were reasonable, not speculative. At trial, the parties and the court acted like the evidence was very important. Contrary to respondent's assertion, appellant presented evidence of similarities in excessive disciplinary techniques. Respondent refuses to acknowledge that the key to that evidence is similarity of bizarre techniques—not the fact that abuse took place in Veronica's family of origin. Respondent's contention that Veronica not similarly abusing all of her children undermined appellant's proffered inferences should be rejected. The lack of identical modus operandi does not render signature-crime evidence inadmissible (see *People v. Hovarter*, *supra*, 44 Cal.4th at p.

1004), and does not materially weaken the probity of appellant's proffered evidence, which was powerful even though the abuse against Genny was not a carbon copy of what Tillie did to her daughters. The similarity of the abusive techniques and their bizarreness provided sufficient probative value. Respondent's biting assertion that "beat[ing] and tortur[ing] a helpless child" required no specialized knowledge is immaterial; specialized knowledge is not part of the chain of relevancy for the proffered evidence.[12] (RB 63.) If the evidence was as ineffectual as respondent claims, it is doubtful that the prosecutor would have fought tooth and nail to exclude it.

Respondent's rebuttal to appellant's argument that the evidence of guilt was thin is unpersuasive. Respondent makes many inferences in its favor. Again, that would be appropriate for an insufficiency-of-the-evidence claim. Harmless-error analysis is different; an appellate court engaging in harmless-error analysis must consider the possibility that the factfinder might have made reasonable inferences in the defendant's favor. For instance, although the jury could have reasonably inferred from appellant's admission that he put up the hook in the master bedroom closet that he was the one who abused her with it, the jury could also have reasonably inferred that he did no more than put the hook up. Similarly, though the jury could have concluded that appellant inflicted the fatal burn based on appellant's admission that he had put Genny in an appropriately

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[12] Signature-crime evidence also does not require specialized knowledge. For example, this Court has found that the location of crimes was a significant characteristic to a signature crime. Committing multiple offenses on Route 101 takes no specialized knowledge, but it is a point of similarity that, together with other similar characteristics that do not involve specialized knowledge, can reasonably lead to inferring the perpetrator's identity. (*People v. Hovarter*, *supra*, pp. 1003-1004.)

warm bath, the jury could also have concluded that appellant merely gave Genny a routine bath hours before the bath in which Genny was burned. Moreover, although Veronica's statement that she alone put Genny in the bath in which she drowned was untrue with respect to how Genny died, the jury could have reasonably concluded the non-exculpatory portion of the statement was an admission to burning Genny without appellant's assistance or participation. Surely, the inference from Veronica's admission that Veronica was the only adult present in the bathroom when she inflicted the fatal burn is no less reasonable than the inference from appellant's admission that appellant participated in inflicting that burn. Yet, respondent deems the former inference unreasonable and the latter inevitable.

Respondent's rejoinder is further weakened by two matters discussed above. First, the timing of Genny's death was very much in dispute. (See *ante*, at pp. 27-28.) Second, the jury could have reasonably concluded that Ivan Jr.'s testimony inculpating appellant was not credible. (See *ante*, at pp. 29-30.) For these reasons, the evidence of appellant's guilt was indeed weak.

Despite respondent's refusal to recognize it, the lengthy deliberations show that this was a close case. Seven days of deliberations following twelve days of receiving evidence is unusually long. A panoply of precedents support the proposition that a long deliberation implies a close case. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 [determining ten-hour deliberations showed closeness of case]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberations]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberations].) The jury should be commended for its meticulous

review of the evidence; nonetheless, the fact that it took the jury so long to decide on one count and one special-circumstance allegation suggests that the jury perceived this case quite differently from respondent. If evidence of appellant's guilt and the special circumstance were remotely as compelling as respondent suggests, the jury could quickly have convicted appellant and found the special circumstance true.

By all indications, this was a close case at the guilt phase and, thus, it is reasonably probable that the admission of the proffered evidence would have tipped the scales away from a conviction. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Even if this Court determines that the prejudice for state-law, guilt-phase error has not been met, reversal is required for the constitutional claims because respondent cannot show beyond a reasonable doubt that the errors were harmless. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant's conviction must be vacated.

If this Court lets appellant's conviction stand, it should nevertheless vacate the special-circumstance finding. The torture-murder special circumstance requires finding that the defendant intended to kill and intended to torture. (See *People v. Davenport* (1985) 41 Cal.3d 247, 271.) The prosecution's only path to proving appellant's mens rea was to imply it from the acts committed against Genny. The excluded evidence suggested that Veronica was the mastermind and primary perpetrator of the offense. The converse inference is that appellant was not the primary perpetrator. From that, it can be inferred that appellant, as the minor participant, did not intend to kill or torture, even if the requisite mens rea could be inferred from the totality of the acts perpetrated upon Genny.

Respondent's argument that the error had no impact on the special-circumstance finding suffers from the same fundamental flaw as its

harmless-error analysis with respect to the conviction. By distorting the nature of the excluded evidence, respondent subverts the evidence's apparent probative value and creates a false illusion of harmlessness. Due to the combination of the strength of the proffered evidence and the weakness of the evidence that appellant intended to torture and kill Genny, it is reasonably probable that the jury would not have found the torture-murder special circumstance if the trial court had admitted the excluded evidence. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) At the very least, respondent cannot not show that the violation of appellant's constitutional rights was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Because the torture-murder special circumstance was the only death-eligibility factor alleged, vacating the special-circumstance finding requires vacating the death judgment.

Even if this Court upholds the conviction and special-circumstance finding, this Court should vacate the death judgment. Relative culpability comprised the key issue at the penalty retrial. The excluded evidence was central to appellant's case that he was, at most, a minor participant in the offense and that Veronica was the ringleader. The exclusion of the evidence neutered appellant's penalty-phase defense. There was at least a reasonable possibility that the court's erroneous evidentiary ruling and the concomitant infringement of appellant's constitutional rights impacted the jury's death-sentencing decision. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

Yet again, respondent distorts the excluded evidence to rob it of most of its probative value. The proffered evidence was highly relevant toward determining the identity of the primary perpetrator. Give the bizarreness

and similarity of the disciplinary techniques, the evidence strongly indicates that Veronica masterminded the offense.

It is implausible that the proffered evidence would not possibly have changed the outcome of the penalty determination. The first jury hung after seven days of penalty-phase deliberations. At the penalty retrial, appellant needed only one holdout juror not to get sentenced to death.

Fewer inferences are required to show penalty-phase prejudice than to show guilt-phase prejudice. With respect to the conviction, showing that Veronica was the ringleader does not definitively demonstrate that appellant was not a participant and thus not guilty; an acquittal would have required an additional inference. With respect to the special circumstance, appellant's lack of intent would have had to be inferred from appellant being at most a minor participant. At the penalty phase, however, appellant's status as a minor participant is itself a mitigating factor that relates to the circumstances of the offense. If the factfinder would have concluded that Veronica was the primary perpetrator, no further inferences would have been needed for the factfinder to give mitigating weight to that fact.

Due to the subjective nature of the penalty determination, this Court cannot conclude that the erroneous exclusion of the evidence at the heart of appellant's penalty-phase defense was harmless. In his opening brief, appellant explained at length why nontrivial penalty-phase errors should rarely be deemed harmless and why the overwhelming-evidence test should not be used in penalty-phase-harmlessness analysis. (AOB 94-98.) Instead of substantively rebutting appellant's argument, respondent summarily states that appellant's argument is unpersuasive. Appellant does not concur.

The wrongful exclusion of the evidence, under false premises, that lied at the core of appellant's defense at the guilt phase and penalty retrial was not harmless. This Court should vacate the conviction, special-circumstance finding, and death judgment.

II.

THE EXCLUSION OF EVIDENCE OF VERONICA GONZALES'S ANTIPATHY TOWARD MARY ROJAS VIOLATED THE EVIDENCE CODE AND APPELLANT'S CONSTITUTIONAL RIGHTS

A perplexing aspect about the evidence presented at the trials in this case the appearance that neither defendant had a motive to harm Genny. Appellant sought to present evidence suggesting that Veronica had a motive to abuse Genny; however, the trial court excluded it as irrelevant. That ruling was erroneous, infringed appellant's constitutional rights, and requires vacating the judgment below.

A. The Excluded Evidence Was Admissible

The trial court erred in concluding that the only available motive evidence was irrelevant. The threshold for relevancy is low. For evidence to be relevant, it must "'hav[e] any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1200, quoting Evid. Code, § 210.) Accordingly, an item of evidence is relevant if it directly or by reasonable inference establishes a disputed material fact. (See, e.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 913.)

The evidence consisted of Veronica's statements during her interrogation in which she called her sister Mary, who was Genny's mother, "a little bitch." (2 CT 383.) During that interrogation, she blamed Genny's inability to speak at 4½ years old on Mary freaking Genny out. (2 CT 454.) It was undisputed that the evidence showed that Veronica harbored ill will toward Mary and that any evidence of Veronica's motive to harm Genny would have been admissible third-party-culpability evidence. The trial court, however, ruled that Veronica's motive to abuse Genny could not be

reasonably inferred from her antipathy toward Mary. That was error.

The inference that appellant sought to make from the excluded evidence was reasonable. As detailed in the opening brief, appellant and Veronica were poverty-stricken and struggling to raise six children in a small two-bedroom apartment when Tillie handed Genny off to them. Genny was incontinent and unable to speak. Due to Genny's behavioral problems, Tillie was not able to care for her. After trying to be her caregivers for several months, Anita and Victor Negrette, Veronica's sister and brother-in-law, also could not raise Genny. With Mary in a drug-rehabilitation program, Tillie had no other child besides Veronica to whom she could turn. These facts suggest that Veronica's ill will toward Mary could have created a motive for Veronica to hurt Genny.

The excluded statements themselves reveal the nexus between Veronica's feelings toward her sister and her motive to abuse Genny. Veronica called Mary a little bitch when explaining to the detectives how Genny came to live with her and appellant. (2 CT 382-385.) After a detective disputed Veronica's assertion that Genny did not scream, Veronica explained that Genny did not talk, a developmental delay Veronica attributed to Genny's "damn mother get[ting] her so goddamn freaked out." (2 CT 454.) During the interrogation, Veronica spoke negatively of Mary only when discussing the difficulties of raising Genny. It would not be a stretch to infer that Veronica also attributed Genny's other developmental delays outside of the realm of her speech to Mary's parenting.

Respondent notes that the trial court stated that it would have admitted the evidence if appellant presented additional evidence of a link between Veronica's antipathy toward Mary and her feelings toward Genny.

(RB 69.) Although appellant did not provide new evidence of the link, appellant had already presented sufficient evidence of the nexus between Veronica's hostile feelings toward Mary and the abuse of Genny. Aside from baldly agreeing with the trial court, respondent does not explain why the evidence of the nexus did not suffice. (RB 69-70.)

To the extent that the strength of the inference was questionable, the purported weakness of the inference presented a question of the proffered evidence's weight, not its admissibility. The connection between Veronica's antipathy for Mary and the abuse of Genny was too substantial for the inference to be deemed speculative; a factfinder could reasonably have concluded that Veronica's feelings toward Mary were related to and provided a motive for the victimization of Genny. A factfinder might have, as the trial court did, determined that Veronica's ill will toward Mary did not impact Veronica's treatment of Genny; however, it should have been the jury, not the court, that made the determination of whether the excluded evidence pertained to Veronica's motive. Under Evidence Code section 403, evidence of disputed relevance should be admitted if the proponent of the evidence produced sufficient evidence for a jury to find it relevant. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466.) Appellant provided ample evidence of the nexus between Veronica's antipathy toward Mary and her feelings toward Genny; accordingly, the court should not have precluded the jury from evaluating the excluded evidence.

Furthermore, the evidence of Veronica's ill will toward Mary should not have been excluded under Evidence Code section 352. Because the evidence of Veronica's third-party culpability was capable of raising a reasonable doubt regarding appellant's guilt, Evidence Code section 352

cannot be an independent basis for excluding the evidence.[13] Respondent's assertion that the evidence could not have raised a reasonable doubt regarding appellant's guilt is undergirded by shaky premises. First, respondent makes all inferences in its favor, although the jury might have reasonably concluded otherwise. Second, respondent again misstates the nature and probity of the excluded evidence regarding the abusive techniques used in Veronica's family of origin. Third, respondent distorts other exculpatory evidence that appellant presented. For example, respondent states that, aside from short trips to the store, appellant did not leave the apartment on the day of Genny's death (RB 70), despite there being undisputed evidence that appellant had left the apartment for at least an hour that evening and the water was running in the apartment for a long period of time while appellant was gone. (52 RT 6244-6245, 6264, 6353; 53 RT 6531; 57 RT 7085-7088.) Fourth, respondent assumes that the trial court correctly excluded other defense evidence although appellant is challenging those adverse rulings. Fifth, respondent asserts that evidence of Veronica's guilt does not constitute evidence of appellant's innocence. Although evidence of Veronica's culpability need not necessarily be evidence of appellant's innocence, that inference could often be reasonably made. Indeed, in *People v. Hall* (1986) 41 Cal.3d 826, 833-834, this Court held that third-party-culpability evidence that did not definitively prove the defendant's innocence could create a reasonable doubt of the defendant's

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[13] Misconstruing appellant's argument, respondent notes that irrelevant evidence pertaining to third-party culpability is not admissible. (RB 70.) Respondent's recitation of the law is indisputably true. Appellant's actual argument is that the trial court's exclusion of the evidence should not be upheld because the evidence, if relevant, was inadmissible under Evidence Code section 352. (AOB 104-105.)

guilt. In this case, inferring appellant's innocence from evidence of Veronica's guilt was reasonable, as the trial court found. Moreover, the exclusion of the evidence carried through to the penalty retrial, at which appellant sought to show that Veronica was the primary, and not necessarily the only, perpetrator. Thus, neither Evidence Code section 350 nor Evidence Code section 352 provided a basis for barring the evidence. The trial court abused its discretion when it ruled that the evidence was inadmissible.

B. The Exclusion of the Evidence Infringed Appellant's Constitutional Rights

Because the evidence of Veronica's antipathy toward Mary was exculpatory and critical to the defense, the exclusion of the evidence violated appellant's rights to a defense. The key to appellant's defense is that Veronica was more culpable, or solely culpable, for the torture-murder. Evidence suggesting that Veronica had a motive that appellant did not have was a crucial component of that defense. In addition, the prosecution lacked a countervailing interest to exclude the motive evidence. The exclusion of the evidence notwithstanding the nexus between Veronica's rancor toward Mary and the abuse of Genny essentially imposes a high-probity requirement for relevancy. Suddenly raising the bar for demonstrating relevancy over what was required at common law or under Evidence Code section 210 cannot trump appellant's rights to a defense. Moreover, the potential for prejudice from admitting the evidence is low. If the jury were to find the inference weak, the logical result would be to consider the evidence immaterial. Accordingly, there is a minimal threat of a wrongful acquittal from the jury misusing the evidence that Veronica hated her drug-addicted sister.

The exclusion of the evidence at the penalty retrial also infringed appellant's constitutional rights. Excluding the evidence pertaining to Veronica's motive was *Skipper* error per se. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.) Even if this Court does not use a per-se standard for *Skipper* error, the balancing test for constitutional overrides of state-law evidentiary rulings yields the same result. The balancing test for constitutional error at the penalty retrial is similar to the rights-to-a-defense balancing test, with one exception: Appellant's interest in introducing the evidence was stronger at the penalty retrial than at the guilt phase because the motive evidence was more probative at the penalty retrial, in which relative culpability comprised the key issue.

C. The Exclusion of the Evidence Was Reversible Error

Because the proffered evidence pertained to Veronica's motive, its erroneous exclusion was not harmless under either the *Watson* or *Chapman* standard. As the only evidence pertaining to either defendant having a motive to harm Genny, the excluded evidence was quite probative. The jury could have reasonably inferred that Veronica transferred her antipathy from Mary to Genny, particularly because Mary's drug addiction resulted in appellant and Veronica needing to care for Genny and Mary's appalling parenting made Genny especially difficult to care for. Furthermore, the jury could reasonably have adopted Dr. Perez-Arce's opinion that Genny had a symbolic meaning for Veronica.[14]

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[14] Contrary to respondent's assertion (RB 71), the exclusion of Dr. Perez-Arce's testimony has not in any way been forfeited on appeal. Appellant sought to elicit her testimony at trial, and she testified at an Evidence Code section 402 hearing. Appellant sought to admit her testimony in its entirety, and the trial court excluded all of it except for

(continued...)

Respondent's dubious claim that the excluded evidence suggested that Veronica's motive was to protect Genny was belied by the evidence that she singled out Genny for torture.[15] The exclusion of the evidence was prejudicial because Veronica had both motive and opportunity to harm Genny, and appellant had only the latter. Although evidence that Veronica had motive for and intent to victimize Genny does not necessarily exonerate appellant, it is probative toward appellant's lack of participation or intent. It is reasonably probable that the jury would have reached different guilt-phase verdicts if the trial court had admitted the evidence. Moreover, respondent cannot show that the denial of appellant's constitutional rights flowing from the exclusion of the motive evidence was harmless beyond a reasonable doubt. Accordingly, the murder conviction and special-circumstance finding must be vacated.

The error was more prejudicial at the penalty retrial. If only Veronica had a motive to torture or kill Genny, that is highly probative toward her being the ringleader. That in and of itself is a mitigating factor that could have carried significant weight with the jury. For that reason, excluding the evidence was not harmless under the state-law or federal-constitutional standards. In any event, assuming *arguendo* that the error is

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[14](...continued)
evidence of appellant's good character and background. (47 RT 5516-5614; 48 RT 5762-5763.)

[15] In view of the prosecution seeking and obtaining a torture-murder conviction and death penalty against Veronica, respondent should be estopped from arguing that Veronica's motive was to protect Genny. (See *In re Sakarias* (2005) 35 Cal.4th 140, 156-160; *United States v, Bagley* (9th Cir. 1985) 772 F.2d 482, 489.)

not reversible by itself, the exclusion of the evidence is an important component of appellant's cumulative error claim. Evidence of Veronica's antipathy toward Mary was one part of a cluster of key defense evidence that the trial court refused to admit into evidence.

III.

THE EXCLUSION OF VERONICA GONZALES'S CONTEMPORANEOUS INCULPATORY REMARKS WAS ERRONEOUS AND UNCONSTITUTIONAL

After the police responded to the 9-1-1 call made from a neighbor's apartment, Veronica told two police officers that she put Genny in the bathtub, went to cook dinner, and, upon returning to the bathroom to check on her, found that Genny had drowned. Because Veronica spoke in the first-person singular, appellant sought to use those statements to show that Veronica was the sole or primary perpetrator. Although Veronica was agitated from the time she ran out of her apartment seeking help until she was taken to the police station, at the penalty retrial the trial court excluded Veronica's inculpatory statements as inadmissible hearsay. That ruling was erroneous, and it violated appellant's constitutional rights.

A. The Excluded Evidence Was Admissible

Veronica's statements to the police officers, which the prosecution elicited in its case-in-chief at the guilt phase of the first trial, were admissible under two hearsay exceptions. They were spontaneous statements that, as a whole, went against her penal interest.

Veronica's remarks were spontaneous statements. Veronica was under the stress of excitement from fatally burning Genny. Genny's death, which may have surprised Veronica, appears to have been the trigger for her emotional outburst. According to the timeline asserted by the defense, Veronica burned Genny after appellant had left the apartment and panicked when Veronica went into shock and died.[16] The panic was not inconsistent

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[16] Although respondent asserts that the burn was inflicted three to six hours before the police arrived, respondent recognizes that the Genny (continued...)

with inflicting the fatal burn; the mechanism of death—burn from tap water that filled the bathtub—was not obvious to a layperson, particularly an ignorant person using methamphetamines. Indeed, it is likely that Veronica was surprised that immersing Genny in the bathtub for no more than ten seconds turned fatal. Contrary to respondent's argument, Veronica probably did find Genny in distress. That Veronica was surprised and panicked when she found Genny dead is corroborated by Officer Collum's testimony that Veronica was emotional after the police arrived and by neighbors' similar observations after she ran out of her apartment.[17] Genny's body feeling cold does not inevitably lead to respondent's preferred conclusion that she had been dead for a long time when Veronica ran out of her apartment in a panic; it could have been a symptom of Genny having been in shock. (51 RT 6117.) Likewise, Genny's body, hair, and shirt being dry proves little. Because at least an hour had passed since the lower half of Genny's body was immersed in the bathtub, Genny's dryness was not remotely inconsistent with Veronica being surprised and panicked

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[16](...continued)
could have gone into shock and died an hour after the infliction of the burn. (RB 78-79.) Respondent therefore implicitly recognizes that Veronica could have burned Genny at approximately 8:10 pm—after appellant had left the apartment and Alicia Montes heard water running in the apartment—seventy minutes before the 9-1-1 call was placed at 9:20 pm. (56 RT 7020.)

[17] Respondent contends that Officers Bennett and Moe testifying that Veronica was calm when she made the statements demonstrates that Veronica was not under the stress of an exciting event. (RB 79.) As respondent recognizes, evidence pertaining to Veronica's demeanor was inconsistent. Accordingly, the impressions of Officers Bennett and Moe, which were not contemporaneously recorded, fail to establish that Veronica's statements were not spontaneous.

to find Genny dead and, upon realizing that she had killed her young niece, screaming for her neighbors to help. Thus, it appears that Veronica did not deliberate or reflect on the situation after she discovered that Genny had died.

Veronica telling the drowning story does not demonstrate that she deliberated or reflected on the situation. Rather, it shows the opposite. It did not require much rumination for Veronica to create a story that would be disproved after looking at Genny for less than one second. Her obviously false story is similar to a six-year-old child's hackneyed excuse that a dog ate his homework. The spontaneous-statement exception should not be premised on the supposition that the hearsay declarant's statement is likely reliable because the declarant has not had the opportunity to fabricate a lie; that is a legal fiction. It takes neither time nor ingenuity to devise an utterly unconvincing story. Nevertheless, the absence of opportunity to reflect and create a plausible and convincing story limits the likelihood that a factfinder would erroneously find a false story to be true. In this case, Veronica's lack of reflection makes it unlikely that Veronica made up the inculpatory portion of the remarks in order to have her story seem plausible. Thus, the inculpatory parts of her statement were indeed trustworthy.

Veronica's remarks to the police officers related to the incident that caused Veronica's excitement: Genny's death. Veronica spoke to Sergeant Bennett and Officer Collum about what had happened to Genny. Respondent contends, as the trial court concluded, that the exciting event was Veronica supposedly finding Genny submerged in the bathtub, not putting Genny in the bath water. Respondent is splitting hairs. The two events are inextricable. Veronica found Genny dead because she had placed Genny in the hot bathtub. It is senseless to state that putting Genny

in the bath water did not cause Veronica's excitement. Because the distinction respondent attempts to make is untenable, this Court should conclude that Veronica's statements to Sergeant Bennett and Officer Collum were made "under the stress of excitement caused" by the incident about which she was talking. (Evid. Code § 1240.)

Once again, respondent improperly analyzes the trial court's ruling by making all inferences in its favor. That approach is inconsistent with Evidence Code section 405. As the proponent of the hearsay evidence, appellant had the burden of producing sufficient evidence that the hearsay exception applies. Appellant met that burden by presenting ample evidence of both prongs of the spontaneous-statement hearsay exception: Veronica was under the stress of the excitement of causing Genny's death, and her statements related to that incident. Respondent's analysis supposes that appellant faced a much more imposing burden: that there not be sufficient evidence to support the conclusion that the hearsay exception did not apply. That is not the law.

Respondent's argument that Veronica's remarks fall outside the ambit of the spontaneous-statement hearsay exception because they are unreliable disregards the key point that appellant has not sought to admit the unreliable portion of Veronica's remarks for the truth of the matter asserted. Appellant does not contend that the clearly false exculpatory comments regarding Genny purportedly drowning in the bathtub are reliable. Rather, he would have used the drowning story to show Veronica's consciousness of guilt—the very purpose for which the prosecutor elicited this evidence at the guilt phase of appellant's trial.

Contrary to respondent's contention (RB 85, fn. 14), appellant's claim that he intended to use the unreliable portions of Veronica's statement

for a nonhearsay purpose has not been forfeited. To be sure, appellant's principal purpose for admitting the statement in its entirety was to argue that Veronica's use of the first-person singular suggested that she had acted alone when killing Genny. An argument that Veronica's obvious lies showed consciousness of guilt was a secondary consideration. Yet, defense counsel argued that Veronica's remarks showed consciousness of guilt. (90 RT 11173.) Although defense counsel was referring to the statement as a whole, it was patently obvious that appellant had no intention of using the exculpatory portion of Veronica's statements for a hearsay purpose. Arguing that Genny drowned after Veronica had innocently placed her in a lukewarm bath could not have conflicted more with appellant's theory of the case. Furthermore, because the forensic evidence clearly debunked Veronica's drowning story, nobody in the courtroom believed that Veronica's lies could possibly have been true. For these reasons, it strains credulity to suppose that appellant would have used Veronica's exculpatory remarks for a hearsay purpose. Even if appellant would have used the drowning story only to put her admissions in context, that would also have been a nonhearsay purpose for using the evidence.

The portion of Veronica's remarks that appellant sought to admit for the truth of the matter asserted was at least as reliable as the admissions appellant made when he was interrogated. The inculpatory portion has not been refuted. Veronica's participation in burning Genny in the bathtub was not disputed at either of appellant's trials. On the other hand, appellant's participation in the offense was very much in dispute.

The incongruity between respondent's perception of appellant's admissions, which respondent contends provides indubitable evidence of appellant's guilt, and Veronica's analogous admissions, which respondent

deems too unreliable for a jury to hear, cannot be denied. Both were statements that contained a similar mix of exculpatory and inculpatory material. At the penalty retrial, appellant's admissions formed one of two pillars upon which the prosecution relied to make its case that appellant was a major participant in the offense against Genny. Yet, Veronica's statements made at her apartment shortly after the police arrived were deemed too unreliable to be admitted into evidence.

The purposes of the hearsay rule and the spontaneous-statement exception were not advanced by the exclusion of the evidence. There was no need to exclude the evidence to prevent the jury from finding unreliable hearsay credible because appellant did not seek to have the exculpatory lies admitted for the truth of the matter asserted, and the lies were so obviously false that no reasonable factfinder would have believed Veronica. Accordingly, the only bona fide basis for concluding that the inculpatory portion of Veronica's remarks were unreliable is a determination that Veronica's partly inculpatory, partly exculpatory remarks as a whole were so unreliable that the inculpatory excerpts should not be believed. Excluding evidence of an allegedly unreliable partly inculpatory, partly exculpatory statement might be sensible if the trial court played the same gatekeeping role for all partly inculpatory, partly exculpatory statements; in that event, all potentially unreliable out-of-court statements would be withheld from the jury if the people who made the statements could not be cross-examined. But that is not the case here. The trial court admitted appellant's mixed statement, but excluded Veronica's. The purpose of the hearsay rule is to keep unreliable, un-cross-examined statements from the jury—not to give the prosecution a leg up over the defendant when attempting to present evidence of the defendant and alleged alternative

perpetrator, respectively.

Moreover, it was improper for the trial court to look to extrinsic evidence to determine that Veronica's remarks were unreliable. The cases that respondent cites to refute appellant's argument fail to undermine this assertion. This Court's holding in *People v. Arias* (1996) 13 Cal.4th 92, 150, that the hearsay declarant's failure to confirm her spontaneous statement was immaterial shows that extrinsic evidence of unreliability has no bearing on whether a hearsay statement is admissible under the spontaneous-statement exception. In contending that *Arias* is inapposite because the trial court's finding of unreliability was not based on a failure to confirm the statement, respondent puts forth an absurdly narrow reading of *Arias*. The principle undergirding *Arias*, that extrinsic evidence is immaterial, still stands irrespective of the nature of the extrinsic evidence. Likewise, respondent fails in its effort to distinguish *People v. Sully* (1991) 53 Cal.3d 1195, 1229 and *People v. Farmer* (1989) 47 Cal.3d 888, 906 because the trial court in those cases found the hearsay reliable. Appellant is arguing that the requirements for the spontaneous-statement exception were met despite the existence of extrinsic evidence of unreliability. The trial courts in *Sully* and *Farmer* reaching a different conclusion from the trial court in this case buttresses, rather than undermines, appellant's argument. Those cases provide further precedential support for the principle that extrinsic evidence of unreliability is not material to determining whether a remark is admissible through the spontaneous-statement exception.

Veronica's hearsay statements were also admissible under the statement-against-penal-interest exception. Respondent recognizes that Veronica was unavailable to be a witness at appellant's trials. In addition,

the inculpatory portion of Veronica's statement was against her penal interest. She admitted to putting Genny in the bath that killed her. At her trial, the inculpatory portion of her statement would have been admissible because it was an admission that was probative toward her guilt. Veronica's false drowning story was immediately debunked and could not be believed. The obvious falsity of her exculpatory comments shows her consciousness of guilt.

The portion of the statement that appellant sought to admit for a hearsay purpose was reliable. Veronica would not have admitted to putting Genny in the bathtub if she had not burned Genny. In that respect, Veronica's remarks were similar to those in *People v. Gordon* (1990) 50 Cal.3d 1223, 1251-1253, in which this Court upheld the admission of a hearsay declarant's statement that he gave medical care to perpetrators of a robbery-murder. Both statements had inculpatory and exculpatory elements. It was no more obvious that the declarant in *Gordon* knew that he was admitting to being an accessory than Veronica knew that stating she put Genny in the bath was subjecting herself to criminal culpability. It matters little that the declarant in *Gordon* "all but confessed" to being an accessory if the declarant was not familiar with this state's accessory-after-the-fact law.

Respondent's reliance on *People v. Geier* (2007) 41 Cal.4th 555, 583-585, is misplaced. At no time has appellant asserted that the entire statement is true. Unlike in *Geier*, appellant did not seek to use most of the statement for a hearsay purpose. The inculpatory portion of her remarks—the only segment that appellant sought to introduce for a hearsay purpose—was reliable. Veronica would not have placed herself as the central figure of her hastily made, obviously false story unless she was the

person who had perpetrated the actual offense.

As it was with respect to the spontaneous-statement exception, looking at the entire statement for reliability in this case makes little sense. All the parties have agreed that the drowning story was false. Based on that and the utter lack of evidence to support the drowning story, there was no risk of the jury crediting the false story. Appellant sought to admit for a hearsay purpose only the inculpatory portion of the statement. Consequently, asking if the entire statement is reliable is posing the wrong question.

Requiring the statement as a whole to be reliable created an imbalance between admissions and statements against penal interest at severed trials. Despite the transparent falsity of the exculpatory portion of Veronica's remarks, the prosecution was able to use Veronica's statement against her at her trial, but appellant could not use it for his penalty-phase relative-culpability case.

Lastly, the evidence was admissible under the catch-all exception to the hearsay rule. The inculpatory portion of the statement was reliable, and that was the only portion that appellant sought to admit for a hearsay purpose. As explained above, the unreliability of the false story is immaterial; all parties agreed the drowning story was not true.

B. The Exclusion of the Evidence Violated Appellant's Constitutional Rights

The trial court's state-law error had constitutional dimensions. Barring the evidence infringed appellant's right to present relevant mitigating evidence. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.) The proffered evidence pertained to relative culpability; the inculpatory portion of Veronica's remarks suggested that she alone burned Genny in the

bathtub. Even if the statements as a whole were unreliable, the admissions—the evidence appellant sought to admit for a hearsay purpose—were reliable. Accordingly, the trial court's ruling was *Skipper* error per se.

Furthermore, excluding the evidence infringed appellant's right to present a penalty-phase defense. Relative culpability was crucial to appellant's penalty-phase defense. Veronica's use of the first-person singular is among the strongest items of evidence that supported appellant's position that Veronica was the primary perpetrator. On the other side of the rights-to-a-defense balancing test, the integrity of the adversarial process also favored admitting the evidence. It was unfair for the trial court to admit appellant's admissions but exclude Veronica's admissions. Moreover, the obvious falsity of the exculpatory segments of Veronica's remarks prevented the jury from erroneously overestimating the reliability of the hearsay. The jury would have been well-aware that the majority of Veronica's statements were exculpatory lies, and the jury would have been free to infer that the false, exculpatory portions of her remarks rendered the inculpatory portions incredible. On the other hand, the jury would also have been entitled to make a reasonable inference that Veronica's inculpatory remarks were indeed true. Indeed, the jury had the opportunity to make that sort of determination with respect to appellant's admissions.

The imbalance in the court's rulings regarding appellant's and Veronica's admissions violated appellant's due-process rights. Respondent's argument that each item of evidence must be analyzed on its own contradicts a key basis for the trial court's exclusion of the evidence of disciplinary techniques used in Veronica's family of origin—the trial court's fear that admitting the evidence of disciplinary techniques at

appellant's trial but not Veronica's would deny the prosecution its purported right to a fair trial. Furthermore, the prosecutor took inconsistent positions regarding the admissibility of the evidence between the two trials. (90 RT 11170-11171.) At the guilt phase of the first trial, Veronica's remarks were competent evidence to show an alleged co-conspirator's consciousness of guilt, but at the penalty retrial the prosecution argued that her statements were not competent evidence for appellant to show that the co-defendant, based on her admissions and her consciousness of guilt, was the primary perpetrator. Due to the prosecution's use of inconsistent positions, the court should have estopped the prosecutor from seeking to exclude the evidence. (See *In re Sakarias* (2005) 35 Cal.4th 140, 156-160; *United States v, Bagley* (9th Cir. 1985) 772 F.2d 482, 489.)

Moreover, the exclusion of the evidence violated appellant's right to a fair and reliable capital-sentencing determination. As a result of the trial court's ruling, key mitigating evidence was withheld from the jury. That skewed the jury's weighing process. Similarly, the exclusion of the evidence infringed appellant's right to rebut the prosecution's aggravating evidence. The prosecution sought to show that appellant was a major participant in the offense. Appellant's admissions formed one of two bases for the prosecution's argument. Excluding Veronica's remarks hamstrung appellant's ability to rebut that evidence.

C. The Death Sentence Must Be Vacated

The exclusion of Veronica's remarks to the police officers at the penalty retrial was prejudicial. As explained above, Veronica's admissions were reliable and the retrial jury could reasonably have found them credible. As a result of the court's ruling, the penalty-retrial jury did not hear any evidence of Veronica making any admissions. Veronica's inculpatory

statements to Sergeant Bennett and Officer Collum comprised the most significant defense evidence that was admitted at the first trial, but not the second. Their inadmissibility at the penalty retrial may explain why the retrial jury, but not the first jury, unanimously agreed that appellant should receive a death sentence. If Veronica's crime-scene admissions had been introduced at the penalty retrial, there is a reasonable possibility that the retrial jury would not have reached a death verdict. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) At a minimum, respondent cannot demonstrate that the erroneous exclusion of the evidence was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Respondent's argument that the jury would have discredited all of Veronica's remarks as self-serving lies flatly contradicts its approach to appellant's admissions, which, according to the prosecution's theory of the case, comprised a major component of the purportedly overwhelming evidence of appellant's participation and deathworthiness. In its response to this appellate claim, respondent argues that Veronica's admissions lacked probative value because appellant admitted to turning on the bathtub. (RB 88.) There is no bona fide basis for cloaking appellant's admissions with an aura of authenticity while foreclosing the possibility that the jury would have found Veronica's admissions credible. Both appellant and Veronica made admissions that were contained in larger statements that were, on balance, exculpatory. Treating the former, but not the latter, as the gospel is inappropriate for harmless-error analysis.

Finally, this was a close case. (See *ante*, at p. 36.) That the first jury hung at the penalty phase, at which Veronica's crime-scene admissions were entered into evidence, undermines appellant's assertions that the combination of appellant's deathworthiness and the weakness of Veronica's

admissions caused the erroneous exclusion of Veronica's admissions to be harmless. This Court must vacate the death sentence.

IV.

THE EXCLUSION OF APPELLANT'S CHILDREN FROM THE COURTROOM WAS ERRONEOUS AND A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

When the trial court barred appellant from having his four youngest children be demonstrative exhibits, the trial court erred and infringed appellant's constitutional rights to present mitigating evidence and have a penalty-phase defense. The court then violated appellant's constitutional right to a public trial when it excluded the children from the courtroom and, for the penalty retrial, the entire courthouse.

A. The Court Erred by Excluding the Evidence

As exhibits, the children constituted relevant demonstrative evidence. Appellant's young children being damaged by a death sentence was evidence of appellant's character. Although this Court has limited the admissibility of execution-impact evidence to evidence that relates to a capital defendant's character (see *People v. Ochoa* (1998) 19 Cal.4th 353, 456), the proffered evidence was probative toward that purpose. Contrary to the respondent's assertion, appellant's argument does not rely on the premise that execution-impact is admissible for a purpose not mentioned in *Lockett v. Ohio* (1978) 438 U.S. 586, 604. Rather, appellant asserts that the proffered evidence was admissible because it relates to appellant's character.

Because execution-impact evidence regarding the children was admissible, demonstrative evidence of the children was also admissible. Litigants are permitted to present their evidence persuasively and forcefully. (See *People v. Dykes* (2009) 46 Cal.4th 731, 785.) Having the jury view the children would have vivified appellant's execution-impact evidence and

ensured that the jury would not consider appellant's four children to be mere abstractions.

As respondent recognizes, the trial court limited the form of the evidence to be presented. That belies the court's determination that the evidence was irrelevant. If the evidence was not relevant, testimony about and photos of the children would have been inadmissible. The evidence, thus, was relevant. Moreover, the demonstrative evidence of the children also would have been relevant to show appellant's background, specifically that he fathered and raised several children. Presenting the children as demonstrative evidence would have enlivened evidence of appellant's background as well.

Indisputably, demonstrative evidence is admissible. Such evidence is routinely admitted at trials, including this one. Respondent's attempts to distinguish the demonstrative-evidence precedents appellant cited in his opening brief come up short. (See RB 94.) Although appellant sought to prove different points from the proponents of the evidence in *People v. McClellan* (1969) 71 Cal.2d 793, 802, *People v. Richardson* (1911) 161 Cal. 552, 561-562, and *State v. Barden* (N.C. 2002) 572 S.E.2d 108, 131, the same logic applies to this case. *McClellan* stands for the proposition that a party may present vivid evidence despite the existence of a less pictorial alternative to prove the same item. *Richardson* and *Barden* demonstrate that people can be used as demonstrative exhibits even if photographs or witnesses' descriptions might suffice to convey similar information. It is immaterial that those precedents involved the prosecution seeking to elicit demonstrative evidence; precedents govern more than cases that share their narrow, specific facts. That is the foundation of legal reasoning and the basis of the development of the common law over

centuries of Anglo-American jurisprudence.

Likewise, respondent's efforts to distinguish execution-impact evidence from victim-impact evidence fall flat.[18] (See RB 94, fn. 16.) This Court has held that execution-impact evidence is admissible, so long as it reflects on the defendant's character. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) The trial court in this case had already determined that evidence of how appellant's execution would impact his four youngest children was admissible, relevant evidence. (65 RT 8325-8326.) The question, therefore, is limited to what form the evidence could have taken. Under the law, the proponent of the evidence may elect to present admissible evidence vividly. That includes using demonstrative evidence even if a witness's testimony may suffice. For this reason, the trial court erred by limiting appellant's relevant, appropriate execution-impact evidence to photographs and witness testimony.

Furthermore, this Court should not uphold exclusion of the evidence under Evidence Code section 352. That was not the basis of the trial court's ruling. In addition, the alleged prejudice to the prosecution from displaying appellant's children before the jury has been overstated. The trial court's

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[18] Respondent's contention that appellant improperly cited cases that are still pending on appeal is unfounded. (See RB 94, fn. 16.) For informational purposes, appellant merely reported on rulings made by trial courts. (AOB 131, fn. 51.) Appellant did not assert or imply that those evidentiary rulings had precedential value. Irrespective of how this Court rules on appeal, the proposition that appellant put forth—that trial courts permitted the prosecution to display victims' young children as victim-impact evidence in at least two capital cases—would be indisputably true. There is a difference between citing an unpublished case to announce the state of the law, which is barred by the Rules of Court, and referring to cases pending on appeal to report on what has happened in trial courts. (See *People v. Hill* (1998) 17 Cal.4th 800, 847, fn. 9.)

subsequent remarks that the presence of appellant's youngest children would have been manipulative were off-base. The trial court did not disapprove of the prosecutor's rank appeals to the jurors' emotions when he "reserved" a chair for Genny, yet, the court deemed appellant's efforts to vivify his evidence as blackmail. Moreover, in its argument that excluding the children as demonstrative evidence was harmless error, respondent contends that photographs and testimony about the four youngest children rendered the exclusion of the proffered evidence harmless. If that is the case, then the admission of the demonstrative evidence also would not have been particularly damaging to the prosecution. In addition, the probative value of the proffered evidence has been understated. The trial court had already found that execution-impact evidence was sufficiently tied to appellant's character to be admissible. The physical presence of the children had potent narrative relevance. Respondent does not dispute that the excluded evidence would have told a powerful narrative.

The admissibility of appellant's four youngest children as demonstrative evidence is the same type of question trial courts routinely face when admitting crime-scene victim photos offered by the prosecution. Contrary to respondent's assumption, the relevance of the proffered evidence has been established and the admissibility question concerns the propriety of the form of the proffered evidence. When appellant proffered this demonstrative evidence, the trial court asked the wrong question. In so doing, the trial court abused its discretion.

B. The Court's Ruling Infringed Appellant's Constitutional Rights

Respondent's argument that the exclusion of the demonstrative evidence did not violate appellant's constitutional rights relies on a faulty

premise. As explained above, the trial court did not properly exclude the evidence as irrelevant. Moreover, the exclusion of mitigating evidence would have been *Skipper* error per se even if the court's ruling had complied with the Evidence Code. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.)

C. The Court Had Neither the Authority Nor Substantial Evidence To Support the Exclusion of Appellant's Children from the Courtroom

The trial court had no power to do a best-interests determination to exclude the children from the courtroom. The court was not acting as a juvenile court judge. Rather, the court's duty was to protect the rights of appellant and the public.

Respondent asserts that the court's power to control its courtroom vested it with the authority to exclude appellant's children. That is not correct.

The trial court's broad power to control the courtroom and maintain order and security does not permit the court to exclude non-disruptive members of the audience. Under respondent's reasoning, the court could use its inherent authority to exclude anybody for any reason. Surely, that is not the law. The dicta from *People v. Hartman* (1894) 103 Cal. 242, 245 that respondent cites does not provide the trial court with the absolute power to exclude people. There must be a bona fide basis for the proper exclusion of someone from the courtroom. Under the court's power to maintain order and security, the court may eject a disruptive person from the audience. (See Code of Civ. Proc. § 128, subd. (a)(1)-(5).) But, that power does not vest the trial court with the authority to block the courthouse door capriciously to a member of the public. Accordingly, the court's discretion to control its courtroom must be exercised soundly. Requiring

evidentiary support for the exclusion prevents arbitrariness. There was no allegation, assertion, or evidence that the presence of the children in the courtroom would have interfered with the "proper conduct of the trial." (*Hartman*, at p. 245.)

In any event, even if the court had the authority to exclude the children in order protect what it deemed to be in their best interest, it lacked substantial evidence to support its ruling that it was in the children's best interest to attend no part of their father's capital trial.[19] The court did not solicit any opinions on what would be in the children's best interest. Unlike when the court ruled that Ivan Jr. and Michael were unavailable, the court had no evidentiary basis for its exclusion of the children. The trial court relied on nothing more than its gut feeling to determine that the children's best interest required that they be excluded from the entire trial. In the absence of any support, its ruling was an abuse of discretion.

D. Excluding Appellant's Children from the Courtroom Violated Appellant's Constitutional Right to a Public Trial

By locking appellant's four youngest children out of the courtroom,

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[19] Respondent contends that appellant lacks direct authority for the proposition that the court did not have to support its best-interests determination with factual findings. (RB 98.) To the contrary, the trial court's duty is derived from multiple sources. Most fundamentally, the constitutional right to a public trial requires the trial court to make factual findings. (See *Waller v. Georgia* (1984) 467 U.S. 39, 48.) In addition, under state law, a trial court's best-interests determination must be supported by substantial evidence. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 423.) When a best-interests determination undermines a third-party's rights, it is essential that the determination have evidentiary support. Moreover, requiring evidentiary support serves as a check against arbitrary rulings.

and ultimately the courthouse, the trial court infringed appellant's right to a public trial. Six decades ago, the United States Supreme Court wrote that "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." (*In re Oliver* (1948) 333 U.S. 257, 271-272.) The court's refusal to permit the children to attend any part of their father's capital trial ran afoul of this principle. Respondent's contention that the rationales for the public-trial right are inapplicable to the exclusion of appellant's children also conflicts with *Oliver*. Moreover, the rationales respondent cites undermines its argument: The presence of appellant's youngest children might have made the trial court and prosecutor "keenly alive to their sense of their responsibility and to the importance of their functions." (RB 98, quoting *People v. Woodward* (1992) 4 Cal.4th 376, 385.)

Under the factors that the United States Supreme Court delineated in *Waller v. Georgia* (1984) 467 U.S. 39, 48, the courtroom should have stayed open to the children.[20] (AOB 142-144.) Respondent's argument that the state had an overriding interest in excluding the children is improperly premised on the assumption that the children would have been present for the entire trial. At defense counsel's suggestion, the children would only have seen their grandfather's direct examination and would have left the courtroom prior to their grandfather's testimony that he did not want appellant to be executed.

The children would not have been damaged by hearing their paternal

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[20] *Waller* is applicable to the exclusion of appellant's family members. (See *Yung v. Walker* (2nd Cir. 2003) 341 F.3d 104, 110-111.)

grandfather's testimony reminiscing about their father. The defense offered a narrowly tailored alternative, and the trial court rejected it out of hand. Respondent claims that appellant cited no case law requiring the trial court to manage the testimony of appellant's grandfather in order to accommodate the children's presence. *Waller* requires trial courts to consider narrowly tailed alternatives to a courtroom-closure order; that is the authority upon which appellant relies. Notably, respondent makes no effort to articulate why the narrowly tailored alternative defense counsel suggested would not have fulfilled the state's interest in protecting the children from harm. It is hard to fathom that avoiding a one-minute break in the trial to permit the children to leave the courtroom during their grandfather's testimony constitutes a sufficient basis for excluding the children from the entire trial. Contrary to respondent's contention, exclusion of the children was not narrowly tailored because only they were barred from the courtroom; it would eviscerate the right to a public trial if the trial court's blanket ban on up to four relatives of the defendant could be deemed narrow.[21] Lastly, the court made no findings, other than its bare assertion, to support the exclusion. The court needs evidence, rather than hunches, to justify excluding the children from the courtroom. Indeed, the court's basis for excluding the children would have been nullified by the alternative that defense counsel suggested. Respondent's assertion that the court made a particularized inquiry by excluding only the four children disregards *Waller*'s requirement that the court make factual findings. A

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[21] Undoubtedly, the exclusion of appellant's entire family would have been a more severe violation of appellant's public-trial right. But, the existence of an irrational and more egregious hypothetical alternative exclusion does not render the trial court's ruling narrow.

ruling is not a factual finding.

The precedents that respondent cites in support of the exclusion order do not govern this case. The closing of the courtroom doors during the prosecutor's closing argument in *People v. Woodward*, *supra*, 4 Cal.4th at pp. 379-385, which this Court upheld, involved a much lesser imposition on the public-trial right than this case. In *Woodward*, the trial court prevented potential unplanned disruptions during the closing argument and did not exclude specific people from attending the trial. Similarly, the imposition on the public-trial right in *People v. Holloway* (2004) 33 Cal.4th 96, 147, in which the court excluded a defense investigator for crying during the trial, was less than in this case. In *Holloway*, the trial court determined that the investigator was being a disruptive spectator and ejected her on that basis. In contrast, the trial court made no factual findings supporting exclusion in this case, and the total exclusion of the four children from the courtroom did not prevent disruptions.[22]

The cases from other jurisdictions that respondent cites as persuasive authority fail to undercut appellant's argument. In *Sobin v. United States* (D.C. 1992) 606 A.2d 1029, 1032-1033, the court upheld the exclusion of the defendant's children during a sentencing proceeding because the court did not want the defendant's children to hear about their father's crimes and

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[22] If the court had permitted the children to be present for only a part of appellant's father's direct examination, a short break would have been taken to permit the children to leave the courtroom. Respondent may label that brief recess a disruption. But, a planned short pause in a witness's testimony is quite different from an unanticipated disruption from a spectator. The narrowly tailored alternative proffered by appellant would not have been disruptive. A minor inconvenience that would have protected appellant's right to a public trial should not be equated with a disruption.

see their father get taken away to be imprisoned. Unlike in this case, defense counsel did not propose a narrowly tailored alternative to total exclusion. Thus, the state's interests could have been met only by complete exclusion. In *McConnaughey v. United States* (D.C. 2002) 804 A.2d 334, 341, the District of Columbia Court of Appeals upheld the exclusion of children at the trial without analyzing the factors the United States Supreme Court delineated in *Waller v. Georgia, supra.* The *McConnaughey* court's conclusion that excluding children from the courtroom does not implicate the Sixth Amendment failed to follow *In re Oliver* and *Waller v. Georgia.* Those two cases demonstrate the excluding a defendant's relatives potentially violates the public-trial right and that the exclusion of children must be analyzed under the *Waller* factors. (See *Yung v. Walker* (2nd Cir. 2003) 341 F.3d 104, 110-111.) Excluding appellant's children from the entire trial was not a de minimus imposition on appellant's public-trial right that should be automatically upheld. A *Waller* analysis must be done, and the *Waller* factors reveal that appellant's public-trial right was violated. (AOB 142-144.) The two United States Court of Appeals cases that respondent cites were decided prior to *Waller*; as a result of their obsolete analyses, those precedents have little persuasive authority. Moreover, respondent cites no precedents in which the trial court rejected a viable narrowly tailored alternative that defense counsel had suggested.

Aside from stating that no precedent has required a trial court to take a short recess to accommodate both the defendant's right to a public trial and noting the state's interest in ensuring that a defendant's children do not hear testimony that could damage them psychologically, respondent offers no rationale for the trial court's refusal to permit appellant's four youngest children to attend the trial for the benign portions of their paternal

grandfather's testimony. The alternative to total closure that appellant's trial counsel suggested would have obliterated the rationale for excluding the children from the courtroom for the entire trial. It was much less broad than the trial court's absolute bar. This narrowly tailored alternative would have created a win-win situation for the state's interests and appellant's right to a public trial. Under *Waller*, the trial court's refusal to permit appellant's children to attend any portion of appellant's trial infringed appellant's rights to a public trial.

E. The Death Judgment Must Be Vacated

The trial court's denial of appellant's public-trial rights constituted structural error. (See *Waller v. Georgia*, *supra*, 467 U.S. at pp. 49-50.) Therefore, reversal is automatic.

This Court should vacate the death judgment even if appellant's public-trial rights were not infringed. The trial court's refusal to permit appellant's children to be demonstrative exhibits was prejudicial error.

The exclusion of the evidence weakened appellant's mitigating case with respect to his character. Although the jury knew that appellant had six children, mere photos and testimony did not convey that information as vividly or powerfully as the children's presence as demonstrative exhibits would have. In *Barnes v. State* (Ga. 1998) 496 S.E.2d 674, 689, the Georgia Supreme Court wrote "the photographs of [the capital defendant's children] show that he is a father in a way that no amount of testimony could duplicate." Likewise, photographs and testimony could not have duplicated the presence of the children in the courtroom as demonstrative exhibits. Although photos were excluded in *Barnes* and admitted in this case, the rationale underlying *Barnes* applies in this case: Requiring a defendant to sanitize otherwise admissible execution-impact evidence is

prejudicial error.[23] Contrary to respondent's claims, the superficial distinctions between this case and *Barnes* do not rob *Barnes* of its persuasive power.

Furthermore, this was a close case at the penalty phase. (See *ante*, at p. 36.) Consequently, a penalty-phase error in this case need not have been major in order to have created a reasonable possibility of a different outcome. Finally, respondent cannot show that the denial of federal constitutional rights from excluding the evidence was harmless.

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[23] The *Barnes* court found that the exclusion of the defendant's children's photos plus two other items pertaining to the defendant's character constituted prejudicial error. (*Barnes v. State*, *supra*, 496 S.E.2d at p. 689.) Like *Barnes*, the limitations on evidence of appellant's children was not the only significant defense evidence excluded at the penalty retrial. The cumulative impact of the penalty-phase evidentiary bars is an additional basis for reversing the death sentence in this case. (See Claims I-V, XX.)

V.

THE EXCLUSION OF APPELLANT'S MITIGATING EVIDENCE VIOLATED THE EVIDENCE CODE AND APPELLANT'S CONSTITUTIONAL RIGHTS

In addition to the evidence discussed in Claims I through IV, the trial court excluded several other clusters of mitigating evidence at the penalty retrial. That was state-law and constitutional error.

A. The Court Erred by Excluding the Evidence

The trial court erroneously excluded relevant, admissible mitigating evidence. The excluded evidence pertaining to the impact of Ivan Jr. testifying as a prosecution witness at the preliminary hearing and having that testimony admitted at the guilt phase of the first trial pertained to appellant's character. The role Ivan Jr. played in providing evidence that led to his father getting convicted and found death-eligible was probative toward the impact that appellant's execution would have on Ivan Jr. As explained in Claim IV, execution-impact evidence is admissible to the extent that it reflects on appellant's character. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) There was a nexus between Ivan Jr.'s role in the proceedings and appellant's character: The impact on Ivan Jr. would be enhanced by having testified, and the extent of the impact would be proportional to appellant's character. (AOB 149-150.) Respondent's concerns of the proffered evidence being confusing and time consuming could have been addressed by admitting only a sanitized synopsis of Ivan Jr.'s testimony.

The excluded evidence of appellant's family background was also relevant and admissible. Evidence of a capital defendant's background is paradigmatic mitigating evidence. (See *Lockett v. Ohio* (1978) 438 U.S.

586, 604.) The background of a capital defendant's family falls within the rubric of mitigating evidence of a capital defendant's background. (*Wiggins v. Smith* (2003) 539 U.S. 510, 523-525.) Contrary to respondent's suggestion, the family history that predated appellant's birth reflected on his background and character and constituted relevant mitigating evidence. (See American Bar Assoc., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 31 Hofstra L. Rev. 913, 1061 [explaining that capital defendant's social history begins before conception].)

Furthermore, the trial court's ruling on the scope of rebuttal regarding evidence of appellant's evenhanded treatment of Anthony, who was sired from Veronica's affair with her cousin, was overbroad. Not singling out a child for mistreatment is not evidence of good fatherhood; it merely constitutes evidence that appellant does not tend to single children out for mistreatment even when provided with a motive to mistreat someone. Defense counsel was not going to attempt to imply that the evidence showed that appellant was a good father. If defense counsel broke that pledge, the trial court could have reopened the prosecution's rebuttal case to permit the prosecutor to elicit evidence that appellant was not a good father.

Lastly, appellant's mother's opinion of Veronica was relevant to the substantial-domination mitigating factor. Belia Gonzales's opinion of Veronica stemmed from her observations of Veronica and appellant's relationship with Veronica. The dynamics of the relationship would have revealed the capacity for Veronica to dominate appellant. Excluding that

evidence was error.[24]

B. The Evidentiary Rulings Violated Appellant's Constitutional Rights

In addition to committing state-law error, the trial court's rulings barring the evidence violated appellant's constitutional rights to present mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing proceeding. The exclusion of relevant mitigating evidence was *Skipper* error per se. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.)

C. The Errors Were Prejudicial

Because this was a close case (see *ante*, at p. 36), it is reasonably probable that the excluded evidence could have tipped the balance against a death sentence. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) Respondent's argument that the error was not prejudicial because Genny was tortured fails to consider that evidence of appellant's participation was hotly disputed and the overwhelming-evidence test is inappropriate for penalty-phase errors. Accordingly, respondent cannot demonstrate that the exclusion of the mitigating evidence was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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[24] Contrary to respondent's assertion, appellant has articulated the nexus between this evidence and the substantial-domination mitigating factor.

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL DUE TO THE JURY'S FAILURE TO DELIBERATE ON AND FIND AN ESSENTIAL ELEMENT OF THE TORTURE-MURDER SPECIAL CIRCUMSTANCE

Respondent presents arguments that are flawed in several respects regarding jurors' statements that the jury did not unanimously find that appellant harbored an intent to kill. Contrary to what respondent argues, a death verdict unsupported by a finding of each element of the special circumstance beyond a reasonable doubt violated appellant's constitutional rights. Appellant requests that the torture-murder special-circumstance finding be vacated and a new special circumstance trial be held; alternatively, he requests that this Court find the key portions of jurors' statements admissible under Evidence Code section 1150 and remand on the new-trial motion.

A. Respondent's Interpretation of Juror Statements Is Deficient

Respondent selectively interprets the juror statements and reaches the unfounded conclusion that the jury legitimately found intent to kill. However, this interpretation ignores the explicit statements of several jurors that the jury, despite finding the special circumstance, did not find that appellant had intended to kill Genny. Thus, there was competent evidence in the trial record that the jury did not deliberate on or find an essential element of the sole special circumstance that rendered appellant death-eligible. The evidence would have provided grounds for the trial court to grant appellant's new-trial motion.

The prosecution attempts to gloss over these statements by pointing out that the jurors said they did not have any "problems" with the intent-to-kill issue, or that one juror "believed" the legal definition of intent to kill to be satisfied. (RB 117, 120.) However, because jurors also stated that they found that appellant lacked intent to kill, the legal definition of the special circumstance was not in fact satisfied, regardless of whether some jurors also "believed" they had followed their instructions. Respondent contends that the jury made the necessary finding of intent to kill (RB 125); however, this argument is explicitly contradicted in numerous juror affidavits.[25] Even if some jurors did believe appellant harbored intent to kill, it remains that several of the jurors did not make such a finding, and so the special-circumstance finding was not supported by a unanimous finding of each of the essential elements.

Similarly, respondent points out that during jury deliberations some of the words in the jury instructions were underlined, including the phrase "intent to kill" (RB 118); however, if in fact the jury did not find that

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[25] Respondent points out that when polled by the prosecution on whether the murder of Genny "was intentional and involved the infliction of torture," the jury said "yes" (RB 125); however, this supposed affirmation does not dispose of the problem of whether appellant had specific intent to kill. The jurors could have been referring to general intent, and may have conflated murder by torture with the torture-murder special circumstance. It is also noteworthy that the question respondent posed was in the passive tense: The phrase "was intentional" does not indicate the agent of the action; moreover, the jury instructions did not say appellant himself had to harbor specific intent to kill. In this particular case, Veronica Gonzales could have intended to kill while appellant lacked intent to kill. Therefore, even if the jury found the murder "was intentional," it does not dispose of the issue that several jurors did not find that appellant himself harbored the specific intent to kill.

appellant had intent to kill but found the special circumstance true nevertheless, it matters little what the jury underlined during deliberations. It remains that the jury did not unanimously find that appellant had the requisite intent that would make him death-eligible—a fact that respondent does not attempt to rebut in its brief. On the whole, juror statements made to the judge and in subsequent declarations showed at the least that the death verdict was not unanimously based on finding of each element of the special circumstance beyond a reasonable doubt. Even judged in the light most favorable to respondent, the juror statements indicate that the death verdict is fundamentally unsound.

Even if respondent's interpretation of the juror statements is valid, all it would tend to show is that the jury did not deliberately refuse to apply the law. However, even if it is the case that the jury arrived at a faulty verdict by accident, the result is the same and equally grievous as would be in the case of outright nullification:[26] the California criminal justice system would execute a man who is legally ineligible for the death penalty. This Court is respectfully urged to vacate the special-circumstance finding and death judgment.

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[26] Although jury nullification is often considered to be the deliberate and knowing acquittal of a criminal defendant by jurors' refusal to apply the law as it is given to them, the concept is equally applicable to the conviction of a defendant contrary to the law. (See *Summer v. Shuman* (1987) 483 U.S. 66, 85 fn. 13 [referring to "undeserved convictions for capital murder" as "another jury nullification problem"]; see also *People v. Williams* (2001) Cal.4th 441, 451, fn. 6 [a verdict based on jury nullification to the defendant's detriment should be vacated].)

B. The Trial Court Erred in Denying Appellant's New-Trial Motion Based on the Jury Not Deliberating on or Finding the Intent-to-Kill Element of the Special Circumstance.

Due to the jury's dereliction of its duties, this claim should be renewed de novo. Respondent misstates the proper standard of review for this claim. In general, a court does review a new-trial motion for abuse of discretion (see, e.g., *People v. Williams* (1988) 45 Cal.3d 1268, 1318); however, the standard of review for the denial of a new-trial motion based on purported juror misconduct is de novo. As this Court explained in *People v. Ault* (2004) 33 Cal.4th 1250, this Court held in *People v. Nesler* (1997) 16 Cal.4th 561 that "when a *criminal defendant* appeals the *denial* of his or her motion for a new trial on grounds of prejudicial juror misconduct," the standard of review is de novo, whereas when the prosecution appeals the granting of a new trial on grounds of juror misconduct, the standard of review is abuse of discretion. (*Ault*, at p. 1255, original italics; see also *People v. Wisely* (1990) 224 Cal.App.3d 939, 947.)

Respondent would have us infer from a portion of *People v. Carter* (2005) 36 Cal.4th 1114, 1210 that the standard of review for this case should be abuse of discretion. (RB 122, fn. 20.) However, any inference respondent attempts to draw from the Court's statement in *Carter* is explicitly precluded by the holding in *People v. Nesler*, *supra*, 16 Cal.4th at 561, as explained in *People v. Ault, supra*, 33 Cal.4th at 1255. Appellant is appealing the trial court's denial of his motion for a new trial on grounds of jury misconduct, which is precisely the situation contemplated in *Nesler*. Thus, the proper standard of review for this Court is de novo.

Furthermore, respondent unduly limits the scope of appellant's claim with regard to the issue of juror statements. A jury's issuing a death verdict

without having found unanimously that appellant harbored specific intent to kill should be considered misconduct; however, it also implicates larger due-process considerations and calls into question the fundamental soundness of the verdict. Upholding such an unsubstantiated death verdict would amount to an arbitrary death verdict in violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. As such, the conduct engaged in by the jury in this case should be considered misconduct, but it should also be examined in light of appellant's right to be protected from an arbitrary finding of death-eligibility. The standard of review this Court undertakes in cases of an inadequate or unsupported verdict is de novo. (Cf. *People v. Avila* (2009) 46 Cal.4th 680, 701-702 [conducting an independent review of the record in considering defendant's challenge to the sufficiency of the evidence].) Accordingly, in either case, appellant's claim should be reviewed de novo.

Nevertheless, even under an abuse-of-discretion review, the trial court's ruling in this case presents a "manifest and unmistakable abuse" because the court's ruling of the statements as inadmissible and its denial of the new-trial motion resulted in an unsubstantiated death verdict. Furthermore, the trial court lacked discretion to commit legal error. (See, e.g., *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.) In any event, whether this Court reviews the trial court's order de novo or for an abuse of discretion, this Court should vacate the special circumstance finding and order a new special-circumstance trial.

1. The Juror Statements Are Admissible under Evidence Code Section 1150.

Respondent does not address appellant's assertion that the juror statements refer to overt acts rather than the jury's subjective reasoning

process. Respondent dismisses this assertion as "erroneous," but does not explain why the juror statements in this case should be considered evidence of the jury's subjective reasoning process. (RB 124.) Both law and logic indicate that the juror statements in this case refer to overt acts and not the subjective reasoning process. Accordingly, this Court should find that the juror statements were admissible under Evidence Code section 1150.

a. The Finding of an Individual Element of a Verdict Is an Overt Act Subject to Corroboration

The juror declarations in this case are strikingly analogous to those in *Drust v. Drust* (App. 2 Dist. 1980) 113 Cal.App.3d 1, where the Court of Appeal held that a finding of elements is an overt act. In *Drust*, the jury returned a verdict of over $1,400,000 in a personal-injury suit, and the defendant made a motion for a new trial on the grounds that the verdict was excessive. In support of the plaintiff's motion in opposition to the new-trial motion, counsel collected twelve juror affidavits that revealed how the jury reached its award. Among other things, the affidavits revealed that the jury "incorrectly included inconsistent elements of damage" in its verdict. (*Id.* at p. 8.) The defendant sought to admit the juror affidavits under Evidence Code section 1150, and the court of appeal found they were admissible because although they "demonstrate how the jury must have arrived at the [verdict]," the declarations were "more susceptible of being interpreted as describing the overt act of awarding a particular sum for a particular element of damage." (*Id.* at p. 9.) Based on those facts in the juror declarations, the Court of Appeal ordered a new damages trial.

The *Drust* court thus held that a finding of an individual element is an overt act, the evidence of which not barred by section 1150; moreover, the court held that a finding of one element that is inconsistent with the

verdict as a whole is grounds for ordering a new trial on that issue.[27] This holding is entirely applicable to the case at hand, where appellant seeks to admit juror statements revealing that one essential element of the special circumstance was not found and that this absence of a finding was inconsistent with the special-circumstance finding as a whole. Because the Court of Appeal found that the juror declarations in *Drust* were "not only substantively permissible, but required as a matter of justice" due to a personal injury apparently being excessive (*ibid.*), this Court should similarly find admissible the juror declarations indicating that the finding of death-eligibility was unsubstantiated by a finding of each of the elements. In a $1,400,000 personal injury suit, the stakes were high, but they were not life-and-death as they are here.

Moreover, respondent does not address appellant's reasoning that because a finding of an element of an offense, such as intent to kill, can be recorded as a special finding on a hybrid verdict form, it is an overt act subject to corroboration. Rather, respondent merely states that the "jury did make the necessary finding." (RB 125.) Respondent's reasoning merely begs the question posed, and does not dispute appellant's position that a finding of each element is an overt act undertaken by the jury. In fact, the

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[27] *Ferreira v. Quik Stop Markets, Inc.* (1983) 141 Cal.App.3d 1023, 1035 purports to disagree with the outcome of *Drust*, but as the court in *Ferreira* explains, the two cases were quite dissimilar inasmuch as *Ferreira* presented juror statements that merely hypothesized other jurors' subjective thinking process, not a finding of particular elements. Notably, the court also noted that the *Ferreira* verdict was not "internally inconsistent" as the verdict had been in *Drust*. (*Ibid.*) Thus, the commentary in *Ferreira* does not diminish appellant's assertion that the finding of an element is an overt act admissible under section 1150 and that a logically unsupported verdict warrants a new trial.

statements to the judge are quite similar to an element-not-present finding on a verdict form, and in this case we know that an essential element was found to be not present by at least some of the jurors. Accordingly, this finding of an element-not-present was an admissible overt act under section 1150.

b. The Absence of Discussion of a Material Element Is an Overt Act Subject to Corroboration

Furthermore, this Court has found that the absence of discussion of a topic during jury deliberations is indeed admissible under Evidence Code section 1150. (*People v. Ramos* (2004) 34 Cal.4th 494, 518, fn. 7; see also, *People v. Williams* (2006) 40 Cal.4th 287, 335 [finding jury misconduct not to be prejudicial, in part because the jury did not discuss the biblical verses a juror had read aloud during deliberations].) In this case, this Court should find admissible the juror statements tending to show that the jury failed to deliberate on or discuss the issue of whether appellant harbored an intent to kill. Respondent contends that *Ramos* stands only for the proposition that evidence of whether a juror read a newspaper article during deliberations is admissible. (RB 124-125.) That is an absurdly narrow interpretation of *Ramos*.[28] The holding in *Ramos* is entirely apposite to the case at hand: This Court held that evidence that the jurors never discussed a particular topic in the course of deliberations was admissible under section 1150. Thus, the absence of discussion, like the overt act of discussion, is an objective fact and as such is admissible under section 1150. The juror

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[28] This is far from the only instance in which respondent refuses to acknowledge that legal precedents are applicable to cases that do not share the precedents' identical facts. (See *ante*, at pp. 60-61.)

statements in this case pertaining to whether the jury failed to deliberate on or discuss the issue of intent to kill are therefore admissible under section 1150.

c. The Juror Statements Were Not Evidence of the Jury's Subjective Reasoning Process

Furthermore, the case law interpreting Evidence Code section 1150 indicates that the juror statements in this case are not evidence of the jury's subjective reasoning process. In *People v. Danks* (2004) 32 Cal.4th 269, 300, one juror's statements were inadmissible where she stated that she voted for the death penalty because "based on the evidence of Mr. Danks' past life and what his future life in prison [would be], he didn't have much to live for; Mr. Danks wanted the death penalty, and because other persons could not be safe around Mr. Danks." Similarly, in *People v. Steele* (2002) 27 Cal.4th 1230, 1261, juror statements were inadmissible where they revealed that the jurors voted for death verdict because they believed a life-without-parole sentence might allow the defendant eventually to be released. A juror in *People v. Cox* (1991) 53 Cal.3d 618, 696 told other jurors to vote for the death penalty because the defendant would be unlikely to be executed since the death penalty had not been exercised recently in California; the statement was inadmissible because it could only be used to explain the reason jurors voted for death.

The juror statements in the present case are entirely dissimilar from those ruled to be inadmissible under Evidence Code section 1150. The statements in this case do not purport to explain the reasons behind a juror's vote; rather, they reveal that the special-circumstance verdict was not supported by finding every element present beyond a reasonable doubt.

Respondent's proposed reading of section 1150 would yield an absurd result. Respondent contends that virtually any evidence concerning jury proceedings is inadmissible as evidence of the subjective reasoning process. However, this proposed reading of section 1150 would categorically exclude far too many incidents of juror misconduct and would, in effect, vitiate the standard set up by section 1150, as interpreted by this Court. For example, it would bar evidence of a juror reading the bible during deliberations, although that is quintessential evidence of misconduct. (See *People v. Williams* (2006) 40 Cal.4th 287, 333.)

In sum, because the juror statements and declarations in this case referred to overt acts and not to the subjective reasoning process of the jurors, the trial court erred in ruling the evidence inadmissible, and erred in its denial of appellant's new-trial motion.

2. Even If This Court Construes the Jurors' Statements To Concern Their Subjective Thought Processes, Evidence Code Section 1150 Should Not Render the Jurors' Statements to the Court or the Subsequently Obtained Juror Declarations Inadmissible

Exclusion of the jurors' statements did not advance the goals Evidence Code section 1150 is meant to achieve. Respondent fails to adequately address the contention that section 1150 was never meant to apply to the situation in this case where the verdict is fundamentally unsound.

a. The Policies Undergirding Section 1150 Were Not Advanced by Excluding the Evidence

The three rationales this Court has listed for section 1150 are to prevent fraud, juror harassment, and verdict instability. (*Kollert v. Cundiff* (1958) 50 Cal.2d 768, 773, overruled on other grounds by *People v.*

Hutchinson (1969) 71 Cal.2d 342.) Respondent does not argue that there is a nexus between excluding the statements in this case and preventing fraud, but claims that doing so would prevent the harassment of jurors and instability of otherwise robust verdicts. However, the application of section 1150 in this case would not advance the purposes of the rule, and it would result in a miscarriage of justice.

Here, the jurors inadvertently revealed that the verdict was fundamentally unsound. Respondent contends that it does not matter "how the ball got rolling" with regard to the revelation that the verdict was unsound. (RB 127.) However, respondent proceeds to argue that admitting these statements in this case nevertheless would encourage juror harassment "by the losing side seeking to discover defects." This indicates that respondent does recognize that how the information comes to light is significant. Respondent does not explain why then it should not matter "how the ball got rolling" in this case, where the information came to light by jurors' spontaneous, voluntary statements to the court, not by harassment. In *Drust*, the goal of preventing juror harassment was inapplicable where the party seeking to admit the juror declarations did not initiate the inquiry. (*Drust v. Drust, supra,* 113 Cal.App.3d 1, 9.) Similarly, in this case there was no juror harassment, and it is not plausible that admitting the declarations under section 1150 in this case would prevent it in the future.

With regard to the policy goal of preserving the stability of jury verdicts, respondent contends that the length of time elapsed between the verdict and juror declarations is of no matter. However, the aim of preserving the stability of jury verdicts necessarily means stability over the long run—section 1150 is meant to discourage parties from seeking to

undermine a verdict years down the road when jurors' memories are faded. Respondent argues that the state has an interest in preserving even those jury verdicts where there is contemporaneous evidence that they are unsound. To the contrary, this is not the end section 1150 seeks to achieve.

Finally, respondent contends that this case "illustrates the importance of the policy prohibiting jurors from impeaching their verdicts." (RB 128.) Respondent's inference that the two jurors' recollections of the guilt-phase deliberations were colored by their positions at the penalty-phase deliberations cannot withstand scrutiny. There is no evidence that the jurors who spoke with the court favored life imprisonment or the death penalty. Respondent's suggestion to this effect is purely speculative and inconsistent with the evidence. In fact, the manner with which the jurors revealed to the court that they had not found intent to kill was strikingly matter-of-fact, which would indicate that they did not have a disingenuous agenda when they spoke with the court. Respondent ignores the circumstances of the revelation, and claims contrary to the evidence in the trial record that the jury unanimously found appellant harbored the specific intent to kill, and that therefore the jurors speaking with the court must have sought to undermine the verdict. (RB 128.) In so doing, respondent again begs the question. Notably, in the same paragraph respondent references three juror declarations that were not contradicted by prosecutor's investigations, which is patently inconsistent with respondent's prior contention that each element of the special circumstance was found unanimously. (RB 128.)

Thus, in light of the fact that the application of Evidence Code section 1150 in this case furthered none of its policy goals, the trial court should have ruled the juror statements admissible.

b. Countervailing Policy Considerations Further Mandate the Admissibility of the Jurors' Statements and Declarations

Respondent argues that Evidence Code section 1150 makes jury verdicts categorically inviolate. However, it is well-established that in certain situations where two compelling policies compete, rules of evidence must give way to advance other policies that would be thwarted by mechanical application of the evidence code. For example, Evidence Code section 1150 already has the well-established exception that evidence regarding jurors' subjective thought processes must be admitted when it pertains to a purported racial bias on the part of the jurors. The racial-prejudice analogy shows that section 1150 is not absolute. The fact that appellant's claim does not involve racial prejudice does not undermine appellant's argument. In the present case, the preference of upholding troublesome jury verdicts must be weighed against the risk of a wrongful execution.

Respondent concedes that the state's interest to uphold the death sentence does not extend to people ineligible for the death penalty. (RB 129.) Respondent presumes that appellant is eligible for the death penalty and that therefore appellant has not presented a compelling reason to admit the evidence. That argument relies on the faulty premise that the jury legitimately and unanimously found intent to kill, which is explicitly contradicted in numerous jury statements. (See discussion, *ante* at pp. 74-76.) Despite finding true the special circumstance, the jury, by the admission of two jurors, never found that appellant intended to kill.

Respondent further argues that the trial court properly relied on this Court's holding in *People v. Romero* (1982) 301 Cal.3d 685, 695 when it

ruled the juror statements inadmissible. However, *Romero* is inapposite because there were no substantial countervailing policy interests that demanded the admissibility of juror declarations in *Romero*. In fact, the competing policy considerations in *Romero* are the diametrical inverse of the competing policy considerations in this case. In *Romero*, if the evidence had been admitted it would have shown the jury found the defendant guilty of one charge of burglary and acquitted him of the second, when the jury meant to do the reverse—acquit the defendant of the first and convict him of the second. Romero would have had to serve his sentence for essentially the same crime of which he was meant to be convicted. On the other hand, admitting the evidence would have required him to be acquitted of both counts, as required by the principle of double jeopardy.

The scales tip differently in this case. Here, the competing considerations are ordering a new trial on the special-circumstance issue, or else ordering an undeserved execution. Respondent does not disagree that these two scenarios are manifestly incomparable. Instead, respondent claims that *Romero* rightly dictated the outcome in this case because "no injustice would occur here" because the jury properly found intent to kill. (RB 130.) This reasoning, prevalent in respondent's brief, merely begs the question posed. Even if we were to take respondent's interpretation of the juror statements at face value (see discussion, *ante* at pp. 74-76), it does not make the stakes in this case any less grave. This Court should find the statements admissible so it can determine whether appellant was ever found to be death-eligible in the first place. The differences between *Romero* and the present case are stark, and the trial court should not have relied on *Romero* to bar the jurors' statements.

The risks of wrongful execution must not be downplayed. As the United States Supreme Court noted in *Lankford v. Idaho* (1991) 500 U.S. 110, 125, fn. 21, the determination of death-eligibility in capital punishment requires heightened reliability. In Eighth Amendment jurisprudence, the finding of death-eligibility is the crucial finding. Under this state's capital-sentencing statute, the finding of death-eligibility purportedly performs the constitutionally-mandated function of narrowing. (See, e.g., *Zant v. Stephens* (1983) 462 U.S. 862, 878.) This Court is urged to find that the risk of undeserved execution outweighs any interest the state may have in applying the evidence code in this case.

3. The Exclusion of the Jurors' Statements Regarding the Jury Finding, or Lack Thereof, of the Intent-to-Kill Element of the Torture-Murder Special Circumstance under Evidence Code Section 1150 Violated Appellant's Constitutional Rights

Respondent fails to address virtually any of appellant's constitutional claims. Respondent denies that California should provide a constitutionally-based exception to section 1150 "in those cases where the jurors reveal to the judge immediately after trial that an essential element underlying the defendant's death-eligibility was never proven." (RB 131-132.) However, respondent's merely explains that "the policy reasons underlying the rule do not depend on who initially spoke to the jurors" and, with that, finds appellant's argument "unpersuasive." (RB 132.) Respondent acknowledges there are two singular aspects to this issue that set it apart from other situations where a party seeks to admit juror statements (RB 131-132): the existence of strong evidence that appellant was found to be death-eligible on a finding of less than all of the required elements, and the fact that the jury spontaneously brought this to light in the

course of casual conversation with the court. Respondent only addresses the second issue, dismissing it as all but irrelevant, and fails to address the issue of the jury's finding othat an essential element was not present. Respondent thereby fails to address the fact that appellant's most fundamental constitutional rights were violated by the exclusion of the juror statements.

With regard to the issue of how the information came to light, respondent clings to the same flawed reasoning it employed when responding to appellant's contention that the policy goals of section 1150 would not be furthered by the rule's application to this case. (See *ante*, at pp. 83-85.) As discussed, it is extraordinarily important that the jurors volunteered this information to the trial judge because it did not amount to a "fishing expedition" by a party seeking to invalidate the verdict, and it therefore did not involve the harassment of jurors.

With regard to the second issue, which respondent leaves largely unaddressed, respondent seems to disagree that an application of the Evidence Code could ever fail to pass constitutional muster. In so doing, respondent disregards robust United States Supreme Court precedent. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586 [the Eighth Amendment required re-examination of death sentence where one factor weighed by the jury in aggravation was later invalidated]; *Green v. Georgia* (1979), 442 U.S. 95, 97 [exclusion of testimony at sentencing phase based on Georgia's Evidence Code violated the defendant's Fourteenth Amendment rights]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [evidentiary rules limited to the extent that they conflict with constitutional rights]; *McDonald v. Pless* (1915) 238 U.S. 264, 268-269 [jury statements must be admitted when justice so requires].)

In support of its contention, respondent cites this Court's holding in *People v. Steele* that Evidence Code section 1150 does not always violate a defendant's constitutional rights. (*People v. Steele, supra*, 27 Cal.4th at p.1263.) However, it does not follow that an application of section 1150 could never deprive a defendant of his or her constitutional rights. (RB 131.) Likewise, the United States Supreme Court holding in *Tanner v. United States* (1987) 483 U.S. 107, 120-121 could not "preclude" the conclusion that the application of an evidentiary rule violated a defendant's rights. (RB 131.) Indeed, this week the First Circuit held that a defendant's due-process and impartial-jury rights trumped the federal analog to section 1150 where hours after the jury reached a verdict, a juror revealed that jurors' ethnic bias had tainted the deliberations. (*United States v. Villar* (1st. Cir. 2009) ___ F.3d ___; 2009 WL 3738787, *8-*9.)

Appellant does not argue that Evidence Code section 1150 is facially unconstitutional. Rather, appellant argues that its application in this case is unconstitutional and patently unjust, considering that excluding the evidence prevents appellant from showing that he was not properly found to be death-eligible. It is paramount in the American legal system that in a criminal case, the jury must unanimously decide that every element was proven beyond a reasonable doubt. (U.S. Const. Amends. VI, VII, XIV; CA Const. Art I, sections 7, 15, 16, 17; *United States v. Gaudin* (1995) 515 U.S. 506, 510, quoted in *United States v. Booker* (2005) 543 U.S. 220; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477.) This constitutional precept applies equally to criminal offenses and special circumstances. (*Ring v. Arizona* (2002) 536 U.S. 584, 609; *Zant v. Stephens, supra,* 462 U.S. at p. 878.) It is axiomatic that there must be heightened reliability in the capital-sentencing determination. (See *Lankford v. Idaho, supra,* 500

U.S. at p.125, fn. 21.)

Moreover, *Tanner* is clearly distinct from the case at hand. In *Tanner*, a mail-fraud case, the trial court declined to order an evidentiary hearing that would have required jurors to testify whether members of the jury had imbibed intoxicating substances during portions of the case. (*Tanner v. United States*, *supra*, 483 U.S. at p. 115.) The Court held that even if the evidence had shown that some of the jurors had drunk during the proceedings, there were still sufficient safeguards present that protected the defendant's rights in that case, such as the ability of the court to observe the jurors' conduct in and around the courtroom. (*Id.* at p.126.) The Court balanced policy considerations to determine the importance of admitting the evidence of juror behavior. It did not, as respondent claims, necessarily preclude the admission of evidence in all cases.

Indeed, in the present case, appellant has significantly more at stake: a bored or somewhat impaired jury during parts of a mail fraud case does not compare to an undeserved execution; and the policy rationale behind not requiring jurors to testify about their own illicit drug or alcohol use is by no means comparable to barring evidence of a spontaneous statements made to the court on the jurors' own initiative. Moreover, the safeguards cited by the *Tanner* Court are inapplicable to this case; if not for the jurors' remarks, the trial court would have had no way to know that the jury failed to find an essential element of the lone special circumstance. Significantly, it was those safeguards' inability to uncover jurors' ethnic bias that convinced the First Circuit this week to hold that the evidentiary bar on the deliberative process had to yield to a defendant's constitutional rights. (*United States v. Villar*, *supra*, 2009 WL 3738787, *8-*9.) Thus, *Tanner* cannot preclude admission of the evidence in this case, not only because the basis of

appellant's claim differs, but also because the factors weighed by the Court in *Tanner* do not strike a comparable balance to those at stake in appellant's case.

Finally, the juror statements and declarations in the present case were favorable and crucial evidence to the defense, and as such must be admitted. Respondent, again begging the question, does not address this point and merely argues that because the statements were not critical evidence, they did not require admission. (RB 131-132.) This fallacious reasoning ignores the staggering consequences of the evidentiary ruling in this case—the trial court's refusal to admit the evidence denied appellant competent evidence in support of his new-trial motion, and the flawed special-circumstance verdict formed the sole predicate of appellant's death-eligibility and subsequent death sentence. The evidence was thus favorable and crucial to the defense, and must have been admitted.

C. The Jury's Failure to Deliberate on or Find the Intent-to-Kill Element of the Torture-Murder Special Circumstance Demands that Appellant Be Given a New Trial

Based on the statements made to the court, the jury did not find all of the essential elements pertaining to the torture-murder special circumstance. The prosecution failed to submit any evidence that the jury as a whole found the intent-to-kill element. The prosecution's declarations that some jurors individually believed that appellant intended to kill cannot rebut the evidence that the jury did not unanimously find the element. A verdict of "true" cannot be presumed valid if it is known that one of the essential elements was found to be not present. The failure to find the intent-to-kill element is structural error; thus, prejudice should be conclusively presumed. A rebuttable presumption of prejudice used for run-of-the-mill misconduct

claims is not appropriate for this grave error.

Additionally, the jury finding the special circumstance without finding every element or deliberating on a contested element constituted misconduct. Even if the declarations are inadmissible in their entirety, the statements to the trial court by themselves established misconduct. The jury failed to follow the court's instructions. Respondent claims that jurors "did not state they did not follow the law" (RB 132-133), but the jurors' remarks to the trial court made manifest the jury's failure to follow the instructions. Here, the blatant inconsistency of finding appellant lacked intent to kill while nevertheless finding him to be death-eligible illustrates that the law in this case was not followed.

Finding the special circumstance without one of the essential elements violated appellant's Sixth, Eighth, and Fourteenth Amendment rights. (*Ring v. Arizona, supra,* 536 U.S. at p.609; *Apprendi v. New Jersey, supra,* 530 U.S. at pp.476-477; *Zant v. Stephens, supra,* 462 U.S. at p.878; *In re Winship* (1970) 397 U.S. 358, 360.) Likewise, the failure to deliberate on an element of a special circumstance also violated appellant's Sixth, Eighth, and Fourteenth Amendment rights. A new-trial motion should be granted for unfair trials that violate a defendant's due-process rights for issues that could not have been raised earlier in the trial proceedings, or for violations of his rights that were intrinsic in the trial proceedings themselves. (*People v. Mayorga* (1985) 171 Cal.App.3d 929, 940; *People v. Fosselman* (1983) 33 Cal.3d 572, 582.)

Granting appellant's motion for a new trial was the proper remedy for this denial of appellant's constitutional rights. Appellant is in the precarious situation contemplated in *Mayorga* and *Fosselman*, and the denial of appellant's new-trial motion was erroneous. Alternatively, if this

Court concludes that there is an issue of fact to be resolved with regard to the failure to find the intent-to-kill element or the failure to deliberate, a remand on the new-trial motion would be appropriate, as respondent agrees. (RB 133.) However, respondent wrongly claims that appellant is only entitled to a new special-circumstances trial if respondent is unable to rebut the presumption of prejudice on remand. (RB 134.) A verdict that is contrary to law should be vacated. (*People v. Williams*, *supra*, 25 Cal.4th at p. 451, fn. 6.) It is within the power of this Court to vacate the special-circumstance finding and order a new trial on the issue, and appellant respectfully urges this Court to do so in the interest of averting a wrongful execution.

VII.

THE ERRONEOUS REMOVAL OF PROSPECTIVE JUROR NO. 504 FOR CAUSE AT THE PENALTY RETRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

Prospective Juror No. 504 was not substantially impaired from serving on appellant's capital jury. Although she opposed capital punishment, she was death-qualified. The trial court thereby violated appellant's Eighth Amendment rights by dismissing her. The only remedy is to vacate the death judgment.

A. The Trial Court's Dismissal of the Prospective Juror Was Not Supported By Substantial Evidence

The prosecution did not demonstrate that Prospective Juror No. 504 was not qualified to serve on appellant's retrial jury. The prospective juror repeatedly stated that she was open-minded regarding appellant's sentence, would consider both sentencing options, and could impose a death sentence. She said she would follow the rule of law rather than her philosophical opposition to capital punishment. In short, she was a quintessential death-qualified prospective juror who stated that she would set aside her scruples against the death penalty and be an impartial juror.

The prospective juror being unlikely to reach a death verdict did not disqualify her from serving on appellant's capital jury. Respondent's argument that it showed substantial impairment lacks precedential support. Several times, this Court has held that a prospective juror is death-qualified if she is unlikely to vote for a death verdict, so long as she is willing to follow the court's instructions, weigh the aggravating and mitigating factors, and determine whether death is the appropriate punishment. (See

People v. Stewart (2004) 33 Cal.4th 425, 447; *People v. Heard* (2003) 31 Cal.4th 946, 959-966; *People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Respondent's attempt to distinguish this case from the pertinent precedents begs the question. Respondent argues that those cases are distinguishable because the record showed that the prospective jurors in those cases were death-qualified. But, appellant argues that the record in this case shows that Prospective Juror No. 504 was death-qualified. He asserts that the prospective jurors in those cases were similar to the prospective juror in this case. Asserting that the erroneously dismissed prospective jurors in *Stewart* and *Heard* are different because they were death-qualified fails to undermine appellant's claim that Prospective Juror No. 504 was death-qualified.

Prospective Juror No. 504 was far more open toward voting for a death verdict than the properly excluded prospective jurors in *People v. Lancaster* (2007) 41 Cal.4th 50, 79-80. One of the excluded prospective jurors in Lancaster said that he would automatically vote for a life sentence. (*Id.* at p. 79.) The other prospective juror, when "asked if imposing death would be 'a realistic, practical possibility or only a very remote possibility that isn't very real,'" said that the possibility of voting for death was remote. (*Id.* at p. 80.) Prospective Juror No. 504 never demonstrated anything approaching that level of reluctance to render a death verdict. There was substantial evidence of substantial impairment for the two prospective jurors in *Lancaster*; such evidence was lacking in this case.

Appellant agrees with respondent that for a prospective juror to be death-qualified, there must be a real possibility that she would vote for a death sentence; however, there was a bona fide possibility that Prospective Juror No. 504 would vote for a death verdict. She never stated or implied

that there was no more than a theoretical possibility that she would vote for a death sentence. Respondent claims that the prospective juror revealed her substantial impairment was the prospective juror answering that there was a possibility, rather than a reasonable possibility, that she would vote for a death sentence. (RB 139.) It is preposterous to expect a prospective juror to utter the magic words of death-qualification that this Court has articulated in its precedents. Likewise, it is senseless to require a prospective juror to mimic all of the adjectives the trial court used in its question; real-life conversations are not so stilted. A comparison of the voir dire of Prospective Juror No. 504 and the voir dire of the second juror in *Lancaster* shows that the dismissed prospective juror in this case was truly open to considering a death sentence.

Despite respondent's assertion, Prospective Juror No. 504 did not give conflicting answers that would provide substantial evidence of her inability to serve on appellant's capital jury. Her answers were consistent and indicative of a life-leaning juror who was philosophically opposed to the death penalty, but willing to engage in the weighing process and fairly consider returning a death verdict. She indicated that she would have a higher-than-average threshold for imposing death, but she consistently stated that she would keep an open mind. (87 RT 10646-10650, 10700-10702, 10718-10723.)

Under respondent's formulation (RB 139-140), a prospective juror who believes that the death penalty should be abolished but is willing to set those views aside and fairly engage in the weighing process has given inconsistent answers. That cannot be the law. If Prospective Juror No. 504 is deemed to have vacillated and this Court thereby grants limitless deference to the trial court's determination of her state of mind, then trial

courts could dismiss for cause virtually all scrupled prospective jurors and never have those for-cause excusals reversed. Under *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 and its progeny, those prospective jurors are death-qualified and cannot be dismissed with impunity.

In any event, this Court must abandon its practice of giving absolute deference to trial court's evaluations of prospective jurors' states of mind, because that extraordinary degree of deference afforded trial courts conflicts with *Gray v. Mississippi* (1987) 481 U.S. 648, 653-69 and other United States Supreme Court precedents. This Court should reconsider its prior rejection of this argument. (But see *People v. Moon* (2005) 37 Cal.4th 1, 14-15.)

Respondent has overblown Prospective Juror No. 504's purported preference not to discuss her views. She willingly answered every question that was posed to her. Respondent's argument rests on her answering "Yes. I mind." to the prospector asking if she minded being asked additional questions. Whether it was an attempt at humor or an honest admission of her discomfort with being in the hot seat, her remark had no discernable impact on her voir dire. (87 RT 10721-10723.) She answered the ten questions posed to her afterward similarly to how she answered the panoply of questions that preceded her remark. The prospective juror saying that she minded being asked questions provided no basis for concluding that she was substantially impaired from following her oath and the law.

In addition, substantial impairment cannot be inferred from the prospective juror saying she would need to hear more before knowing whether she would override her moral objection to capital punishment and give the prosecution a fair trial. She indicated that she would make her sentencing decision based on the evidence, not that she might not be an

unbiased juror. (97 RT 10720.) This open-mindedness is what we expect of jurors. Furthermore, she explained that her repugnance to child abuse would temper her abstract opposition to the death penalty. (97 RT 10722-10723.)

In his opening brief, appellant argued that Prospective Juror No. 504's concerns about the irreversibility of capital punishment, her uncle's experiences with the criminal justice system, and her views on using prisoners in medical experiments were not bona fide bases for finding her substantially impaired from being a capital juror. (AOB 189-190.) Respondent, stating that the trial court did not dismiss the prospective juror for those reasons, implicitly agrees.

Although a prospective juror's bias need not be proven with "unmistakable clarity" (*People v. Martinez* (2009) 47 Cal.4th 399, 425), the prosecution has the burden of demonstrating that a life-leaning juror should be dismissed for cause. (See *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Respondent did not show that Prospective Juror No. 504 was substantially impaired from following her oath and the law. The trial court infringed appellant's Eighth Amendment rights by dismissing her for cause.

B. The Death Judgment Must Be Vacated

The erroneous removal of a life-leaning prospective juror whom the prosecution had challenged for cause under *Witherspoon-Witt* cannot be harmless. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.) Because the trial court erroneously ruled that Prospective Juror No. 504 was not death-qualified and dismissed her for cause, appellant's death sentence must be reversed.

VIII.

APPELLANT DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT AT EITHER THE INTRODUCTORY PROCEEDINGS WITH THE JURY VENIRES AT THE FIRST TRIAL AND THE PENALTY RETRIAL OR THE HARDSHIP VOIR DIRE AT THE FIRST TRIAL

At the outset of both trials, the court forced appellant to choose between two constitutional rights: the right to be present at his trial or the right not to be shackled. Appellant's presence at the introductory proceedings was conditioned on being shackled in full view of the prospective jurors. In the absence of an on-the-record showing of a case-specific necessity to shackle appellant, the trial court abused its discretion in requiring appellant to wear shackles if he exercised his constitutional right to be present for the proceedings in the jury lounge. Due to the lack of case-specific necessity to shackle, it was unconstitutional to require appellant to decide whether to be shackled or whether to absent himself from a crucial stage of the proceedings. Because the trial court forced appellant to relinquish one of his constitutional rights, appellant's purported waivers of his Sixth and Fourteenth Amendment rights to be present were invalid. Moreover, the purported waivers were not in writing as required by Penal Code section 977, subdivision (b)(1); therefore, it was statutory error to have appellant absence from proceedings. These errors were prejudicial to appellant; thus, the conviction, special circumstance, and death sentence must be vacated.

A. Appellant's Purported Waivers of His Presence at the Proceedings in the Jury Lounge Were Invalid Because The Court Made Appellant Choose Between Two Constitutional Rights

A capital defendant may validly waive his presence at critical stages of the trial. (*People v. Dickey* (2005) 35 Cal.4th 884, 923.) However, appellant did not validly waive his rights to be present here, because the purported waivers were the product of an unlawful choice the court mandated appellant to make. Appellant's purported waivers to be present were invalid because he had to sacrifice either his right to be present and or his right not to be shackled. The trial court violated appellant's constitutional rights by requiring him to choose between those rights.

Respondent states that appellant was not shackled. (RB 149.) That misses the point of appellant's argument. Of course appellant was not shackled; appellant relinquished his right to be present at crucial trial proceedings in order to avoid being shackled in front of the jury. Respondent contends that the trial court properly exercised its discretion in requiring shackles for security purposes. (RB 149.) This is incorrect; the court did not exercise *any* case-specific discretion in its decision. The court decided to conduct the initial proceedings in the jury lounge rather than the courtroom because the courtroom would be unable to accommodate all the prospective jurors. Although one or two extra marshals would be present in the jury lounge, the court stated that appellant would be required to be shackled if he were to be present at the proceedings in the jury lounge. The court stated that most defendant's relinquish their right to be present so that prospective jurors would not see them in shackles. (35 RT 3723-3725.) The court never expressed a case-specific reason why appellant would need to be shackled in the jury lounge.

"The imposition of physical restraints in the absence of a record showing violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Duran*

(1976) 16 Cal.3d 282, 291.) This Court has long concluded that shackling is permissible only if the defendant's actions, not the venue's characteristics, create a "manifest need" for restraints and that the court must make an on-the-record determination that the defendant's nonconforming behavior requires shackling. (*Id.* at pp. 290-293 [finding trial court abused its discretion by shackling defendant without giving reasons on the record and holding the mere fact that defendant was a state prison inmate and charged with a violent crime was an insufficient basis for shackling]; see also, *People v. Burnett* (1980) 111 Cal.App.3d. 661, 668 [holding that, absent some indication that defendant was likely to become violent or would attempt to escape, there was no justification for restraint of defendant charged with first degree murder although only one bailiff was available].)

Whether to shackle a defendant for security purposes falls within the trial court's discretion; however, this discretion and determination must be case-specific and should reflect particular concerns related to the defendant on trial. (*Deck v. Missouri* (2005) 544 U.S. 622, 633.) The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses unless there is a showing of case-specific necessity on the record. (*People v. Duran* (1976) 16 Cal.3d 282, 293.) Here the court had a general policy of shackling defendants when not in the courtroom, as evidenced by the court's statement that "most defendants relinquish their presence right so the prospective jurors do not see them in handcuffs and waist chains." (35 RT 3723-3725.) Requiring all defendants to be shackled, without showing necessity for each defendant, is an abuse of the court's discretion. There is no evidence in the record suggesting that the trial court took into consideration appellant's specific circumstances when it

required him to be shackled in the jury lounge.

Had the court appropriately considered whether appellant's characteristics and behavior necessitated shackles, the court would not have been able to find justification to require restraints. Appellant has been consistently described as passive, meek, timid, nonviolent, quiet, shy, mild-mannered, polite, and respectful.[29] The record also indicates that appellant behaved flawlessly while incarcerated at the Central Detention Facility and the George Bailey Detention Facility: Appellant never received any rule violations, was quiet and usually kept to himself, and took bible study courses. (67 RT 8498, 8534-8537; 68 RT 8648-8650, 8657-8658; 95 RT 11897; 96 RT 12256-12260; 97 RT 12343-12344, 12348-12350.) That does not indicate a necessity to shackle; in fact, as the court acknowledged, there was no reason to believe that appellant posed a security risk. (35 RT 3725.) Even if there had been something in the record to suggest the need to shackle, there is no justification for this determination laid out by the trial court on the record. Because there was no case-specific necessity to shackle, it was therefore unconstitutional to require appellant to be shackled if he exercised his right to be present.

Respondent contends that appellant acceded to holding the introductory proceedings in the jury lounge. (RB 149.) Appellant does not object to the use of that location. Appellant objects to his absence from

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[29] 51 RT 6140; 52 RT 6253, 6356; 56 RT 7050; 57 RT 7129, 7138, 7210, 7240, 7272; 60 RT 7705; 67 RT 8535, 8544-8546, 8564, 8571-8573, 8591, 8601-8604, 8612; 68 RT 8649-8650, 8658, 8747; 70 RT 8897-8898, 9010; 92 RT 11491; 95 RT 11993-11994, 12018-12020, 12042-12044; 96 RT 12123, 12162, 12179, 12232-12233, 12238, 12243-12244, 12249-12250, 12277-12279, 12288, 12303; 97 RT 12343, 12357, 12360, 12365-12366, 12414-12415, 12472-12473, 12480-12481.

those proceedings based on an unconstitutional choice he had to make. These proceedings constituted a critical stage of appellant's trial for many reasons. At these proceedings the prospective jurors formed their first impressions of the case. Appellant's absence, unexplained and juxtaposed against the serious charges he faced, likely affected the jury's opinion of him.

Appellant's failure to object to the court's determination to shackle him does not forfeit his claim now. The trial court was well-aware that appellant opposed being shackled. (See *Bundy v. Sierra Lumber Co.* (1906) 149 Cal. 772, 776.) In *People v. Givan*, the defendant was shackled without on-the-record justification. (*People v. Givan* (1992) 4 Cal.App.4th 1107, 1116-1117.) Despite the prosecution's assertion that defense counsel failed to make a timely objection to the defendant's shackles, the court found the issue preserved for appeal because the record reflected that defense counsel had requested the court not to prejudice the defendant by requiring him to be shackled while he testified. Similarly in this case, the record reflects that appellant and defense counsel sought to avoid being prejudiced at trial by having potential jurors see him shackled; that is why appellant did not want to be present in the jury lounge.

Because there was neither a manifest need nor an on-the-record determination to shackle, it was unconstitutional to require appellant to choose between the right to be present or the right to be free from shackles. Appellant had a state-law entitlement not to be shackled as well. (*People v. Duran* (1976) 16 Cal.3d 282, 290-29; Pen. Code, § 688.) The violation of appellant's state-law guarantee to be free from shackling also infringed appellant's due-process rights under the Fourteenth Amendment and article I, sections 7 and 15. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In addition, appellant's purported presence waivers were invalid because they violated Penal Code section 977. Appellant had a statutory right to be present that could only be waived in writing. (See Pen. Code, 977, subd. (b)(1).) Appellant's purported oral waivers failed to meet the written-waiver requirement.

Contrary to respondent's argument (RB 152), this Court's holdings that defendants have no statutory presence rights for discussions of prospective jurors' hardship excusals are inapposite. Respondent relies on *People v. Rogers* (2006) 39 Cal.4th 826, 855-856, where the defendant was absent from unreported in-chambers conferences regarding jurors' requests for hardship dismissals, and *People v. Ervin* (2000) 22 Cal.4th 48, 74, in which the defendant was absent while counsel discussed questionnaires. These two cases are fundamentally different than the case before us. Unlike *Rogers* and *Ervin*, the instant case concerns public trial proceedings in the jury lounge, a substitute location for the courtroom, that involved prospective jurors. Appellant's presence would have benefitted him by allowing the prospective jurors to see him and form their first impression of him.

B. Appellant Did Not Waive His Presence at the Hardship Voir Dire That Took Place in the Courtroom

The court exceeded the scope of appellant's wavier when it conducted hardship voir dire in the courtroom in his absence. Appellant purportedly waived his right to be present at proceedings that occurred in the jury lounge, where te court meet the initial pool of prospective jurors. In the afternoon session, the court met in the courtroom with prospective jurors requesting to be excused for hardship. (RT 38:4044.) Because of the large number of jurors requesting to be excused for hardship, this

proceeding continued to the following Monday in the courtroom. (RT 39:4108-4156.)

Appellant's personal waiver was not intended for the whole day while the parties met the entire venire, as respondent contends. (RB 151.) Rather, it was for the proceedings that would be occurring in the jury lounge in order to avoid appearing before prospective jurors in shackles. Appellant's counsel requested that he not be produced for the sessions so that he would not be sitting and waiting in the holding tank. (37 RT 4009.) That waiver, however, was not personal. Moreover, counsel's purported waiver for the Friday afternoon proceedings did not imply a waiver for the proceedings on the ensuing Monday. Defense counsel not wanting appellant to sit in the holding tank all day had no bearing on whether appellant should be absent on the following Monday, when all proceedings occurred in the courtroom.

Respondent contends that appellant's absence from proceedings that occurred in the courtroom were the product of invited error. (RB 151.) This is incorrect for several reasons. First, in *People v. Riel* (2000) 22 Cal.4th 1153, 1214, the precedent on which respondent relies, this Court held that any error by the trial court was invited, because the error was requested by defendant and it could only have *benefitted* him. The doctrine of invited error is not invoked unless counsel articulates a tactical basis for her choice. (*People v. Graham* (1969) 71 Cal.2d 303, 319.) "If defense counsel suggest or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose." (*Ibid.*) "Error is invited only if defense counsel affirmatively causes the error and makes 'clear that he acted for tactical reasons and not out of ignorance or mistake' or forgetfulness." (*People v.*

Tapia (1994) 25 Cal.App.4th 984, 1030, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330.) Defense counsel requested that appellant be absent so appellant would not have to sit in a holding tank all day—not to gain a tactical advantage.

Having appellant absent from these proceedings did not benefit him; rather, it harmed him. In these proceedings members of the jury began to form their first impressions of appellant and the case. Appellant's absence was unexplained and, at the penalty retrial, unmentioned. Appellant's absence was coupled with the severity of the allegations and at the penalty retrial with the convictions and special-circumstance finding, which was damaging to the jurors' first impressions of him.

Additionally, defense counsel cannot invite this type of error because appellant has a personal right to be present that cannot be waived by counsel. In criminal matters, a party's attorney has general authority to control the procedural aspects of litigation. However, the attorney cannot bind the party to certain fundamental matters. (*People v. Masterson* (1994) 8 Cal.4th 965, 969.) "It is up to the defendant to decide such fundamental matters as to whether to plead guilty, whether to waive the right to trial by jury, whether to waive the right to counsel, and whether to waive the right to be free from self-incrimination." *In re Horton* (1991) 54 Cal.3d 82, 95.) The right to be present during trial proceedings is a fundamental matter to appellant. As the trial court acknowledged, the Sixth and Fourteenth Amendments and article I, sections 7 and 15 vested appellant with the right to be present at the proceedings that took place in the jury lounge (35 RT 3724-2725; see *Kentucky v. Stincer* (1987) 482 U.S. 730, 745), as well to the proceedings that took place in the courtroom. These initial proceedings constituted a critical stage of both trials. Thus, appellant's decision whether

to be at the proceedings was a fundamental matter to his case and could not be waived by counsel.

C. Appellant's Absences Were Prejudicial

Because appellant was absent at the proceedings in which the jury venire first arrived in court, the prospective jurors inevitably came away from those proceedings with the impression that appellant callously did not bother to show up at his own capital trial despite being accused of committing dastardly deeds. Although appellant's presence at subsequent proceedings would have mitigated this misperception, the prospective jurors' initial impression of appellant remained important because a first impression can never be undone.

Respondent seems to argue that because the jury lounge was so crowded, the prospective jurors may not have noticed that appellant was not there. (RB 153.) This is highly unlikely considering the prospective jurors were there to be potential jurors in *appellant's* murder case. He was the "star of the show" and all potential jurors in the room would have wondered who he was and what he looked like. Respondent also contends that if the jury were to form an impression of the appellant as callous, it would because of things he was charged with, rather than for being absence from the proceedings. (RB 153.) Appellant agrees that the charges may have predisposed the jury against him; to be clear, appellant contends that the juxtaposition of the charges against appellant's absence from the introductory proceedings created the damaging first impression.

This was a close case, and the evidence against appellant was not overwhelming. (See *ante*, at pp. 33-34, 36.) Had appellant been present at initial proceedings, it is reasonably probable that the jury would not have found him guilty or found the torture-murder special circumstance.

Likewise, it is reasonably possible that the jury at the penalty retrial would not have sentenced appellant to death. At a minimum, respondent cannot demonstrate that the errors were harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) It is speculative for this Court to conclude that the jurors who sat on appellant's trials would *not* have perceived appellant differently had he been present at the proceedings. Accordingly, the conviction, special circumstance, and death sentence must be vacated.

IX.

THE TRIAL COURT ERRED AND INFRINGED APPELLANT'S CONFRONTATION-CLAUSE RIGHTS BY ADMITTING VIDEOTAPED PRELIMINARY HEARING TESTIMONY OF IVAN GONZALES, JR.

While living in a confidential foster home prior to and during the preliminary hearing, Ivan Jr. experienced hallucinations, had his recollections and testimony influenced by others, and lied regularly. None of this information was known to defense counsel at the time of the preliminary hearing. Accordingly, defense counsel never had a meaningful opportunity to cross-examine Ivan Jr. when he testified at the preliminary hearing. Consequently, the admission of Ivan Jr.'s preliminary hearing testimony at appellant's first trial ran afoul of state law and infringed appellant's constitutional rights.

A. The Trial Court Erred By Admitting Ivan Jr.'s Preliminary Hearing Testimony into Evidence

The preliminary hearing testimony should not have been admitted because appellant did not have the opportunity for meaningful cross-examination, the court abused its inherent authority to protect children by denying live testimony but admitting prior testimony, and Ivan Jr. was not competent to serve as a witness at the preliminary hearing.

1. Appellant Lacked a Meaningful Opportunity For Effective Cross-Examination Because He Lacked Crucial Information at the Preliminary Hearing

Because appellant lacked a opportunity to cross-examine Ivan Jr. meaningfully, Ivan Jr.'s preliminary hearing testimony was inadmissible under Evidence Code section 1291. Appellant was unable to access Ivan Jr. or information regarding Ivan Jr. As a result, he was unable to learn crucial

information that would have been vital for cross-examination. During the preliminary hearing, the defense lacked knowledge of Ivan Jr.'s hallucinations and other symptoms of post-traumatic stress disorder, improper influences on his recollection and testimony, and his foster mother's concern over his proclivity to lie. If appellant had access to this information, he would have been able to question Ivan Jr. in such a way that would have undercut the credibility of the allegations Ivan Jr. made against him.

Respondent incorrectly contends that appellant wishes to rely on events that occurred after the preliminary hearing in order to justify that appellant lacked crucial information at the time of the hearing. There is evidence of events prior to the preliminary hearing that would have been invaluable to appellant's cross-examination of him. In addition, the reports of Ivan Jr.'s mental state that followed the preliminary hearing were relevant evidence of Ivan Jr.'s psychological well-being at the time of the preliminary hearing. Nothing in the record suggests that Ivan Jr.'s symptoms suddenly appeared for the first time after the preliminary hearing. Rather they were manifestations of the same symptoms he had been experiencing prior to the hearing. Prior to the preliminary hearing, Ivan Jr. had stated to his therapist that he sometimes saw double and that he thought it was his soul. (6 CT 1447.) That is significant because seeing hallucinations or illusions is a symptom of post-traumatic stress disorder. (22 RT 1896; see generally American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000), pp. 463-468.)

Similarly, respondent's contention that Ivan Jr. seeing double

provided no evidence that Ivan Jr. experienced illusions or hallucinations prior to the preliminary hearing does not withstand scrutiny. (RB 160.) Respondent fails to mention Ivan Jr.'s belief that he was also seeing his soul. The fact that Ivan Jr. was seeing double and seeing his soul demonstrates that he was experiencing illusions or hallucinations. Ivan Jr. may also have experiencing flashbacks and nightmares, which are additional symptoms of post-traumatic stress disorder.

Contrary to respondent's claim disputing the nexus between Ivan Jr.'s post-traumatic stress syndrome and his credibility (RB 159), Ivan Jr.'s post-traumatic stress disorder symptoms cast doubt on the accuracy of Ivan Jr.'s perceptions and recollections. A witness experiencing hallucinations pertains to his credibility. (See *United States v. Society of Indep. Gasoline Marketers of Am.* (4th Cir. 1979) 624 F.2d 461, 469 [finding abuse of discretion when a district court precluded evidence that a witness was being treated for mental illness rendering him delusional and hallucinatory]; *Boggs v. Collins* (7th Cir. 2000) 266 F.3d 724 [explaining that some courts have found confrontation clause violations when a witness's mental condition was relevant to cast doubt on that witness's ability to perceive or interpret the events in question.].) Had appellant been aware of Ivan Jr.'s illusions and or hallucinations, appellant could have cross-examined him regarding such matters.

Appellant does not claim that Ivan Jr.'s nightmares and hallucinations became the sole source of his memory of the incident, as respondent contends. (RB 160.) Rather, appellant is arguing that the symptoms of post-traumatic stress disorder impacted his memory of the incident and thereby affected the veracity of his testimony. Mental illness

or emotional instability of a witness can be relevant on the issue of credibility, and cross-examination on the subject can reveal the inaccuracies of a witness's recollection. (See *People v. Gurule* (2002) 28 Cal.4th 557, 592.)

In addition to having hallucinations, Ivan Jr.'s foster mother had spoken to him and questioned him about the case. (AOB 205.) At the time of the incident, Ivan Jr. was eight years old, an age during which a child's memories are susceptible to contamination. (See *People v. Delaney* (1921) 52 Cal.App. 765, 774 [explaining that a young child would undoubtedly hear his parents talk about the case and after hearing the repetition of supposed facts the child would create a mental impression that has no objective reality in any actually existing fact].) Dr. Volcani testified at length regarding the connection between the influences on Ivan Jr.'s memories and perceptions and the unreliability of his testimony. (48 RT 5686-5748.) Together, the fact that his foster mother had spoken to him about the case and the fact that he was suffering from post-traumatic stress indicate that his recollection of the events may have been so altered or contaminated that it casts doubt on the veracity of his testimony. Because appellant lacked this crucial information regarding Ivan Jr.'s post-traumatic stress symptoms and his foster mother speaking to him regarding the case, appellant was not allowed a meaningful opportunity to effectively cross-examine him.

Respondent also contends that the case law appellant has cited to in his opening brief fails to support the claims presented because they are discovery cases. That is too narrow a reading of the precedents. The principle underlying the discovery-violation cases—nondisclosure of

material facts precludes effective cross-examination—is applicable in this case. (See *People v. Mackey* (1985) 176 Cal.App.3d 177, 185 [holding defendant was unable to effectively cross-examine witness during preliminary hearing because prosecution failed to disclose that the witness had been hypnotized]; *Alford v. Superior Court* (1972) 29 Cal. App. 3d 724, 728 [extending trial rules for prosecutor's duty to disclose information to preliminary hearings].) Thus, the discovery cases indeed demonstrate that defense counsel's lack of access to exculpatory information produced a pronounced effect on the opportunity for effective cross-examination.

2. The Court Erred in Using Its Purported Inherent Authority To Protect Children from Imminent Harm To Quash the Subpoena of Ivan Jr. But Causing Ivan Jr. Harm by Admitting His Preliminary Hearing Testimony

Because the trial court, using its inherent authority to protect children from imminent harm, found Ivan Jr. unavailable to testify at trial, it should have also excluded Ivan Jr.'s preliminary hearing testimony. The court relied on mental-health expert testimony that Ivan Jr. would suffer harm if he had to testify against his parents and found Ivan Jr. unavailable to testify in order to protect him. By preventing Ivan Jr. from testifying at trial but allowing his preliminary hearing testimony to be admitted, the court defeated its purpose of protecting Ivan Jr. The court thus erred in its use of its inherent authority to protect children.[30]

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[30] Appellant agrees with respondent that the potential harm to Ivan Jr. is immaterial to this Court's analysis under Evidence Code section 1291. (See RB 163.) Appellant argues that the court committed a separate state-law error. The inherent authority that the trial court claimed to declare Ivan Jr. unavailable was not derived from the Evidence Code or another statute.

(continued...)

The admission of his prior testimony likely traumatized Ivan Jr. Ivan Jr.'s therapist, Edna Lyons, testified that Ivan Jr. would suffer long-term trauma from the admission of his preliminary hearing testimony at trial, whether or not he was called to testify at trial. (22 RT 2030-2031.) In addition, Dr. Cynthia Jacobs stated that playing the tape of Ivan Jr.'s preliminary hearing testimony would be traumatic to him because Ivan Jr. would have to come to terms with providing testimony that led to his parents' death sentences. (24 RT 2297-2298.) Moreover, the prosecutor stated that he did not need Ivan Jr.'s testimony to prove his case. (6 CT 1442.) Accordingly, protecting Ivan Jr. from potential long-term trauma from having his testimony entered into evidence at appellant's capital-murder trial outweighed the small interest the prosecution had in having it admitted. By admitting the preliminary hearing testimony that posed a slightly less severe risk of causing the harm and trauma to Ivan Jr. that compelled the trial court to declare Ivan Jr. unavailable to testify at trial, the court defeated its purpose of trying to protect Ivan Jr. from harm.

Respondent underestimates the harm caused by the admission of Ivan Jr.'s prior testimony than by testifying at trial. Edna Lyons testified that she was not sure how the preliminary hearing testimony would affect Ivan Jr. (22 RT 2031.) Her testimony that she was unsure how it would affect him was not the same as saying it would not affect him. Likewise,

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[30](...continued)
Respondent states that appellant did not have legal support for this subclaim. (RB 162.) The trial court lacked precedential or statutory support for its assertion of inherent authority. Consequently, appellant had no case law or statute on which to rely for his argument that the trial court misused its inherent authority.

Dr. Jacobs testifying that Ivan Jr.'s preliminary hearing testimony would be "less traumatic" is not the same as saying it would not be traumatic enough to cause harm. (24 RT 2297.) Indeed, Lyons and Dr. Jacobs made clear that Ivan Jr. would be drastically harmed by the admission of the prior testimony. (22 RT 2030-2031; 24 RT 2297-2298.) Thus, the trauma risk of admitting the preliminary hearing testimony remained unacceptably high though some expert testimony postulated that Ivan Jr. faced a reduced risk of trauma from the admission of his preliminary hearing testimony.

3. The Court Erred In Ruling That Ivan Jr. Was Competent To Testify at the Preliminary Hearing Because He Was Incapable Of Distinguishing Between the Truth and a Falsehood

Ivan Jr. could not distinguish between truth and falsity. To be competent to testify, a witness must be able to discern that difference. (*In re Nemis M.* (1996) 50 Cal.App.4th 1344, 1354; *In re Basillio T.* (1992) 4 Cal.App.4th 155, 167, fn. 7.) Ivan Jr. saying that he understood the importance of testifying truthfully and agreeing to tell only the truth does not show that he was competent. For a person who cannot distinguish truth from falsity, a vow to be truthful is utterly meaningless. Ivan Jr.'s confidence in his ability to tell truth was similarly superfluous. (See *People v. Shirley* (1982) 31 Cal.3d 18, 62 [expert witness explaining that studies have shown that "people can be more confident about their wrong answers than their right ones"].)

Dr. Volcani provided uncontradicted expert testimony that there was a significant probability that Ivan Jr.'s stated recollections of the events at the preliminary hearing were inaccurate. (48 RT 5715.) Dr. Volcani also testified that children of Ivan Jr.'s age are most likely to confabulate and

layer their own fantasies and associations onto the stored memories of an event and that children's memories of a traumatic event could be altered by adults and support services provided for the child. (48 RT 5705-5706.) Police officers telling Ivan Jr. hours after Genny's death that he was lying, Ivan Jr.'s foster mother questioning him regarding the case, and Ivan Jr. working with child therapists are all sources that would have added different perspectives and layers to Ivan Jr.'s memory. Ivan Jr.'s memory of the event mutated over time as more influences to his memory were made known to him. By time Ivan Jr. testified at the preliminary hearing, four months after Genny's death, he had been exposed to numerous influences to his memory to the point where he lacked the ability to distinguish between truth and falsehood in regards to the event.

Despite the superficial distinctions that respondent overemphasizes, this case is analogous to cases regarding hypnotically aided testimony. Like witnesses who provide hypnotically aided testimony, Ivan Jr. had a false confidence in the truthfulness of his testimony. Although the sources of the false confidence differ, the cross-examination of Ivan Jr. was similarly hampered by Ivan Jr.'s incorrect belief that his recollection of events was accurate. (See *People v. Shirley* (1982) 31 Cal.3d 18, 66-67 [holding defendant had no opportunity for effective cross-examination witness's hypnotically-aided testimony because witness had false confidence in that testimony].) Because Ivan Jr. thought he was he was testifying truthfully, cross-examination could not uncover the untruths in the testimony as it would for a witness who was either lying or unsure of his testimony's accuracy. That is why a witness who cannot discern truth from falsity or separate reality from fantasy cannot be a competent witness. The trial court

erred by ruling that Ivan Jr. was competent to testify and thereby not excluding the preliminary hearing testimony on the basis of Ivan Jr.'s incompetence.

B. The Admission of Ivan Jr.'s Preliminary Hearing Testimony Violated Appellant's Confrontation-Clause Rights

The admission of Ivan Jr.'s preliminary hearing testimony infringed appellant's constitutional rights. Without a meaningful opportunity for effective cross-examination, the admission of prior testimony transgressed the confrontation clause. For the reasons that Evidence Code section 1291 should have barred the testimony, the trial court's ruling infringed appellant's constitutional rights.

Contrary to respondent's assertion, the mere opportunity to ask a witness questions is not sufficient. If state action prevents defense counsel from conducting an effective cross-examination, the confrontation clause is violated despite the fact that defense counsel was able to ask the witness some questions. (See *United States v. Owens* (1988) 484 U.S. 554, 559.) Respondent contends, however, that the United States Supreme Court's plurality opinion in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 demonstrates that any opportunity to cross-examine a witness suffices under the confrontation clause. Respondent reads *Ritchie* too broadly. If respondent's cramped interpretation of the confrontation clause were correct, then the United States Supreme Court opinions in *Owens* and *Kentucky v. Stincer* (1987) 482 U.S. 730 would have been much simpler; the Court would only have had to explain that the confrontation clause guarantees nothing more than any opportunity to ask a witness questions on cross-examination. Furthermore, respondent exaggerates the similarities

between this case and *Ritchie*. In *Ritchie*, the defendant was denied access to social-service records prior to trial and argued on appeal that not having the documents violated his confrontation-clause rights. (*Ritchie*, at pp. 43-45.) Thus, quite literally, the defendant in *Ritchie* sought to turn the denial of discovery into a constitutional violation. That is why the *Ritchie* plurality opinion explained that the justices did not want to transform the confrontation clause into a constitutionally compelled discovery rule. (*Id.* at p. 53.) This case is quite different. The ruling that appellant appeals is the admission of prior testimony—not the denial of access to specific documents. Appellant does not contend that it was error for Ivan Jr.'s foster-care placement to be confidential. Nor does appellant argue that any court erroneously denied him access to documents. Accordingly, *Ritchie* is inapposite. *Ritchie* involved the denial of discovery; this case concerns the admission of prior testimony. The nexus between this claim and the confrontation clause is much stronger than the analogous claim was in *Ritchie*. Therefore, the Supreme Court's concerns in *Ritchie* are inapplicable to this case.

Appellant was deprived of the meaningful opportunity for effective cross-examination of Ivan Jr. The admission of his prior testimony at the guilt phase of the first trial violated his confrontation rights.

C. The Seating Arrangement During Ivan Jr.'s Preliminary Hearing Testimony Also Violated Appellant's Confrontation Clause Rights

The seating arrangement during Ivan Jr.'s preliminary hearing testimony violated appellant's confrontation clause rights. Without a case-specific showing of necessity, it was improper for the municipal court to have Ivan Jr. face away from appellant.

Respondent's argument that the seating arrangement did not implicate the confrontation clause must fail. Respondent cites *People v. Sharp* (1994) 29 Cal.App.4th 1772 to support its proposition that the seating arrangement was a de minimis violation of the confrontation clause that need not have been justified by a case-specific necessity. *Sharp*, however, recognized that *Maryland v. Craig* (1990) 497 U.S. 836, 854-855 requires a case-specific showing of necessity for finding any "procedure affording less than literal face-to-face confrontation is necessary to protect the particular child witness." (*Sharp*, at p. 1783, fn. 4.) Thus, under *Sharp*, a courtroom seating arrangement that impedes the defendant's view of a witness infringes the confrontation clause unless supported by a case-specific necessity.[31]

Respondent's alternative argument that the prosecution made a case-specific showing of necessity lacks factual support. As explained in the Opening Brief, the prosecutor's unsworn allegation did not constitute competent evidence upon which a case-specific showing of necessity could be made. (AOB 223-227.)

Respondent's rejoinder that appellant forfeited this subissue strains credulity. At the outset of the preliminary hearing, defense counsel lodged a confrontation-clause objection to the seating arrangement. The trial court

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[31] In *State v. Miller* (N.D. 2001) 631 N.W.2d 587, 594-595, the North Dakota Supreme Court wrongly concluded that a case-specific showing of necessity was not required. The *Miller* court based its decision on the mistaken premise that other courts have not required such a showing when the defendant's view of the witness is not physically obstructed. (See, e.g., *Ellis v. United States* (1st Cir. 2002) 313 F.3d 636, 649-650 [requiring case-specific showing of necessity for alternate seating arrangement similar to the arrangement used in this case].)

concluded that the confrontation violation was de minimis and did not require the prosecution to prove its allegations that Ivan Jr. feared his parents. (1 PX 7-10.) Under the governing law, any impediment to face-to-face confrontation required an on-the-record showing of case-specific necessity. The confrontation-clause objection thus contained an implicit demand that the prosecution make the requisite on-the-record showing that the alternate seating arrangement was needed. Respondent's contention that appellant forfeited his claim that the prosecution failed to make a case-specific showing of necessity is akin to an assertion that a hearsay objection forfeited a claim that the proponent of the hearsay evidence did not establish that a hearsay exception applied. Therefore, appellant's claim that the prosecution failed to make an on-the-record showing of case-specific necessity is preserved for appeal.

Respondent's effort to distinguish this case from the precedents cited in the Opening Brief are unconvincing. Slight differences between this case and others matter little: A case-specific showing of necessity was required, but not made. The precedents in which courts have decided that the state's case-specific showing of necessity required the defendant's confrontation rights to yield to the state's interest are immaterial. In this case, the state failed to present competent evidence of its interest in overcoming appellant's confrontation rights. That infringed appellant's rights.

D. The Municipal Court Improperly Truncated the Cross-Examination of Ivan Jr.

The municipal court placed undue limits on the cross-examination of Ivan Jr. at the preliminary hearing. The trial court erred and violated appellant's confrontation rights when it sustained prosecutorial objections

to questions regarding Ivan Jr.'s credibility.

Despite respondent's assertion that appellant has forfeited his confrontation subclaim, the issue has been preserved for appeal. Under *People v. Partida* (2005) 37 Cal.4th 428, 435-436, the constitutional issue was preserved; the trial court sustaining the objection had the additional legal consequence of infringing appellant's confrontation rights. This Court should reconsider its ruling in *People v. Thornton* (2007) 41 Cal.4th 391, 427 that a confrontation claim was forfeited where the defendant did not explicitly raise the confrontation-clause issue with the trial court. Although *Thornton* cited *Partida*, this Court did not explain how the confrontation-clause issue in *Thornton* differed from the due-process issue this Court deemed preserved in *Partida*. A logical distinction between the two scenarios cannot be drawn. Moreover, the policies underlying the contemporaneous-objection requirement do not support finding the confrontation-clause issue forfeited in this case. Unlike a situation in which defense counsel objects to prosecution evidence on some grounds but not on others, appellant preserved the evidentiary and confrontation-clause issues for appeal by cross-examining Ivan Jr. Defense counsel's mere act of cross-examining Ivan Jr. was inherently an exercise of appellant's confrontation-clause right. Accordingly, when the municipal court sustained the prosecutor's objection to defense counsel's cross-examination, the court was aware of the confrontation rights at stake and, by sustaining the objection, implicitly ruled that appellant's confrontation rights did not require that the objection be overruled.

In addition, appellant has not forfeited his appellate claims pertaining to the court's questioning of Ivan Jr. The court's follow-up

questions were its response to its ruling curtailing the cross-examination of Ivan Jr. with respect to his credibility. The court ruled that defense counsel's questions to Ivan Jr. was impermissible and launched into its own questioning. The trial judge had formed an opinion of what questions were proper and queried Ivan Jr. accordingly. As a result, an objection would have been futile. Because the contemporaneous-objection requirement is inapplicable when objections would be futile, this issue is preserved for appeal. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1007.)

E. The Admission of Ivan Jr.'s Preliminary Hearing Testimony Violated Additional Constitutional Rights

Although Ivan Jr.'s preliminary hearing testimony was not admitted at the penalty retrial, the admission of the testimony nonetheless violated appellant's Eighth and Fourteenth Amendment rights. The admission of Ivan Jr.'s prior testimony at the first trial played a significant role in the jury finding the torture-murder special circumstance. Because the admission of Ivan Jr.'s preliminary hearing testimony tainted the death-eligibility finding, the admission of the prior testimony denied appellant a fair, impartial, and reliable capital-sentencing determination.

F. The Admission of Ivan Jr.'s Preliminary Hearing Testimony Prejudiced Appellant

Contrary to respondent's argument, this was not harmless error. This Court should not underestimate the importance of Ivan Jr.'s preliminary hearing testimony.

Ivan Jr. was a uniquely situated witness. All of the abusive acts occurred inside appellant and Veronica's apartment. Except for Ivan Jr.'s prior testimony, there were no percipient witnesses to the abuse at either

trial. The physical evidence did not reveal whether appellant, Veronica, or both had perpetrated the criminal acts against Genny. Ivan Jr.'s testimony was crucial for filling this evidentiary gap.

Ivan Jr.'s prior testimony did exaggerate the appearance of appellant's participation. As the lone percipient witness, Ivan Jr. provided the strongest evidence that appellant participated in the offense. Yet, there was a significant risk that Ivan Jr. unconsciously based his testimony on manufactured memories. As a result, Ivan Jr.'s testimony appeared to the jurors to be more reliable than it actually was.

The penalty retrial jury sentencing appellant to death does not demonstrate that the errors were harmless. Prior the penalty retrial, appellant had been convicted by another jury's verdict; the retrial jury thus knew that appellant had been found to have participated in the offense. Moreover, the retrial jury could have reached a death verdict despite finding that appellant was a minor participant. Furthermore, the highly discretionary nature of the death-sentencing decision restricts the inferences that can be made from the death verdict. In addition, the panoply of errors at the penalty trial infected the death verdict.

Lastly, the evidence of appellant's guilt and intent to kill was not overwhelming. The verdicts reached were not inevitable (see *ante*, at pp. 33-34), and the wrongful admission of Ivan Jr.'s preliminary hearing may have tipped the balance in the prosecution's favor. Accordingly, respondent cannot demonstrate harmlessness beyond a reasonable doubt.

X.

THE ADMISSION OF VERONICA GONZALES'S HEARSAY STATEMENTS TO HER BROTHER-IN-LAW WAS ERROR THAT INFRINGED APPELLANT'S CONFRONTATION RIGHTS

Victor Negrette's testimony should have been excluded as inadmissible hearsay. The spontaneous-statement hearsay exception did not apply because the prosecution, which introduced the evidence, failed to establish that Veronica had no time to deliberate before calling Negrette. Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." In this case, the prosecutor elicited statements Veronica made to her brother-in-law over the phone after an alleged fight between Veronica and appellant. Furthermore, the prosecutor elicited testimony of Veronica's statements regarding the argument after Negrette and his wife drove for over 90 minutes to pick Veronica up. (60 RT 7711,7713,7715, 7758.) Testimony that Veronica had been crying does not, in and of itself, qualify as substantial evidence of spontaneity. There was no evidence related to when the alleged fight occurred that day or the amount of time that had passed before Veronica called Negrette. As such, the evidence should have been excluded.

A. The Trial Court Abused Its Discretion When It Found Veronica Was Still under the Stress of Excitement When She Called and Spoke with Her Brother-in-Law

The prosecution did not establish the threshold for the hearsay

statement's admissibility. "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant." (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 74, citing *People v. Farmer* (1989) 47 Cal. 3d 888, 903-904.) In this case, Negrette testified that Veronica told him that appellant and she had fought earlier that day. There is no testimony that suggests the time the alleged fight occurred, the amount of time that passed before Veronica called Negrette, or whether Veronica's statements were in response to Negrette's questions. Because there are many unanswered questions related to the spontaneity of the admitted hearsay statements, the prosecution failed to lay the proper foundation for the statements' admissibility.

Contrary to respondent's assertion, Veronica crying when she spoke to Negrette does not provide substantial evidence to support the trial court's admission of her hearsay statements under the spontaneous-statement exception.[32] Simply put, crying per se about an event that occurred earlier in the day does not suffice. Crying in itself does not equate to a startling event. (*Commonwealth v. Trowbridge* (Mass. 1995) 647 N.E.2d 413, 420.) Accordingly, the trial court abused its discretion by admitting the

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[32] Indeed, respondent takes a very different approach to the significance of Veronica being emotional with respect to whether her statements to the police officers made after Genny's death were admissible under the spontaneous-statement exception to the hearsay rule. (RB 78-80.)

statements.

B. The Introduction of Veronica's Statement to Negrette Violated the Confrontation Clause

The Sixth Amendment gives defendants the right to confront and cross-examine witnesses against them. The admission of hearsay violates the confrontation clause when (1) the defense has not had the opportunity to cross-examine the hearsay declarant and (2) the statement is testimonial in nature. (See *Crawford v. Washington* (2004) 541 U.S. 36, 50-56.) In this case, the statement was testimonial in nature because Veronica described what had already happened rather than what was happening when she called Negrette. The alleged statement concerned an alleged familial altercation that occurred sometime earlier that day. Similarly, in *Davis v. Washington* (2006) 547 U.S. 813, 830, statements to determine what had happened were considered testimonial in nature while statements to an officer to determine what is happening were not. Because there was no ongoing emergency in this instance, this case is similar to *Davis*. To be sure, Veronica did not make her statement to the police; however, an out-of-court statement need not be made to the police in order to be deemed testimonial. (See *Davis*, 547 U.S. at 828 [citing hearsay declarant's report of rape to her mother as example of testimonial hearsay], citing *King v. Brasier* (1779) 1 Leach 199, 168 Eng. Rep. 202; *Hartsfield v. Commonwealth* (Ky. 2009) 277 S.W.3d 239, 247 (conc. opn. by Schroder, J.); *State v. Mechling* (W.V. 2006) 633 S.E.2d 311, 323, fn. 10.). Although *People v. Cage* (2007) 40 Cal.4th 965, 991, limits the universe of out-of-court testimonial hearsay to interrogations, this Court's reading of the confrontation clause is unduly restrictive and should be reconsidered. (See *People v. Bryant* (Mich. 2009) 768 N.W. 65, 67-76, [analyzing whether statement was testimonial by

dissecting when hearsay statements were made, not to whom they were made].) Therefore, the statement should have been excluded.

C. The Error Was Prejudicial Because the Hearsay Evidence Admitted Was the Only Evidence Proffered To Show Appellant Ever Was Physical with Veronica Throughout Their Marriage

Under either the *Watson* or *Chapman* standards, the erroneous admission of the evidence was not harmless. The admission of the hearsay statement undermined appellant's assertion that he failed to stop Veronica from solely perpetrating the crimes against Genny because he was a battered spouse. In addition, as the only evidence of appellant allegedly using force against Veronica, the jury could have concluded from it that appellant was a violent person and used that as a basis for finding him guilty of perpetrating the torture-murder. For these reasons, this Court should vacate appellant's conviction and the special-circumstance finding.

XI.

THE ADMISSION OF APPELLANT'S VIDEOTAPED INTERROGATION VIOLATED HIS CONSTITUTIONAL RIGHTS BECAUSE HE NEVER VALIDLY WAIVED HIS *MIRANDA* RIGHTS TO COUNSEL

The conviction, special-circumstance finding, and death judgment must be vacated because the trial court erred when it failed to suppress appellant's videotaped interrogation although appellant never made a knowing, voluntary, and intelligent waiver of his right to counsel. Appellant did not impliedly waive his constitutional rights.

To find a valid waiver of a *Miranda* right, "first, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*People v. Smith* (2007) 40 Cal.4th 483, 501.) Whether a defendant has made a knowing and intelligent waiver of *Miranda* rights "depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171.)

Looking at the totality of the circumstances, the record lacks substantial evidence that appellant made a knowing, intelligent, and voluntary waiver of his rights. In this case, appellant's initial response was unintelligible. Instead of asking for clarification from appellant, Detective Powers told him that he had already talked to Veronica and wanted to get his side of the story because the case would go to court. (8 CT 1757.)

Detective Powers did not explain to appellant that he had a right not to talk to the detectives. Furthermore, Detective Powers spoke over appellant and began interrogating him prior to obtaining any sort of waiver. (8 CT 1753-1757.) Appellant answered the questions without the aid of counsel or knowing the effect of his actions. Appellant answering affirmatively when asked if he understood his rights was not sufficient to show a waiver. He may have believed he understood his rights when he actually did not; appellant is a high-school graduate who was not aware of the nature of the *Miranda* rights and the consequences of any decision to abandon them. Appellant did not affirmatively state that he would waive his rights. These facts do not provide substantial evidence that appellant waived his *Miranda* rights.

In arguing that appellant had impliedly waived his *Miranda* rights, respondent unduly lowers the bar for courts finding a waiver of constitutional rights. Respondent's argument boils down to the following assertion: Appellant made an implied waiver because he answered the questions after stating that he understood his *Miranda* rights. (RB 191-193.) Respondent's effort to show that appellant made an implied waiver flies in the face of *North Carolina v. Butler* (1989) 441 U.S. 369, 373. Respondent cannot meet its great burden of showing implied waiver in this case. Appellant's waiver cannot be clearly inferred from these facts: Appellant did not answer when asked if he would waive his *Miranda* rights, Detective Powers thrust ahead with the interrogation before appellant could articulate a response, and Detective Powers deceptively told appellant that he needed to answer his questions in order to ensure that Veronica's out-of-court statement would not go unanswered at appellant's trial.

The interrogators misled appellant. The detectives urged appellant to sacrifice his *Miranda* rights so he could protect himself against having Veronica's statement be the only story told at his trial. But, contrary to respondent's assertion, it was clear at the time of the interrogation that Veronica was a suspect. Because Veronica appeared that morning to be a probable perpetrator, the interrogators should have known that Veronica's statements would not have been admissible against appellant at his trial. Even if she had become a star prosecution witness, her out-of-court statement have been rank hearsay. There was no way that appellant's trial could have become a credibility contest determined by the jurors' perceptions of Veronica and appellant's statements during their interrogations. Thus, Detective Powers misled appellant when he sought to convince appellant to waive his *Miranda* rights in order to avoid being convicted on the basis of Veronica's hearsay statements.

Concededly, Detective Powers deceiving appellant during the interrogation does not constitute a per se violation of appellant's privilege against self-incrimination. (AOB 245-246.) Nevertheless, the chicanery undercuts respondent's assertion that appellant made an implied waiver of his *Miranda* rights. Respondent cites appellant's invocation of his *Miranda* rights at a subsequent interrogation as proof that appellant understood and waived his *Miranda* rights at the first interrogation. (RB 193.) That inference is far-fetched in this case, in which Detective Powers resorted to subterfuge to urge appellant to answer his questions.

In the absence of a bona fide waiver of appellant's *Miranda* rights, the admission of appellant's interrogation was error. The error was not harmless for two fundamental reasons. First, this was a close case and the

evidence of appellant's guilt was far from compelling. (See *ante*, at pp. 33-34, 36.) Second, the admissions appellant made during the interrogation were critical to the prosecution's case at the guilt phase and the penalty retrial. At the guilt phase, the interrogation and Ivan Jr.'s dubious prior testimony comprised the only evidence pointing specifically to appellant, rather than Veronica, as the perpetrator. At the penalty retrial, appellant's interrogation stood alone, because the prosecution did not admit Ivan Jr.'s prior testimony into evidence.

In its effort to show that the erroneous admission of appellant's interrogation was harmless at the penalty retrial, respondent cannot rely on the fact that the prosecutor would have used Ivan Jr.'s statements. Respondent's penalty-retrial harmlessness analysis could hardly be more speculative. Moreover, Ivan Jr.'s testimony lacked veracity and was internally contradictory. The jury at the first trial needed seven days to convict appellant and failed to reach a penalty-phase verdict despite the admission of Ivan Jr.'s prior testimony.

Accordingly, the erroneous admission of appellant's interrogation was not harmless at the guilt phase or the penalty retrial. This Court should vacate appellant's conviction, special circumstance, and death sentence.

XII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE USE OF A CHILD-SIZED MANNEQUIN AND GRUESOME PHOTOGRAPHS OF GENNY INTO EVIDENCE OVER DEFENSE OBJECTIONS.

The potential for undue prejudice from the photos of or mannequin representing Genny so far outweighed their probative value that the trial court abused its discretion by admitting the evidence over the defense's Evidence Code section 352 objections. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court abused its discretion when it failed to weigh properly the probative value versus the substantial danger of undue prejudice and consumption of time.

A. The Photographs of Genny Were Improperly Admitted Because They Were Gruesome, Cumulative, and Prejudicial, Which Resulted in an Improper Appeal to the Jurors' Emotions

Respondent concedes that the autopsy photos of Genny were gruesome. Respondent, however, claims that the trial court properly admitted the gruesome photos because appellant committed a gruesome crime. (RB 201). That argument reveals the fundamental flaw with the admission of the photos.

The admission of the autopsy photos presented the high potential for prejudice. Whether appellant perpetrated the offense was the most important issue the jury had to determine. The photos shed no light on this question. The photos, or the evidence of the particular injuries, could not

demonstrate whether appellant, Veronica, or both victimized Genny. But, the photos had the potential to inflame the jury and cause the jury to infer guilt from the degree of victimization.

In addition, the trial court also abused its discretion by admitting the Halloween photo of Genny. The photo added little to the testimony that Genny was not injured when she came to live with appellant and Veronica. Yet, the photo likely created sympathy for Genny.

Respondent's argument that the court properly admitted the photos could not be more different from respondent's argument that the trial court's exclusion of appellant's demonstrative evidence. Appellant's proffered demonstrative evidence shared similar characteristics to the autopsy photographs. The trial court's disparate treatment of the different parties' evidence further demonstrates that the court's admission of the photos was erroneous.

B. The Trial Court Abused Its Discretion by Permitting the Use of a 34-Inch Mannequin, Which Was an Improper Appeal to the Jurors' Emotions That Created a Substantial Danger of Undue Prejudice

By admitting into evidence a 34-inch mannequin to demonstrate graphically how Genny may have sustained one of her injuries, the trial court erred. The mannequin had little probative value and appealed to the jurors' passions. (See *State v. Wright* (Fla.App. 1985) 473 So.2d 268, 270.) The introduction of the mannequin added little to the testimony describing her injuries. Respondent contends that the mannequin was not dramatic and, thus, not prejudicial. (RB 203-204.) Yet, the court excluded appellant's demonstrative evidence though there was nothing particularly dramatic about having appellant's children be exhibited in, or merely sit in,

the courtroom. Further, defense counsel's contemporaneous concerns suggest that the mannequin was not as innocuous as respondent contends. (Cf. *People v. Jurado* (2006) 38 Cal.4th 72, 106 [equating defense counsel not disputing trial court's observation with apparent agreement with court].) In cases with child victims, the jury often is hypersensitive and tends to focus on the victim and not the events surrounding the incident. (See Sundby, *The Capital Jury and Empathy: The Worthy And Unworthy Victims* (2003) 88 Cornell L. Rev. 343, 346.) That is a particular concern in this case, because the focus on Genny's age and vulnerability could have distracted the jury from the key question whether appellant tortured or killed Genny and risked having the jury convict appellant because he permitted a young child to die, irrespective of whether he personally perpetrated the offense.

C. The Admission of the Photos and Mannequin Infringed Appellant's Constitutional Rights

The combination of the Fifth, Eighth, and Fourteenth Amendment rights and the California constitutional guarantees in sections 7, 15, and 17 provide a defendant with the constitutional guarantees of due process and a fair and reliable capital-sentencing proceeding. "In the event that evidence is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Admitting multiple graphic photos, which the trial judge described as the "most gruesome he had seen in 25 years," along with the 34-inch mannequin rendered appellant's trials fundamentally unfair.

Furthermore, the trial court gave wide latitude to the prosecutor when introducing the gruesome photographs and mannequin while prohibiting appellant from presenting his four children to the jury. This disparate treatment was fundamentally unfair and formed an additional violation of appellant's due-process rights.

Additionally, by permitting these multiple gruesome photographs and the use of a 34-inch mannequin, the court violated the heightened-reliability requirement at the penalty retrial. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The admission of the photographs and mannequin opened the floodgates for jurors' emotions, rather than their reason, to guide the penalty-phase deliberations and verdict.

D. The Conviction, Torture-Murder Special Circumstance, and Death Judgment Must Be Vacated Because the Improper Admission of the Photos and Mannequin Resulted in Reversible Error

Appellant's involvement or lack thereof in the infliction of Genny's injuries was hotly disputed at both trials. Contrary to respondent's claim, the evidence against appellant was not overwhelming (see *ante*, at pp. 33-34, 36); therefore, it is highly probably that the erroneous admission of the photos and 34-inch mannequin convinced the jury of appellant's involvement and convicted him or found the torture-murder special circumstance applicable. Further, the jury at the penalty retrial, which was

focused on the relative culpability of appellant and Veronica, may not have returned a death verdict in the absence of the error. (See *People v. Brown* (1988) 46 Cal. 3d 432, 448.) At the very least, respondent cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIII.

THE PROSECUTION FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT THE MURDER CONVICTION AND THE SPECIAL-CIRCUMSTANCE FINDING

Nothing more than mere speculation about what happened behind closed doors supports the conviction and special circumstance. The prosecution presented insufficient evidence that appellant was the perpetrator or that he intended to kill or torture Genny. To the contrary, appellant was abused in his relationship with Veronica. Veronica called all the shots, and appellant submissively allowed her to do that. His will was overcome by his wife's aggressiveness.

The record provides little evidence of who did what in appellant and Veronica's apartment. Appellant's guilt or participation cannot be inferred from his mere presence. (*People v. Campbell* (2001) 25 Cal.App.4th 402, 409.) That is especially true in this case, in view of the abusive relationship between appellant and Veronica.

A. There Was Insufficient Evidence That Appellant Was the Perpetrator

The evidence provided no hint of the perpetrator's identity. (53 RT 6526.) Ivan Jr. inculpatory testimony was directly contradicted on cross-examination when he testified that he did not see appellant put Genny in the bath on the night of her death. (2 PX 236, 293.) None of the admissions made by appellant provided ample evidence that he was culpable for any unlawful activity. Ivan Jr.'s subjective thoughts that he personally knew that Genny would die one day does not reveal what appellant did or intended. (9 CT 1934, 1939.) Admittedly, appellant

disciplined his children's behavior by spanking them, hitting them with a belt, or swatting them with a brush; however, from none of these actions can this Court infer that appellant perpetrated the offense against Genny. (8 CT 1768-1770, 1840-1841.)

Undoubtedly, this Court must consider the entire record when determining whether the evidence supporting the conviction and special circumstance is sufficient. (*People v. Slaughter* (2002) 27 Cal. 4th 1187, 1203.) Even viewing all of the evidence in the light most favorable to the judgment (see *People v. Lewis* (2006) 39 Cal.4th 970, 1044), the evidence that appellant was either the primary perpetrator or an aider and abettor was insufficient to support the conviction.

B. There Was Insufficient Evidence To Determine That Appellant Intended To Torture and Kill Genny

To prove the torture-murder special circumstance, the prosecution must show that appellant intended to kill and inflict extreme pain. (*People v. Cole* (2004) 33 Cal. 4th 1158, 1197.) Although the jury may infer the "intent to inflict extreme pain" from the surrounding circumstances of the crime (*People v. Chatman* (2006) 38 Cal.4th 344, 390), the prosecutor failed to show that appellant personally inflicted Genny's injuries. Further, this Court has "cautioned against giving undue weight to the severity of the wounds." (*Ibid.*)

Although respondent refers to numerous acts that appellant allegedly committed, it cannot be inferred from the evidence in the record that appellant formed the requisite mens rea for the torture-murder special circumstance. The admissions appellant made during his interrogation do not show the intent to torture or kill Genny. Appellant admitted to

disciplining his children and Genny by spanking them, hitting with a brush or belt, and putting Genny is isolation in a wooden box to scare her. (8 CT 1768-1770, 1786, 1804-1805; 52 RT 6325). The spanking and belt hitting to which appellant admitted is a far cry from either torture or intent to torture. Appellant putting Genny in a box or installing the hook are more troublesome admissions; nevertheless, it is not reasonable to infer an intent to kill or an intent to inflict extreme pain. Such an inference is particularly weak because the evidence does not identify the perpetrator. Not knowing which person perpetrated the offense cannot affirmatively prove that both people had the requisite intent to torture and kill Genny.

C. The Conviction, Special-Circumstance Finding, and the Death Sentence Must Be Reversed

The insufficiency of the evidence requires reversing the conviction and torture-murder special circumstance. As a result of those reversals, appellant would not be eligible for the death penalty. Accordingly, the death sentence should also be reversed.

XIV.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING THE GUILT PHASE

The prosecutor committed several instances of prejudicial misconduct. They include referring to numerous witnesses that did not testify, comparing appellant to Adolf Hitler and Slobodan Milosevich, and calling appellant Ivan the Terrible, as well as a camp commandant conducting a campaign of terror.

A. The Prosecutor Committed Misconduct by Referring to Witnesses the Defense Failed To Call and Thereby Diminishing the Presumption of Innocence and Shifting the Burden of Proof

First, the prosecutor referred to numerous witnesses that the defense did not call. Instead of referring to the evidence that actually was in front of the jury, the prosecutor made a series of speculative comments relating to nontestifying witnesses. Respondent asserts that the prosecutor's comments properly highlighted the lack of defense evidence supporting the defense theory that Ivan Jr. had been coached. (RB 215.) The prosecutor's comments were more pernicious than respondent perceives. The prosecutor did not merely state that no defense witnesses supported the theory; he argued that if the nontestifying witnesses had been called to the stand, they would have testified that Ivan Jr. had not been coached. That argument crossed the line between merely pointing out a deficiency in the evidence and referring to evidence that was not in the record.

B. The Closing Argument Was Prosecutorial Misconduct Because the Prosecutor's Arguments Were Unsupported by the Evidence and Unduly Prejudicial

Second, the prosecutor committed misconduct by referring to appellant as a "murderer of epic proportion," comparing him to Hitler and Milosevic, and calling appellant a "camp commandant" embarking on "a campaign of terror." (63 RT 8031- 8032.) Respondent, however, claims that the comparisons to Hitler and Milosevic were appropriate references to matters within the jury's common experience and that the prosecutor drew a legitimate parallel to Hitler because both appellant and Hitler committed heinous acts despite not being physically imposing figures. (RB 216-217.) A close review of the record undermines respondent's argument. The prosecutor compared only appellant's conduct to Hitler and Milosevic, and his references to appellant's height were not part of the comparison between appellant and genocidal heads of state. (63 RT 8031.) Respondent also asserts that calling appellant a camp commandant conducting a reign of terror was a fair comment on the evidence. (RB 217.) That prosecutorial argument, however, was not part of a reasonable inference. Under respondent's theory, to which the trial court subscribed, any head of household who commits a crime in his home can be deemed king of his castle and called a camp commandant. Similarly, any defendant named Ivan who elicits evidence that he was peaceful or had been victimized could be called Ivan the Terrible. The prosecutor's epithets were too far fetched to constitute a legitimate argument.

C. The Misconduct Was Prejudicial and Violated Appellant's Due-Process rights

The prosecutor's inflammatory argument denied appellant a fair trial and thereby denied him due process.[33] Although respondent contends that the epithets were fleeting (RB 220), comparing a capital defendant to notorious figures like Hitler and Ivan the Terrible would, unless truly supported by the evidence, always be succinct. Yet, even a terse comparison to Hitler or the use of an epithet can make a strong impression on a jury. Accordingly, the prosecutor engaged in " a pattern of conduct 'so egregious that it infected the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray* (2005) 37 Cal.4th 168, 214.)

D. The Misconduct was Not Harmless and Appellant's Conviction and Special Circumstance Finding Should Be Reversed

The prosecutorial misconduct rendered appellant's trial unfair. Therefore, this Court must vacate the conviction, special-circumstance finding, and the death judgment.

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[33] This claim has been preserved for appeal, though defense counsel did not specifically raise a due process claim during trial. Because appellant asserts that the prosecutor's improper argument "had the additional legal consequence of violating due process," appellant did not forfeit his due process claim. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.)

XV.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING THE PENALTY RETRIAL

Prosecutorial misconduct marred the penalty retrial. This misconduct included characterizing appellant as a camp commandant, referring to him as Ivan the Terrible, asking irrelevant and prejudicial questions about appellant's clothing, and providing an empty chair to represent Genny.

As explained in Claim XIV, calling appellant a camp commandant and Ivan the Terrible constituted misconduct. The prosecutor's remarks were not a fair comment on, and could not be reasonably inferred from, the evidence. (See *ante*, at p. 142.) The prosecutor committed further misconduct by calling appellant a camp commandant in the opening statement after the prosecutor had represented that he would not do so. Respondent's argument that the deception was not prejudicial because the trial court ruled that the camp-commandant epithet was a proper comment on the evidence is flawed in three respects. (RB 231-232.) First, the prosecutor deceived the court and counsel regardless of how the trial court ultimately ruled. Second, although the trial court ultimately concluded that the epithet was permissible, at the time the prosecutor made his opening statement the court had not yet ruled on the propriety of the argument—because the prosecutor said that he would not call appellant a camp commandant during the opening statement. Third, respondent's contention relies on the dubious premise that the trial court correctly concluded that the prosecutor may call appellant a camp commandant.

The prosecutor's reservation of an empty chair to show "that somebody cares about Genny and that Genny does exist in all of our hearts" was misconduct. The prosecutor's use of this symbolic chair constituted an inappropriate emotional appeal to the passions of the jurors. (See *Frazier v. Huffman* (6th Cir. 2003) 343 F.3d 780, 793.) The prosecutor may not seek to arouse the jury's sympathy. (See *Hooper v. Mullin* (10th Cir. 2002) 314 F.3d 1162, 1173 [holding prosecutor committed misconduct by soliciting sympathy for victim].) Victim-impact evidence cannot be designed to elicit sympathy for the victim. (See *Kelly v. California* (2008) 129 S.Ct. 564, 567 (dis. opn. by Stevens, J., on denial of cert.).) Likewise, the prosecution cannot seek to manufacture sympathy for the victim when it seeks to substitute for the absence of victim-impact evidence.

Respondent contends that the empty chair was not an effort to appeal to the jurors' emotions. Rather, respondent claims that it was a valid stunt to show that only Veronica and appellant cared for Genny, which relates to the viciousness of the offense. Respondent's argument is, to say the least, a stretch. First of all, the prosecutor used to chair to show that somebody cares about Genny, not that appellant and Veronica were her only caretakers at the time of the offense. Second, the nexus between the empty chair and Genny being cared for by the two potential perpetrators is a figment of respondent's counsel's imagination. Third, if the empty chair and the prosecutor's related argument constitutes fair comment on the evidence, it would be hard to envision a scenario in which a prosecutor's prop would not be perceived as a fair comment on the evidence. Why could a prosecutor not use an empty chair in every homicide case to demonstrate that the killing prevented the decedent from attending the trial? After all, in

every homicide trial the prosecution elicits evidence that the decedent is dead.

Perhaps the most disturbing aspect of the prosecutor's use of the chair, with the trial court's imprimatur, is the double standard that respondent and the trial court have had toward potentially emotional evidence elicited by the parties. When appellant sought to have his four youngest children exhibited to the jury, respondent fought tooth and nail to exclude the evidence. The prosecutor was concerned about the possibility that the jury would sympathize with appellant.[34] The trial court remarked that the presence of the children in the courtroom would "blackmail" the jury. (68 RT 8621I.) These concerns shared by respondent and the trial court regarding efforts to introduce evidence that would arouse the jury's emotions did not extend to prosecution evidence.

The prosecutor also committed misconduct when he improperly referred to appellant's clothing and grooming.[35] Unlike in *People v. Schmeck* (2005) 37 Cal.4th 240, 298-299, the prosecution elicited evidence

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[34] It would be preposterous to suggest that a desire to protect the children undergirded the prosecutor's opposition to the defense-proffered evidence. By seeking death sentences against appellant and Veronica, the prosecutor was willing to orphan their children.

[35] Appellant did not forfeit this misconduct claim with respect to the prosecutor's closing argument. After the trial court ruled that the evidence of appellant's appearance at the time of the arrest was relevant, then the argument was necessarily a fair comment on the evidence. An objection during closing argument would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) In addition, the claim was not perfunctory; the previous subsection of the Opening Brief explained why references to appellant's clothing constituted misconduct. (See AOB at 267-268.)

of appellant's appearance at the time of the incident for the sole purpose of arguing that appellant was better groomed at the trial than when he got arrested. Moreover, in *Schmeck* the prosecutor argued that the defendant being a drug-selling liar made him deathworthy. In this case, there is no connection between appellant's appearance and whether he was deserving of the death penalty, and respondent does not attempt to articulate any nexus. By placing improper emphasis on immaterial characteristics, the prosecutor improperly influenced the jury by diverting their attention from the actual facts presented in the case.

The prosecutor committed additional misconduct during his closing argument. The prosecutor's reference to the odors and filth in the apartment were improper.[36] The trial court barred the admission of dirty-house evidence because the potential for prejudice far outweighed its probative value. The dirty-house inference that the prosecutor made from the evidence suffered from the shortcomings as the excluded evidence: The probative value paled in comparison to potential for prejudice. Respondent asserts that the prosecutor merely made a fair comment from the evidence; however, whether this inference was reasonably derived from the evidence is immaterial. Appellant asserts that the evidence or inference that the

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[36] This issue has not been forfeited for appeal. A contemporaneous objection would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) The trial court's conclusion that the prosecutor's argument was proper demonstrates that the trial court would not have cured the prejudice in response to a contemporaneous objection. Furthermore, the trial court's rulings show that the trial court believed that any argument that constituted a reasonable inference from the record was valid, regardless of how prejudicial the argument was.

house reeked of feces and urine was unduly prejudicial—not that the inference could not be reasonably derived from the evidence.

As explained above (see *ante*, at pp. 142-143), the comparison of appellant's actions to what occurred in concentration camps was unduly inflammatory. In addition, the prosecutor distorted appellant's argument when he argued that an I-was-just-following-orders defense was common at concentration camps; appellant had argued that Veronica's domination over him deterred him from intervening on Genny's behalf, not that she compelled his participation.

The prosecutor committed further misconduct when he implored the jurors to picture themselves inside appellant's apartment with a gun and asking them to pull the trigger to prevent Genny's death. Respondent's argument that the prosecutor's remarks validly rebutted appellant's defense that the death was not a mistake or accident misses the point. Appellant hasn't argued that the prosecutor made an unreasonable inference regarding the intent to kill; rather, the prosecutor's argument was an unduly inflammatory appeal to the jurors' emotions. Jurors are impartial arbiters of the facts, not participants in the events that they have been called upon to evaluate. The prosecutor's effort to inject them rhetorically into the incident was improper. (See *People v. Jackson* (1963) 59 Cal.2d 375, 381.) Respondent's attempt to distinguish this case from *Jackson*, the governing precedent, is unconvincing; the distinction is immaterial. The argument in this case and in *Jackson* was prejudicial because it placed the jurors at the crime scene with guns in their hands and charged them with the task of shooting the perpetrator in order to prevent a murder—the prosecutor in

Jackson urging the jurors not to be squeamish about returning a death verdict was not the basis of the *Jackson* court's misconduct finding.

During his closing argument, the prosecutor misrepresented several of appellant's arguments. That allowed him to topple straw men while disparaging defense counsel for purportedly making ludicrous assertions. In so doing, the prosecutor committed misconduct.[37] Respondent contends that the prosecutor did not disparage defense counsel because he did not accuse counsel of fabricating a defense. Respondent's conception of this type of misconduct is too narrow; a prosecutor can denigrate defense counsel even when he doesn't claim that a defense was fabricated. (See *People v. Woods* (2006) 146 Cal.App.4th 106, 116 ["'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense' or to otherwise denigrate defense counsel."], quoting *People v. Bemore* (2000) 22 Cal.4th 809, 846.) Lastly, contrary to respondent's assertion, appellant did not elicit evidence or imply that he was a good father. Appellant was careful not to open the door to a rebuttal of good-father evidence, and the trial court ruled that evidence of the children's love for appellant did not imply that he was a good father, because virtually all children love their parents. (65 RT 8331-8332.)

The prosecutorial misconduct deprived appellant of a fair penalty retrial. Because the jury's penalty determination is subjective and fairly discretionary, prosecutorial misconduct at a penalty retrial is substantially more prejudicial than at a noncapital trial or the guilt phase of a capital trial. (Howarth, *The Geronimo Bank Murders: A Gay Tragedy* (2008) 17 Law &

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[37] This issue has not been forfeited for appeal. A contemporaneous objection would have been futile. (See *ante*, at p 147, fn. 36.)

Sexuality 39, 66-70.) In this case, the prosecutor's improper appeals to the jury's emotions, inflammatory rhetoric, and unreasonable inferences impeded the jury from properly weighing the aggravating and mitigating factors and precluded the jury from making an appropriate capital-sentencing determination.

Because the prosecutorial misconduct deprived appellant of a fair penalty retrial, the trial court erred by denying the motion for a new trial. In addition, the misconduct violated appellant's due-process rights and constituted reversible error.

XVI.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S PRETRIAL MOTIONS AND THEREBY VIOLATED HIS CONSTITUTIONAL RIGHTS

A. The Trial Court Improperly Denied Appellant's Request for Sequestered Voir Dire

The trial court should have granted appellant's motion for individual voir dire. Respondent claims that appellant did not present a "compelling reason" for this court to rule that sequestered voir dire was necessary in this case. (RB 274.) However, the gravity of a capital case makes it crucial to have an impartial jury and fair trial. Capital trials require heightened reliability, and this precept necessarily requires a trial court to assure that jurors are impartial.

It is settled in California that the death-qualification process makes the jury significantly more likely to presume the defendant's guilt and to impose a death sentence. (See *People v. Hovey* (1980) 28 Cal.3d 1, 69-82, superseded on other grounds by Code Civ. Proc. § 223.) Moreover, the death-qualification of jurors in a group setting exacerbates this phenomenon, where jurors observe the dismissal of other jurors for expressing reservations regarding imposing the death penalty. (*Ibid.*) Thus, group voir dire in capital cases undermines a defendant's right to a fair and impartial jury and to a fair and reliable capital-sentencing determination.

Code of Civil Procedure section 223 (passed as Proposition 115 in 1990) gives trial courts discretion in the manner of conducting voir dire, and individual voir dire is permitted if the court determines that large-group voir dire is impracticable. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1177.) In capital cases where a defendant's life is at

stake, the phrase "not practicable" should be understood in light of the defendant's constitutional rights, not just in terms of efficiency. In death penalty cases, it is not "practicable" to conduct group voir dire because it is well established that it results in a "death-prone," and therefore insufficiently impartial, jury. Even if section 223 did undermine the mandate in *Hovey*, its general preference for group voir dire should not be employed to vitiate constitutional norms. (U.S. Const., 6th & 14th Amends.; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522.) This Court is respectfully urged to find that section 223 only abrogates *Hovey* to the extent that it does not conflict with the rights of capital defendants to an impartial jury and a reliable capital-sentencing determination.

B. The Trial Court Improperly Denied Appellant's Request To Instruct the Jury on the Definition of Life Without Parole

The trial court should have granted appellant's motion to define the sentence of life without parole. Appellant had the right to a fair and reliable capital-sentencing determination. (U.S. Const., 8th & 14th Amends.) It is well-established that most jurors in California capital cases mistakenly believe that parole may eventually become available even to those sentenced to life without the possibility of parole. (See AOB 275.) When jurors are mistaken as to the nature of the available punishments, they are unable to make an accurate moral judgment regarding the sentence that the defendant should receive. Instead, the jury could sentence a defendant to death due to concerns that he would get parole if given a life sentence, not on a determination that the aggravating factors so substantially outweigh the mitigating factors that death is the appropriate punishment. The requested instruction was not redundant and unnecessary, as the trial judge stated;

rather, it was needed to ensure a fair and reliable capital-sentencing determination. By failing to give complete instructions to the jury regarding the various sentencing options, the trial court erred, and this Court is urged to reconsider its relevant precedents.

C. The Trial Court Should Have Granted Appellant's Motion To Set Aside the Indictment

The trial court should not have denied appellant's motion to set aside the indictment due to numerous constitutional defects. The defects, which include prosecutors' unbridled discretion to seek death, the inclusion of inapplicable aggravating factors, the failure to designate sentencing factors as aggravating or mitigating, the absence of written findings, the absence of a beyond-a-reasonable-doubt burden of proof, the absence of proportionality review, the use of restrictive adjectives in mitigating factors but not aggravating factors, and the vagueness of aggravating and mitigating factors all distort the jury's weighing process and make for a capital-sentencing scheme that is unreliable and arbitrary in violation of capital defendants' basic rights. Accordingly, this Court is urged to reconsider its position with regard to these constitutional issues.

D. Motions for Procedural Protections

Likewise, the trial court should not have denied appellant's motion for procedural protections requesting a reasonable-doubt standard on aggravating factors, written findings and unanimity on aggravating factors, and a beyond-a-reasonable-doubt standard for the determination that death is the appropriate punishment. This Court is respectfully urged to reconsider its pertinent precedents.

E. Motion To Declare Penal Code Section 190.3 Unconstitutional

This Court is urged to declare Penal Code section 190.3 unconstitutional. Section 190.3 provides for a unitary list of aggravating and mitigating factors that does not explain which are aggravating and which are mitigating, though the factors are susceptible to conflation. (See AOB 280.) Capital defendants in California are therefore subject to an arbitrary and capricious death-sentencing process, in violation of their basic rights. This Court is therefore urged to reconsider its precedents with regard to the constitutionality of section 190.3.

F. Motions To Strike the Special Circumstance Due to Constitutional Defects

Following this Court's precedent, the trial court denied appellant's motion to strike the torture-murder special circumstance on vagueness and overbreadth grounds. This Court is urged to reconsider its position with regard to the constitutionality of the torture-murder special circumstance in general.

Moreover, the trial court also erred in denying the motion because, in appellant's particular case, there was little evidence supporting a nexus between the alleged torture and the homicidal act, but the court nonetheless issued CALJIC No. 8.81.18. (See AOB 280-281.) Respondent's interpretation of the evidence is unrealistic with regard to appellant's relative involvement in Genny's death. (RB 240.) Furthermore, respondent's argument merely presupposes that the jury did find a nexus between the torture and the homicide; respondent fails to address the fact

that CALJIC No. 8.81.18 does not require a jury to find a logical relationship between the two events. (RB 239.)

The use of CALJIC No. 8.81.18 was extremely problematic because it does not require the jury to find a nexus between either the torture and the homicide, or the intent to torture and the homicide. The instruction merely juxtaposes the two elements of the torture-murder special circumstance, without any reference to the required temporal or logical relationship between the two elements. (See RB 240.) However, to find the special circumstance true, a jury must find the torture and homicide were part of the same intentional act of homicide; CALJIC No. 8.81.18 does not convey this requirement.

The Eighth and Fourteenth amendments, and article I, sections 7, 15, and 17 require that there be a nexus between a tortuous act and a homicide in order for the act to properly constitute the torture-murder special circumstance. Because CALJIC No. 8.81.18 does not adequately convey this requirement, and because the facts surrounding Genny's death were particularly susceptible to a finding that any torture inflicted by appellant were not directly connected to her death, the trial court's use of the instruction violated appellant's rights to due process of law and a fair and reliable capital-sentencing determination, as well as his right to be free from cruel and unusual punishment.

Accordingly, even if this Court does not find that the torture-murder special circumstance is vague and overbroad per se, appellant urges this Court to find that the trial court erred in denying the motion to strike the special circumstance in this case because it allowed the jury to find true the

special circumstance without having found any nexus between the torture and the homicide.

G. Motion for a South Bay Jury Venire

Appellant does not contend he has a right to have his jury drawn from a particular judicial district, as respondent claims. (RB 241.) Rather, at issue is the disparate manner in which jury venire is conducted across the judicial districts in the county, which results in an overall decrease in the number of minorities serving on juries across the county as a whole.

The manner in which jury venire was conducted in this case yielded a discriminatory result. It is uncontested that there is a disparity in the racial makeups of North and South County Judicial Districts, as well as a difference in the way jury venires are constructed. The North County Judicial District has relatively few underrepresented minorities, and juries for that district are drawn exclusively from North County. On the other hand, the South County Judicial District has a higher concentration of Latinos than the county as a whole, yet juries from that district are drawn from the entire county rather than just the Southern district. The result is that juries from the South County judicial district contain fewer underrepresented minorities than there are in the district, but juries from the North County district would contain on average the same proportion of minorities as the district as a whole. Thus, fewer minorities serve on juries across the county as a whole.

Because the jury venire policies across the two districts are different, and the result is that, across the whole county, fewer minorities are represented in juries, the disparity in jury-venire policy is fundamentally unfair and discriminatory. In this case, the discriminatory policy yielded a

jury pool that contained fewer Latino jurors than it would have otherwise, and appellant was therefore not tried by a representative cross-section of his community. This error was particularly prejudicial to appellant because he is Mexican American.[38] Thus, appellant was denied his rights to equal protection, due process, and an impartial jury.

H. Motion To Quash the Jury Venire

Likewise, this Court is urged to reconsider its precedents with regard to the exclusion of non-citizen residents and former felons from jury service because doing so interfered with appellant's rights to an impartial jury.

I. Motions Challenging Discriminatory Prosecution

The trial court should not have denied appellant's motion for supplemental discovery of the charging criteria in capital cases and subsequent motion to dismiss the indictment for discriminatory prosecution. Appellant made a prima-facie showing of discrimination that provided the requisite plausible justification for discovery, even under the heightened standard employed by this Court in *People v. McPeters* (1992) 2 Cal.4th 1148, 1170-1171.

In *McPeters*, the defendant bolstered his motion to dismiss with statistics indicating a correlation between sentencing and victim race, but he did not include any factual comparison between his case and other cases.

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[38] A defendant's race is not determinative in whether the jury venire in a particular case was prejudicial. (See *People v. Burney* (2009) 47 Cal.3d 203, 225, fn. 6 [noting that a defendant need not be a member of a minority group allegedly excluded from jury venire in order to challenge that group's exclusion], citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1217, fn. 3; *People v. Wheeler* (1978) 22 Cal.3d 258, 281.)

(*Id.* at p.1170.) This Court held that the failure to compare the outcome in the defendant's case to the outcomes in other actual cases was fatal to the defendant's claim. (*Ibid.*) In the present case, appellant did make the factual comparison required by the *McPeters* court by providing an analysis grounded in the facts of specific comparable cases rather than just statistics. To this end, appellant presented evidence that other child-abuse murders in San Diego County committed by white people were not prosecuted capitally by comparing the facts and circumstances of specific cases. Appellant's motion for supplemental discovery of charging criteria therefore had plausible justification, and the court should have granted the motion.

The trial court dismissed the motion on the grounds that appellant did not show discriminatory intent. (17 RT 1567-1573; 5 CT 1170-1171; 6 CT 1210.) However, capital-sentencing patterns that are discriminatory need not be intentional for them to violate a defendant's rights. So long as a district as a whole tends to seek harsher sentences for defendants of certain races, or to feel "moved" to leniency more often with defendants of some races rather than others, any such disparate treatment would violate equal protection and should not be tolerated. Respondent says standard of review for this matter should be abuse of discretion. (RB 242.) However, the Court in *McPeters* engaged in an independent review of the appellant's evidence in that case to determine whether the plausible justification threshold had been met. (*People v. McPeters*, *supra*, 2 Cal.4th at 1170-1171.)

Appellant showed sufficient plausible justification under the *McPeters* standard; therefore, his motion for discovery should have been granted.

J. Appellant Is Entitled to a New Trial

The trial court's denial of appellant's pretrial motions for South Bay jury venire and of the motion to quash the jury venire constituted structural error, and the denial of appellant's other pretrial motions warrant reversal of the death sentence. Respondent does not contend that the harmless-error analysis should be applied to the denial of the other pretrial motions. Because appellant's was a close case with comparatively weak evidence against him, and because the features in the capital-sentencing scheme that appellant challenged in the pretrial motions increased the likelihood of a death verdict nevertheless, this Court is respectfully urged to grant appellant a new trial.

XVII.

THE TRIAL COURT COMMITTED SEVERAL PREJUDICIAL INSTRUCTIONAL ERRORS AT THE GUILT PHASE

The trial court's several instructional errors at the guilt phase were prejudicial, and require that appellant be given a new trial.

A. The Court Erred When It Refused To Instruct the Jury that Failing To Stop Somebody From Committing Murder Is Not a Crime

The trial court's refusal to give the requested instruction violated appellant's right to a pinpoint instruction. Respondent does not deny that the instruction accurately stated the law or had adequate evidentiary support to warrant the instruction. Respondent also does not deny that the instruction pinpointed appellant's theory of defense: that appellant was guilty of child endangerment but not murder. Citing CALJIC No. 3.01 as being substantially similar to appellant's proposed pinpoint instruction, respondent merely argues that the instruction would have been duplicative. (RB 244.) However, respondent's argument is unconvincing for several reasons.

First, CALJIC No. 3.01 does not adequately convey the law behind appellant's theory of defense. Although the instruction does state that "mere presence at the scene of a crime ... [or] mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting" (see RB 244), the instruction is not broad enough to encompass appellant's whole theory of defense. Contrary to what respondent argues, CALJIC No. 3.01 did not "explicitly" tell the jury that appellant was not "culpable" for any failure to prevent a crime; it merely

stated he was not guilty of one possible crime, aiding and abetting, which is only one of a whole panoply of crimes that did not include the distinct offenses of murder or child endangerment. The jury had no way to know, based solely on CALJIC No. 3.01, that any moral culpability arising out of appellant's failure to act did not translate into a conviction for murder, or that it could translate only into a conviction for child endangerment. The jury only knew that a failure to act could not translate into a conviction of aiding and abetting. Thus, CALJIC No. 3.01 was not duplicative, and did not sufficiently convey appellant's theory of defense.

Secondly, a criminal defendant's right to present a defense must override a judicial preference of avoiding potentially duplicative instructions. The right to present a defense and to have a jury consider that defense are essential principles in the criminal justice system and should not be abrogated by ineffective jury instructions. Respondent does not provide any compelling reason to subvert appellant's right to have the jury consider his defense. Therefore, this Court should find the instruction was erroneously refused.

B. The Court Erred When It Refused To Instruct The Jury with Respect to Veronica Gonzales's Consciousness of Guilt

Appellant's proposed instruction would have pinpointed appellant's theory of defense. Moreover, the instruction correctly stated the law, was not duplicative, and had sufficient evidentiary support. The presence of an instruction on appellant's consciousness of guilt but not of Veronica's created an imbalance that vitiated the effectiveness of the adversary system and violated appellant's state-law and constitutional rights to present a

defense. The trial court's rationale for refusing the instruction was that the jury could not determine Veronica's guilt, and so the instruction was inappropriate. (RB 246; 62 RT 8011-8012.)

The instruction should not have been refused on the grounds stated by the trial court. Appellant was not requesting that the jury engage in proceedings to determine Veronica's guilt. If every court employed this reasoning to decide whether to admit third-party culpability evidence, no evidence of third-party culpability would ever be admissible. However, it is well-established that evidence of third-party culpability is admissible so long as it is capable of raising a reasonable doubt as to the defendant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833-834.) Although juries are not formally required to determine the guilt of a person who is not a defendant, introducing evidence of third-party culpability necessarily requires the jury to assess the culpability of a person who is not a defendant in that case. Therefore, the trial court erred in refusing the instruction.

Respondent concedes that a defendant may introduce evidence of third-party culpability if it raises a reasonable doubt as to the defendant's guilt. Despite recognizing that Veronica's culpability would in fact present a reasonable doubt as to appellant's guilt, respondent claims that Veronica's consciousness of guilt was not "material or determinative" of appellant's culpability. (RB 247-248.) That assertion cannot withstand scrutiny. The crux of appellant's defense was that Veronica and not he was the primary perpetrator and mastermind of Genny's homicide. (See AOB Claims I-III.) Therefore, evidence of her relative involvement and consciousness of guilt were relevant and crucial in raising a reasonable doubt as to appellant's culpability.

There is absolutely no basis for respondent's inference that Veronica's consciousness of guilt could not constitute evidence of third-party culpability, especially because in this very case the jury was instructed that appellant's own consciousness of guilt could be evidence of his guilt. (See AOB 291.) Veronica's consciousness of guilt would in fact have introduced a reasonable doubt as to appellant's culpability, and the instruction to this end pinpointed appellant's theory of defense. The refusal of the instruction prevented the jury from considering this important factor, and accordingly the trial court should not have refused to issue it.

C. The Court Erred By Giving CALJIC No. 2.04

The prosecution did not present evidence at trial that sufficiently supported the inference that appellant attempted to persuade Ivan Jr. to testify falsely, and the trial court erred by giving CALJIC No. 2.04. Respondent's interpretation of the facts surrounding Ivan, Jr.'s testimony is illogical. Appellant told Ivan Jr. that Genny had stopped breathing, which was a true statement and an age-appropriate way to tell the child that his cousin had died. There is no connection between this statement and the veracity of Ivan Jr.'s testimony. Likewise, the fact that Ivan Jr. testified that he was afraid of his father spoke only to the nature of his parents' discipline of his children. It is natural and to be expected that a child would fear his or her parent's disapproval for testifying against them. It was for this very reason that the trial court found Ivan Jr. unavailable to testify at his parents' trials. Any inference that these two normal responses could possibly show that appellant attempted to persuade Ivan Jr. to falsely testify is unfounded, and the court should not have given CALJIC No. 2.04.

D. The Court Erred In Giving CALJIC No. 8.81.18 Because the Instruction Required No Nexus Between the Alleged Torture or Intent to Torture and the Homicide

The trial court should not have given the jury the instructions contained in CALJIC No. 8.81.18 because the instructions omitted an essential element of the special circumstance: a nexus between the torture and the homicide. (See *ante* at pp. 154-156; AOB 280-282.) In so doing, the court deprived appellant of the right to have a jury decide whether the prosecution proved every element beyond a reasonable doubt. This constituted a violation of appellant's substantial rights, and as such it was not forfeited upon appellant's failure to object at trial.

The instruction in this case did not pass constitutional muster under the facts of appellant's case, where the jury was faced with determining appellant's level of involvement in a homicide where there had also been a prior situation of child abuse unrelated to the homicidal act. Contrary to what respondent argues, appellant's methods of discipline did not implicate him in Genny's murder. (RB 251.) In fact, the evidence tended to show that appellant was only marginally involved in disciplining Genny, and that Veronica was the primary disciplinarian in the relationship. (AOB 42-47.) Respondent does not claim that appellant's involvement amounted to any more than that, and merely says the evidence showed Genny "was tortured" and "the torture escalated leading up to her murder"; that "Genny's murder involved torture" because she "was forcibly held in a scalding bath." (RB 251.) Respondent is correct in using the passive tense in this case, because there was insufficient evidence to show any nexus between *appellant's* acts of abuse and Genny's death. However, the jury was not free to conclude this because CALJIC No. 8.81.18 took the question out of the jury's hands.

Under the facts of this case, the court should have instructed the jury with an amended CALJIC No. 8.81.18 to specifically include the nexus requirement. The court's failure to do so gave the jury free rein to determine appellant's level of culpability based on unrelated events, which impermissibly broadened the scope of the torture-murder special circumstance in violation of appellant's rights under the California and United States Constitutions.

E. A Series of Guilt-Phase Instructions Undermined the Requirement of Proof Beyond a Reasonable Doubt in Violation of Appellant's Rights to Due Process, a Trial by Jury, and Reliable Verdicts

The instructions on circumstantial evidence under CALJIC Nos. 2.02, 2.21.2, 2.22, and 2.51 undermined the requirement of proof beyond a reasonable doubt. Constitutionally deficient reasonable doubt instructions require reversal of a conviction. (E.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Moreover, jury instructions are constitutionally deficient if it is reasonably likely that the jury understood the instructions to allow a conviction based on less than a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The plain meaning of the instructions as a whole effectively vitiates the reasonable-doubt standard, even if the jury is also given an instruction that generally states that the burden proof is the reasonable-doubt standard. This Court is respectfully urged to reexamine the plain meaning and practical effect of the jury instructions at issue here and to find that the instructions do not pass constitutional muster.

It is axiomatic that an inquiry into the meaning of a legal text begins with the plan language of the text. (E.g., *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 340.) If the plain language is clear and unambiguous, then

the judicial inquiry into its meaning ends. (*Ibid.*) This canon of interpretation applies to the full range of legal texts. (See, e.g., *Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438 [applying the canon to a statute]; *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia* (Pa. 2003) 823 A.2d 108, 125, fn. 25 [applying the canon to a contract], *Hyman v. Nationwide Mut. Fire Ins. Co.* (11th Cir. 2002) 304 F.3d 1179, 1186 [applying the canon to an insurance policy].) This Court in *People v. Jennings* (1991) 53 Cal.3d 334, 386 recognized that this first canon of interpretation applies to jury instructions, and assessed the "plain meaning" of CALJIC No. 2.01.

However, the Court in *Jennings* reached a result that is at odds with the plain meaning of the language of CALJIC 2.01. Although the instruction reads "if ... one interpretation of [circumstantial] evidence appears to you to be reasonable," that is the interpretation the jury must accept, the Court found that the phrase "appears reasonable" was not equivalent in meaning to the phrase "is apparently reasonable." However, the term "appears" should have been accorded its plain meaning. There is no semantic difference between the active and passive variations of the same root word, "to appear," in this context.

According to the Uniform Statute and Rule Construction Act of 1995 § 2, "[u]nless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar, and common usage." The common meaning of the term "appears" is "to seem or look to be; to seem likely." (*American Heritage Dict.* (4th ed. 2006), p. 86, senses 3 and 4.) Likewise, there is no grammatical difference between the active verb "appears" and the inactive/adjectival form "is

apparently." It follows that there is no functional difference between the phrases "the evidence appears reasonable" and "the evidence is apparently reasonable."

It remains that a mere "appearance" of plausibility is not the same as the near-certitude that characterizes the reasonable-doubt standard. (E.g., *In re Winship* (1970) 397 U.S. 358, 364.) Thus, the Court should not have concluded that "[n]o reasonable juror would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was "apparently" guilty, yet not guilty beyond a reasonable doubt" (*People v. Jennings*, *supra,* 53 Cal.3d at p. 386), because a finding that the evidence against a defendant is "apparently reasonable" necessarily leads to a conviction of a defendant who is "apparently guilty." This lesser burden of proof does not meet constitutional standards for a conviction, and this Court is urged to reconsider its prior rulings upholding these instructions.

The Court also found that even if instructions such as CALJIC 2.01 do erode the burden of proof, the existence of the more general reasonable-doubt instruction sufficiently instructed the jury on the reasonable-doubt standard for every element and finding. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [holding that CALJIC 2.90 "saves" the deficient instructions.]) This reasoning is likewise flawed because it runs contrary to the well-established principle of legal textual interpretation that the more specific principles are to be read as exceptions to the more general. (See, e.g., *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1056 [holding specific provision takes precedence over conflicting general provision].)

The Court in *Crittenden* concluded that the general instruction regarding the reasonable-doubt standard, as given in CALJIC 2.90, sufficiently trumps the lesser standards of doubt set out in instructions such as CALJIC 2.02, 2.21.2, 2.22, and 2.51. (*People v. Crittenden, supra,* 9 Cal.4th at p.144.) However, this reasoning is flawed as a matter of common sense and as a matter of textual interpretation. The standards of proof set out in instructions like 2.02, 2.21.2, and 2.22 contemplate specific situations, such as the believability of circumstantial evidence, witness testimony, an alleged mental state, etc. (AOB 296-304.) Therefore, such instructions will be read as exceptions to the more specific rule that a defendant's guilt is to be proven beyond a reasonable doubt.

For example, when jurors are given both CALJIC Nos. 2.90 and 2.02, they are first to apply the general rule that every element must be proven beyond a reasonable doubt; and then they will apply the specific rule that in determining the defendant's mental state, they are to choose "whichever interpretation appears more reasonable." Thus, the jury is instructed on a lesser standard of proof for the specific issue of mental state, even where it is a required element of the offense. It is not credible to argue that the jury will apply a reasonable-doubt standard even when it is specifically instructed to apply a different standard for a particular issue.

Because the trial court in this case gave guilt-phase instructions that similarly undermined the burden of proof, appellant's conviction was not based on a finding of each element beyond a reasonable doubt. Accordingly, this Court is urged to reconsider its prior rulings upholding these defective instructions.

F. Appellant Is Entitled to a New Trial

These errors individually and cumulatively require that appellant be given a new trial. Appellant presented significant evidence to support his theory of defense, that he perpetrated none of the abusive acts and, at most, failed to stop Veronica from inflicting some of them. None of the jury instructions adequately conveyed this theory of defense. If the jury had been instructed with appellant's requested instructions, it is reasonably probable that the jury would not have convicted him of first degree murder. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) In fact, it is quite likely the jury would have acquitted appellant of first degree murder, considering that his was a close case and the jury took a full seven days to reach its verdict. Furthermore, respondent cannot show that the constitutional errors were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The trial court's refusal to issue appellant's requested instructions was state-law error and a violation of appellant's federal constitutional rights. Accordingly, the conviction, special-circumstance finding, and death judgment must be vacated.

XVIII.

THE TRIAL COURT COMMITTED SEVERAL PREJUDICIAL INSTRUCTIONAL ERRORS AT THE PENALTY PHASE

A. The Court Erred When It Refused To Instruct the Jury Which Capital-Sentencing Factors Could Be Either Aggravating or Mitigating and Which Factors Could Only Be Mitigating

Appellant urges this Court to reconsider its ruling in *People v. Ramirez* (2006) 39 Cal.4th 398, 469 that CALJIC No. 8.85 adequately ensures a reliable capital-sentencing determination. CALJIC No. 8.85 does not sufficiently instruct the jury on the law, and it thereby gives the jury free rein to consider impermissible factors, or to weigh factors in an impermissible manner.

For example, factor (d) instructs the jury to consider whether a defendant was under the influence of extreme mental or emotional disturbance, which is a *factual* determination, but it does not indicate the *legal* implication of a finding that the defendant was emotionally disturbed at the time of the crime. (See CALJIC No. 8.85.) This ambiguity is problematic because legally, such emotional disturbance may only be mitigating. (E.g., *People v. Smith* (2005) 35 Cal.4th at p. 352; *People v. Montiel* (1993) 5 Cal.4th 877, 944; *People v. Whitt* (1990) 51 Cal.3d 620, 654; *People v. Ghent* (1987) 43 Cal.3d 739, 776, *People v. Boyd* (1985) 38 Cal.3d 762.) However, without an instruction to this effect, a layperson is just as likely to improperly weigh emotional disturbance as aggravating, for example, as evidence of a defendant's criminal propensity. (See, e.g., *People v. Smith, supra,* 35 Cal.4th at pp. 352-356 [holding a defendant's

alleged propensity as a "sadistic pedophile" is relevant aggravating evidence if related to the circumstances of the crime.]) Evidence of mental disturbance may easily be interpreted as evidence of future dangerousness or criminal propensity, and so a jury cannot be expected to know the difference without proper instruction. Thus, this Court's inference that "no reasonable juror would interpret emotional disturbance as aggravating" is unrealistic. (*Id.* at p.353 [citation omitted].)

This fundamental flaw extends to other factors that CALJIC No. 8.85 leaves unlabeled, such as factor (f) or (g). Many factors enumerated in CALJIC No. 8.85 are susceptible to multiple moral interpretations—for example, factor (f) could lead a jury to find a defendant was less culpable because he believed his actions to be justified; or alternatively, that he is more dangerous because he has a skewed notion of what actions are morally justified; factor (g) could lead a jury either to find that a defendant is less culpable because he was not the mastermind of the crime with which he was charged; or alternatively, that he is easily led to participate in crime, and therefore is dangerous to society. Laypersons are likely to interpret many of the factors outlined in CALJIC No. 8.85 as either aggravating or mitigating, though the factors may legally only weigh in favor of mitigation. Because CALJIC No. 8.85 does not sufficiently inform jurors of the legal implications of each factor, the jury's discretion is not sufficiently constrained by specific standards; the resulting verdict is therefore random and capricious.

Indeed, in *Tuilaepa v. California*, Justice Blackmun demonstrated that factor (a), which instructs the jury to consider the "circumstances of the crime," leaves jurors free to find a whole gamut of circumstances to be

aggravating, including those that should legally only be mitigating.[39] (*Tuilaepa v. California* (1994) 512 U.S. 967, 986-987 [dis. opn. by Blackmun, J.]) Justice Blackmun made similar objections to factor (i) [defendant's age], as well as the common yet improper inference that the absence of a mitigating factor is in itself an aggravating factor. (*Id.* at pp. 990-991 [dis. opn. By Blackmun, J.].) Unlike Justice Blackmun in his dissenting opinion, the Court in *Tuilaepa* did not address the particular issue of whether jury instructions must differentiate between mitigating and

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[39] In support of his proposition, Justice Blackmun draws heavily from California cases where juries were free to weigh virtually anything about the offense as aggravating: "Prosecutors have argued, and jurors are free to find, that 'circumstances of the crime' constitutes an aggravating factor because the defendant killed the victim for some purportedly aggravating motive, such as money, or because the defendant killed the victim for no motive at all; because the defendant killed in cold blood, or in hot blood; because the defendant attempted to conceal his crime [footnote], or made no attempt to conceal it; because the defendant made the victim endure the terror of anticipating a violent death, or because the defendant killed without any warning; and because the defendant had a prior relationship with the victim, or because the victim was a complete stranger. Similarly, prosecutors have argued, and juries are free to find, that the age of the victim was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly; or that the method of killing was aggravating, because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire; or that the location of the killing was an aggravating factor, because the victim was killed in her own home, in a public bar, in a city park, or in a remote location. In short, because neither the California Legislature nor the California courts ever have articulated a limiting construction of this term, prosecutors have been permitted to use the 'circumstances of the crime' as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide—something this Court condemned in *Godfrey v. Georgia* (1980), 446 U.S. 420." (*Tuilaepa v. California* (1994) 512 U.S. 967, 986-988 [dis. opn. by Blackmun, J.,][citations omitted.])

aggravating factors; rather, the Court held that each factor in "weighing" states such as California need not have a numeric "weight" attached to them to meet constitutional standards. (*Id.* at 978-979.) Thus, the United States Supreme Court has not foreclosed the possibility that the Eighth and Fourteenth Amendments bar Penal Code section 190.3 from allowing juries to consider legally exculpatory factors to be aggravating. In this case, this Court should hold that the failure to demarcate which factors are aggravating and mitigating renders California's capital-sentencing scheme unreliable, arbitrary, and fundamentally unfair.

If jury instructions in a capital case do not sufficiently inform the jury of the legal weight of each factor, there is no way to ensure a death verdict passes constitutional muster. This is especially true because evidence of jurors' subjective-reasoning processes is normally inadmissible to impeach a verdict; so if a verdict was based on a weighing of factors in an impermissible manner, there is no way to access this information and give the defendant relief. (Evid. Code, § 1150.) The only way to avoid this dilemma is to ensure juries are adequately instructed on the legal significance of each factor they are to weigh. There is little cost to requiring such an instruction, and the benefit—a more reliable capital-sentencing scheme—clearly is worthwhile. The instructions as they currently stand run the risk of an arbitrary and capricious result, in violation of capital defendants' constitutional rights; providing clearer jury instructions is the remedy. Moreover, a revised version of CALJIC No. 8.85 to label each factor as either aggravating or mitigating would not be duplicative, as respondent claims (RB 254), because the jury has no other way to know which factors are aggravating and which are mitigating.

For the above reasons, this Court should reconsider its position with regard to labeling of aggravating and mitigating factors.

B. The Court Erred When It Refused Appellant's Modified Instructions Pertaining to the Catch-All Mitigating Factor

Likewise, the trial court should have delineated appellant's non-statutory mitigating factors. Appellant's proposed instruction on non-statutory mitigating factors constituted a pinpoint instruction on his theory of defense; appellant was entitled to that instruction, because it correctly stated the law, was supported by the evidence, and was not duplicative. (See *ante*, at pp. 160-163.) Moreover, the United States Supreme Court held in *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399 that a trial court errs if it does not allow the consideration of non-statutory mitigating factors. In appellant's case, the trial court denied the instructions that would have informed the jury of permissible non-statutory mitigating factors.

As respondent points out, the trial court did issue CALJIC No. 8.85, which instructed the jury that they could consider other circumstances that extenuate the gravity of the situation. (RB 258.) However, CALJIC No. 8.85 did not convey the non-statutory factors, including compassion and mercy, that did not pertain to circumstances of the crime and were therefore not covered by CALJIC No. 8.85. Furthermore, the compound structure of factor (k) renders the language pertaining to appellant's "character or record" appear as though it is subsidiary to the initial phrase "any other circumstance," which is the most salient language of factor (k). The structure of CALJIC No. 8.85(k) thus makes it appear as though appellant's character or record is a sub-category of "other circumstances" of the crime; the language "whether or not related to the offense" is not clear enough to

overcome the fact that the two discrete factors, the circumstances of the crime and appellant's character, are fused into one single factor.

The confusion that the amalgamation of two discrete factors causes is particularly invidious because evidence about a defendant's character or record generally comprises all or most of the penalty-phase evidence at a capital trial. This was the case in appellant's penalty trial. Without instructing the jury to consider the range of mitigating evidence presented at the penalty phase, appellant was denied full consideration of the mitigating evidence. Accordingly, the trial court should not have refused to issue appellant's proposed modification of CALJIC No. 8.85.

C. The Court Erred When It Refused to Instruct the Jury That It Should Not Limit Its Consideration of Mitigating Evidence to the Delineated Factors

A defendant's background comprises a significant portion of mitigating evidence presented at the penalty phase. CALJIC No. 8.85 permits the jury to consider the circumstances of the crime as well as a defendant's character and record, but it does not include language pertaining to a defendant's background, such as family dynamics, medical history, and upbringing. Appellant's proposed instruction No. 3 would have informed the jury that it must consider such evidence as well as any other mitigating evidence that is relevant to appellant's case. The instruction did not define mitigation too broadly (69 RT 8822-8825), but accurately conveyed the proper scope of mitigation. Accordingly, the court should not have rejected the instruction.

D. The Court Erred When It Refused To Instruct the Jury That It May Return a Life Sentence for Any Reason

The jurors should have been instructed that they are permitted to consider sympathy, empathy and compassion arising from the mitigating evidence, as in Defendant's Proposed Instruction No. 7. These instructions would not have been duplicative of factor (k) of CALJIC No. 8.85, as respondent contends (RB 260), because factor (k) only references the "circumstances" of the crime and the defendant's "character or record"; it does not give the jury license to consider any sympathy, empathy, or compassion they likely felt as a result of much of the mitigating evidence. Accordingly, the jurors may not have known they were permitted to return a verdict of life without the possibility of parole if they felt it was the right thing to do in appellant's case. Considering the extensive mitigating evidence that appellant put forth, the court should not have rejected Defendant's Proposed Instruction No. 7.

E. The Court Erred When It Instructed the Jury That It Need Not Be Unanimous in Finding Aggravating Factors

Capital defendants are entitled to greater constitutional protections than noncapital defendants, and they have a constitutional right to a fair and reliable capital-sentencing determination. It is crucial to the reliability of a capital-sentencing scheme that the verdict be supported by unanimity as to every element, special circumstance, and aggravating factor. This Court should therefore reconsider its rulings in *People v. Prieto* (2003) 30 Cal.4th 226, 275 and *People v. Taylor* (1990) 52 Cal.3d 719, 749, and find that capital defendants are entitled to have a jury find every aggravating factor unanimously.

F. The Court Erred When It Refused To Give a Lingering-Doubt Instruction at the Penalty Retrial

The trial court gave a lingering-doubt instruction at the penalty phase of the first trial (10 CT 2302), and it should have done so at the penalty retrial. As respondent points out, the court's rationale for not giving the lingering-doubt instruction to the penalty retrial jury was that appellant had already been found guilty of murder and the special circumstance had been found true. (RB 262.) However, this reasoning was inconsistent, because appellant had also been found guilty of murder by the time the first penalty jury was to deliberate on the proper sentence. There was no difference in the soundness of appellant's conviction between the time of the first penalty trial and the time of the penalty retrial.

The only difference then was that the first jury could have had a "lingering doubt" because it was composed of the same jurors that had found appellant guilty at trial; whereas the penalty retrial jury could only be said to have a "skepticism" as to the soundness of appellant's conviction. However, while the first jury was instructed that they were permitted to consider their lingering doubts, the penalty retrial jury was not. In appellant's case, the circumstances of Genny's death left much doubt as to appellant's participation, and the first penalty jury was in a better position to gauge the significance of lingering doubt as to his culpability. Because the second jury did not have the opportunity to form lingering doubts themselves, but were merely informed of appellant's conviction, and because the second jury was not given a lingering-doubt instruction, the penalty retrial jury was significantly more likely to issue a death sentence

than the first jury. Accordingly, the court should have issued the lingering-doubt instruction to both penalty juries, not just the first one.

Respondent claims that the court issued a modified lingering-doubt instruction. (RB 262.) However, the instruction respondent cites merely told the jurors that they were to "weigh" the "particular circumstances of the crime and the defendant's involvement," not that they were permitted to consider any skepticism or lingering doubt they had as to the circumstances and level of appellant's involvement in mitigation. (12 CT 2661.) This language in no way constituted an instruction on lingering doubt.

In appellant's case, the lingering-doubt instruction was crucial because this was a close case and lingering doubts regarding the circumstances of the crime could have weakened the case against him, and so the trial court should have issued the instruction to the penalty retrial jury as it did for the first penalty-phase jury.

G. The Court Erred When It Amended CALJIC No. 8.88 To Instruct the Jury That It Must Return a Death Verdict If Aggravation So Substantially Outweighs Mitigation That Death Is Warranted

The trial court's amended version of CALJIC No. 8.88 impermissibly created a mandate to impose the death sentence under certain circumstances. Respondent's arguments that the phrase added to CALJIC No. 8.88, "instead of life without possibility of parole," undermines the mandatory language of "shall" is unpersuasive. (RB 264.) Likewise, appellant does not argue that the modified instruction told the jury to weigh "mechanically" the aggravating and mitigating factors to yield a particular result, rather appellant asserts that the jury was instructed that a death sentence was mandatory if the factors weigh out in a particular way. The

amended instruction was not merely "confusing" as to how to weigh aggravating and mitigating factors; it was constitutionally flawed because it established a mandatory verdict of death after a particular set of findings, which is categorically impermissible. Thus, the court erred in instructing the jurors with its amended CALJIC No. 8.88.

H. The Court Erred When It Gave CALJIC Nos. 8.85 and 8.88 Despite Their Fundamental Flaws

The serious flaws in CALJIC Nos. 8.85 and 8.88 make California's capital-sentencing scheme unreliable and inconsistent. Capital defendants must be afforded more procedural protections, not fewer, than other criminal defendants. Although the capital-sentencing determination is concededly normative, the discretion given the jury should not be unduly expanded in a way that allows for freakish and arbitrary results. Jury instructions must provide specific parameters to guide jurors' discretion, especially at the penalty phase of a capital case where every factor is crucial. The excessive breadth of factor (a), the failure to impose any burden of proof, the failure to instruct on the presumption of life, the impermissibly vague penalty-phase determination, and the disparity between capital and non-capital sentencing standards are all serious flaws in the capital-sentencing scheme that weigh heavily in favor of execution and circumnavigate procedural safeguards. This Court is urged to revisit its precedents with respect to these flawed jury instructions.

I. Appellant Is Entitled to a New Trial

Appellant presented significant evidence that he did not participate, or participated only minimally, in the offense with which he was charged. In addition, appellant had a nonviolent character and a life-long history of

law-abiding conduct. The jury should have been able to give full consideration to every relevant mitigating factor, but the series of penalty-phase instructions impeded the jury's ability to do so. None of the errors were harmless, and appellant's death sentence must be vacated.

XIX.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO MODIFY THE DEATH SENTENCE WHEN IT DENIED THE *DILLON* MOTION TO MODIFY, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS AND RESULTING IN REVERSIBLE ERROR

Appellant's death sentence is disproportionate to his individual culpability. He had neither a criminal record nor a history of violence. In addition, the evidence of appellant's participation in perpetrating the offense or of his intent to kill is flimsy. In contending that the death sentence is not disproportionate, respondent attributes to appellant every act committed by the perpetrator. (RB 271.) Respondent's interpretation of the events lacks support in the record. The evidence that appellant committed some of the criminal acts is weak. Evidence that appellant committed all of those acts does not exist.

Because the death sentence is disproportionate, the trial court erred in denying the automatic and *Dillon* motions to modify the sentence. Moreover, the disproportionate death sentence infringes appellant's Eighth and Fourteenth Amendment rights.

XX.

CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR TRIAL AND A RELIABLE PENALTY RETRIAL

Although appellant is not entitled to a perfect trial, he is entitled to a fair trial. Appellant did not receive a fair trial at either the guilt phase or the penalty retrial. Reversal is required unless the cumulative effect of all the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15, 24.) Appellant never received a fair trial because of the plethora of synergistic errors. In the Opening Brief, appellant explained how the panoply of errors combined to deprive him a fair trial. (AOB 332-335.) Notably, respondent made no attempt to rebut appellant's analysis. (ARB 271-272.) This is not a case in which the errors were minor or unrelated and thus unlikely to exceed the sum of their parts. The combination of errors at the first trial and penalty retrial worked together to infringe appellant's rights to a fair trial and reliable penalty determination.

XXI.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

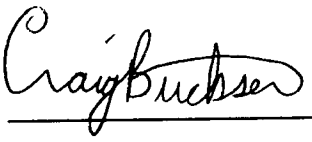
Appellant requests this Court to reconsider its precedents and conclude that capital punishment violates international law and is unconstitutional. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

CONCLUSION

For the foregoing reasons, the conviction, special circumstance finding, and death judgment must be reversed.

Dated: November 12, 2009

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



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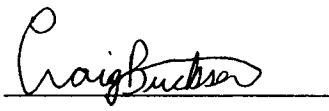
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, CRAIG BUCKSER, am the Deputy State Public Defender assigned to represent appellant IVAN JOE GONZALES in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 47,910 words in length.

DATED: November 12, 2009



CRAIG BUCKSER
Attorney for Appellant

DECLARATION OF SERVICE

Case Name: **PEOPLE v. IVAN JOE GONZALES**
Case Number: **Supreme Court No. Crim. S067353**

I, SAUNDRA ALVAREZ, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 801 K Street, Suite 1100, Sacramento, California, 95814; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF and
APPLICATION FOR LEAVE TO FILE APPELLANT'S REPLY BRIEF EXCEEDING 47,600 WORDS

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

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Each said envelope was then, on November 12, 2009, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on November 12, 2009, in the City and County of Sacramento, California.

SAUNDRA ALVAREZ