S072161

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Kings County Superior Court No. 97CM2167
v.	)	
THOMAS J. POTTS,	)	
Defendant and Appellant.	)	

APPELLANT POTTS'S REPLY BRIEF

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

HONORABLE LOUIS BISSIG, JUDGE

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS J. POTTS, Defendant and Appellant.	No. S055856 Kings County Superior Court No. 97CM2167

APPELLANT POTTS'S REPLY BRIEF

INTRODUCTION

At appellant's trial, the prosecution presented a weak but arguably sufficient case that appellant was the perpetrator of serious crimes committed against Fred and Shirley Jenks, as well as a theft of property belonging to Viola Bettencourt. Its attempts to portray the homicides as first-degree murder, however, and the taking of their property after their deaths as robbery, were based entirely on speculation. The jury's verdicts of guilt on those charges can be understood only with reference to a series of errors at trial, some of which generally oriented them towards convicting, and some of which facilitated a robbery-murder verdict in particular.

Respondent presents this case as cut and dried. On the question of the sufficiency of the evidence, respondent is able to do so only by ignoring most of appellant's analysis. Thus, the prosecution had two premeditation theories,

one based on plans supposedly made in advance of the crimes, one based on premeditated, deliberate decision being made after appellant encountered the Jenkses. Respondent tacitly abandons the first but propounds the other without even attempting to show that a reasonable juror could find that the evidence rendered unreasonable a hypothesis about an spontaneous explosion of violence. Regarding its alternate robbery-murder theory, very little of the evidence respondent marshals actually bears on the only issue: whether appellant intended to steal when he used force against the Jenkses, or whether he decided to steal in the aftermath of the attacks

As for the remaining claims of error, respondent's brief analyzes appellant's claims singly, without regard to an unusual degree of synergy between the various contested actions of the trial court and a prosecutor. While it is more difficult to analyze the appellate claims in the context of their interaction, i.e., with awareness of the forest while examining each tree, this Court must do so to avoid reaching an incorrect result. This is more than just analyzing a cumulative-error claim. It means considering each individual contention in light of the broader picture. Towards this end, appellant respectfully suggests that the Court might find it useful to reread the Introduction and Summary of Argument in the opening brief. (AOB 31–35.) In any event, considering the questionable events at trial in isolation would impose an artificial construct on a trial that appellant's jury experienced as an integral whole.

Before turning to the arguments, appellant wishes to reply briefly to parts of respondent's statements of the case and facts.

STATEMENT OF THE CASE

Respondent erroneously states that the trial court sentenced appellant to a determinate term of two years for an enhancement "associated with counts one and two," pursuant to section 667.9, subdivision (a). (RB 2.) In fact, there was a two-year enhancement on each count, for a total of four years. (CT

10: 2929, 2935.) The validity of this portion of the sentence is challenged in Argument X.

STATEMENT OF FACTS

Guilt Phase Testimony

A few erroneous details about the crime scene can color one's view of what happened. In describing Fred Jenks's body, respondent states, "Internal bleeding and fractures to Mr. Jenks's ribs were consistent with the killer stomping on him after he was lying face down." (RB 6.) The actual testimony, however, was that there was no bleeding, that the victim was dead when the fractures occurred, and that they could have been caused by an attempt at resuscitation, someone stepping on the body, a blow to the area, *or* someone stomping on the body. (RT 6: 1414.)

At one point respondent describes the head wounds that caused Fred Jenks to be unconscious and near death before he was stabbed as being on the back of the head, which suggests an attack from behind. However, there were such wounds on the top of the head and the face as well, consistent with the possibility that a conversation became so heated that it turned into a lethal assault. (Compare RB 6 with RB 5 and RT 6: 1398–1401.)

Respondent implies that Diana Williams testified that appellant's Nike shoes, which he supposedly wore at the crime scene, disappeared around the time of the crimes. (RB 9.) She actually had not seen them for over two weeks, possibly a month. (RT 7: 1594.)

Respondent asserts, "the defense vigorously attacked the credibility of the [prosecution] witnesses and the integrity of the crime scene" and acknowledges the lack of evidence in appellant's apartment linking him to the offenses and the lack of blood on his bicycle. (RB 12–13.) While counsel did use cross-examination to bring out some of the limitations of the prosecution

case, appellant disagrees that there was a vigorous defense. In addition, respondent omits much of the evidence that made the prosecution case a relatively thin one. While it is appropriate to recite only the evidence in support of the verdict in responding to a sufficiency-of-the-evidence claim, the harmless-error inquiries which both parties ask of this Court require consideration of the entire record.[1]

Respondent thus notes appellant's having a scratch on his arm and one on his neck when he was arrested several days after the killings but omits the absence of any scratches on appellant's arm when he was first interrogated. (RT 10: 2106.) Respondent similarly omits lead investigator Darryl Walker's suspiciously contradictory statements about noticing a tiny blood droplet on appellant's dark-tinted eyeglass lens;[2] the absence of at least 200 items of jewelry from the Jenks house, compared to the two pieces that appellant pawned,[3] and the failure to examine the recovered items for evidence that someone other than appellant may have handled them (and given them to appellant);[4] appellant's pattern of pawning other items that appeared not to be his and the absence of any evidence they were acquired in assaultive crimes;[5] the weakness of the evidence that the footprints in the house came from

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[1]See discussion and authorities at pages 187 et seq., below.

[2]RT 6: 1277, 1313 (he took the glasses to look for trace evidence, which explained his noticing the speck), 1313–1314 (he took them to examine appellant's eyes, which explained a slip in which he said he was about to return them to appellant and then noticed the spot), 1314 (pinhead-sized speck, dark-tinted lens).

[3]See AOB 14 and cited portions of the record.

[4]RT 8: 1830–1831.

[5]RT 10: 2144–2146, 2159.

appellant, or even that the brand of the shoes was Nike;[6] appellant's considerable cooperation with the police;[7] and many other significant gaps in the prosecution case and omissions in a police investigation which was aimed at appellant from the beginning.[8]

If this Court reaches a harmless-error inquiry, the totality of the evidentiary picture will need to be considered.

Penalty Phase Testimony

Respondent double-counts the incident involving Carol Tonge, noting both a statutory rape among appellant's prior convictions and Tonge's testimony that he raped her. (RB 14–15.) The prior was based on the Tonge incident. (See Ex. 90, at CT 10: 2826.)

As to Diane Hill's testimony about being sexually assaulted, respondent implies that appellant threatened her afterwards: "Hill did not go to the police, she was too afraid for herself and afraid for [appellant's wife] Lori." (RB 16, citing RT 13: 2584–2585.) Respondent misstates the testimony. Hill said only that she was afraid her husband would kill appellant if his actions became known and that she did not want either herself or Lori to experience the consequences of such a reaction. (RT 13: 2582–2585.)

Respondent oversimplifies the equivocal evidence about whether Shirley Jenks was sexually assaulted around the time of her death or had engaged in consensual activity with her husband. (Although they were older adults, a family member described them as "[l]ike love birds." (RT 13: 2707.)) Respondent also overlooks the striking absence of qualifications of the out-of-

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[6]See AOB 90–91, as well as AOB 9, 15.

[7]See AOB 17.

[8]See AOB 17–20.

state expert who was willing to go further in this regard than the prosecution's more qualified local expert. (Compare RB 16–17 with AOB 21–22 and cited portions of the record.) Contrary to respondent's claim that the former found "deep tearing of tissue,"[9] he said nothing about the depth of the "two little tears, not very long" that an examination with a magnifying instrument disclosed. (RT 13: 2682; cf. 2677–2678 [explaining the difference between an abrasion and a tear: any tear affects cells "deeper" than the uppermost layer of skin cells].)

Respondent's summary of the mitigation evidence treats psychiatrist Tuason's diagnosis of paranoid schizophrenia as based only on a record of a prior diagnosis noted in appellant's chart and appellant's report of hearing voices again. (RB 19.) In fact, Dr. Tuason conducted a full psychiatric assessment before making his own diagnosis, which he continued to stand by at trial, even after agreeing on cross-examination that there were other possibilities. (RT 13: 2721, 2793, 2797–2798.)

Respondent omits the testimony of the Jenkses' son-in-law, Clarence Washington, that the Jenkses had high praise for appellant's work, were happy to see him, and liked him a lot. (RT 12: 2636–2637.) Respondent's summary of the mitigation testimony of Lula McCowan omits the challenges appellant faced in his upbringing, some particulars of his good relationships with family members, and especially his return to Hanford from Los Angeles in an attempt to stay out of trouble. (See AOB 28–29.)

While the crimes were gruesome and the prosecution presented further aggravation, a life verdict was certainly possible, and any summary informing a harmless-error inquiry must include these facts to be accurate and complete.

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[9]RB 17.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THERE WAS A ROBBERY OR THAT THE MURDERS WERE PRECEDED BY PREMEDITATION AND DELIBERATION[1]

A. Standard of Review: This Court Must Decide Whether Jurors Could Rationally Exclude All Hypotheses Consistent with a More Favorable Verdict

The standard of review is critical to resolution of this claim. The parties agree both that (a) evidence is sufficient only if reasonable jurors could have been convinced beyond a reasonable doubt, by "evidence that is reasonable, credible, and of solid value"[2] and (b) the reviewing court need not be so convinced. However, they disagree about the meaning and application of these propositions.

1. A Jury Must Acquit If the Evidence Does Not Exclude a Reasonable Hypothesis Inconsistent with Guilt

Respondent fails to acknowledge that application of the reasonable-doubt standard required the jury to acquit appellant of first-degree murder, as well as of robbery, and to find the related special circumstance untrue, "if it [found] that circumstantial evidence is susceptible of two interpretations, one

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[1]In the opening brief, appellant's argument heading referred only to his challenge to the sufficiency of the evidence on the murder counts. (AOB 36.) In the text of the argument, however, appellant made it clear that he was attacking not only the first-degree murder convictions but the robbery conviction and the robbery-murder special circumstance as well. (AOB 37, 44–45, 62.) Respondent explicitly acknowledges and responds to the special-circumstance contention (RB 20, 26) and, in doing so, argues that there was sufficient evidence to show that appellant committed a robbery (RB 27–28).

[2]*People v. Kipp* (2001) 26 Cal.4th 1100, 1128, quoted at RB 20.

of which suggests guilt and the other innocence." (*People v. Bean* (1988) 46 Cal.3d 919, 932.) Respondent further errs by suggesting that a reviewing court is somehow absolved from determining whether the evidence could have permitted the jury to reach that conclusion. Clearly, "[w]here, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings . . . ." (*People v. Earp* (1999) 20 Cal.4th 826, 887.) Thus this Court must determine if a reasonable jury could have decided that "that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state)." (CALCRIM No. 225.)

2. The Jury's Latitude to Find Facts Does Not Insulate Its Reasoning About Competing Hypotheses From Review

a. The Jury Decides Matters of Weight and Credibility

Respondent relies on *People v. Earp*, *supra*, 20 Cal.4th 826. In doing so, respondent confuses the fact-finder's role in resolving the credibility and weight of evidence with its role in deciding whether the facts which it could reasonably believe exclude reasonable hypotheses inconsistent with guilt. In the first area it has broad latitude; in the second it has little.

People v. Earp only clarifies that an appellate court's ". . . 'opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (20 Cal.4th at pp. 887–888.) This part of the formulation in *People v. Earp* is true but incomplete. It is clearly aimed at emphasizing that "this inquiry [for constitutional sufficiency] does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) Evidence could be reasonably

reconciled with a more favorable finding because of issues of the credibility and weight of evidence, matters beyond an appellate court's purview. (See *People v. Bean, supra*, 46 Cal.3d 919, 933 [reviewing a circumstantial case, "[a]lthough defendant offered an explanation for his fingerprint on the window screen and palm print on the sink counter . . . , the jury disbelieved him"].) For the jury is the body "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." (*Jackson v. Virginia, supra*, 443 U.S. 307, 319.) This is why, on review for sufficiency, the evidence is considered in the light most favorable to the prosecution. (*Ibid.*) So, for example, evidence could be reasonably reconciled with a different finding if the defense presented evidence which, if believed, would negate some element of the offense. This is not, however, a reason to reverse, if there was contrary evidence in the record, which the jury also could have reasonably believed.

b. After Indulging Reasonable Inferences Which the Jury Could Have Drawn About Disputed Evidence, this Court Must Still Determine If the Facts Thus Found Reasonably Excluded Hypotheses Consistent with Innocence

Although respondent also receives the benefit of reasonable inferences which the jury might have drawn, in a circumstantial case this has to have its limits, or verdicts based on insufficient evidence would be beyond meaningful review. First, "[a]n inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts" (Evid. Code § 600, subd. (b)), as opposed to "imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Coddington* (2000) 23 Cal.4th 529, 599, quoting *People v. Morris* (1988) 46 Cal.3d 1, 21.) Second, for an element of the crime to be established beyond a reasonable doubt, each fact which is

essential to complete a chain of inferences relied on to establish that element must itself be established beyond a reasonable doubt. (*People v. Watson* (1956) 46 Cal.2d 818, 830–831; see also CALCRIM No. 224.) Finally, the appellate court cannot ignore the rule that a jury is not permitted to base a guilty verdict on a reasonable inference from circumstantial evidence when there exists a different reasonable inference, drawn from the same facts (derived from viewing the evidence most favorably to the prosecution), which is inconsistent with the truth of the element sought to be proven. (*People v. Bean, supra*, 46 Cal.3d 919, 932.)

A reasonable doubt necessarily exists if the known facts are consistent with innocence. (See *People v. Hatchett* (1944) 63 Cal.App.2d 144, 154–155, cited with approval in *People v. Bender* (1945) 27 Cal.2d 164, 175–176.) The point of indulging reasonable inferences on review cannot be to ignore this truth. Nor can it be to take away the due-process right to appellate review of whether a jury could have reached its conclusion rationally, and consistent with the law. (*Jackson v. Virginia, supra*, 443 U.S. 307, 319.) Rather, its sole purpose is to prevent a reviewing court from undermining the factfinder's role. (*Ibid.*) Thus, for example, assuming lead investigator Darryl Walker's report of Oscar Galloway's purported statement about taking appellant downtown and to a casino was "reasonable, credible, and of solid value,"[3] the fact that jurors might have inferred from the circumstances that it was not reliable enough to take into account[4] would *not* be part of this Court's determination of whether there were reasonable hypotheses inconsistent with guilt. Rather, the Court might note reasons why jurors could have reasonably credited the

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[3]*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.

[4]See AOB 196, 200.

reported statement, and the fact that they could also have reasonably disregarded it as unreliable would be irrelevant on review for sufficiency.

The distinction, then, is between (a) indulging verdict-favoring inferences regarding the credibility and reliability of evidence underlying factual determinations, and (b) permitting a jury to find guilt by choosing among competing reasonable inferences as to what the facts—thus determined—imply and avoid the rule that a reasonable inference inconsistent with guilt requires acquittal. Respondent avoids this distinction. Were this Court to do the same, it would abdicate its duty to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319, emphasis omitted.) Appellant, whose life is at stake, is entitled to more.

B. The Evidence of Appellant's Mental State Was Insufficient to Support the Verdicts

1. There Was Insufficient Evidence to Support a Theory of Premeditation and Deliberation

The prosecution propounded three first-degree murder theories, including two involving premeditation and deliberation.[5] To prevail on either of those, it had to prove premeditation beyond a reasonable doubt, i.e., "that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation] . . . ." (*People v. Anderson* (1968)70 Cal.2d 15, 27.)

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[5]There were three legal theories, but they involved only two factual scenarios. The concept that appellant went to the Jenks residence to murder and rob them would, if proven, have supported first-degree verdicts on both a robbery-murder and a premeditation-and-deliberation basis. Premeditation and deliberation mid-attack were also supposedly shown by the claimed sharpening of the longer knife during the attack on Fred.

And it had to prove deliberation. "A killing is deliberate . . . if the killer acted 'as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design.'" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, citations and emphasis omitted, bracketed insert in original.)

a. The Evidence Did Not Eliminate the Reasonable Possibility of a Spontaneous, Rash Act

The first prosecution theory regarding premeditation and deliberation, asserted in argument but never supported by reference to evidence, was that appellant planned the homicides before arriving on the scene. Appellant's opening brief explained why there was insufficient evidence to support this theory. (AOB 46–55.) Respondent, while stating in passing that "various theories can be argued about when appellant decided he was going to rob and kill the Jenks," does not try to marshal evidence in support of a position that reasonable jurors could conclude, beyond a reasonable doubt, that appellant planned the homicides in advance. (RB 25.) Evidently abandoning that point, respondent propounds the prosecution's second premeditation/deliberation theory, one that relies on the principle that "cold, calculated judgment may be arrived at quickly." (RB 22, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Thus respondent highlights what it sees as evidence that appellant at least premeditated and deliberated immediately before, or even during, the fatal assaults.

Of the three factors typically used to evaluate premeditation and deliberation, evidence of planning is the first and, if strong enough, the one which can sustain a case by itself. (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) Appellant has pointed out that there was a complete evidentiary void

regarding planning,[6] and respondent does not disagree. Respondent does, however, argue that there was strong enough evidence of manner and motive to eliminate non-premeditation hypotheses.

(1) The Manner of the Attacks Did Not Show Premeditation and Deliberation

First, notes respondent, the number and nature of the wounds inflicted on Fred Jenks showed the perpetrator's intent to kill. (RB 22.) This is indisputable. However, so is the fact that an intent to kill is consistent with murder of either degree; the issue was presence or absence of premeditation and deliberation. (§§ 187–189.) Respondent does not attempt to answer appellant's argument that the circumstances of the crimes and nature of the attacks were actually more consistent with spontaneity and fury than with premeditation and deliberation.[7] This is not to say that the Court need so find in order to uphold appellant's claim, but only that the manner of the attacks was not "so particular and exacting"[8] as to help render unreasonable the hypotheses that premeditation, deliberation, or both were absent.

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[6]AOB 48.

[7]See AOB 49–52, summarizing the evidence regarding the weakness of the need for funds as a motive to kill; appellant's recent history of non-violent thefts; the lack of any evidence of desperation in Diana Williams's account of appellant's behavior; appellant's interest in having his source of earnings remain alive, not be cut off by death; appellant's knowledge that he could obtain very little money from pawning jewelry; the dollar bills sticking out of Fred's pocket; the difficulty, gruesomeness, and risk of detection (because of the victims' likely screams and shouts and getting blood on the perpetrator) of the manner of the killings, and the use of objects available with no planning or preparation; the hurried search that left $113 in cash in a desk drawer that had been opened; and appellant's act of pawning the jewelry the next day in the small town where he lived and the killings took place.

[8]*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.

Respondent next claims that after Fred Jenks suffered the hatchet/hammer wounds, the perpetrator obtained a paring knife from the kitchen to hasten Fred's death. That instrument being too short to reach vital organs, he then sharpened a longer knife and used it. These acts showed calculation. (RB 22, 25.) If true, this scenario would tend to show there was *time* to premeditate and deliberate—at least mid-homicide—and a reasonable juror arguably could infer the cooler rationality which those acts require. However, respondent cites no evidence in support of this theory.[9] Because the prosecution advanced this narrative at trial, appellant has analyzed the evidence in detail and showed several reasons why a more reasonable hypothesis was that the filet knife—already of sharped-tipped and narrow design (i.e., no better for stabbing after receiving a keener edge than before)—needed to be sharpened for the perpetrator's post-mortem disfigurement of Shirley's body with shallow incisions across the skin of her throat.[10, 11] (AOB 55–60.) Respondent makes no attempt to show that

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[9]There are no record citations in this part of respondent's argument, and no evidentiary facts mentioned, only respondent's characterization of appellant's behavior. (RB 22.) Respondent's statement of facts mentions the finding of a knife sharpener, a paring knife, and a bloody dish rag in the sink, and a boning knife in the room where Shirley Jenks was found, all of which were consistent with the disfigurement scenario discussed next. (RB 5.)

[10]Respondent advances a different, and unsupported, interpretation of the throat wounds. Respondent refers to appellant's supposed "act of deeply cutting the front of her neck from ear to ear," as another manifestation of appellant's intent to kill, but respondent again fails to cite the record. (RB 23.) Nor does respondent's statement of facts attempt to support the claim that the wounds were deep. There it does, however, cite RT 7: 1445 in regards to the incisions. (RB 6.) In the cited portion of the record, the pathologist notes that neither of the two wounds reached the sheath surrounding the carotid artery, although one did enter the larynx. (RT 7: 1445; see also RT 5: 1107; 7: 1442,

(continued...)

reasonable jurors could have found this competing hypothesis to be unreasonable, apparently relying on its stance that jurors' presumed findings

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[10](...continued)
1448.) The pathologist flatly describes the wounds as post-mortem, in contrast to respondent's statement that this "may" have been the case. (RB 6.)

Respondent posits that there was no evidence that the perpetrator was aware that Shirley was already dying or dead. (RB 23.) Respondent is wrong. Shirley was dead. (RT 7: 1445.) Respondent suggests no way that this fact could escape a person dealing with a body that was therefore not moving, breathing, or moaning. It had already received four chop wounds to the head, followed by seven stab wounds to the chest that themselves were delivered near her death or shortly after. (RT 7: 1441–1442, 1445–1448.) The perpetrator could not have failed to know that he was making the throat incisions on a corpse.

[11]The facts favoring the disfigurement theory are (a) the absence of definitive evidence on the long-knife theory from the pathologist, (b) the fact that the paring knife could penetrate more than four inches, even without any compression of the body from the force of the blows, (c) Fred—for whom the longer knife was supposedly needed—being dead or nearly so when *any* stabbing *began*, obviating any need to switch to a longer knife or continue the attack after retreating to obtain and sharpen it, (d) the inconsistency of a scenario where the assailant is too impatient to let an expiring victim die and yet calm and patient enough to select and sharpen another weapon, (e) the failure to provide evidence of Fred's DNA on the longer knife (or explain its absence), and (f) as noted above, the weakness of a theory about sharpening the knife for stabbing, when sharpening its edge could have not have improved its utility for that purpose, but only for making the post-mortem slicing wounds on Shirley. (See AOB 55–60 for details.)

The prosecution's theory also implicitly had Shirley doing nothing while the perpetrator paused in the attack on her husband to select and sharpen the knife. But a version that would have him subduing her before going back to Fred makes it even more likely that Fred would have expired before the presumed return with the filet knife. In sum, the prosecution hypothesis that Fred's size led to use of the filet knife—rather than being the only reasonable hypothesis—was far less reasonable than that it was sharpened to be used on Shirley's throat after both victims were dead.

on such matters are unreviewable. But the jurors were not permitted to infer premeditation from the two-knives-to-kill theory, unless they could reasonably reject competing explanations of the use of the sharpened filet knife.[12] (*People v. Watson*, *supra*, 46 Cal.2d 818, 830–831 [a fact essential to a chain of circumstances that establish guilt must itself must be proved beyond a reasonable doubt].) Appellant's theory, however, is reasonable—without relying on the jury's disbelieving any evidence that could have favored the prosecution. This alone disqualifies the two-knives theory as a basis for upholding a first-degree finding. Moreover, respondent's hypothesis is mere speculation, and a finding on an element of the offense cannot be "based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Coddington*, *supra*, 23 Cal.4th 529, 599.)

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[12]In the opening brief, appellant noted that the lack of evidence that the filet knife appeared to have been recently sharpened was troubling, yet acknowledged that the jury could reasonably accept the theory that the attacker left the paring knife in the sink after using it, found the filet knife, and sharpened it with the sharpener, which was also found in the sink with blood on it. (AOB 58–59.)

The mere absence of evidence that should have been available did not give rise to an alternative reasonable hypothesis regarding two knives and a sharpener. This is an example of where it is appropriate to defer to a jury assumed to have interpreted the evidence in a manner favoring the prosecution. Such deference, and that assumption, would leave the sharpening-the-second-knife inference available to support the verdict (if it did so). This is in contrast to the prosecution's hypothesis about *the reason that the second knife was sharpened*, i.e., that the attacker felt Fred was dying too slowly from the hatchet and knife wounds already inflicted, which both is not supported by the evidence and competes with an inference that is at least as reasonable

(2) There Was No Motive Evidence Showing Premeditation and Deliberation

Continuing, respondent asserts that the use of means that would kill shows a motive, avoiding identification, and that the post-homicide theft shows a further motive. (RB 25.) These are certainly possibilities. They are guesses, however; they do not rise even to the level of inferences regarding what was likely true. (See Evid. Code § 600, subd. (b) [defining inference as "a deduction of fact that may logically and reasonably be drawn from another fact"].) They could be made in every homicide where there was no real evidence about what led to the homicides or when an intent to steal was formed. When this Court spoke of evidence of motive that could be combined with evidence of planning activity or a method of execution that showed a preconceived design, it did not mean bootstrapping evidence of motive from the manner of the assault and thus double-counting the manner factor. Rather, it described "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim." (*People v. Anderson*, *supra*, 70 Cal.2d 15, 27, emphasis omitted.) Such "facts" are not an intent to kill, nor the generic classification of the crime as one where a further (and far less serious) offense was committed afterwards and could thus have theoretically motivated the homicide. A juror rationally following the law could not have found that the evidence excluded the triggers for killing in a spontaneous and undeliberated fashion propounded in appellant's opening brief. Respondent does not attempt to argue otherwise. Rather, respondent relies on its belief that reasonable inferences leading to a conclusion of guilt are enough, without recognizing that the existence of reasonable competing inferences foreclosed the elimination of reasonable doubts. (See RB 23, last paragraph.)

In sum, respondent argues that the evidence eliminated all reasonable doubts as to appellant's mental state because it showed an intent to kill, a mid-attack pause to sharpen a better weapon, and the motives of eliminating interference with, and witnesses to, a theft. But intent to kill does not even distinguish murder from voluntary manslaughter, much less equate to a cool, considered balancing of the considerations for and against the killing. A motive that could be similarly guessed at in every case where the defendant ultimately took something after a homicide does little to eliminate doubts as to what happened. Respondent posits only a manner of killing that ultimately became deliberate, but the factual premise is not one that was proved true even by a preponderance standard, much less "to a near certainty." (*People v. Hall* (1964) 62 Cal.2d 104, 112; see also *People v. Watson*, *supra*, 46 Cal.2d 818, 830–831[circumstances relied on to prove guilt must themselves be proved beyond a reasonable doubt].)

b. *People v. Perez* Should Not be Extended to these Facts

Respondent relies heavily on *People v. Perez* (1992) 2 Cal.4th 1117. (RB 24–25.) Respondent's description of the facts supporting premeditation and deliberation in *Perez* omits critical evidence of motive that was not present here. There was unambiguous evidence that Perez had entered the house of the victim surreptitiously and had surprised her, perhaps unintentionally. Given that fact, along with certain other evidence, the jury could have reasonably inferred that, "once confronted by [the victim], who knew him and could identify him, he determined to kill her to avoid identification." (*Id.* at p. 1126.) Here surreptitious entry and an unanticipated confrontation seem extremely unlikely, since the evidence, as the prosecutor argued, pointed towards the events having occurred early on a Monday evening at the home of

the elderly couple.[13] (RT 11: 2381–2382.) Either the homicides were planned from the beginning, which would have been a highly improbable way for appellant or any other thief to decide to obtain some property to pawn, for reasons stated in the opening brief[14] and not disputed by respondent, or something happened other than an unanticipated need to eliminate witnesses.

Even a slight difference between this case and *People v. Perez* makes *Perez* distinguishable. For that case pushed deference to the jury to its outer limit. As a court considering a federal habeas petition in that non-capital case noted, "this evidence certainly approaches the constitutional minimum . . . ." (*Perez v. Borg* (9th Cir. 1994) 1994 WL 497339, *3.) Scholars commenting on the case saw it as over that line. "The decision in *Perez* reveals a[n] . . . effort to conjure up premeditation and deliberation from minimal facts." (Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2002) 36 U.S.F. L.Rev. 261, 318; see also Crump, *"Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions* (2007) 109 W.Va. L. Rev. 257, 284 ["*People v. Perez* . . . bears a striking resemblance to [*People v.*] *Anderson*[, *supra*, 70 Cal.2d 15] factually, but the result is different"].) The case should not be extended beyond its facts.

This is particularly true because the opinion seems to illustrate the flawed reasoning propounded now by respondent. The *Perez* opinion correctly

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[13]If appellant was the perpetrator, he should have known the likelihood that the couple would be home. In any event, he either was let in by Fred Jenks, as the prosecutor argued (RT 11: 2411), or he entered through an unlocked front door—which again would have let him know that the house was occupied.

[14]AOB 47–52.

stated the applicable principles. "[T]he relevant question on appeal is . . . whether any rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated the murder." (*Id* at p. 1127.) It could not have been so persuaded "if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence . . ."; rather, in those circumstances "it is the duty of the jury to acquit . . . ." (*Id.* at p. 1124.) And yet the majority opinion never analyzed whether the jury could have justifiably found that there was no reasonable interpretation inconsistent with a premeditation and deliberation theory; it only explained why the latter theory was reasonable. (*Id.* at pp. 1126–1128; cf. *id.* at p. 1141 (dis. opn. of Mosk, J.).) Thus the opinion took too far, as respondent does now, the principle that reversal is not required simply because the reviewing court could view the evidence differently and, in doing so, discern circumstances that might also be reasonably reconciled with a contrary finding. (*Id.* at p. 1124.) It seemed to take it to mean not only that conflicts in the evidence should be resolved in favor of the prosecution, but that there should be no review of whether, having resolved conflicts in that manner, rational jurors could have eliminated reasonable hypotheses inconsistent with guilt.

c. Premeditation and Deliberation Were Not Shown

It is undisputed that, in general, a sufficient circumstantial case for premeditation and deliberation involves some combination of facts showing planning or acts of preparation, "facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim," and/or "facts about the nature of the killing from which the jury could infer that the *manner* of the killing was so particular and

exacting that the defendant must have intentionally killed according to a 'preconceived design' . . . ."[15] (*People v. Anderson, supra*, 70 Cal.2d 15, 27; see also *People v. Jennings* (2010) 50 Cal.4th 616, 645–646.) While it is also undisputed that the *Anderson* framework is an aid to analysis, not a rigid formula,[16] respondent suggests no reason for casting it aside here, and respondent in fact seeks to apply it. (RB 21–25.) But, as to planning, respondent points to no *evidence* of that factor, just the possibility that appellant knew there was jewelry at the Jenks residence and decided he would rob and/or kill to get it. Moreover, if appellant killed the Jenkses, he did it with a tool that he usually carried with him and a kitchen knife found a few feet away, not a weapon that he acquired for the purpose. What respondent says about the factor of motive is similarly speculative; respondent's claims about what the jury could have inferred boil down to "appellant could have wanted" to do this or that. And respondent has no answer to the fact that the manner of the killings was the opposite of "so particular and exacting" that it showed the implementation of a "preconceived design." (*People v. Anderson, supra*, 70 Cal.2d at p. 27; see AOB 51–52 .)

2. There was Insufficient Evidence to Support an Intent-to-Steal Theory

Alternatively, to prevail on a felony-murder theory of the degree of the

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[15]This Court further explained that first-degree verdicts typically were sustained when there was evidence of all three types, or when there was very strong evidence of planning, or when evidence of motive was combined with evidence from one of the other categories in a manner that "would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation] . . . ." (*People v. Anderson, supra*, 70 Cal.2d at p. 27)

[16]*People v. Jurado* (2006) 38 Cal.4th 72, 118–119.

murder, as well as on the robbery-murder special circumstance and the charge of robbery itself, the prosecution needed to prove that a robbery occurred. It is undisputed that, for any of these purposes, the application of force against the victims had to have been motivated by the intent to steal. If, in contrast, the decision to take their property was made after they were assaulted, there was no robbery.[17] The record is bare of any evidence on this score. (See AOB 46–51.)

Respondent disagrees, but none of the evidence it marshals even helps answer the question of when the intent to steal arose, much less would have been sufficient to satisfy a jury that understood and applied the reasonable-doubt standard. Respondent begins by asserting that appellant had worked in the house and was thus aware of its layout "and the Jenks' possessions." (RB 27.) This abstract inference—if it is not taken to highly speculative lengths—is unimpressive, because the evidence did not suggest that appellant knew that Shirley Jenks had valuable jewelry or where to find it. Even that would help little in discerning whether appellant approached Fred Jenks asking for help or seeking access to the jewelry.

Moreover, the lead investigator testified that a quantity of "the good stuff" among Shirley Jenks's jewelry, as opposed to costume jewelry, was still in shoe boxes at the bottom of her closet. (RT 6: 1319.) Appellant received $50 for the two items of jewelry that he pawned. (RT 11: 2467.) Even if he stole the rest of what was taken and somehow, for some reason, discarded it soon afterwards, he presumably pawned more expensive-looking pieces first. Thus the evidence did not show that appellant knew the Jenks residence to be

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[17] *People v. Marshall* (1997) 15 Cal.4th 1, 37 (robbery-murder); *People v. Bolden* (2002) 29 Cal.4th 515, 556 (robbery); *People v. Green* (1980) 27 Cal.3d 1, 54, 61 (robbery special circumstance); see RB 26–27.

a gold mine of valuable items, such that he would have been unable to resist the temptation to go after them in a manner that could only be accomplished without consequence via brutal murders.

Respondent observes that appellant needed money. (RB 27.) Respondent acknowledges that "evidence of poverty is not admissible to show motive for robbery" but neglects to say why, commenting only that there was no objection to its admissioin here. (*Ibid.*) One reason is unfairness to poor defendants but, as explained in the opening brief, the other is its sheer lack of probative value. The need or desire to have more money affects a great many people, very few of whom steal, much less rob or kill.[18] Thus the evidence proves so little that it should not have been admitted. The fact that it was nevertheless allowed in does not give it any more value as a reasonable basis for an inference that appellant planned a robbery. Moreover, the prosecution evidence, as detailed in the opening brief, showed appellant going about his business in a normal frame of mind before the crimes, not a desperate one, and his close relationship with Diana Williams suggested at least one source of emergency support.

Next, according to respondent, the three or four dollar bills sticking out of the pocket of Fred's robe "imply that there was some sort of demand for money with which Mr. Jenks was trying to comply" when appellant killed him. (RB 27.) This is more gross speculation, not an inference, i.e., "a deduction

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[18]See AOB 48–49, citing *People v. Koontz* (2002) 27 Cal.4th 1041, 1076; *People v. Hogan* (1982) 31 Cal.3d 815, 854; *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101–102; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108–1109; II Wigmore, *Evidence* § 392, p. 431 (Chadbourne rev. 1979); accord, *People v. Clark* (2011) 52 Cal.4th 856, 928–929; cf. *id.* at pp. 923–924 ("sexual deprivation" evidence inadmissible on rape charge because it was so speculative as to have no tendency in reason to prove rape).

of fact that may logically . . . be drawn from another fact,"[19] that can help make the case for a capital crime. Rather, the evidence favors the second-degree hypothesis. Both parties seem to agree that it is unlikely that a man in night clothes would be carrying money, so both interpret the evidence as pointing to some sort of interaction between Fred and appellant. But the idea of trying to satisfy an armed robber with three or four dollars, when there was much more cash in the house,[20] is preposterous. It is at least as likely, as appellant already suggested (AOB 50), that Fred offered appellant a few dollars in response to an emergency request for work or for an advance against forthcoming work, and that the gap between that small handout and the requested opportunity to earn something more substantial pushed appellant over some kind of edge.

Again, the issue is not whether this Court believes this was case, or whether the jury should have so believed. The question is whether reasonable jurors could have found to be true, beyond a reasonable doubt, the supposed intermediate fact of the bills being there because of a robbery demand,[21] when to do so they would have had to have found no other hypothesis reasonably consistent with the evidence.[22] But under any view of the evidence, the possibility that the bills had been offered in response to a non-robbery request was at least as reasonable as that they were offered to a robber, and a

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[19]Evid. Code § 600, subd. (b).

[20]Investigators found $113 in an open desk drawer. (RT 5: 1200–1201; 6: 1307.)

[21]See *People v. Watson, supra*, 46 Cal.2d 818, 830–831 (fact essential to a chain of circumstances relied on to establish guilt must be proved beyond a reasonable doubt).

[22]*People v. Perez, supra*, 2 Cal.4th 1117, 1124; *People v. Bean, supra*, 46 Cal.3d 919, 932.

reasonable jury could not have found that it was not.

Respondent also notes that appellant looked in the Jenks home office and bedroom for valuables and pawned some of Shirley's jewelry soon after the offenses. (RB 27.) This behavior is identical to what he would have done if he had killed the couple in a fit of rage and then realized he could probably at least find some things to take. It does not, therefore, support an inference of pre-existing intent. Indeed, if looking for valuables after a homicide were "evidence that reasonably inspires confidence and is of solid value"[23] in support of a conclusion that a defendant used force to facilitate a planned taking, the circumstances of every such case would be sufficient to prove that element, absent an affirmative defense. The prosecution's burden of proof would be illusory, as would the law's recognition of the possibility of after-acquired intent to steal.

"[I]t was easier," continues respondent, "to ransack the Jenks' bedroom and steal their valuables after they were dead and unable to [interfere in various ways]." (RB 28.) This is circular. Whether appellant's plan was to steal was the proposition to be proven. Yes, if appellant's intent when he came to see the Jenkses was to steal from them, their deaths would have facilitated that action.[24] Conversely, if his intent was different but he ended up killing them, their being suddenly unable to interfere with stealing some of their things simply created the opportunity for him to do so. Again, the known facts reveal nothing about the unknown fact, i.e., when intent to steal actually arose.

Finally, asserts respondent, the jury, which rendered a separate verdict

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[23]*People v. Marshall*, *supra*, 15 Cal.4th 1, 34, internal quotation marks omitted.

[24]There are, however, "easier" (RB 28) ways to obtain money than killing one's employers.

on the robbery count, found that the prosecution met its burden of showing that appellant took property using fear or force. (RB 28.) This, too, is circular. The question is whether there was evidence to justify the jury in finding as it did, on the robbery count, the robbery-murder theory of first-degree murder, and the robbery-murder special circumstance—all of which had the same temporal element regarding intent—or if this was one of those occasions where "a properly instructed jury . . . convict[s] even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . ." (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 317.) It is that possibility which necessitates sufficiency-of-the-evidence review in the first place[25] and makes it a frequent enough problem in first-versus-second-degree contexts that this Court set out guidelines for analyzing the question.[26]

In sum, of all that respondent proposes as substantial evidence to show that appellant was intending to steal when he used force against the Jenkses, none has any logical tendency whatsoever in that direction except for the slight weight of the claim—possibly true but not at all clear—that he knew beforehand that there were valuables in the Jenks home. Without much, much more, this is not a basis for a jury to "reach a subjective state of near certitude"[27] that appellant attacked the Jenkses with a concurrent intent to steal. And yet there was nothing more to rule out, as a reasonable possibility, that the intent arose after the lethal assaults. The need for money was far more likely to prompt a negotiation for work or help from occasional employers than to prompt a clumsy murder/robbery/pawn scheme, which is why its probative

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[25]*Jackson v. Virginia*, *supra*, 443 U.S. 307, 317.

[26]*People v. Anderson*, *supra*, 70 Cal.2d 15.

[27]*Jackson v. Virginia*, *supra*, 443 U.S. 307, 315.

value was too low for it to be admitted, or to be considered in an after-the-fact analysis. The bills in Fred's pocket similarly pointed more towards a non-robbery interaction than that the victim was in a process of complying with a robbery demand which appellant halted by killing him. And evidence of looking for valuables after a homicide says nothing about the question of when the decision to do so arose. That being the case, no reasonable jury could be "convinc[ed] . . . of [appellant's] guilt with utmost certainty." (*In re Winship* (1970) 397 U.S. 358, 364; see also *People v. Perez*, *supra*, 2 Cal.4th 1117, 1124 ["it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence"].)

C. In the Circumstances of This Case, Failure of Proof on Either Theory Requires Reducing the Murders to Second Degree

The insufficiency of the evidence for first-degree verdicts under all of the theories presented to the jury requires reduction of the judgment to second-degree murder. Should, however, the Court find evidence insufficient on one or more theories but not all, the question would be whether to reverse because of the possibility that one or more jurors voted to convict on an invalid basis. The parties agree that *People v. Guiton* (1993) 4 Cal.4th 1116 sets out California law on when insufficiency of the evidence on one of two theories relied on by the prosecution requires reversal of a verdict.[28]

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[28]The material under this Subheading C will be pertinent only if the Court finds that both a factually sufficient and a factually insufficient theory were submitted to the jury. Otherwise it can be ignored.

If the Court should determine that the jury was allowed both a valid and an invalid basis to convict, appellant respectfully suggests that the Court (continued...)

> [W]hen an appellate court determines that the evidence was insufficient, it has concluded that no "reasonable" trier of fact could have found the defendant guilty. . . . An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise . . . . Thus, if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, *absent a contrary indication in the record,* that the jury based its verdict on the reasonable ground.

(*Id.* at pp. 1126–1127, emphasis added.) A similar rule prevails under the United States Supreme Court's current interpretation of the federal Due Process Clause. (*Griffin v. United States* (1991) 502 U.S. 46.) In the circumstances of this case, the record does indicate an unacceptable risk that the jury relied on an invalid theory, so reversal would be required even if one of the theories submitted to the jury were valid.

1. Reversal Is Required When the Record Places the *Guiton* Assumption In Question

Several things can interfere with jurors making decisions according to the ideal model. Two are prejudice and emotion, such as horror at horrific crimes. Others are confusion about, or disinterest, in what they might see as the technicalities of the law. If such dynamics never derailed the process, there would be no need for review of judgments for sufficiency of the evidence. The opinion in *People v. Guiton*, *supra*, recognizes that the general rule which it

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[28](...continued)
analyze the other contentions presented by appellant before concluding its review of this one. Controlling law requires examination of other occurrences at trial to see whether the record discloses a realistic likelihood that any jurors relied on an invalid theory. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129–1130.) Here, much of the relevant context is documented and explained in the course of presenting other claims of error. In particular, Argument C.2.e, below, an integral part of the analysis under *Guiton*, will be difficult to evaluate without complete familiarity with the other claims.

announces is based on an assumption regarding jury reasonableness, and the language about the possibility of "a contrary indication in the record" recognizes that, like any assumption, it may not be valid in a particular case. (4 Cal.4th at p. 1127; see also p. 1129.) Such a "contrary indication" does not require direct evidence of why the jurors voted as they did, proving that some of them relied, in whole or in part, on the theory on which the evidence was insufficient. It could not be, because evidence of a juror's mental processes is inadmissible. (Evid. Code § 1150; *People v. Smith* (2007) 40 Cal.4th 483, 523–524.)

Analytically, *Guiton* recognizes that it is error to submit a factually insufficient theory to the jury and that the question is whether the error can be held harmless. This still requires an assessment of the likelihood that one or more jurors relied on an invalid theory. (*Id.* at pp. 1129–1130.) To determine that, this Court applies the test of *People v. Watson* (1956) 46 Cal.2d 818, i.e., whether "it is reasonably probable the result would have been more favorable to the defendant had the error not occurred ." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) Where, as here, the issue is submission of a factually insufficient theory,[29] a reviewing "court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Ibid.*) "We have made clear that a 'probability' in this context[, .i.e., the *Watson* standard] does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–801, citation and quotation marks omitted.)

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[29]As opposed to erroneous instructions on the law, which a jury is not equipped to recognize as problematic.

Finally, per *Guiton*, in determining whether it can truly be assumed that jurors themselves recognized that the prosecution failed to meet its burden on a theory of guilt, "the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. " (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

Appellant contends that submitting an unsupported theory to the jury, at least where, as here, it has a surface plausibility, violates the Due Process Clause of the 14th Amendment and the Eighth Amendment requirement of reliability in proceedings leading to a death sentence. The risk of juror confusion, or of diluting the seriousness of deliberations on the supported scenario because there seems to be the fallback of the unsupported one, is too grave. Recognizing, however, that this Court has stated that such an error "does not appear to be of federal constitutional dimension,"[30] appellant argues the harmless-error issue under the *Watson* standard invoked by the *Guiton* opinion, although he maintains he should have the benefit of the rule of *Chapman v. California* (1967) 386 U.S. 18.

2. There Is "a Reasonable Chance, More Than an Abstract Possibility,"[31] That a Juror Relied on an Invalid Theory

The record of this trial shows that there is more than an abstract possibility that one or more jurors relied on an insufficiently supported theory. If this Court holds the scenario that the robbery and murders were pre-planned

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[30]*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129–1130.

[31]*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, 800.

to have been such a theory,[32] juror reliance on it is extremely likely, as the jury found the robbery count and the robbery-murder special circumstance to be true, and no alternate basis for either of those verdicts was offered.

Respondent argues that the obverse is also true, requiring affirmance even if the premeditation-during-knife-sharpening theory was inadequately supported, since the verdicts show that the jury believed the felony-murder theory. (RB 29.) But the conclusion does not follow. A juror could have had difficulty with the hypothesis that appellant went to the home planning robbery and murder. Even if this Court finds sufficient evidence under appellate-review standards, a rational juror could have found it highly problematic. For reasons explained below, such a juror could have bought into the unsupported hypothesis about premeditation during the sharpening of the filet knife. If so, such a juror could have decided that during this time appellant also conceived of the idea of taking property after killing the victims, since he did subsequently take property. This juror would vote for first-degree murder verdicts, a guilty verdict on robbery, and a "true" finding on the robbery-murder special circumstance. All, however, would have rested on the unsupported factual scenario of reflection during the sharpening of the knife.

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[32]Theoretically, robbery without murder could have been the original plan, leading to felony-murder verdicts. Here, for simplicity's sake, appellant collapses the distinction between a pre-planned robbery scenario and a pre-planned murder scenario, for the prosecution never argued pre-planned robbery without a plan to kill, and respondent does not do so on appeal. The scenario is highly improbable, since the Jenkses could identify appellant; it would be hard for him to leave town quickly owning only a bicycle; and there was no evidence that he had prepared in any way for a departure. (See RT 11: 2411–2413 [prosecutor argues appellant killed the Jenkses upon arrival at the house because he went there needing money and that was the way to get it without leaving witnesses].)

Respondent further asserts that nothing in the record demonstrates that the jury relied on any particular prosecution theory. (RB 29.) Appellant disagrees. In the language of *People v. Guiton*, *supra*, there is "a contrary indication in the record,"[33] i.e., contrary to the assumption that no jurors relied on the insufficiently supported theory. As noted previously, such an indication cannot come from the jurors themselves, but the available indirect indications are enough to leave grave doubt as to whether every juror relied only on a sufficient theory. First, as shown below, the arguments guiding the jury in its analysis of the issues provided absolutely no help in sorting out the sufficiency of the prosecution case on degree. Rather, they left the jury entirely focused on the identity of the perpetrator as the one significant issue. Moreover, deliberations were so short that it is highly unlikely that the jury gave the questions pertaining to degree significant attention; remarks of the court and counsel left the jury less-than-well-equipped to apply the reasonable-doubt standard to the facts; and certain jury instructions further undermine the assumption that the jurors were equipped to reject an inadequate theory.

a. The Arguments to the Jury Treated the Degree of the Murders as a Non-Issue

The evidence was legally insufficient, but it would take an advocate's explanations for jurors to understand why this was so. The prosecutors, with the credibility their office gives them in front of a jury, strongly asserted appellant's guilt of robbery, first-degree murder, and a robbery-murder special circumstance and provided scenarios in support of their assertions, including both the sharpening-the-knife hypothesis[34] and the one involving a plan to kill

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[33]4 Cal.4th at p. 1127.

[34]RT 11: 2390–2392, 2412.

and rob conceived of before going to the house.[35] Their factual theories were arguably *consistent* with the evidence, and it would have taken skilled advocacy to point out that they were by no means *compelled* by that evidence, to suggest an alternative hypothesis, and to raise issues like the weakness of the poverty motive, the inconsistency of a mental state of cool planning in advance with the irrationality of killing one's ongoing income source for what was predictably little money, the obviously equal efficacy of the filet knife as a stabbing instrument with or without sharpening of its edge (unlike its efficacy in making the post-mortem incisions), and the other problems with the prosecution narrative. These are things few jurors would have seen without help, particularly under an adversarial system that by its very nature encourages them to place great reliance on how counsel frame and analyze the issues. However, none of the analysis put forward here about the prosecution's failure of proof on its premeditation-and-deliberation theories and its theory about a pre-assault intent to steal was argued at trial.

Given the relative weakness of a defense going to identity, compared to challenging the prosecution theories that the murder was in the first degree, counsel's failure to argue in the alternative that the crimes were not shown to be first-degree murder is at best puzzling. An explanation for his conduct, however, will have to await the filing of a habeas corpus petition. This is not the proceeding in which to litigate either the quality of his judgment—assuming he exercised it at all—or its relationship to the jury's verdicts, except in the context of whether the *Guiton* assumption applies here: that where "if there are two possible grounds for the jury's verdict, one unreasonable and the other unreasonable, we will assume, absent a contrary

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[35]RT 11: 2411–2413.

indication in the record, that the jury based its verdict on the reasonable ground." (*People v. Guiton*, *supra*, 4 cal.4th at p. 1127.) One of several "contrary indications in the record" is the lack of assistance which the jury received in handling the question of degree.

The defense closing argument occupies 27 transcript pages. (RT 11: 2417–2443.) It was overwhelmingly an attempt to show that there was doubt as to the identity of the perpetrator. Less than one and one-quarter pages addressed the degree of any murder, and that portion of the argument was perfunctory. (RT 11: 2441–2442.) The only analysis of the evidence regarding premeditation and deliberation was this:

> [Y]ou need to ask yourselves, ladies and gentlemen, when you view the crime scene and you view the evidence in front of you, does this look like planning or not? Does it look like someone frenzied or not?

(RT 11: 2441.) As to robbery-murder, counsel argued,

> You have to ask yourselves, ladies and gentlemen, the People say that Mr. Potts was so desperately in need of money that he went over there planning to rob those people. But you have to ask yourselves, ladies and gentlemen, as I said before, if he was in such desperate need of money, why isn't there more property pawned? Why can't we find more property?
>
> Second, you have to ask yourselves, ladies and gentlemen, are you convinced beyond a reasonable certainty—excuse me—are you convinced to an abiding conviction that the intent to rob, if it was done by Mr. Potts, the intent to rob [sic] was formed before or after the murders?

(RT 11: 2441–2442.) Thus the jurors were given no real assistance in seeing that either prosecution theory on the mental state regarding the degree of murder was insufficient. Nothing was said about the weakness of poverty as a motive for brutal murders of one's employers; no alternate explanation of appellant's visiting the Jenkses was suggested, much less an alternate

explanation for what might have happened; the Bettencourt theft's implications about appellant's modus operandi were unmentioned; and the second-knife-to-kill theory was entirely unchallenged. Indeed, the jury did not even hear an assertion that at best second-degree murders were proven. Unfortunately, it was left to believe that counsel did not consider issues pertaining to the degree of the offenses important and did not expect the jury to do so either.

Similarly, in a 23-page rebuttal[36] the only prosecution response was an equally brief argument that the nature of the wounds was evidence of an intent to kill, that there was time to reflect when the filet knife was being sharpened, and that evidence that the perpetrator moved through the house and at one point left a footprint on Fred's back somehow[37] also proved that there was time to reflect. (RT 11: 2264.) As the prosecutor said, "[T]his is a case of who did it, not what was done." (*Ibid.*) Thus none of the arguments encouraged the jury to truly examine competing hypotheses regarding when and how the intents to steal and to kill arose or gave it analytical tools for doing so. Other than the two defense sentences on the frenzied nature of the attack and the failure to obtain more money by pawning more jewelry, neither the planned-in-advance robbery-and-murder theory nor the sharpening-the-second-knife theory was challenged at all. Rather, the jurors were left with strong assertions

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[36]RT 11: 2445–2467.

[37]There was nothing in the evidence to show that the perpetrator's movements in the house were not post-mortem. As to the footprint on Fred's back, there was a hand print near it as well (RT 5: 1197–1198); the perpetrator may have slipped on the bloody floor.

in the first prosecutorial argument regarding the prosecution's theories,[38] followed by a defense argument and prosecution rebuttal that made clear that they were being challenged to closely examine only the evidence regarding identity.

This is a far cry from *People v. Guiton*, *supra*, where the only issues were whether or not the defendant sold cocaine and whether or not he transported it. There was no question about how seriously the jury looked at those two issues because it was directly charged with deciding each, and with nothing else. The prosecution treated the sale theory perfunctorily, stressing instead the transportation theory as the "easiest" to agree on. There being no other indication in the record of a reasonable probability of jury reliance on an invalid theory, this Court affirmed. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1131.) Here the prosecution's tactic, even in its first argument, appeared to be to gloss over the issue of the degree of the murder—covering that base but doing it in a way that would not alert the jurors to its being a possible issue. Since the defense handled it the same way, and since the prosecutorial theories were colorable speculations that could appeal to jurors not given any reason to examine them closely, either or both could have been adopted.

The remainder of this part of the argument explains other indications in the record that weigh against the usual likelihood that a jury will have rejected an inadequate theory.

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[38]See RT 11: 2388–2392, 2411–2413.

b. The Instructions Reflected the Trial Court's Belief That the Jury Could Properly Accept Either Theory

The Court instructed on both willful, deliberate, and premeditated murder and on felony (robbery) murder in telling the jury how to determine the degree of the offense. (RT 11: 2350–2352.) While this Court has held that the error of permitting the jury to consider a factually invalid theory does not in itself compel reversal,[39] the trial court's explicitly telling the jurors that both theories were available certainly added to the likelihood that either theroy could have been relied on, especially in a context where the arguments of counsel supplied no basis for emphasizing one or ruling out the other.

c. The Brevity of Deliberations Shows Absence of Concern About Whether First-Degree Murder Was Proven

Further evidence that the jury gave little attention to the strength of the evidence regarding degree was the length of its deliberations. Even if there was sufficient evidence on one of the first-degree theories, certainly both the claim of an advance plan to kill and rob and the hypothesis of mid-assault sharpening of a better weapon had obstacles to be overcome before 12 jurors, truly concerned with the issue, could have been satisfied beyond a reasonable doubt. Yet the jury returned verdicts on the two murder counts, robbery count, grand theft (Bettencourt) count, and four special circumstances allegations in four hours. (CT 9: 2647–2651.) This was not a jury that wrestled with either factual theory.

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[39] *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129–1130.

d. This Was Not a Case Where Jurors Were Faced With an Obviously Sufficient Case on One Theory and an Obvious Failure of Proof on the Other

Moreover, the assumption that *People v. Guiton*, *supra*, takes as a starting point—that rational jurors would have rejected an insufficient theory and relied on the sufficient one—is more likely to be true where there is a dramatic difference in the strength of the evidence on each theory. Thus in *Guiton* itself, the defendant was charged with transporting or selling cocaine, and the jury was offered both transporting and selling as possible bases for a guilty verdict. As to transporting, the defendant was stopped in a moving car with bags of cocaine at his feet. In contrast to this unequivocal evidence of guilt, the evidence regarding making a sale was extremely thin. It depended on proof

> that Lee is the agent of the defendant, that Lee sold something to the driver [of a different vehicle], and that the thing sold to the driver was cocaine. Instead, each of those steps requires speculation. For instance, there is no evidence that the driver bought anything. Even if he did, there is no evidence of what he bought . . . .

(*People v. Guiton*, *supra*, 4 Cal.4th at p. 1120; see also *id.* at pp. 1119–1120 [more detail on the evidence].) Similarly, in *Griffin v. United States.* (1991)502 U.S. 46, on which *Guiton* relied, there was an utter failure of proof on one of the factual theories which the government had initially charged. (*Id.* at pp. 47–48 [no evidence presented connecting defendant with one of two alleged objects of conspiracy].)

The *Guiton* rule should be limited to such situations. Even if it is not, however, clearly the level of confidence in the assumption of jury rejection of the inadequate theory in favor of the adequate one must decline as the difference in their respective strengths diminishes. This implies a lesser

showing is needed to make out a reasonable probability that one or more jurors did rely on an inadequate basis.

Here, in contrast to the situations in *People v. Guiton* and *Griffin v. United States*, each prosecution factual scenario had a surface plausibility, especially given that each side directed the jury's attention to other questions. The evidence supporting those scenarios—or, under the situation addressed here, the evidence supporting one—did not rise to the reasonable-doubt standard, but there was at least something from which speculation masquerading as inference could be drawn. This is another aspect of the record which contributing to "a reasonable chance, more than an abstract possibility,"[40] that a juror relied on an inadequate ground.

e. Other Events at Trial Further Undermine the Presumption of Jurors' Capacity to Reject the Inadequate Theory

Clearly the *Guiton* assumption relies in part on the premise that the jury understood the meaning of its duty to discern whether each element of an offense was proven beyond a reasonable doubt. That premise, however, is unjustified here. Regardless of whether this Court finds that the events underlying appellant's claims of error related to reasonable doubt reached the level of error, it is undisputed that the following took place:[41]

- the trial court made its raspberry-pie remarks emphasizing the sufficiency of a circumstantial case, which at best added murkiness to the reasonable-doubt standard and showed a

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[40]*Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th 780, 800; see *People v. Guiton, supra*, 4 Cal.4th at p. 1130.

[41]The events are undisputed; in several instances the consequences attributed to them here are disputed.

concern with avoiding an erroneous acquittal;[42]

- one of the prosecutors implored jurors not to acquit appellant if they believed he was guilty;[43]
- she equated a "belie[f]" in guilt that would abide for a week to the requisite level of certainty;[44]
- a reasonable-doubt instruction supported the prosecutor's argument that it was enough to *believe* defendant guilty if the belief was strong enough to predictably abide,[45]
- defense counsel stated that reasonable doubt "doesn't mean that the People are held to a burden of proving Mr. Potts guilty . . . to any kind of certainty,"[46]
- the court instructed the jury to presume appellant innocent only "until" the impliedly anticipated proof of guilt,[47]
- and the court instructed that conscious possession of stolen property was practically enough to prove robbery—requiring only slight corroboration to make the proof sufficient—although it has long been recognized that there are non-theft explanations for possession alone, which slight corroboration may or may not

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[42]See Arguments II.C.2 and II.B, respectively.

[43]See Argument III.

[44]See Argument IV.C.

[45]See Argument IV.B; see also IV.A.

[46]See AOB 99, discussing remarks at RT 11: 2420.

[47]See Argument IV.D.

address.[48]

In the current context, it does not matter if none of these, standing alone, was error. Nor does it matter whether cumulatively they created enough unfairness to amount to error.[49] For the question at issue now is whether a review of the entire record demonstrates a reasonable probability, i.e., a reasonable chance—as opposed to just an abstract possibility—that a juror relied on an unsupported theory for his or her first-degree vote. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130; *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, 800–801; see also *Griffin v. United States*, *supra*, 502 U.S. 46.) Put differently, the question is whether this is the type of situation recognized by this Court when it cautioned that "the record may sometimes affirmatively indicate that the general rule [that submitting a factually insufficient theory is harmless error] should not be followed." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) That rule applies when "[t]he jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion." (*Id.* at p. 1131.) Here it was not: the actions of the trial court and counsel for both parties reviewed above undercut the normal level of confidence that it could correctly apply the reasonable-doubt standard to this case.

Moreover, a series of problematic instructions went directly to the question of first-degree robbery-murder or determining the degree in general. Again, although these are argued elsewhere as errors, what is important here is that even if alone they were not serious enough to amount to prejudicial error or error at all, they each partially rebut any presumption that jurors would reject an inadequate theory. The instructions at issue stated that:

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[48]See Argument V.B.1.

[49]See Argument XVI.

- as noted above, conscious possession of recently stolen property, along with slight corroboration, was sufficient to prove guilt of robbery, when in fact such evidence shows at best theft, leaving unaddressed two critical elements of robbery: force or fear, and—more important here—the concurrence of intent to steal with the act of applying force;[50]
- to constitute robbery, the intent to steal need only to have arisen by the time of the actual taking, when in fact it must be present by the time of the application of force to the victim;[51]
- to determine that a murder was of the second degree, the jurors would have to agree that there was a doubt as to whether it was first degree, rather than stating directly that a first-degree finding required the prosecution to convince every juror of its elements beyond a reasonable doubt;[52] and
- that a second-degree verdict could be returned only if there was unanimity on first-degree murder not having been proved, a directive which unnecessarily pressured any minority jurors by giving them a choice of causing a mistrial or going along with a first-degree verdict.[53]

The first two instructions make reliance on a robbery-murder theory more probable even if it was insufficiently supported by the evidence. The second two, along with all the other circumstances mentioned above (e.g.,

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[50]See Argument V.B.2.

[51]See. Argument VI.

[52]See Argument VII.B.

[53]See Argument VII.C.

arguments of counsel, comments about reasonable doubt) made it more likely that a juror having trouble with a theory that—under the standards of appellate review—amounts to a sufficient case, would have turned to the theory that closer analysis shows to have been unsupported.

f. There Is a Reasonable Probability That a Juror Relied on an Invalid Theory

The rule of *People v. Guiton*, is based on the presumption that jurors can be generally be counted on to evaluate the evidence and reject an insufficient case. However, as explained in the authorities discussed on page 26, above, our system provides appellate sufficiency review, and comparable powers in the trial courts, because real-life jury behavior creates exceptions to the general rule. *Guiton* recognizes the same truth, in its emphasis on the fact that the record may show a reasonable probability that some members of a jury relied on an unsupported theory. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

In sum, to prevail, appellant need show only "a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) Again, a reasonable probability in this context "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, 800–801, citation and quotation marks omitted.) Here the arguments of counsel framed the case as a "who-dunnit," not a "what was done," and the jury was given no help in identifying the weaknesses in the pre-conceived-plan scenario or the difficulties with eliminating after-acquired intent to steal or concluding, beyond a reasonable doubt, that the filet knife was sharpened as a murder weapon. The instructions did sanction the prosecution's offering all its theories to the jury. A series of judicial,

prosecutorial, and even defense comments diminished the degree to which it can be assumed that the hypothesized rational fact-finder truly understood the reasonable-doubt standard. Misleading instructions blurred the robbery-theft distinction, and others turned the first-degree finding into the default one and placed pressure on any jurors who did recognize difficulty with one theory to at least go with the other. In these circumstances, there was a reasonable chance that a juror relied on an invalid theory.

While appellant is assuming for the sake of argument that the error of submitting an unsupported theory to the jury was one of state law only,[54] affirmance in the face of that error would violate the federal constitution. If there is a reasonable probability that the conviction underlying a death sentence rests on insufficient evidence, upholding it would violate appellant's rights to due process and to a fair, reliable, and individualized penalty determination. (U.S. Const., Amends. 8 & 14; see *People v. Partida* (2005) 37 Cal.4th 428, 435 [defendant may contend, for the first time on appeal, that a trial court ruling violating state law had additional consequence of violating federal constitution].)

The guilty verdicts on the robbery and first-degree murder charges and the true findings on the robbery-murder special circumstances must be reversed.

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[54]See p. 30, above.

II. IN EXTEMPORANEOUS PRE-INSTRUCTIONS CONCERNING REASONABLE DOUBT IN A CIRCUMSTANTIAL CASE, THE TRIAL COURT IMPERMISSIBLY LENT THE COURT'S AUTHORITY TO THE PROSECUTION'S CAUSE AND GROSSLY DILUTED ITS BURDEN OF PROOF

It is undisputed that during voir dire the trial court gave extensive, extemporaneous pre-instructions emphasizing the sufficiency of a circumstantial case for guilt and giving an example to illustrate that point. Appellant's position is that, in context, the very act of attending to these matters represented a dramatic judicial tilt towards the prosecution and thus violated appellant's due-process rights. In addition, the court's "raspberry-pie" example diluted the prosecution's burden of proof.

Respondent disagrees. Besides contending that appellant has no right to review of the issue and that any error was harmless, respondent repeatedly asserts that the contention about a biased approach is unsupported by the record, while ignoring entirely appellant's analysis of that record; illogically assumes that only an explicit expression of concern for the prosecution's interests would demonstrate such a concern to the jury; and goes to great lengths to distinguish two of the sixteen cases appellant cited in support of the proposition that judicial actions during a jury trial should not appear to favor one side, while ultimately conceding the basic axiom.

As to whether the "raspberry-pie" remarks also diluted the reasonable-doubt standard, respondent claims the court was only explaining how to infer a fact from a predicate fact, ignoring the way those remarks were integrated into a discussion of what was sufficient for the prosecution to meet its burden. Respondent does not dispute that, rather than teaching jurors that their job—unlike any other situation they had met in their lives—was less to discern what had happened than to decide whether the prosecution had met its burden,

its remarks reinforced old preconceptions. Respondent notes that the case does not squarely fall into the prohibited territory of explaining reasonable doubt in terms of making important decisions in everyday life, while overlooking the harm done by *analogizing* the jury's task to making such decisions. Finally, respondent unjustifiably assumes that—although the court made clear that it was explaining early on what it considered most essential about a circumstantial case and in doing so demonstrated a guilt-deducing process that had nothing to do with eliminating other reasonable hypotheses—there was no reasonable possibility that jurors misunderstood the matter once the court finally read CALJIC No. 2.01 at the end of the guilt phase.

A. The Absence of an Objection Does Not Deprive This Court of the Power to Reverse if the Instructions Made the Trial Unfair

1. No Preservation Requirement Applies to Instructional Error Affecting Appellant's Substantial Rights

Noting that trial counsel did not object to the pre-instructions, respondent invokes the forfeiture doctrine. Respondent thus seeks affirmance of a conviction and death sentence regardless of whether the trial court's remarks rendered the trial unfair and the death sentence unreliable. The doctrine does not compel such a result.

a. Even a Trial Court's Correct Statement of Law Violates Substantial Rights and Is Reviewable Without Objection if It Violates Due Process for Other Reasons

Misquoting three authorities at once, respondent writes

> "It is of course true that a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights." (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469,]505-506; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7.)

(RB 34, quotation marks and bracket in original.) The language attributed to the statute and cases is in none of them. There is no requirement that the instruction incorrectly set out the law, as opposed to, for example, expressing state law but violating due process for other reasons. Section 1259 actually reads, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." While the *People v. Smithey* footnote cited by respondent distinguished a related doctrine—discussed below—by noting that the defendant there claimed there was an incorrect statement of the law, it also relied on his claim of a due-process violation for its conclusion that the claim "is not of the type that must be preserved by objection." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn.7.) *People v. Hillhouse* simply restates the general rule. (*People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 505–506 ["Even without an objection, a defendant may challenge on appeal an instruction that affects 'the substantial rights of the defendant . . . .' (§ 1259.) "].)

The instant case parallels *People v. Smithey*, *supra*, where this Court rejected respondent's forfeiture claim. (20 Cal.4th at p. 976, fn.7.) Here, too, one of the sub-issues is, in fact, that the raspberry-pie illustration incorrectly presented the law regarding the prosecution's burden, so if respondent's rule were correct, the claim would still fall within its exception. The other sub-issue—that, in context, the extensive detours into the whole area of sufficiency of a circumstantial case represented a fatal lack of evenhandedness —involves a claimed due-process violation, i.e., a serious violation of appellant's substantial rights. (See *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn.7.)

b. There Is No Claim That the Instructions Required Amplification or Clarification

Respondent also invokes the principle that, "[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Palmer* (2005)133 Cal.App.4th 1141, 1156, quoted in part at RB 34.) That principle is inapplicable here. First, as just noted, one of the claims is that the instructions were legally incorrect, in that they illustrated juror fact-finding in a manner that lowered the prosecution's burden of proof. (See AOB 76 et seq.) This was not a matter of being incomplete or requiring amplification.

As to appellant's other contentions, they are altogether independent of the content of the instructions; the issue is the instructions' imbalance and their tendency to convey an impression about the judge's leanings and concerns, whether considered as instructions or comments on the evidence. It is not that they were "too general or incomplete." True, appellant demonstrated the serious judicial tilt towards the prosecution by pointing out other topics on which a court would have instructed the jury, if it were concerned—in an evenhanded way—with dispelling jurors' typical misconceptions. (AOB 63, 70–72.) But appellant does not claim that the instructions needed clarification or amplification on the topics they covered correctly, for the jury to fully understand those topics. For example, emphasizing the duty to acquit a defendant who appeared guilty if the prosecution's burden had not been met would have helped diminish the imbalance. But such a comment would have been on a different topic, not further explanation of what circumstantial evidence is or the fact that circumstantial evidence constitute a sufficient case.

In sum, the court's pre-instructions on the law are reviewable without objection below. (*People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 505–506.)

2. Comments on the Evidence Are Deemed Objected to by Statute, Whether or Not an Objection Was Actually Made

Appellant alternatively framed his contention as involving an improper comment on the evidence to be presented. Review is available without contemporaneous objection in that event as well. "All of the following are deemed excepted to: . . . any statement or other action of the court in commenting upon or in summarizing the evidence." (Code Civ. Proc. § 647; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1217, assuming without deciding that the statute eliminates any preservation requirement and citing *Delzell v. Day* (1950) 36 Cal.2d 349, 351, which so holds.)

3. This Court Can and Should Ascertain Whether the Trial Was Fair and the Result Reliable Even if Appellant Should Have Objected

Assuming, arguendo, an objection was required to preserve appellant's *right* to appellate review on this issue, this Court could and should still reach the merits. Two exceptions to the forfeiture doctrine apply. Moreover, this Court has the discretion to consider unpreserved claims and should do so, given the stakes here.

First, "[u]nder settled law," an appellate court has discretion to address "a question of law based on undisputed facts . . . even though it had not been raised in the trial court." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061.) Even a "new theory pertaining to [a] question of law on facts appearing in the record may be raised for the first time on appeal." (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 24, citing *Ward v. Taggart* (1959) 51 Cal.2d 736,

742.) Here the only questions are questions of law: whether the emphasis on not holding the prosecution to too high a burden and the comment on the forthcoming evidence violated the due-process right to judicial evenhandedness, and whether the content of the raspberry-pie anecdote incorrectly illustrated the burden of proof.

Second, even apart from this general rule, a claim of deprivation of a fundamental constitutional right may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276–277.) This is the case "especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgement [citation], or important issues of public policy are at issue [citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) The first two of these conditions are true here, although even one makes the exception "especially" worthy of application. (*Ibid.*) This is even more true in a capital case.[1]

Finally, this Court has discretion to consider claims for which the right to review has been forfeited. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; see also *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.).) Here the integrity of the state's process for determining whether to put a citizens to death is at stake. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1074 [state's own interest in a fair and reliable penalty verdict].) The judicially-created forfeiture rule should not be used to permit an execution based on a conviction that cannot be relied upon to be fair.

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[1]U.S. Const., 8th Amend. A reviewing court in a capital case should "take a liberal view of the technical rules applicable to criminal cases generally [citation] and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted." (*People v. Bob* (1946) 29 Cal. 2d 321, 328.)

In sum, because there was instructional error affecting appellant's substantial rights and unfair comment on the evidence, no action was required at trial to preserve the right to review. Even if it were, relief by this Court would still be appropriate because of the nature of the errors.

B. Extraordinary Judicial Emphasis on Countering a Bias That Could Hurt the Prosecution Introduced the Opposite Bias into the Proceedings

It is difficult to say whether the parties agree regarding the law applicable to the claim that, even if the trial court's instructions were correct, the manner of giving them telegraphed to the jurors a strong judicial concern about not holding the prosecution to too high a burden. Respondent seems to accept the premise that evenhandedness and neutrality in instructing on the law are required by due process. (See, e.g., *Reagan v. United States* (1895) 157 U.S. 301, 310; *People v. Moore* (1954) 43 Cal.2d 517, 526–527; RB 35.) However, most of its argument is aimed at distinguishing two of the cases appellant cited in support of that proposition, in an apparent attempt to limit the principle to a few specific factual scenarios. (RB 35–37.)

Respondent does not dispute that evaluating a claim of lack of evenhandedness must proceed in light of the fact that a trial judge is a figure whose "lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States* (1933) 239 U.S. 466, 470, quoting *Starr v. United States* (1894) 153 U.S. 614, 626; see also *People v. Sturm* (2006) 37 Cal.4th 1218, 1237; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 799; *People v. Mahoney* (1927) 201 Cal. 618, 627; *Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 819; *People v. Campbell* (1958) 162 Cal.App.2d 776, 787; see AOB 68–70)

1. The Pre-Instructions Showed Special Solicitude for the Prosecution

a. Respondent Substitutes Unsupported Assertions About the Record for an Analysis of the Evidence

Respondent repeatedly asserts that the record does not indicate that the judge conveyed a particular concern that the prosecution not be given short shrift. (RB 34 [claim "is premised on an extreme exaggeration of the trial court's comments], RB 35 ["[w]hen appellant's characterization of the court's comments is unwrapped and the comments themselves are actually considered," his argument fails; appellant "fails to show how the court in this case acted partially"], RB 36 ["fails to find support for this rhetoric in the record"].) Yet respondent declines to engage any portion of appellant's actual analysis, which is entirely based on the record, of the court's lack of impartiality. (See AOB 64–67, 70–74.) Thus respondent neither acknowledges nor disputes either the following facts, or the power of each to convey an impression of the court's particularly strong concern that a guilty man not be acquitted because the case would be entirely circumstantial:

- The lack of any similar attention to misconceptions favoring the prosecution that are probably far more common than a belief that a convincing but entirely circumstantial case for guilt should result in acquittal;[2]
- The sheer length of the circumstantial-evidence discourse—over three minutes, compared to one to three sentences on the other important topics covered by the court during the portion of the

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[2]See AOB 70–72.

voir dire at issue;[3]

- The atypically home-spun, extemporaneous quality of the instruction, which both conveyed the court's special interest in reaching the jurors on this topic and was conducted in a manner that made more direct contact with them than reading CALJIC instructions did;[4]
- An illustration of circumstantial evidence stated from the point of view of the prosecution—rather than a neutral example (e.g., a wet umbrella supporting an inference of rain) or adding one showing how circumstantial evidence can point towards innocence—which in itself is a well-recognized violation of neutrality.[5]

Respondent ignores all this in the hope that repetition of the claim that *appellant* ignores the record will establish its contention.

b. Respondent Wrongly Assumes That Only an Explicit Expression of Concern for the Prosecution's Interests Would Demonstrate Such a Concern to the Jury

Respondent further observes that "appellant points to no place in the record where the court expresses 'concern' about the prosecution being short-changed." (RB 35.) This is true only in the sense that the court never said, "I am concerned that you will hold the prosecution to too high a standard." The

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[3]See AOB 71–72 and cited portions of the record; see also AOB 64–67.

[4]See briefing and record cited in previous footnote.

[5]See AOB 72–73, 73–74, discussing *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 46, and citing *Cool v. United States* (1972) 409 U.S. 100, 103, fn. 4; *People v. Moore* (1954) 43 Cal.2d 517, 526; and *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158.)

violation was not in an explicit expression of such concern, nor need it have been. The claim is not based on the trial court's conscious intentions. Nor is it about the type of bias inherent in having, for example, a financial interest in the outcome. A fair trial is also denied when a judge *behaves* in a manner that is not impartial and conveys to the jury an apparent particular concern for one side's interests. (*People v. Sturm*, *supra*, 37 Cal.4th 1218, 1237 ["Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other'"].)

Here the court addressed the questions of circumstantial evidence and burden of proof in a capital case in a manner so different from anything else it said, and in such a one-sided fashion, that its concern that jurors might hold the prosecution to too high a standard was manifest. Moreover, it is splitting hairs to say that the concern was not expressed explicitly. The judge told one panel, "I want to talk about circumstantial evidence . . . to disabuse you of [a] misconception" about whether such evidence can be sufficient in a capital case. (RT 3: 549.) He told the next panel that he was discussing the matter because "sometimes people have . . . preconceived notions" about the burden of proof or the use of circumstantial evidence in a capital case, and "because I think a lot of jurors are confused about circumstantial evidence." (RT 3: 693, 694.) He explained to the third panel that he was going into the matters "[b]ecause of the nature of this case and the confusion that sometimes arises," again "to disabuse you of the idea that a person cannot be convicted of capital murder on circumstantial evidence." (RT 4: 805, 808.) The last panel, too, was advised that the pre-instructions on these issues were required because "[s]ometimes in a capital case we hear jurors who are expressing a thought or an idea that somehow different rules of evidence apply or that absolutely

insurmountable evidence is required"and because "people sometimes are a little confused about . . . circumstantial evidence." (RT 4: 904.) These remarks definitely expressed a concern that the jurors would get it wrong unless the court straightened them out at the beginning of trial.

c. Distinguishing Cases Acknowledging the Critical Nature of Judicial Evenhandedness Does Not Make Proper What Happened Here

Unable to actually defend the trial court's detour into "disabus[ing]" (RT 3: 549; 4: 808) jurors of misconceptions about the evidentiary burden that might be harmful to the prosecution, respondent focuses primarily on distinguishing two of the sixteen cases appellant cited.[6] Neither opinion claims to outline particularly limited situations where judicial evenhandedness is required, or to suggest that such evenhandedness is crucial—given jurors' natural attention to hints about the judge's leanings[7]—only under certain circumstances. Yet respondent implies that distinguishing the two cases is sufficient to show that the trial court here was evenhanded in the critical pre-instruction phase of appellant's trial.

Thus respondent faults appellant for "rel[ying] on *People v. Brown* (1993) 6 Cal.4th 322, 332 for his themed proposition that he was denied a fair and impartial trial." (RB 35.) Appellant, however, cited *Brown* only for the principle that "[a] defendant is entitled to impartiality from the bench under the

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[6]AOB 68–70.

[7]The judge's "lightest word or intimation is received with deference, and may prove controlling." (*Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 819 , quoting *Starr v. United States* (1894) 153 U.S. 614, 626; see also *People v. Cole* (1952) 113 Cal.App.2d 253, 261 [many cases "reiterate the fact that jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide"].)

state and federal Due Process Clauses." (AOB 68.) In case the principle is less than obvious, *Brown* is helpful because it cites five high court precedents. Respondent acknowledges that it is "axiomatic that all defendants are entitled to a fair and impartial judge." (RB 35, repeating, without attribution, the citations and parentheticals used in *Brown*.) And yet, to respondent, *Brown* "is completely inapplicable" because the procedural context was different (a disqualification motion) and because "appellant was not denied an impartial judge." (RB 35.) The first point is irrelevant, and the second is just another statement flatly contradicting appellant's demonstration that the judge's behavior was not impartial, still without supporting analysis.

The heart of respondent's argument lies in distinguishing *People v. Sturm*, *supra*, 37 Cal.4th 1218. Again, appellant is not claiming that the facts of *Sturm* are analogous. Rather, this Court's opinion in *Sturm* sets forth principles of broad—not fact-bound—applicability. As appellant previously explained,

> When a judge significantly intervenes in the trial sua sponte, he or she must do so in an "evenhanded" fashion. [Citation to *Sturm* and another case.] "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.'" [Citations to *Sturm* and other cases.] A trial judge may not "convey[] to the jury the message that the court [is] allied with the prosecution." (*People v. Sturm* . . . .) Intervening on behalf of the prosecution, when the action is not balanced by similar treatment of the defense, conveys the prohibited message. (*Id.* . . . .)

(AOB 69.) None of the language in *Sturm* relied on by appellant is cautious or qualified, limiting the principles expressed in the opinion to factual situations comparable to that presented in *Sturm*, which did deal in part with flagrant judicial misconduct. These are fundamental principles. The fact that

appellant's trial judge violated them in a manner different from what the *Sturm* trial court did, or that he did so only in a critical early stage rather than throughout the trial, as the *Sturm* judge did, is beside the point. Respondent notes the absence of the hostility between the court and the defense attorney that existed in *Sturm*. (RB 38, citing 37 Cal.4th at p. 1237.) However, this Court mentioned hostility in the context of excusing further objections to the trial court's misconduct. (*Ibid.*) It did not set up hostility to the defense as the *sine qua non* of behavior that unfairly conveyed to the jury a sense that the trial court felt particularly protective of one side's interests.

The fact that Judge Bissig's instructional choices were unusual enough that neither party can find a modern case directly on point to support its position makes neither party right or wrong.[8] The applicable principles and undisputed facts clearly establish the impropriety of his actions. Respondent, however, never seeks to apply the law to the facts.

Before concluding its discussion of *Sturm*, respondent seems to reprise its forfeiture claim. Respondent points out that *Sturm* notes that judicial misconduct claims generally require preservation via trial-court objection and explains the circumstances excusing the *Sturm* attorney for eventually giving up on objecting. Respondent contrasts the instant case, giving an example of a requested prosecution pre-instruction to which appellant's attorney successfully objected. (RB 37–38, citing 37 Cal.4th at p. 1237; see also RB 43.) On this point *Sturm* is distinguishable. The issue presented here is not

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[8]Appellant did cite *People v. Wilson* (1913) 23 Cal. App. 513, 522–523, where a much less egregious case of a judge making a point of emphasizing the sufficiency of a circumstantial case was held to be an obvious error. (AOB 74.) Respondent ignores the case in favor of the ones it believes it can most easily distinguish.

judicial misconduct, like disparagement of defense counsel and witnesses in *Sturm*. Rather, it is a claim of error in giving instructions and commenting on the evidence, to which objection was not required at all, for the reasons set forth in Part II.A, above.

d. Appellant Does Not Contend That the Court Was Required to Spend More Time on Reasonable Doubt

Respondent makes one other claim, that appellant is belatedly suggesting "that the court ought to have spent more time on reasonable doubt and presumption of innocence issues during pre-instruction to balance its over 3 minute explanation of circumstantial evidence." (RB 35, erroneous quotation marks omitted.) As explained previously, however, appellant makes no free-standing claim of error in this regard; what respondent refers to is one of the examples appellant gave—citing empirical research—of the prosecution-favoring misconceptions jurors typically bring with them. Appellant contrasted what the trial court did with how an even-handed approach might have looked, one that dealt with some of those prosecution-favoring preconceptions as well, if it had been truly necessary to give a circumstantial case special attention. The scenario regarding possible instructions on the particular rule applicable to evaluating a circumstantial case, on the need to take the burden of proof seriously enough that a guilty man might go free, etc., simply provides a contrast with what the court did do, demonstrating the imbalance of its approach. (AOB 70–72.)

Respondent answers the purported contention that the court erred in not spending more time on reasonable doubt and the presumption of innocence by noting that the court did read the standard instructions concerning those subjects, but without acknowledging that this occurred in a separate part of the

proceedings, two days earlier,[9] as part of the reading of a standard CALJIC instructional package to the entire venire.[10] (RB 35–36.) Appellant is not saying that reasonable doubt and presumption of innocence were not covered. But when the court began actually addressing the jurors about issues of possible concern in jury selection and asking if those issues applied to any of them, the circumstantial-evidence homily was the only instruction that particularly benefited either side. (See, e.g., RT 3: 542–544, covering four topics, such as following the law regardless of personal opinion and evaluating an officer's testimony like that of any other witness.)

Respondent continues,

> The court's "example" of circumstantial evidence came after a legitimate concern was raised, that jurors might think, based on many fictional television shows, that *mere* circumstantial evidence could never be sufficient to convict . . ., especially in a capital case. The court's explanation properly disabused jurors of this misconception.

(RB 36.) This "legitimate concern" appears nowhere in the record; it first arises in respondent's brief on appeal, without support in the jury questionnaires. The only concern expressed by the prosecutor, as respondent acknowledges in its "Background" (RB 31–32), was that some jurors thought that in a capital case the burden should be beyond a shadow of a doubt. At that point the trial court stated that it had already intended to address that issue. It then *volunteered* that it would also address the sufficiency of a circumstantial case, which the prosecutor had not mentioned. (RT 3: 523–524.)

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[9]See RT: 2: 368–369, 436–437.

[10]In its Procedural Background, where it quotes the instructions in their entirety, respondent does acknowledge that these were read during a different portion of the procedings, as part of a longer package of basic pre-instructions about the trial process. (RB 30–31.)

Appellant has noted the unlikelihood that jurors would free someone they were convinced, beyond a reasonable doubt, to be a double murderer merely because the evidence producing that conviction was circumstantial—especially in light of the standard instructions on the equal value of circumstantial evidence.[11] Respondent's only answer is its unsupported assertion that exposure to television dramas would lead them to do so. (RB 36. Compare AOB 70–71 & fns. 47, 48, 50, citing empirical research about the frequency of jurors presuming a charged defendant guilty, believing defense attorneys to be more partisan and less ethical than prosecutors, and wanting to convict apparent offenders even if the proof was less than a beyond a reasonable doubt.)

e. Respondent Fails to Address the Bias Inherent in the Instructional Package

In sum, respondent does not try to show that the court's digression into circumstantial-evidence and burden-of-proof issues, when it began examining panels about matters that could be problematic in their service as jurors, was typical of its presentation of all the matters which it covered. Nor does respondent seek to show that this material was balanced by similar attention to matters of concern to the defense or that it could have failed to impress jurors with the court's evident concern about their freeing a guilty man unnecessarily. Instead respondent relies on (a) multiple unfounded assertions that appellant's characterizations of the record are unsupported; (b) discussion of the factual or procedural background of two cases cited by appellant, when neither background limits the scope of the fundamental due-process requirements which those opinions state; and (c) partial mischaracterizations

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[11]See AOB 70 & fn. 49.

of appellant's contention and the record.

Regardless of its intentions, the trial court positioned itself in front of the jury as sympathetic to the needs of the prosecution, in a manner bound to influence at least some of its members.

2. Alternatively, the Court's Remarks Constituted a Biased Comment on the Evidence

Due process requires a trial court to exercise special care to be evenhanded should it choose to comment on the evidence. (U.S. Const., 14th Amend.; *People v. Slaughter*, *supra*, 27 Cal.4th 1187, 1218; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 799.) Here the trial court's remarks could be understood either as instructions or as comment on the case about to be presented by the prosecution. While the trial court clearly was instructing on the law, it was also talking about how to view the facts in light of the law. Reasonable jurors would recognize that the court would not have digressed as it did unless the case which they were about to hear was circumstantial, and the prosecutor's opening statement was soon to make clear that it was entirely circumstantial. Moreover, there was an unfortunate parallel between the speck of pie residue on the hypothetical child's lip and the speck of blood on appellant's glasses. Given, again, that the thrust of the court's comments was that the evidence to be presented could be sufficient, an alternative way of viewing the due-process violation is as a biased comment on that evidence. (See AOB 75–76.)

Respondent argues that the challenged remarks "did not constitute a comment on the evidence[,] as no evidence had even been presented yet . . . ." (RB 38.) Respondent then goes on, however, to discuss a case in which the principle that comment on the evidence "must be . . . non-argumentative, and scrupulously fair" was held applicable to a court's remarks, during jury

selection, on what the evidence would show, i.e., the same situation presented here. (*People v. Slaughter, supra*, 27 Cal.4th 1187, 1218; see also RB 38, acknowledging that the *Slaughter* comment took place "during jury selection".) Comments on the evidence expected to be introduced are likely to be as potent, and are, therefore, as subject to the due-process requirement of fairness, as comments made post facto.

Respondent also argues that the remarks, if comment on the evidence, were proper. Respondent quotes examples of what a trial court may not do from *People v. Rodriguez* (1986) 42 Cal.3d 730, notes that the comments of the court below fit none of those examples, and concludes that its remarks should not be deemed improper. (RB 38–39.) The logic is infirm. The language quoted from *Rodriguez* was not an exclusive list; this Court did not seek to catalog every way a court's attempts to assist a jury in analyzing the evidence could be imbalanced or unfair. (See *People v. Rodriguez, supra*, 42 Cal.3d at p. 766.) Its opinion emphasized that "a trial court that chooses to comment to the jury must be extremely careful to exercise its power with wisdom and restraint and with a view to protecting the rights of the defendant." (*Id.* at p. 772, citation and quotation marks omitted.) That opinion was the source of the language in *People v. Slaughter, supra*, insisting that a court's comments be "non-argumentative . . . and scrupulously fair." (*Id.* at p. 766, quoted in *People v. Slaughter, supra*, 27 Cal.4th at p. 1218.) Intervening at the very beginning of the trial, when the court was ascertaining such matters as whether prospective jurors in a small town could approach the testimony of witnesses with whom they were acquainted in an unbiased manner, in order to give the jurors the court's opinion that the type of prosecution case to be presented could make out a perfectly good case for guilt—using an example that bore some resemblance to that case—violated

these basic injunctions and appellant's due-process rights, whether or not they matched any of the examples given in *Rodriguez*.

Finally, respondent points to CALJIC No. 17.30, a standard instruction that nothing the court said or did, nor any questions it asked or rulings it made, was intended to suggest what the jury should find to be the facts or that the court believed or disbelieved any witness.[12] (RB 39, citing RT 11: 2468.) However, the timing and content of this instruction virtually guaranteed that it would be understood as pertaining to the court's actions once the actual trial had begun. It was not given during jury selection, but two weeks later, at the close of the guilt phase. As a matter of abstract logic, the instruction might be construed to encompass the preliminary comments. It was, however, part of an instructional package dealt with evaluating the evidence heard and the issues raised during the guilt phase itself. Moreover, the series of behaviors that it named would be commonly understood to refer to the court's words and actions during that time. Thus it referred to questions and rulings, which occurred only after the case had begun to be presented, as did any other action that could indicate believing or disbelieving a witness.

Respondent's point would have some force if the court had emphasized, during its initial discourse on circumstantial evidence and reasonable doubt, that it had neither an opinion about the sufficiency of the forthcoming

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[12]The court read the following:

> I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(RT 11: 2468.)

prosecution case nor a concern that the court needed to protect the prosecution's interests. But the sequence of events—stressing to prospective jurors the sufficiency of the type of case to be presented, then a whole trial in which the jurors had been oriented to the court's point of view, followed by a series of instructions about what to do with the evidence which they heard, including the general instruction now at issue (on forming their own conclusions about that evidence)—belies any capacity of that general instruction to have the effect claimed by respondent. No juror would suddenly think, "Oh, I guess I misinterpreted what he was telling us during jury selection and should let go of how it has colored my view of the evidence all this time." The later instruction could not undo the effect of the earlier comments.

Whether the court's remarks are viewed as an instruction on the law or as a comment on the evidence, or a mixture of both, their tilt towards protecting the prosecution violated fundamental fairness.

C. The "Raspberry-pie" Example Trivialized the Prosecution's Burden of Proving its Case Beyond a Reasonable Doubt

The previous contentions, based on the imbalance in the court's attention to issues of concern for each party, do not depend on the correctness or incorrectness of the content conveyed by the court. As a separate matter, however, the court's discourses on burden of proof and circumstantial evidence also misled the jurors about the standard which due process requires the prosecution to meet to obtain a conviction.

1. Standard of Review: This Court Must Decide If the Pre-instructions Misstated the Law or, If Not, If They Introduced an Ambiguity That Created a Reasonable Likelihood That Jurors Received the Wrong Impression

At various points respondent emphasizes that correct and complete CALJIC instructions on the concepts at issue were given to appellant's jury during the trial. As respondent stresses, a reviewing court considers the instructional package as a whole.

The briefing up to this point shows that two different standards of review could arguably apply. Appellant stated one in the opening brief; respondent does not mention it but sets forth another, at least as favorable to appellant. As will appear shortly, there is an appropriate synthesis. If the court's remarks amounted to an explanation of the meaning of reasonable doubt and lowered the prosecution's burden, there was error. Even if this was not the case, if the court's remarks made the instructions as a whole ambiguous, there was error if there was a reasonable likelihood that a juror could interpret them to permit a lower standard of proof.

Respondent acknowledges the rule for deciding whether an ambiguous instruction regarding reasonable doubt should be held erroneous. Such an instruction is infirm under the 14th Amendment if there is a reasonable likelihood that a juror could understand it to permit a lower standard of proof than that contemplated by *In re Winship* (1970) 397 U.S. 358.[13] (*Victor v.*

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[13]The high court uses this principle to determine if there was error in instructing on reasonable doubt (*Victor v. Nebraska* (1994) 511 U.S. 1, 2–3), in which case the error would be reversible per se (*Sullivan v. Louisiana* (1993) 508 U.S. 275). Rather than using the concept as a test for error, respondent mistakenly relies on it in attempting to show that any error was (continued...)

Nebraska, *supra*, 511 U.S. at pp. 2–3; see RB 43.)

Respondent does not dispute that, while this standard requires "more than speculation" that an instruction could somehow have been interpreted as requiring less than proof beyond a reasonable doubt, it does not require that such an understanding be "more likely than not." (*Boyde v. California* (1990) 494 U.S. 370, 380, cited at AOB 79; see also *Victor v. Nebraska*, *supra*, 511 U.S. at p. 6 [citing the discussion of *Boyde* in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & n. 4].)

Appellant, in contrast, has cited[14] a line of cases in which the giving of a proper reasonable-doubt instruction did not save an instructional set which includes explanations that dilute the standard. Rather than treating the instructional package as ambiguous, they recognized that if a correct general statement regarding reasonable doubt is given, but more specific, and incorrect, explanations are also supplied, there is no real ambiguity. Reasonable jurors will understand the explanations to be consistent with—and an attempt to help them understand and apply—the more general language of the basic rule.[15] In doing so, they apply the common-sense principle, applied

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[13](...continued)
harmless. (RB 43.) However, respondent's argument that there was no reasonable likelihood of an erroneous interpretation would presumably be the same in the correct context.

[14]AOB 79, 88.

[15]*Cage v. Louisiana* (1990) 498 U.S. 39 (reversal when correct statement of reasonable-doubt standard modified by incorrect explanations of level of doubt required to acquit); *People v. Serrato* (1973) 9 Cal.3d 753, 767 (informal judicial comment possibly implying defense burden to explain possession of contraband reversible per se, despite giving of correct formal instructions); *People v. Garcia* (1975) 54 Cal.App.3d 61, 70 (applying (continued...)

frequently by courts in construing contracts[16] and statutes,[17] that the particular controls over the general. (See also *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 300 [correct general instructions on how to determine guilt do not cure specific, erroneous permissive-inference instruction].)

As appellant will show, there was error under either standard. The remarks at issue amounted to an explanation of reasonable doubt that impermissibly lowered the burden of proof. Even if they did not, they introduced an ambiguity into the instructions that created a reasonable likelihood that jurors interpreted them to express a lower burden.

2. The "Raspberry-pie" Example Illustrated Not Only How to Infer a Fact from a Predicate Fact, but How to Conclude That Guilt Was Proven

Respondent leaves unanswered parts of appellant's analysis of this issue. In respondent's view, there is no need to answer because the trial court's raspberry-pie story "was not meant to demonstrate the concept of guilty beyond a reasonable doubt." Rather, it was an attempt to "explain[] how inferences can be drawn from facts, and thus proof can occur through circumstantial evidence." (RB 40.) Appellant has acknowledged that this may have been the trial court's intention, although the matter is far from clear. (See

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[15](...continued)
Chapman test before *Sullivan* declared such error "structural," incorrect remarks purporting to explain statutory definition of reasonable doubt could not be held harmless); *People v. Johnson* (2004) 119 Cal.App.4th 976, 984, 985–986 (though trial court finally instructed jury using CALJIC No. 2.90, *Brannon* error [see p. 72, below] during voir dire treated as reversible per se).

[16]E.g., *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386.

[17]*Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246.

AOB 77.) But in terms of what a reasonable juror would have understood, respondent's assertion is belied by the overall context and much of the court's language.

This was most obvious with the last panel, which included jurors B-105 and B-78. (See RT 4: 955, 982.) After covering the matters it handled in a more routine manner, the court stated that it is not true, as some jurors think, that in a capital case "absolutely insurmountable evidence is required to convict." Rather, the rules and procedures are the same, whether the charge is petty theft or a capital crime, and the prosecution's burden is beyond a reasonable doubt. Then the court stated that people are sometimes confused about circumstantial evidence, said that "there's nothing mystical" about such evidence, which proves something "by indirection," and that an example would help explain it. (RT 4: 904.) The court then gave its raspberry-pie example, concluding, "Now, that's circumstantial evidence, sure, but I think most moms or dads would arrive at *a conclusion beyond any reasonable doubt* under those circumstances that that child was the one who got into that pie." (RT 4: 905, emphasis added.) The court acknowledged—in more neutral terms than it did with other jurors—that circumstantial evidence requires special rules to understand and use it, which would be given them later, but stated that it wanted to tell the jurors "going in" that there "is nothing inherently defective" about such evidence. Then it reiterated that the burden of proof is the same as in any other trial. (RT 4: 905–906.)

So, yes, the raspberry-pie example was an illustration, but it was not an illustration only of "how inferences can be drawn from facts." (RB 40.) It was also an illustration of how an accused perpetrator of a misdeed can be identified as the guilty party, beyond a reasonable doubt, via circumstantial evidence. There is no avoiding that the pre-instruction became part of the

court's explanations of reasonable doubt itself.

With the other three panels, each of which also included people who ultimately sat on the jury,[18] the court did not use the language of reasonable doubt in describing the process of concluding that the child was the pie-tasting perpetrator. But the context and much of its language show that a reasonable juror would have understood the illustration to exemplify not only the process of inferring some greater level of probability of one fact from proof of another, but also of reaching a very strong conclusion in the context of establishing guilt of a crime. The context was disabusing jurors of the notions that circumstantial evidence may be insufficient to convict, or in some way of less value for that purpose, or that the burden of proof is higher in a capital case. (See, e.g., RT 3: 549.) In other words, the raspberry-pie illustration was merely a component of a larger instruction on what it would take to convict. Moreover, the example itself did not just illustrate facts having some unspecified inferential value tending to show the existence of a further fact, as a simple illustration of the use of circumstantial evidence would have done. (Cf. *United States v. Dove*, *supra*, 916 F.2d 41, 46.) Rather, even with the panels with whom the language of reasonable doubt was not used, the example was about how one could "conclude" that a proscribed act had been committed[19] or about the raspberry evidence being enough to "figur[e] out" or "decid[e] . . . what happened."[20, 21] Finally, with every panel, as part of the

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[18]See AOB 66, fns. 40–43.

[19]RT 3: 550.

[20]RT 3: 807–808, 695, respectively.

[21]The three quotations here cover all three panels that did not hear the
(continued...)

same discussion, the court below explicitly referred to the burden of proof, emphasizing that in a capital case it is the same as in any other. This was an integral discussion, not one treating the topics as separate. (RT 3: 550–551, 693–696; 4: 806–808, 904–906.) In sum, the court was not only explaining what circumstantial evidence is, but instructing about its use in meeting the prosecution's burden of proof. To the extent that it did so in a misleading fashion, therefore, it was an infirm instruction regarding that burden.

3. Rather Than Educating the Jurors About an Unusual, Extremely High Burden of Proof in the Face of a Presumption of Innocence, the Challenged Remarks Reinforced Jurors' Notions About "Deciding What Happened"

The trial court's choice of an illustration that commingled fact-finding with determining a person's guilt leads to two points tacitly conceded by respondent. The first is that the trial court's duty was to educate the jurors about an extremely high standard of proof. The constitutional requirement is that "the factfinder . . . [must] reach a subjective state of near certitude of the guilt of the accused."[22] (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.) The trial court's concern that a major problem in qualifying a jury is ensuring that jurors do not adopt an even higher standard was misplaced.

Second, jurors come to court expecting trials to be a way of deciding what happened, "a search for the truth." Their actual task, however, is to determine "not whether the defendant committed the acts[, but] . . . whether

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[21](...continued)
"reasonable-doubt" version. More complete quotations appear at AOB 66 and 82.

[22]For more authorities along the same lines, see AOB 77–78; see also 78–81.

the Government has carried its burden . . . ." (*Mitchell v. United States* (1999) 526 U.S. 314, 330.) This is an unfamiliar way of thinking for lay jurors. Appropriate instructions about the presumption of innocence and burden of proof hopefully "disabuse" the jurors of their illusions in this regard.[23] But the raspberry-pie explanation reinforced the popular misconceptions. With every panel, the court spoke not of whether a case against the child with access to the pie was proven, but of what had actually happened.[24] The example could not convey the impression that the child was presumed innocent and that someone had a burden of not just proving "what happened" (RT 3: 695), but of establishing it to a much greater degree of certainty than would be required for a decision to reprimand the child. Instead, the court authoritatively reinforced the popular misconception about determining what the truth was or what had happened, and it did so in the context of explaining how the jurors were to make their decision. Appellant identified this as one of several ways that the

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[23]Although, as pointed out earlier (AOB 70), it may be that the most that is being addressed is a common presumption of guilt—that if the police and prosecutor concluded that the defendant was the perpetrator, he or she probably is. (Mogill, *Some Reflections on the Relationship Between the Jury System, Truth, and Charles Ives* (1987) 4 Cooley L.Rev. 610; Schwab, *Interview with Edward Bennett Williams* (1985) 12(2) Litigation 28, 34.) Standard instructions probably do little more, therefore, than remind jurors that the defendant might not be guilty, without effectively indoctrinating them in the difference between deciding what happened and deciding whether the prosecution met its burden.

[24]"[Y]ou don't need any other evidence . . . to conclude that your child got into the pie." (RT 3: 550.) "I don't think any of you would have much trouble deciding what happened . . . ." (RT 3: 695.) ". . . I don't think any of you would have a problem figuring out what happened to that pie." (RT 4: 807–808.) "I don't think you'd have any trouble figuring out what happened to that pie." (RT 4: 905, where the court adds that parents would know beyond a reasonable doubt.)

illustration confused the jury about its task,[25] and respondent has not tried to refute this point.

4. The Court's Remarks Analogized the Jurors' Task to Decision-Making in Everyday Life

The court's remarks also compared the jurors' duty to decision-making in ordinary life, which—the parties agree—it was not permitted to do. (E.g., *People v. Brannon* (1873) 47 Cal. 96; RB 39–40.) Respondent contends, however, that the trial court did not violate the proscription. First, as noted earlier,[26] respondent erroneously sees the remarks as merely an illustration of how facts can be inferred from other facts, unconnected to any explanation of how the jurors were to make their decision. (RB 40.)

Respondent further argues that *Brannon* and its modern progeny are distinguishable: here the court did not say that one way of understanding the reasonable-doubt standard is for the jurors to think about how they make important decisions in everyday life. (RB 40.) Respondent's reasoning has some merit, but only to a point. Appellant's case is not squarely controlled by *Brannon*, but it intrudes enough on the territory that *Brannon* protects that—taken together with the instruction's other problems—the reasonable-doubt standard was still fatally diluted. The problem here is related to the one about reinforcing—instead of countering—jurors' notions about trying to figure out what happened. Deciding what happened is what jurors do in ordinary life. Moreover, by presenting its illustration to prove the validity of deciding matters of culpability based on circumstances alone, the court was analogizing trial fact-finding with fact-finding in ordinary life. The

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[25]AOB 82–83.

[26]See pp. 67 et seq., above.

comparison was explicit, even if a directive to understand *reasonable doubt* according to how important decisions are made in ordinary life was not.

True, the case is not on all fours with *Brannon* or the other cases cited by the parties. It is, however, still badly contaminated by the court's muddling—instead of clearly explicating—the differences between decision-making in the two spheres. For the court made its point about the value of inferences for determining guilt by analogizing the jury's decision-making with that of a person who had far less incentive to take the time to consider alternative possibilities for what might have happened and whether they could be ruled out.

5. The Court's Illustration Effectively Instructed the Jurors That They Could Find Guilt Without Considering Whether Alternative Hypotheses Were Reasonable

The analogy to decision-making in everyday life ties in to the third problem with the illustration, which was that there was no consideration of hypotheses other than guilt.[27] The example of determining the child's guilt was presented without the guidance required by law and, appellant contends, due process, when instructing on how to determine guilt through circumstantial evidence.[28] (U.S. Const., 14th Amend.; *People v. Yrigoyen* (1955) 45 Cal.2d

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[27]Was there a rivalrous sibling in the house who might have set up the young child? Was there a pet who could have taken a bite, or a bird that took advantage of the pie cooling on a window sill, while the suspicious parent mistook the child's runny nose for the syrupy pie filing? Were these possibilities reasonable, or not?

[28]Respondent notes that, under current high court precedent, the federal constitution does not require an instruction, such as CALJIC No. 2.01, explaining the interrelationship between the reasonable-doubt standard and proof of a circumstantial case. (RB 42.) Appellant agrees that this is the (continued...)

46; *People v. Bender* (1945) 27 Cal.2d 164, 174–177.) The jury went through the trial with an understanding of how to evaluate circumstantial evidence created by the court's misleading illustration. Only at the end of trial was it told about the need to adopt reasonable interpretations of the evidence consistent with innocence and to acquit unless the evidence was irreconcilable with a rational conclusion other than guilt.

a. The Trial Court Downplayed the Circumstantial-Evidence Rule Explicitly, as Well as by Excluding it from the Principles it Told the Jury Were Important Enough for Pre-Instruction

Respondent, emphasizing that these principles were explained to the jury at the close of trial, contends that omitting them from the pre-instructions was therefore not error. (RB 41–43.) Respondent has no answer to the court's explicitly telling one panel—including three eventual jurors[29]—that "[t]he instructions on circumstantial evidence are very—are somewhat complex and I will read those to you at the appropriate time, but let me at this time just generally tell you" what it clearly felt was most important for them to understand. (RT 3: 694.) It eventually added that such evidence "has to be considered with the utilization of certain criteria, and I'll go into those instructions later on." (RT 3: 696.) But what it was elaborating on during voir dire was "what I want you to understand at the outset . . . ." (*Ibid.*) This could only mean that the fundamentals were being elaborated then. This was not true; understanding what it means to eliminate reasonable doubt in a

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[28](...continued)
current state of the law. (See AOB 86.)

[29]Jurors A-79, A-89, and A-48 heard the remarks. (See RT 3: 724, 741, 767.)

circumstantial case is fundamental to a jury's ability to evaluate such a case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46; *People v. Bender* (1945) 27 Cal.2d 164, 174–177; *People v. Hatchett* (1944) 63 Cal.App.2d 144, 154–155.) Nor does respondent attempt to deal with the same message being given implicitly to the other panels. For each group was given the customized explanation of, e.g., "what I want you at the beginning to understand" (RT 3: 550) and told that more would come later. (RT 3: 548–549, 550; 4: 807, 808, 905–906.)

A case relied on heavily by respondent explains the purpose of a court's discretionary power to pre-instruct on some of the principles that will ultimately guide the jury's deliberations:

> [T]he purpose of preinstructing jurors . . . is to give them some advance understanding of the applicable principles of law so that they will not receive the evidence and arguments in a vacuum. Moreover, [c]alling the attention of the jury at the commencement of the trial, to legal problems to be met, if fairly done, may be of great value in enabling the jury to understand the purpose and thus properly evaluate various bits of the evidence.

(*People v. Smith* (2008) 168 Cal.App.4th 7, 15, ellipsis and second set of brackets in original, citations and quotation marks omitted.) These purposes will be self-evident to any juror, and surely each heard the evidence while having clearly in mind the court's explanation of how it could be used.

There obviously would be a stronger case for reversal if CALJIC No. 2.01 had never been given at all. However, it was still highly problematic to take a major pre-instructional detour into this area, with more emphasis and comprehensibility than what was in the standard instruction, purporting to illustrate exactly how circumstantial evidence can be used to determine the perpetrator of a forbidden act, while omitting the "complex" but essential and correct rules that were relegated to a formal instructional process that could

wait until later.[30] The court emphasized what it felt the jurors most needed to know about evaluating a circumstantial case, while omitting what they are legally required to know in order to apply the reasonable-doubt standard to such a case. Respondent offers no reason why this was not another very troublesome aspect of the pre-instructions.

b. *People v. Smith* Dealt With a Different Contention

Respondent does, however, claim that appellant's contention was rejected in *People v. Smith*, *supra*, 168 Cal.App.4th 7. (RB 42.) The contention was not the same, and *Smith* is not dispositive. The contention in *Smith* was that the trial court erred in pre-instructing with CALCRIM No. 223 without also reading No. 224. CALCRIM No. 223 explains the difference between direct and circumstantial evidence (illustrating each with evidence that it is raining outside), states that neither is necessarily more reliable than the other, and tells the jury that it must decide whether a fact has been proved based on all the evidence. CALCRIM No. 224 is the analog to CALJIC No. 2.01. The Court of Appeal noted a trial court's discretion in choosing whether and to what extent to pre-instruct, the absence of authority supporting the appellant's position, and the reading of both instructions at the end of trial. (168 Cal.App.4th at pp. 17–19.)

The precise contention rejected in *Smith*, then, was that the trial court

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[30]The circumstantial-evidence rule expressed in CALJIC No. 2.01, whether viewed as "complex," as the trial court saw it, or foreign to the jurors' usual reasoning processes, as appellant sees it, certainly would have benefited from the type of example-based elaboration which the trial court used to illustrate determining guilt from circumstantial evidence without the use of correct principles. This speaks not only to the evenhandedness point, but also to the limits on the capacity of the formal instructional process to undo what was done in the pre-instructions.

was required " to sua sponte preinstruct the jury under CALCRIM No. 224 on the sufficiency of circumstantial evidence just because it exercises its discretion to preinstruct the jury under CALCRIM No. 223." (*Id.* at p. 19.) The instant case differs, first, in that *Smith* involved no illustration of finding a person to have been the perpetrator of an offense. It is one thing to simply explain the equal value of the two kinds of evidence without going into the mechanics of how to use circumstantial evidence to prove someone guilty. It is quite another to illustrate the process of concluding that someone was the guilty party, while both omitting critical directions on how that is to be done and violating them in the reasoning used in the illustration. Moreover, in *Smith*, it was not a case of letting the jury know that the essentials were being communicated beforehand, while the complex formal instructions would come later. Finally, the only complaint in *Smith* was the failure to include CALCRIM No. 224 in the pre-instructions; there was no trial-court commentary reinforcing the jurors' preconceptions that their job was to determine "what happened" or analogizing their task to fact-finding in everyday life.

6. The Three Difficulties With the Instruction Together Amounted to Error Under Either Applicable Standard

In sum, there were three problems with the content of the pre-instructions relating circumstantial evidence to the burden of proof, and together they amounted to fatal error. The first, which respondent tacitly concedes, is that the court's explanations reinforced—rather than countered—the prevailing misconception that a juror's duty task is "deciding what happened." (RT 3: 695.) The second is that they fell within the penumbra of *People v. Brannon*, *supra*, 47 Cal. 96, to borrow a term from

constitutional law.[31] They did so by making an analogy to decision-making in everyday life, where there are no presumptions, standards lower than the reasonable-doubt standard apply, the task *is* to "decid[e] what happened," and there is little need to ensure that reason and the known facts permit no alternative explanations. Finally, the illustration contained no search for such explanations to see if there were any reasonable ones. Instead of helping the jurors understand what the presumption of innocence meant for the logic they had to apply and that, to convict, they had to "be reasonably persuaded to a near certainty,"[32] the court illustrated determining guilt of an offense in a way that was what they were accustomed to doing, not in a way that would eliminate all reasonable doubts. Thus neither the case's not being on all fours with *Brannon* nor the later giving of correct instructions permits respondent to avoid the fact that, at this critical point, there was error in conveying the jurors' constitutional responsibilities.

As explained previously,[33] there are two possible standards of review. Viewing all the instructions given at various parts of the trial, and assuming that the jurors understood and paid attention to all of them, the careful digression during voir dire was an explanation of how to go about the fact-finding referred to in other instructions. For three jurors it explicitly showed how reasonable doubt was to be eliminated; for the others it did so implicitly. In both cases the emphasis on determining what happened, as one would in everyday life, and without a hint of the need to consider other hypotheses and

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[31]*Griswold v. Connecticut* (1965) 381 U.S. 479, 483.

[32]*People v. Hall* (1964) 62 Cal.2d 104, 112 (Traynor, C.J., for the Court).

[33]See pp. 65, et seq., above.

eliminate them as unreasonable, provided an infirm explanation of how the prosecution's burden was to be met. There was, therefore, error. (*In re Winship*, *supra*, 397 U.S. 358.)

The result is no different under the standard propounded by respondent. At best, the instructions as a whole were ambiguous, making the question whether there was a reasonable likelihood that jurors took in the voir-dire portion in a manner which lowered the prosecution's burden. That portion received special emphasis.[34] The challenged remarks were bound to mislead for the reasons summarized in the previous paragraph. And a reasonable juror would easily reconcile them with the correct statements of the law, as the further elaboration of those general rules that they were in fact intended to be. For all these reasons, there was not just a "speculati[ve]," possibility,[35] but a reasonable likelihood, that some jurors were misled. (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 2–3.) In either case, there was error.

Respondent argues that the context in which the instructions were given negates any reasonable likelihood that the jury understood the instructions to allow conviction based on a weakened standard.[36] Respondent observes that the challenged statements occurred before the jury had been selected and, by respondent's count, "roughly two and a half weeks" before deliberations began. (RB 44.) (The intervals were 12 and 13 days, depending on the

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[34]See p. 52, above.

[35]*Boyde v. California*, *supra*, 494 U.S. 370, 380.

[36]Respondent frames this as a harmlessness argument, although both cases it cites put the reasonable-likelihood test forward as a basis for determining whether there was error. (RB 43; see *Victor v. Nebraska*, *supra*, 511 U.S. at pp. 2–3; *People v. Smith* (2008) 168 Cal.App.4th 7, 13.

panel.[37]) Respondent again notes that those instructions were complete and correct on the issues involved here, that the court included the general instruction that it had not intended at any point to suggest how the jury should find the facts, and that appellant did not request re-instruction or clarification. (RB 44.)

As noted previously, however, the very act of pre-instructing, as part of voir dire, placed special emphasis on those instructions. Indeed, for one group the court made explicit that

> [i]n this kind of a case[,] especially[,] it's sometimes valuable to give the jurors some exposure to the criteria that they'll be utilizing in evaluating the case and their responsibilities in evaluating that evidence before we even complete the selection of the jury.

(RT 3: 548; see also, e.g., RT 4: 805–806.) Respondent does not suggest how the vivid and clear raspberry-pie illustration of how they were to do their fact-finding could fail to influence the jurors' view of the evidence as they were hearing it, or how it could be forgotten in a period of under two weeks. The fact that the jury finally heard the correct rules on how to determine if circumstantial evidence has proven a case beyond a reasonable doubt had been dealt with above at pages 74–76, above. The final factor relied on by respondent, trial counsel's failure to intervene, has nothing to do with whether whether there was error. There is a reasonable likelihood that the jurors understood the pre-instructions to be guiding them as to how to carry out their

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[37]The pre-instructions at issue were delivered June 4 and June 5, 1998. (RT 3: 514, 548 et seq., 693 et seq.; RT 4: 775, 806 et seq., 904 et seq.) The complete instructional set was read, and deliberations began, June 17. (RT 11: 2327, 2467, 2472.)

task. For reasons already explained, the guidance was erroneous. There was, therefore, error. (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 2–3.)

D. Respondent Does Not Attempt to Show That the Lack of Evenhandedness in Pre-instructing or in Commenting on the Evidence Was Harmless, and the Lowering of the Burden of Proof Is Reversible Per Se

The errors regarding showing concern for the prosecution and commenting favorably on the kind of evidence it would present (rather than showing how circumstantial evidence could either prove a case or leave reasonable doubts), on the one hand, and in actually lowering the reasonable-doubt standard, on the other, trigger different inquiries regarding the need to reverse.

1. Respondent Appears to Concede That Lack of Evenhandedness Could Not Have Been Harmless

Appellant has canvassed the evidence and shown how the due-process infringement of conveying an impression that the court was concerned lest the prosecution be short-changed could have influenced the outcome, i.e., could not have been harmless beyond a reasonable doubt. (AOB 89–98.) Respondent's attempt to shoulder its burden of demonstrating harmlessness, however, addresses only the other error—the effective lowering of the reasonable doubt standard.[38] (RB 43–45.) As to the question of harmlessness in demonstrating sympathy for respondent, therefore, appellant relies on his opening brief.

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[38]In the middle of that discussion, respondent repeats that the trial court gave the standard instruction cautioning the jurors not to assume from its words or conduct how it thinks they should find the facts. (RB 44.) To the extent that this observation might apply to the appearance-of-bias error, see the discussion at page 63, above.

2. Lowering the Standard of Proof Is Reversible Per Se

Error that could have permitted jurors to hold the prosecution to a lesser burden than the constitutional standard of beyond a reasonable doubt is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) Respondent ignores this rule. Rather, as explained above,[39] it mistakenly treats the reasonable-likelihood-of-misunderstanding test for whether the instructions were erroneous as a test for harmlessness.[40] (RB 43–45.)

Thus respondent does not try to show harmlessness where it is permitted to do so (due-process tilt towards prosecution), and tries to where it may not (lowering standard of proof). If there was error under either rubric, reversal is required.

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[39]See pages 65, fn. 13, and 79, fn. 36, above.

[40]If it were correct, however, that there is no reasonable likelihood that jurors understood the remarks as appellant contends, respondent would prevail because of lack of error at all. The reasons why this is not the case were discussed in the portions of this argument showing that there was error.

III. THE PROSECUTION WAS PERMITTED TO ARGUE THAT THE JURY SHOULD NOT ACQUIT A GUILTY DEFENDANT JUST BECAUSE THE REASONABLE-DOUBT STANDARD WAS NOT MET

In his guilt-phase argument, appellant's attorney told the jury that its duty was to acquit appellant if the prosecution had not proved its case beyond a reasonable doubt, even if it believed appellant guilty. The assisting prosecutor, in rebuttal, referred to the argument and urged the jury to not "ever come back and tell a prosecutor, 'Gosh, you know, we believed he was guilty, but—.'"[1] (RT 11: 2448.) Despite the egregiousness of the comment, it was uncorrected by the trial court, the lead prosecutor, or appellant's attorney.[2] And the lead prosecutor had already told the jury that the instructions, though convoluted, were not intended to make them violate their common sense when they knew appellant was guilty. (RT 11: 2380.) In these circumstances, the injunction not to let the reasonable-doubt standard prevent them from doing justice was fatal error.

Respondent argues that there was no misconduct, that if there was it

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[1]Respondent quotes an uncorrected version of the record, in which punctuation was missing: "[W]e believed he was guilty, but don't do that." (RB 46.) The certified record reads as follows:

> But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but—." Don't do that. If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you.

(RT 11: 2448.)

[2]Appellant is aware of the general rule regarding forfeiture of review of unobjected-to misconduct. (*People v. Green* (1980) 27 Cal.3d 1, 27.) Applicable exceptions are discussed in the opening brief. (AOB 104–107.) Respondent's partial response is discussed below.

was harmless, and that in these circumstances there is no harm in treating the claim as forfeited.[3] Most of respondent's position involves a mischaracterization of appellant's contention and serious distortions of the record. Respondent's only point on the merits requiring an answer beyond correcting such mischaracterizations and distortions is whether the trial court's instructions on the prosecution's burden cured the error. It is clear that they did not.

A. Appellant Does Not Claim That the Deputy District Attorney Conveyed a Prohibited "Subliminal Message"; She Stated it Clearly and Outright

"Appellant claims," writes respondent, "that the prosecutor's statement . . . conveyed a subliminal message to the jury that it must disregard the reasonable doubt standard." (RB 48.) Respondent downplays the claim. Neither *subliminal* nor the concept it describes occurs in appellant's argument. The prosecutor's statement was a direct, unmistakable exhortation for the jury not to let a technicality like reasonable doubt to prevent it from doing justice. The only way she could have been more explicit would have been if she had completed her sentence, admonishing the jury to never come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but we couldn't say the case was proved beyond a reasonable doubt." Appellant argued that the sentence and its context made that meaning perfectly clear in any event.[4] Respondent has suggested no alternate meaning. Appellant need not and does

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[3]Because whether the claim should be reached depends in part on its merits, appellant replies to respondent's forfeiture contention last. (See pp. 97 et seq., below, arguing, e.g., that a curative instruction could not have been effective and reasons why the Court should exercise its discretion to review the claim even if it was forfeited.)

[4]See AOB 102.

not reach to complain of some kind of "subliminal" impact from the remark.

B. Standard of Review: Misstating the Law Is Misconduct and, If Done in a Manner That Violates a Specific Constitutional Guarantee *or* Infects the Trial with Unfairness, Violates Due Process

Respondent does not dispute that it is improper for a prosecutor to attempt in argument to absolve the prosecution from its obligation to overcome reasonable doubt on all elements. (*People v. Hill* (1998) 17 Cal.4th 800, 829–830.) Nor does respondent dispute that such misconduct implicates a core element of a defendant's federal due process rights. (*In re Winship* (1970) 397 U.S. 358.) However, respondent posits that there is a Fourteenth-Amendment violation only when the misconduct infects the trial with such unfairness as to make the conviction a denial of due process. (RB 45, citing *People v. Morales* (2001) 25 Cal.4th 34, 44.) While the remarks at issue here certainly qualify, the statement relied on by respondent, true as far as it goes, is incomplete. Its origin apparently lies in the following discussion in *Donnelly v. DeChristophoro* (1974) 416 U.S. 637:

> This is not a case in which . . . the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. [Citation.] When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process.

(*Id.* at p. 643.) Here a "specific guarantee[] of the Bill of Rights" *is* involved: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra*, 397 U.S. at p. 364.)

This is not a case where appellant relies on the catchall fundamental-fairness aspect of due process that applies when no specific guarantee of the Bill of Rights is implicated. The remarks did "impermissibly infringe" upon one of those guarantees, and that is enough to make out a due process violation. (*Donnelly v. DeChristophoro*, *supra*, 416 U.S. at p. 643.) Even if this were not the case, an error that permitted the jury to find guilt while understanding the reasonable-doubt standard to present a lower bar than it does would still render the trial fundamentally unfair and hence amount to a due-process violation. (*In re Winship*, *supra*, 397 U.S. 358.)

C. It Is Not True That the Context Transformed the Meaning of the Prosecutor's Point

Appellant maintains that the meaning of Deputy District Attorney Helart's remarks was clear and could be understood only to be that the reasonable-doubt standard was not one that needed to stand in the way of convicting a man the jury believed to be guilty, as long as it expected that belief to abide. However, even if there were any ambiguity, the authorities cited by respondent in its harmlessness argument establish that appellant need only show a reasonable likelihood that the jury would have so understood the prosecutor's argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 244; *People v. Clair* (1992) 2 Cal.4th 629, 663, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [reaffirming reasonable-likelihood test for ambiguous instructions]; see also *Victor v. Nebraska*, *supra*, 511 U.S. at pp. 2–3 [applying test to instructions claimed to lower reasonable-doubt standard].)

Respondent briefly makes four points on whether there was misconduct, claiming that appellant ignores a context which somehow makes the remarks other than what they seem. Each of respondent's statements, however, misreads the record.

Respondent writes that "focusing on the language of the instruction and telling the jury that in order to convict appellant, they needed to 'believe' in his guilt, and that the belief could not be a fleeting one, did not impair or denigrate the reasonable doubt standard." (RB 48.) Such a statement about what was needed to convict would not denigrate the standard, but this is not what the prosecutor said. The portion of her remarks which respondent seems to be interpreting—respondent supplies no quotation or citation—is the sentence immediately following the crucial one about not returning a not-guilty verdict if the jury believed appellant was guilty. There the prosecutor did not say either that belief in guilt would be required or that it could not be a fleeting one. She said not what was necessary, but what was sufficient: "If you believe he's guilty today and you'll believe he's guilty next week[,] then that's that abiding conviction that's going to stay with you." (RT 11: 2448.) And in fact that is not sufficient; a juror could believe appellant was guilty and continue to believe it because of clear and convincing evidence, or even a preponderance of the evidence. This is not a mere telling the jurors that they needed to believe in appellant's guilt and that the belief could not be a fleeting one. It was an elaboration of the point that if they believed he was guilty, the meaning of *reasonable doubt* was not such that they needed to let that doubt stand in the way of conviction.

Respondent next lauds "the prosecutor" for "even encourag[ing] jurors to ask questions to the court if any of the instructions confused them." (RB 48, citing RT 11: 2380–2381.) The remark was made by the lead prosecutor, Michael Reinhart, in the first summation. Respondent does not suggest how this newly-considered "context" changes the meaning of the challenged part of Gayle Helart's rebuttal.

Respondent insists that both prosecutorial arguments "urged the jury to follow the law, which was properly given by the court and read by the prosecutor." (RB 48, citing RT 11: 2380–2381.) This is simply not true. In the portion of the record which respondent cites, Mr. Reinhart cautions the jurors not to "read[] too much" into "complicated and convoluted" instructions in a manner that makes them "go[] against your common sense" when they "know he's guilty," and that, if they found themselves pulled to do so, they should stop and seek clarification from the court. (RT 11: 2380–2381.) Nowhere did either prosecutor make a statement encouraging the jurors to follow the law.

Finally, as to whether the law on the subject was "read by the prosecutor" or whether "the statement that appellant finds so objectionable . . . was coupled with an accurate reading from, and reference to[,] the reasonable doubt instruction" (RB 48), the record establishes that neither prosecutor read the instructions on presumption of innocence or reasonable doubt. (See RT 11: 2367–2413, 2445–2467.) The closest either came was when Ms. Helart paraphrased the portion of the instructions that emphasize that a reasonable doubt is not a mere possible doubt:

> And "beyond a reasonable doubt" is defined in the jury instructions[. I]t's not a mere possible doubt; anything open to being human has some possible or imaginary doubts. It's what's reasonable.

(RT 11: 2448.) Then she moved on to discussing the value of circumstantial evidence. (*Ibid.*)

In sum, the real context—which appellant described in detail in a discussion which respondent does not address[5]—was that Ms. Helart was

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[5]AOB 99–102.

responding point-by-point to the defense discussion of reasonable doubt. She took well over the line of propriety Mr. Reinhart's theme, which was in a grey area at best, about not letting complicated instructions lead the jury to go against its common sense regarding someone they knew to be guilty. She had just misleadingly denied that there is a hierarchy of standards of proof, of which the applicable one was the highest. Her answer to the defense reminder that *belief* in guilt was not enough was that the jurors should not "come back and tell a prosecutor" that the reason they acquitted someone they believed was guilty was that a reasonable doubt remained nonetheless, and that if they believed he was guilty now and would again next week, that was enough. (RT 11: 2448; see also pp. 2420–2421 [defense argument], 2447 [beginning of Helart response], 2380 [Reinhart argument].) It is not true that she or her colleague softened the attack the reasonable-doubt standard by reading the instructions and urging the jurors to follow the law.

It is telling that respondent's best shot on the substance of appellant's claim relies entirely on baseless assertions that appellant ignores the context and on fabrications about what the prosecutors said. Respondent does not attempt to supply an interpretation of Ms. Helart's remarks other than what appellant has put forward, or to defend them directly. Finally, respondent does not dispute that implying that the jurors might have to answer in some way to the prosecution team heightened their effect. (See AOB 103 & fn. 70.)

There is far more than a reasonable likelihood that jurors understood the argument to mean what it said. In fact there is no likelihood that they did not. This was an egregious error that requires reversal unless it were somehow harmless or if it were appropriate to apply the forfeiture doctrine.

D. Respondent Cannot Show Harmlessness

1. The Error Was Structural; If Not, Respondent Must Show Harmlessness Beyond a Reasonable Doubt

Respondent misunderstands the standard applicable to this Court's harmlessness inquiry, stating

> There is no reasonable likelihood that the prosecutor's comments caused the jury to misunderstand its duty to find guilt based on an abiding conviction and beyond a reasonable doubt. (See *People v. Harrison* (2005), 35 Cal.4th 208, 244; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

(RB 50.) Here, as in Argument II, respondent conflates the standard for error with the standard for harmlessness. If harmlessness is reached at all, it is because the Court has already found a reasonable likelihood that the jury understood the prosecutor's remarks to mean that, in the final analysis, an abiding belief in guilt is all that the law requires.[6] *People v. Harrison*, *supra*, makes this particularly clear, since the opinion first states the reasonable-

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[6]Appellant was also less than clear on this distinction in the opening brief. In his prejudice argument he cited *Cage v. Louisiana* (1990) 498 U.S. 39 for the proposition that reversal is required if a reasonable juror could have interpreted the argument to permit a finding of guilt based on less than the *Winship* standard of proof. (AOB 108, 109.) It is literally true that reversal is required in those circumstances, if the prosecutor's uncorrected argument is treated, as it should be, as equivalent to instructional error in the circumstances of this case. Analytically, however, the high court used the test in determining *whether* there was instructional error regarding reasonable doubt, which, if there was, cannot be held harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; see also *Cage v. Louisiana*, *supra*, 498 U.S. 39, 41; *Victor v. Nebraska*, *supra*, 511 U.S. 1, 2–3, 20.) It is not a test for harmlessness, once error is found.

In addition, the "could-have-interpreted" test of *Cage* should be amended to the "reasonable likelihood" test later adopted by the high court. (*Victor v. Nebraska* (1994) 511 U.S. 1, 2–3.)

likelihood test for error, then provides a separate statement of the test for harmlessness of prosecutorial misconduct. (35 Cal.4th at p. 244; see also *People v. Clair*, *supra*, 2 Cal.4th 629, 663.)

In the circumstances of this case, the error had the same effect as a judicial instruction lowering the burden of proof, given defense counsel's and the trial court's seeming acquiescence in it and its being followed with an actual instruction—as shown below—that backed up the prosecutor's explanation that a belief that abides is enough. An instruction explaining the burden of proof in terms less demanding than the actual reasonable-doubt standard is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) Appellant has, however, acknowledged the theoretical possibility that respondent could show, beyond a reasonable doubt, that the prosecutorial error was somehow cured and was not, therefore, equivalent to such an instruction. (*Chapman v. California* (1967) 386 U.S. 18.) In either case, the issue is only whether the jury was permitted to apply an improper standard, not whether this court believes that a jury applying the correct reasonable-doubt standard would have have reached the same verdicts. (See AOB 107–108, discussing *Sullivan v. Louisiana*, *supra*.)

In the interests of completeness, it should also be noted that, if the Court rejects the position that the error was equivalent to instructional error, *Chapman* would apply, given the due-process violations inherent in both the direct infringement on a specific right guaranteed by the federal Constitution and, more generally, in rendering the trial fundamentally unfair. (See pp. 85–86, above.)

2. Respondent Fails to Show Harmlessness

Little of respondent's attempt to meet its burden of showing that any error was harmless deals with the actual circumstances of this case. Rather,

respondent relies on two inapplicable precedents.

Respondent begins by citing *People v. Anderson* (1990) 52 Cal.3d 453, where a prosecutor's argument was claimed to have been susceptible to the interpretation that the defendant would prevail if the evidence were closely balanced but not if the prosecution's case preponderated. This Court held that there was no misconduct because that was not the point being made at all: "[I]n context . . . the prosecutor appears to have been merely observing that conflicting testimony and inferences must be resolved in defendant's favor." (*Id.* at p. 472.) Here, as noted above, even respondent provides no interpretation of the critical part of the argument, other than its obvious import, but only argues (erroneously) that in the context of other references to the law there was no misconduct. In relying on *Anderson*, however, respondent does not even mention the primary basis for this Court's conclusion. Respondent recounts only a secondary aspect of the Court's reasoning, where it added, "In any event, defense counsel amply clarified the matter during his own closing argument, and thereafter the court correctly instructed on the subjects of reasonable doubt and burden of proof." (*Ibid.*; see RB 49.) Even in these respects, however, the case is distinguishable. Here the prosecutor's purported guidance, in rebuttal, on how to treat reasonable doubt, was the last word on the subject in argument. There was no opportunity for defense clarification.

Similarly, as to the trial court's instructions, here the rebuttal was followed by instructions which neither specifically supported what defense counsel had said earlier nor contradicted the prosecutor's explanation. As appellant has pointed out, the situation is similar to those triggering application of the principle that a proper reasonable doubt instruction becomes infirm if

elaborated on in ways that explain reasonable doubt but do so improperly.[7] Respondent has no answer. Moreover, respondent is mute in the face of appellant's demonstration[8] that the instruction and the prosecutor's argument actually complemented each other. Even if the instruction is sufficient under normal circumstances, it did not in any way contradict, much less cure, a prosecutorial argument that all that was required was a belief in guilt that would abide. For the instruction explicitly defined a reasonable doubt only as one which would prevent jurors from having an abiding conviction of the truth of the charge. It said nothing else about what a reasonable doubt is or what proof beyond such a doubt is. (CT 9: 2667 [CALJIC No. 2.90].) Telling jurors that they had to be convinced and that the conviction had to abide was thus in no way inconsistent with Ms. Helart's version. This is why she followed her injunction not to "come back and tell a prosecutor, '. . . we believed he was guilty, but—'" with, "If you believe he's guilty today and you'll believe he's guilty next week[,] then that's that abiding conviction that's going to stay with you." (RT 11: 2448.) The instruction did not remedy the prosecutor's error; it gave her a fulcrum on which to leverage it.

Finally, the Helart argument, and a claim that the court's reading of CALJIC No. 2.90 corrected the error in that argument, cannot be considered in isolation. The judge had already signaled his own concern that the reasonable-doubt standard not be considered an "insurmountable" one during

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[7]See page 66, above, explaining this principle and cases which apply it, and AOB 108, invoking it.

[8]AOB 108–109; see also AOB 114–115.

voir dire,[9] where he found it necessary to convince the jurors that the circumstantial case they were about to here could well be sufficient and to illustrate how this could be so with the raspberry-pie narrative. Defense counsel had erroneously conceded that the prosecution had no "burden of proving Mr. Potts guilty to a moral certainty, to any kind of certainty." (RT 11: 2420.) The trial court instructed—on the theft/possession/robbery distinction—that possession of stolen property was nearly enough evidence to prove robbery.[10] This made specific and concrete the notion that "beyond a reasonable doubt" was not the barrier to conviction that it seemed to be. Other actions, interpretable by jurors as showing a judicial interest in conviction, noted in appellant's cumulative-actions claim[11]—such as an instruction argumentatively focusing on evidence of consciousness of guilt without mentioning evidence of consciousness of innocence, and prosecution-oriented (versus neutrally-phrased) instructions on determining the degree of murder—further negated any ability of the standard instruction on the prosecution's burden to deprive the Helart explanation of that burden of its power.

In sum, none of the bases for this Court's conclusions in *People v. Anderson* exist here.

Similarly, in citing *People v. Barnett* (1998) 17 Cal.4th 1044, respondent relies on a secondary aspect of this Court's reasoning, overlooking what requires the case to be distinguished. The *Barnett* prosecutor argued, "If you have that feeling, that conviction, that gut feeling that says yes, this man is guilty, . . . that's beyond a reasonable doubt." (*Id.* at p. 1156) This Court

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[9]RT 4: 904.

[10]See Argument V, AOB 119–136, and pp. 110, et seq., below.

[11]See Argument XVI.B.1, AOB 322–325.

addressed the following contention:

> According to defendant, the "moral certainty" language of former CALJIC No. 2.90, when considered in conjunction with the prosecutor's argument that guilt could be based on a "gut feeling," made it reasonably likely that the jury would have misunderstood the instruction as allowing for a finding of guilt on a standard lower than proof beyond a reasonable doubt.

(*Ibid.* at p. 1156.) The Court rejected the claim because a broader context, quoted in the opinion, showed that "[t]he prosecutor was not purporting to define 'moral certainty' as having a 'gut feeling'; rather, he was directing the jurors to trust their gut feelings in assessing the credibility of witnesses and resolving the conflicts in the testimony." (*Id.* at p. 1157.) Here, however, there is no alternate interpretation of the prosecutor's remarks. In *Barnett*, only after the Court concluded that the prosecutor was not demeaning the reasonable-doubt standard did it add the reasoning relied on by respondent: the judgment that the remarks caused no misunderstanding was "reinforced" by the fact that the trial court

> had repeatedly admonished the jurors, both at the outset of trial and after closing arguments, that they were required to follow the law and base their decision solely on the law and instructions as given to them by the court. Those admonishments were sufficient to dispel any potential confusion raised by the prosecutor's argument.

(*Ibid.*)

Here, in contrast, respondent offers no interpretation of the argument other than its obvious intent, which was to say that the concept of reasonable doubt was not something meant to cause acquittal of a man they believed, and would continue to believe, was guilty. *Barnett* does not, therefore, stand for the proposition that an argument clearly undercutting the reasonable-doubt standard can be saved by an instruction that the law comes only from the court.

Nonetheless, respondent analogizes the situation here, claiming that any confusion

> was adequately remedied by [a] multiple references to the reasonable doubt standard, [b] the court properly instructing the jury and giving them copies of the instructions, and [c] the prosecutor encouraging the jury to follow the law and ask the court if it had any confusion about the instructions.

(RB 49–50, bracketed material added.)

As to [a], in truth the only reference to reasonable doubt by either prosecutor was part of Ms. Helart's minimizing the burden, as explained above, page 88.

As to [b], as just explained in the discussion of *People v. Anderson*, in these circumstances the trial court's understandable use of revised CALJIC No. 2.90 validated the prosecutor's interpretation of her side's burden. In fact, it appears that she crafted her argument with the instruction in mind.

As to respondent's third point, it has already been shown[12] that in reality neither prosecutor encouraged the jurors to follow the law, while both demeaned anything that would go against the jurors' common sense. To the extent that Mr. Reinhart encouraged the jurors to ask questions to permit them to understand the law if they felt it was requiring them to go against their common sense (RT 11: 2380–2381), this would have helped only if the jurors knew that they needed assistance. From the jury's perspective, however, common sense and the law were congruent. Since the Helart argument could successfully mislead them—in the direction in which their common sense would likely take them—and, since it was not contradicted by the instructions, respondent's assumption that the jurors would have known they needed

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[12]Page 88, above.

clarification if they understood Ms. Helart to be saying what she said is unfounded.[13]

Thus reversal cannot be avoided even if respondent is entitled to try to show harmlessness beyond a reasonable doubt, unless, as respondent urges, the forfeiture doctrine, which is discussed next, should be applied.

E. The Forfeiture Doctrine Does Not Require Affirmance of These Unreliable Verdicts

Respondent ventures a cursory attempt to argue that the claim should be rejected because of trial counsel's failure to object. Recognizing the general rule, appellant pointed to three exceptions. He also provided two reasons why—even if no exception applied—this Court should exercise its discretion to reach the issue and grant relief. (AOB 104–107.) Respondent addresses one of the exceptions in a single sentence; asserts that the others do not apply, without naming them, much less attempting to show their supposed

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[13]Respondent also cites a footnote in *People v. Clair* (1992) 2 Cal.4th 629 for the proposition that it is presumed that jurors treat a court's instructions as the judge's statement of the law and a prosecutor's comments as an advocate's attempt to persuade. (RB 50, citing *id.* at p. 663, fn. 8,) The statement is valid as a general principle, especially in its context. The footnote is a caveat in an abstract discussion of a new standard for reviewing prosecutorial remarks allegedly susceptible of being construed in a way contrary to law. Since the standard adopted was identical to that applied to ambiguous instructions, the point was that whether there is a reasonable likelihood of jurors being misled will vary depending on who made the statement at issue. (See 2 Cal.4th at p. 663 & fn. 8.)

The principle is, however, unhelpful here. Jurors would not expect defense and judicial acquiescence in an important and rather startling reframing of the cardinal principle of the criminal law—if it was wrong. Nor would they, therefore, treat that reframing as mere puffery, to be ignored in favor of the court's instructions, particularly when those instructions unintentionally but effectively complemented the prosecutor's formulation, rather than correcting it.

inapplicability; and—for the rest—relies on its (mistaken) position on the merits, i.e., that there was no unfairness for which relief should be granted in any event. (RB 47–48.)

The one point respondent chooses to address is the futility exception. This is, in fact, the only one on which there is arguably room for disagreement regarding its applicability. Appellant cited ample case law regarding bells which cannot be "unrung" and powerful considerations which may influence jurors, even unconsciously. He then argued that, given the authority of the state's representative and the power of her suggestion that a likely hatchet-murderer should not be released back into their small town, certainly some jurors would wonder, "Do I go with the D.A. or the judge on this one?" and be irreparably influenced by the argument. (AOB 105–106.) Respondent answers only that counsel could easily have objected and requested a curative instruction. (RB 47.) But this fails to show that such an instruction would have been effective as a cure, which is the issue.

Respondent does not attempt to explain why the exceptions for (a) deprivation of fundamental constitutional rights and (b) a question that presents a pure question of law on undisputed facts do not apply. (See AOB 105, citing *People v. Vera* (1997) 15 Cal.4th 269, 276; *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

Respondent does not dispute that at most appellant's *right* to appellate review has been forfeited. I.e., this Court has discretionary power to consider the claim even if it was forfeited. (See AOB 106, citing, inter alia, *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Nor does respondent dispute that, if it is true that the type of error claimed was committed, that discretion should be exercised to vindicate the state's interest in, and appellant's right to, fair and reliable proceedings leading to a death judgment.

Finally, appellant has explained, "What was violated here was not an arcane principle or a complicated evidentiary question, where a fully-functioning adversary process would understandably be necessary to produce an appropriate outcome." (AOB 106.) The error was blatant, flagrant, obvious, and severe. In that light, Ms. Helart should have thought better of what she said; Mr. Reinhart should have spoken up; the trial court should have intervened on its own; and, of course, defense attorney Jerry Hultgren should have objected.[14] (See AOB 106–107, citing cases.) Thus the trial court and three of its officers fell down on the job. The fact that one of them was the person appointed by the county to represent appellant is not a sufficient reason to uphold critical verdicts arrived at by a jury likely to have been convinced that the reasonable-doubt standard is a lesser burden than it truly is.

Respondent has not attempted to rebut this reasoning.

The judicially-created forfeiture doctrine would permit this Court to uphold these verdicts because appellant was unlucky enough to have his attorney as one of the negligent actors at his trial. Justice, however, would not.

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[14]Because vigorous advocacy was not required to identify the error and because it is unclear that judicial action could have cured it, the error challenged here differs from Mr. Reinhart's more subtle suggestion that the jurors would probably be misinterpreting the instructions if they thought the law was requiring them to do something contrary to common sense (like acquitting a guilty person). It similarly differs from Ms. Helart's attack on the defense explanation of a hierarchy of standards of proof and her implying that a jury that declined to convict would have to answer to the prosecutors. For that reason, appellant has noted those three unobjected-to errors only as context for how the jury would have understood Ms. Helart's more egregious remarks and the prejudicial effect or those remarks, while refraining from claiming that they should be reached in this appeal. (See AOB 100–102, 103.)

Nor would the logic behind the forfeiture doctrine. Nor would the Eighth and Fourteenth Amendments. The judgment should be reversed notwithstanding the failure to object.

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IV. CALJIC NO. 2.90 DOES NOT ADEQUATELY DEFINE *REASONABLE DOUBT*, AND ANY POSSIBILITY FOR ITS BEING CORRECTLY UNDERSTOOD WAS UNDERMINED BY PROSECUTORIAL ARGUMENT

Read without preconceptions, as a juror would understand it, CALJIC No. 2.90 defines *reasonable doubt* as being left without an abiding conviction of the truth of the charge. If jurors are convinced, therefore, that a charge is true and expect that conviction to abide, that is enough. Revision of the instruction dropped now-archaic language explaining *how* convinced the jurors must be ("to a moral certainty"). This language which, when it was adopted, clarified that they had to be as certain as they could be without having had their own direct perceptions of the pertinent events. The revised language is similar to common explanations of the clear-and-convincing evidence standard and could even be understood as permitting a still lower degree of belief. Moreover, while both versions of the instruction seemed to hedge on the degree of certainty required by emphasizing that a reasonable doubt is not a mere possible doubt, the old one circled back to emphasize the strength of the prosecution's burden, in a way that the new version does not.[1]

Authorities upholding the change have never addressed these problems, instead relying on pre-revision dicta suggesting that the phrase at issue could be dropped,. This occurred in cases where defendants attacked the outdated language as confusing. The holdings were that the instruction was not invalid, but each included strong dicta suggesting that the old language had become so confusing that it should be removed. (See *Victor v. Nebraska* (1994) 511 U.S. 1; *People v. Freeman* (1994) 8 Cal.4th 450, 504.) Thus no party to either case

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[1]This is explained more fully at AOB 112–113.

had an interest in questioning whether the excisions ultimately to be suggested in the opinions would actually leave a sufficient instruction.

Despite appellant's analysis of the history of this Court's approval of the revised instruction, respondent mistakenly asserts that those precedents dealt with the critique presented here. Respondent offers nothing in precedent or in reason which answers that critique.

Perhaps, as with the old language, the new version is suspect enough for this Court to suggest revision but not so susceptible to misinterpretation as to automatically invalidate convictions. At appellant's trial, however, there was more than a reasonable likelihood[2] that appellant's jury understood the instruction this way. For, as shown above,[3] the truncated "abiding conviction" language was explained in prosecution argument as being only a belief that would abide. Defense counsel had no opportunity to reply; nothing in the court's instructions negated Ms. Helart's explanation; and that explanation was consistent with the revised wording of the instruction. Respondent's only answer, to be addressed below, is to set up the straw man of a claim of prosecutorial misconduct and defeat the (nonexistent) claim. Respondent has nothing to say about the impact of the prosecutor's analysis on a juror's understanding of the instruction.

As a separate matter, the instruction contained a pro-prosecution bias by stating that appellant was "presumed to be innocent until the contrary is proved . . . ," implying that conviction was expected. While this alone may not be reversible error, it was error nonetheless and should be considered in any analysis of whether actions at trial cumulatively require reversal. Respondent

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[2]*Victor v. Nebraska*, *supra*, 511 U.S. 1, 2–3.

[3]Page 93.

dismisses this contention without responding to any of the reasoning supporting it.

A. No Precedent Upholds the Instruction Against Appellant's Facial Attack

Respondent observes that the revised instruction has been repeatedly upheld. (RB 50–51.) Appellant has already acknowledged this but explained that the position appellant, like others before him, puts forth has yet to be answered on its merits, rather than by reference to dicta in cases not presenting the question. Thus appellant asks for actual review on the merits. (AOB 110–111.)

Respondent ignores this request and the reasoning underlying it. Respondent cites *People v. Brown* (2004) 33 Cal.4th 382, 392. Appellant had already explained that the Court in *Brown* was not presented with the analysis raised here and found it sufficient to rely on the dicta in *Victor v. Nebraska*.[4] Respondent provides no answer.

Similarly, respondent cites *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286–1287, "and cases cited therein"; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207–1208, "and cases cited therein"; and *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1299. (RB 50–51.) But these and the "cases cited"[5] all ultimately treat *Victor v. Nebraska*, *supra*, and/or *People v.*

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[4]See AOB 110–111; see also the critique of the instruction at pages 112–113.

[5]*Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999–1000; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571–1572; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895–896; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815–816; *People v. Tran* (1996) 47 Cal.App.4th 253, 262–263; *People v. Light* (1996) 44 Cal.App.4th 879, 884–889; *People v. Torres* (1996) 43 Cal.App.4th 1073, (continued...)

Freeman, supra, as dispositive.

Only one case cited by respondent, *People v. Haynes* (1998) 61 Cal.App.4th 1282, seeks to independently explain why a strong preponderance of the evidence could not convince a juror of the truth of the charge, to a level that he or she expected to abide. It, too, relies in what it acknowledges to be dictum in *People v. Freeman*. (See 61 Cal.App.4th at p. 1299.) But, in addition, it suggests,

> As for "abiding conviction" connoting duration but not the degree of conviction, defendant unduly isolates "abiding." "Abiding" may commonly mean lasting or enduring, without specifying degree, but here it modified the word "conviction," and jurors were told this meant being convinced beyond a reasonable doubt . . . .

(*Ibid.*) This hopeful characterization reverses the actual logic of the instruction. CALJIC No. 2.90 does not define *conviction* or *abiding conviction* in terms of the absence of any reasonable doubts. Rather, it defines *reasonable doubt* as the absence of an abiding conviction.[6] This means that proof beyond such a doubt is any proof which leaves the juror *with* an abiding conviction of the truth of the charge. There is still no statement of the required strength of conviction, other than that it must not be one likely to disappear over time.

Respondent has identified no case that it claims analyzed the issue on its merits. In an abundance of caution, appellant has reviewed respondent's "cases cited therein" in *People v. Hearon, supra*, and *People v. Aguilar, supra*. Several acknowledge that the Court's discussion in *People v. Freeman,*

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[5](...continued)
1077–1078.

[6]The pertinent language is at AOB 150. Respondent reprints the entire instruction at page 11 of Appendix B to its brief.

supra, was dictum, while citing the principle that dicta from this Court are highly persuasive and deferring to this Court to make any changes.[7] The only opinion which even attempts to address the merits of the issue is *People v. Tran*, *supra*, which states, after deferring to *Freeman*,

> Moreover, we believe that in the context of the complete instruction, the use of the phrase "abiding conviction," as a conviction which will last over time, adequately encompasses the appropriate depth or intensity of the jury's certainty and satisfies the requirements of due process.

(47 Cal.App.4th at p. 263.) This is erroneous. True, a wavering belief will not be expected to abide, but due process demands excluding more than wavering beliefs. There are states of being convinced that *will* be expected to abide, which nonetheless fall short of having eliminated every reasonable doubt. For example, New Mexico's pattern jury instructions explain, "'Clear and convincing evidence' is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true." (N.M. Stats. Ann., Uniform Jury Instructions—Civil, No. 13–1009.) The federal clear-and-convincing-evidence standard requires a party "to place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'"[8] (*Colorado v. New Mexico* (1984) 467 U.S. 310, 316.) Unfortunately, a simple "abiding conviction of the truth of the charge," per CALJIC No. 2.90, without further elaboration, could well be a conviction based merely on a high probability of its truth.

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[7]E.g., *People v. Hurtado*, *supra*, 47 Cal.App.4th at p. 816; *People v. Light*, *supra*, 44 Cal.App.4th at p. 889; see also *People v. Aguilar*, *supra*, 58 Cal.App.4th at p. 1209.

[8]This language shows that an abiding conviction can apply to a lower standard. Appellant did not mean to imply in his opening brief that the expression necessarily defines a lesser standard. (See AOB 112.)

Respondent offers no reasons to conclude otherwise.

The former instruction—"abiding conviction, to a moral certainty, of the truth of the charge"—recognized that the *level* of conviction needed to be addressed. In the procedural posture of the cases that recommended eliminating language that no longer did so in a reliable way, there were no advocates to point out this fact. Their task was to argue that the language rendered the instruction infirm. The fact remains that a replacement phrase is required if, on reconsideration, it is deemed necessary to say more than that the presumption of innocence can be overcome only by proof beyond a reasonable doubt.[9] Something along the following lines is needed: ". . . an abiding conviction of the truth of the charge, with as much certainty as can be established when trying to ascertain past events in the realm of human affairs." (See *Victor v. Nebraska*, *supra*, 511 U.S. 7–9 [explaining meaning of *moral certainty*]; see also AOB 77–78, quoting other authorities from the high court and this Court on the need for near certainty.)

B. Any Favorable Ambiguity in the Instruction Was Eradicated by the Prosecution's Explanation

Even if, in the usual case, CALJIC No. 2.90 is merely less than optimal, without being constitutionally infirm, here prosecutorial argument ensured a reasonable likelihood that a juror would understand it to permit a lower standard of proof than the reasonable-doubt standard required by due process. (See *Victor v. Nebraska*, *supra*, 511 U.S. 1, 2–3 [reasonable-likelihood

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[9]But see *People v. Brigham* (1979) 25 Cal.3d 283, 308 (arguing, and marshaling numerous authorities for, the proposition that it is better to abandon attempts to define *reasonable doubt*) (conc. opn. of Mosk, J.). See also AOB 112–113, on the structure of the instruction, the author of which deemed it necessary to say that a reasonable doubt is not a mere possible or imaginary doubt, creating the necessity to affirmatively state what a reasonable doubt is.

standard applies to finding error in ambiguous reasonable-doubt instruction].) As explained in Argument III, the prosecutorial rebuttal's point about reasonable doubt included this statement: "If you believe he's guilty today and you'll believe he's guilty next week[,] then that's that abiding conviction that's going to stay with you." (RT 11: 2448.) This statement guaranteed that the jury would understand the instruction to mean what it states in any event: if the state of being convinced will abide, there is no reasonable doubt.

Respondent sidesteps this portion of appellant's argument. First, respondent erroneously recasts it as a misconduct claim, then argues that lack of an objection forfeited review. Then respondent argues that, in any event, there was no misconduct. (RB 52.) But appellant claims instructional error, not prosecutorial misconduct. He actually emphasized that all the prosecutor did, in that sentence, was exploit an opportunity created by the language of the instruction itself. (AOB 114 & fn. 73.) The issue is only the impact of the argument on how jurors would have understood the instruction. The prosecutor clarified that, under the instruction, a particular degree of belief in guilt was not what was required, as long as it was strong enough that a juror could expect it to persist. Respondent fails to provide any reason why the prosecutor's argument did not have this effect. Instead, in observing, as did appellant, that the argument was consistent with the language of the instruction,[10] respondent unwittingly endorses appellant's position. The court's instruction was more than amenable to the interpretation set forth here, and the prosecutor explained that this was indeed what it meant.

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[10]RB 52.

C. The Instruction's Biased Language Implying the Inevitability of a Conviction Was Prejudicial Under the Circumstances of this Case

As a separate matter, CALJIC No. 2.90—unlike CALCRIM No. 103 and instructions used in many other jurisdictions—refers to a presumption that the defendant is innocent "until the contrary is proved." Taken literally, and under the assumption that the word *until* is being used correctly, this implies that the judge delivering the instruction expects guilt to be proved. Appellant acknowledges, however, that the context somewhat diminishes the power of the implication, and there is no claim that this alone was prejudicial error. Yet in a trial where so many other judicial actions created the appearance of a court that believed that doing justice would mean returning verdicts of guilt, the linguistic error contributed to that appearance. It should therefore figure into any cumulative-impact analysis, and it warrants a strong statement from this Court encouraging the CALJIC committee to modify the instruction.

Appellant has fully briefed this point. (AOB 115–118.) Respondent quotes a case which appellant had already distinguished, then simply dismisses —as "beyond convoluted"—appellant's straightforward analysis of the problem with the instruction's wording. (RB 52–53, quotation at p. 53.) Respondent adds only that a prosecutor's use of the expression, "[i]f you believe he's guilty today" defeats any claim that guilt was presupposed. Appellant acknowledges that these words—like other aspects of the trial context—would, logically and on a conscious level, prevent jurors from believing that the instruction was directing them to rubber-stamp something that was a foregone conclusion. However, respondent says nothing about appellant's actual contention about the subtle contribution of the court's language to an overall *gestalt* that prejudiced appellant, and nothing about his analysis of pertinent case law. Appellant therefore relies on the opening brief.

D. Reversal Is Required

Respondent's entire argument is that there was no error and does not include a claim that any error was harmless. In particular, respondent does not dispute the applicable principles: that reversal is required if an inadequate instruction on reasonable doubt was given or if, in the circumstances of this case, there is a reasonable likelihood that jurors interpreted the reasonable-doubt instruction as establishing a burden lower than that required by the true standard. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *Victor v. Nebraska*, *supra*, 511 U.S. 1, 2–3.)

The guilt verdicts and special-circumstances findings must be reversed.

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V. THE TRIAL COURT EXPLAINED HOW THE PROSECUTION COULD MEET ITS BURDEN OF PROVING ROBBERY IN TERMS THAT FURTHER UNDERMINED THE REASONABLE DOUBT STANDARD

The reasonable-doubt standard was further eroded by another instruction. The trial court instructed appellant's jury, in the words of CALJIC No. 2.15, that robbery and grand theft could not be proved by conscious possession of recently stolen property alone. The bulk of the instruction, however, went on to explain that the jury *could* find guilt from such possession as long as there was also some slight corroboration, giving examples.[1] The instruction takes a rule of thumb for appellate review of the sufficiency of evidence to support a conviction for knowing possession of stolen property and transforms it into a principle that a jury can find all the elements of robbery true, beyond a reasonable doubt, from the mere fact of possession, plus any slight corroboration of the charge. From the jury's perspective, the only reasonable interpretation had to be not that the instruction contradicted the general rule about the prosecution's burden of proving each element of the offenses beyond a reasonable doubt, but that it spelled out how the general rule could be applied in a particular situation.

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[1]This Court characterizes the instruction as favorable to defendants. (See *People v. Gamache* (2010) 48 Cal.4th 347, 375, and cases cited.) However, the bulk of the instruction is devoted to emphasizing the need for only slight corroboration and giving examples of corroboration that, to the extent that they refer to evidence in the case, are argumentative. (*People v. Hughes* (2002) 27 Cal.4th 287, 361 [instructions inviting jury to draw inferences favorable to a party from specified evidence are improperly argumentative].) As to the favorable part—its statement that possession alone is not enough to convict—this Court has recognized that this is such an obvious application of principles explained to the jury in more general instructions that it need not be spelled out. (*People v. Najera* (2008) 43 Cal.4th 1132, 1138–1141.)

This Court has long recognized that possession can occur innocently.[2] (*People v. Najera*, *supra*, 43 Cal.4th 1132, 1138.) Possession plus "slight" corroboration of the charged offense cannot, therefore, automatically permit "the factfinder . . . to reach a subjective state of near certitude of the guilt of the accused"?[3] Nor can it be said that, in every case where evidence of possession and slight corroboration are presented, the circumstances are irreconcilable with any conclusion other than guilt.[4] Moreover, since "slight" corroboration will typically go only to identity or one element of the offense, and since, as was true here, more than one of these will frequently be at issue, it is often a logical impossibility that all bases will be covered at all, much less to the exclusion of reasonable doubt. Thus, for example, even if the possessor stole the property, he or she may not have done so in a robbery, unless, in addition to what the instruction requires, there was unequivocal evidence that it was taken in a robbery and identity is the only issue.

In appellant's case, his having pawned the two pieces of jewelry in question was corroboration, since it aligned with the prosecution's theory that took the Jenkses jewelry to meet a need for funds. So was opportunity to steal, since appellant's employment gave him access to the Jenks home. Yet it is manifestly untrue that possession and pawning, or opportunity, alone

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[2]This is true of "conscious possession," the term used in the instruction. *Conscious* here simply refers to knowledge that one is in possession of an item, eliminating situations where another might have surreptitiously placed it, e.g., in the person's home. It does not specify knowledge of the item's having been stolen. (See *People v. Najera*, *supra*, 43 Cal.4th at p. 1138.)

[3]*Jackson v. Virginia* (1979) 443 U.S. 307, 315.

[4]See *People v. Yrigoyen* (1955) 45 Cal.2d 46; *People v. Bender* (1945) 27 Cal.2d 164, 174–177.

eliminated all doubts as to whether appellant was the one who originally took the jewelry, whether he did so at the time of the fatal crimes or on a prior occasion, and whether the taking was a robbery or an opportunistic post-mortem theft. The instruction stands reality on its head. In circumstances like appellant's, *possession corroborates other evidence of the charged offenses*, rather than coming so close to proving all their elements beyond a reasonable doubt that only slight additional corroboration is required.

This may be less true in the crime of possession of stolen property, where the rule seems to have originated. Perhaps the principle can legitimately reach theft itself and even burglary, under some circumstances. Respondent disagrees that, in appellant's case, the instruction collapsed the distinction between theft and robbery. (RB 55.) But when it comes to robbery, possession and slight corroboration (like the opportunity to steal) show nothing about, e.g., the force or fear element, nor about their temporal relationship to formation of the intent to steal.

Giving the instruction violated the federal constitution in two ways. It invited a finding of guilt on evidence that did not necessarily meet the reasonable-doubt standard. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) And it offered the jury an irrational permissive inference, one in which the fact inferred (guilt of robbery, versus theft or receiving stolen property) was not made more likely than not—much less true beyond a reasonable doubt—by the facts proved (possession plus slight corroboration). (*Leary v. United States* (1969) 395 U.S. 6, 36.)

A. Respondent Does Not Attempt to Show That the Cases on Which it Relies Should Not Be Reconsidered

Appellant has acknowledged case law upholding the instruction at issue here but has provided a reasoned basis for seeking reconsideration, pointing

out factors not addressed in prior opinions, flaws in their reasoning, and, in some cases, distinctions between the issues as presented previously and here. (AOB 127–129, 131–134.) Respondent simply relies on that same body of case law, without seeking to rebut appellant's critique of it and its applicability. (RB 54–55.)

Thus respondent cites *People v. Prieto* (2003) 30 Cal.4th 226, in which this Court summarily rejected a contention that the instruction lowered the burden of proof: "CALJIC No. 2.15 did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." (*Id.* at p. 248.) This conclusion overlooks that the instruction is a particularized directive on what it takes to infer guilt of the charges: conscious possession plus slight corroboration. The instruction need not address the burden of proof directly to impact it; it does so by telling the jury the requirements for finding guilt of the specified charges. Here the lead prosecutor interpreted the instruction that way for the jury, arguing that it meant that, having shown possession and the opportunity to steal, the prosecution had fulfilled the slight corroboration requirement, "and that meets our burden"[5] of proof on robbery and grand theft.

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[5]"There's an instruction that possession of stolen property, of recently stolen property is not by itself sufficient to permit an inference that the defendant is guilty of robbery or grand theft. That may seem a little strange to you because it's logical if they've gotten the stolen property, it's pretty good evidence that they're the thieves. The law acknowledges that, but says you need just a little bit more and says you need slight evidence to establish the robbery or the theft. And it gives you some examples, but it only requires slight evidence, and that slight evidence need not be of—well, slight, not of great weight.

"One of the examples they give is simply we have to show not only that

(continued...)

(RT 11: 2380.) He was justified in doing so, because that is how the instruction reads. The instruction does address the burden of proof, albeit indirectly.

Prieto further stated, "Moreover, other instructions properly instructed the jury on its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof. In light of these instructions, there is 'no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case." (30 Cal.4th at p. 248.) This reasoning assumes that jurors would be unaffected by the intuitive principle, applied explicitly when courts construe contracts and statutes, that the particular (here, how to find guilt of robbery) controls over the general (weighing evidence, burden of proof).[6] The instruction to which *Prieto* refers set forth general principles; No. 2.15, as the prosecutor pointed out, implicitly but clearly purported to apply them to the robbery and grand theft issues. Indeed, in *People v. Najera*, *supra*, this Court held that CALJIC No. 2.15 is but a specific application of the circumstantial-evidence/reasonable doubt principles to theft-related offenses. (43 Cal.4th at p. 1138–1139.) While the general instructions would, one would hope, color the jury's view of its task, no analysis of their application to the robbery-related charges was required of the jury once the court set forth a specific rule

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[5](...continued)
he had the stolen property, but he had the opportunity to steal it. And that meets our burden." (RT 11: 2379–2380.)

[6]See *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 300 (general instructions on how to determine guilt do not cure the giving of an erroneous permissive-inference instruction); see also *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386 (construing contract—particular controls over the general); *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246 (statutory construction—same).

for what permits a legally sufficient inference that appellant robbed the victims.

In a closely-related holding, *People v. Prieto* contains a recognition that undermines its summary rejection of the challenge to the instruction. The Court held that the instruction should not be adapted to permit finding guilt of murder just because a taking was part of the homicidal incident. (*People v. Prieto*, *supra*, 30 Cal.4th 226, 248–249; accord, *People v. Gamache*, *supra*, 48 Cal.4th 347, 375.) But robbery, like murder, has elements on which no light will necessarily be shed by possession plus unspecified corroboration. A prosecutor can add successively more elements to the crime of knowing possession—where the inference of guilt from conscious possession is strong—to charge the crimes of theft, burglary, robbery, and ultimately robbery-murder. The inference of guilt from possession alone, therefore, becomes weaker and weaker as the complexity and seriousness of the charged offense is increased. It cannot be that the prosecution is required to produce the same quantum of evidence regardless of whether it seeks to prove possession or robbery. *Prieto* recognizes this conclusion for murder, but there is no principled basis for drawing the line there and not applying it to robbery as well.

Subsequent to the filing of respondent's brief, this Court decided *People v. Moore* (2011) 51 Cal.4th 1104, another case which seems to support respondent. The Court found only state-law error in a trial court's applying CALJIC No. 2.15 to a murder charge. It reasoned that the jury was told that it "could draw merely 'an inference of guilt' from the fact of possession with slight corroboration, which any rational juror would understand meant he or she could consider this inference in deciding whether the prosecution has established the elements of" the charged offenses. (*Id.* at p. 1131.)

It is true that *inference of guilt* can mean "tending in logic to show that the defendant is guilty." It can, however, also mean "a logical conclusion that the defendant is guilty." The idea that no rational juror could assume the latter meaning in this context, particularly where, as here, the prosecutor explicitly relied on it,[7] is persuasively contradicted in the preceding paragraph of the *Moore* opinion, where the Court explains why there was error. Although the instruction correctly states that possession alone is not "is not sufficient to support a finding of guilt . . . and, accordingly, there must be other corroborating evidence[,] . . . the provision that the corroboration of the defendant's guilt 'need only be slight'" is erroneous in offenses like murder. (*Id.* at pp. 1130–1131.) Clearly, as the Court recognized, the subject-matter of the instruction is what is required for "a finding of guilt." A reference to the amount of corroboration needed would not be stated in the instruction, and its misstatement could not have any consequence, if the instruction merely permitted the jury *to take into account* the evidence of possession in cumulating all the evidence tending to show guilt. Evidence does not need to be corroborated in order to be considered.

Respondent cites *People v. Smithey* (1999) 20 Cal.4th 936. *Smithey* dealt with a contention similar to that presented here, "that there is no rational connection between conscious possession of stolen property and *how* that property was taken (e.g., with regard to the robbery charge, by means of force or fear with the specific intent to permanently deprive the victim of the property)." (*Id.* at p. 976.) Therefore, defendant contended, if the crime is one such as robbery, the instruction should not be given unless the only contested

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[7]See footnote 5, page 113, above.

issue is identity. This Court rejected the contention in reliance on *People v. Johnson* (1993) 6 Cal.4th 1 and *People v. Holt* (1997) 15 Cal.4th 619. But, in a discussion respondent ignores, appellant analyzed both *Johnson* and *Holt* in depth, explaining the need to reconsider each, at least to the extent that they appear to reach appellant's contention. (AOB 131–133.) The contention rejected in *Johnson* was only that the inference set forth in CALJIC No. 2.15 had enabled a conviction where *all* the evidence of the charged offense was actually insufficient to convict. This Court held that the evidence was in fact sufficient. (*Id.* at pp. 37–38.) The greater problem with the inference permitted by CALJIC No. 2.15 is that it permits the jury to convict *without considering* all the evidence and leaves a reviewing court unable to determine whether the jury did so, and to what extent it credited and relied on the remaining evidence, or whether it relied on the inference. (See *Connecticut v. Johnson* (1983) 460 U.S. 73, 85–86 (plur. opn.), quoted at AOB 131–132.) *Holt* used the same method of analysis as *Johnson*. As this Court put it in *Smithey*, "In both of these decisions, we found no error in giving the instruction—and no constitutional violation—when there was corroborating evidence sufficient to permit the jury to find beyond a reasonable doubt possession of stolen property and intent to steal." (20 Cal.4th at p. 977.)[8] So

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[8]*People v. Holt* relied on one other point, in a portion of its opinion which *Smithey* quotes (20 Cal.4th at pp. 977–978), and which appellant criticizes at AOB 132–133. Briefly, the concept is that admonishing the jury that it could not rely solely on possession could not be understood as relieving it from finding all the elements of the charged offenses. But, as explained earlier, focusing on that admonition ignores the bulk of the instruction, which is devoted to telling the jury that possession plus slight corroboration are enough.

the heart of the matter—a verdict from a jury given a shortcut that meant it never had to make those findings from that evidence—was never reached.

Smithey does take the *Johnson/Holt* approach to a more sophisticated level, holding that the instruction should not be given where there is insufficient evidence for the jury to find either possession or intent to steal that could meet the reasonable-doubt standard. (*Id.* at pp. 976–979.) But it still falls into the fundamental error of holding that, if those prerequisites are met, it is acceptable to tell the jury that it can convict on evidence of conscious possession and slight corroboration. The mistake is based on failure to recognize that "[t]he fact that the . . . court may view the evidence as overwhelming is . . . simply irrelevant" because "the jury may . . . rel[y] on the [instruction] rather than upon that evidence." (*Connecticut v. Johnson*, *supra*, 460 U.S. at pp. 85–86 (plur. opn.).)[9]

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[9]*Smithey*, in reviewing not only the evidence on which the instruction permitted the jury to rely, but all the evidence on which that body *might* have relied, cites *Ulster County Court v. Allen* (1979) 442 U.S. 140. *Allen*, however, is distinguishable.

The five-person majority in *Allen* tried to draw a line between mandatory and permissive presumptions. Strangely, even though the instant case arguably does not involve "a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense" (but see fn. 10, p. 120, below), the instruction also falls short of the "permissive" side of the line. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 167.)

In *Allen* the Court emphasized that the instructions as a whole did not permit the jury to rely on the suggested inference to find that the prosecution met its burden. (*Id.* at pp. 160–162 & fns. 19–22.) The instruction at issue told the jury that the presumption it offered had no effect if evidence, or a lack of evidence, contradicted the conclusion that the presumption otherwise permitted. (*Id.* at p. 161 & fn. 20.) Thus it was appropriate for the reviewing court to consider the entire record, because the jury understood that the

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Respondent also cites four Court of Appeal cases, but they add nothing to the analysis. Two do state that "[t]he instruction creates only a permissive inference, one the jury could either credit or reject '*based on its evaluation of the evidence*, and therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt. . . .'" (*People v. Gamble* (1994) 22 Cal.App.4th 446, 454, italics added, quoting *People v. Anderson* (1989) 210 Cal.App.3d 414, 427.) The instruction, however, in no way suggested that the jury should make that choice based on all the evidence. (Cf. *Ulster County Court v. Allen*, *supra*, 442 U.S. 140, 161 & fn. 20 [instruction stated that the presumption at issue was unavailable if the suggested inference was contradicted by either evidence or lack of evidence]; *Barnes v. United States* (1973) 412 U.S. 837, 839–840 [instruction permitting inference of guilty knowledge from possession admonished jury to consider the surrounding circumstances before drawing the inference]; *People v. McFarland* (1962) 58 Cal.3d 748, 758–759 [instruction emphasized possession was "a circumstance to be considered in connection with other evidence in determining the question

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[9](...continued)
predicate fact was "one[,] not necessarily sufficient[,] part of [the prosecution's] proof." (*Id.* at p. 167; see also p. 160.)

Here, in contrast, nothing negates the effect of telling the jury that it *could* rely entirely on possession plus slight corroboration to convict. So the situation triggering a need for the reviewing court to consider the entire record—a presumption or inference so "permissive" that the jury itself could not have relied on it without deciding whether the entire evidentiary picture warranted conviction—is absent.

The *Allen* majority also reaffirmed that even a permissive inference is valid only if "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," a test not met by the possession-corroboration rule. (442 U.S. at pp. 165–167, and fn. 28, quoting *Leary v. United States* (1969) 395 U.S. 6, 36.)

of innocence or guilt"].) More fundamentally, giving the jury an option to apply or reject the inference of guilt was error: the jury simply should not have been permitted to find that appellant was guilty of robbery based on possession plus slight corroboration. Doing so would constitute finding guilt on evidence that fell short of eliminating reasonable doubt. The fact that the jury was theoretically[10] free to avoid this erroneous route does not negate the fact that the instruction also gave the jury freedom to take it.

Besides claiming that case law settles the issue, respondent claims that "the instruction merely provides that evidence of possession of stolen property can be considered along with other factors in finding appellant's guilt." (RB 55.) This benign characterization of the instruction, would, if true, defeat appellant's claim. But it is untrue, belied by the language of the instruction itself.[11] Thus *People v. Barker* (2001) 91 Cal.App.4th 1166, in an analysis which this Court later endorsed as "persuasive,"[12] explained its holding that CALJIC No. 2.15 should not be applied to non-theft offenses, such as murder, on the basis that "the [trial] court is essentially singling out the fact of possession of recently stolen property as one that, if the jury finds it, will support a murder conviction with merely slight corroborating evidence." (91 Cal.App.4th at p. 1176.) The same is true when "robbery" is substituted for

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[10]As the lead prosecutor emphasized (see p. 113, fn. 5, above), the instruction sets forth a method through which the prosecution could meet its burden. It is not at all clear, therefore, that jurors would have felt free to ignore the purported rule and decide that possession and slight corroboration alone were not enough.

[11]The text of the instruction is at AOB 119, fn. 78. See also RB 53.

[12]*People v. Prieto*, *supra*, 30 Cal.4th at p. 248.

"murder." Despite respondent's contrary claim, the instruction does not merely provide that possession is a factor that may be considered.

B. All the Verdicts Must Be Set Aside

In some situations, such as where the evidence and arguments present no question regarding the robbery/theft distinction, no other errors muddled the jury's understanding of the prosecution's burden, and the trial court gave no impression of a concern that the jury could demand too much, there might be no reasonable likelihood that the jury could understand the instruction to lower the burden of proof or to create what would be an irrational permissive inference. In that case there would be no error. (*Victor v. Nebraska*, *supra*, 511 U.S. 1, 2–3) Given all the factors at play here, however, there was error. And error of this type is structural. (*Sullivan v. Louisiana* (1993) 508 U.S. 275); see also AOB 134, discussing *Sullivan* and *Leary v. United States*, *supra*, 395 U.S. 6, 53.)

Alternatively, to uphold verdicts of a jury told that it need not examine the entire evidentiary picture to find whether robbery was proven, this Court would have to be able to conclude that no rational juror who did rely on the evidence rather than the assertively permissive inference could have been left with a doubt as to whether it was appellant who attacked the Jenkses, and whether he did so with an existing intent to steal. (*Neder v. United States* (1999) 527 U.S. 1, 19; *Chapman v. California* (1967) 386 U.S. 18; see also *People v. Mil* (No. S184665, 1/23/2012), __ Cal.4th __, __ [slip opn., pp 18–19].) Given the weakness of the circumstantial case on identity[13] and the

[13]See AOB 90–94.

virtual absence of evidence excluding after-acquired intent to steal,[14] a finding of harmlessness under any standard would be unfounded.

The trial court adapted the instruction so that the jury would understand it to apply not only to the robbery charge, but also to the robbery-murder questions facing them in the felony-murder theory of murder and the similar special circumstance. (RT 11: 2266.) Thus the verdicts on the robbery and grand theft counts and robbery-murder special circumstance must be reversed. The situation is slightly more complex with the murder verdicts, as they may have been based on a robbery theory or a premeditation theory. However, this is not a situation, like factual insufficiency of the evidence on one of two alternative theories, where the jury could have been relied on to recognize the inadequacy of the bad theory. It was not equipped to reject the faulty legal basis for finding guilt which was given them by the infirm instruction. (See *Griffin v. United States* (1991) 502 U.S. 46; *People v. Guiton* (1993) 4 Cal.4th 1116, and see pp. 27 et seq., above.)

Moreover, if the rule of *Griffin* and *Guiton* did not compel reversal and further analysis were still required, evidence of premeditation was even weaker than that of robbery-murder. Moreover, the erroneous instruction itself made a robbery-murder verdict much easier to arrive at than accepting the premeditation theory. Finally, the verdicts on Count III and the robbery-murder special circumstance showed that all jurors adopted a robbery theory, so there was no need to deliberate on the more difficult premeditation question. Therefore the murder verdicts must also be reversed.

Respondent neither acknowledges nor disputes that error affecting the jury's understanding of how to apply the reasonable doubt standard is

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[14]See AOB 45–55.

structural, nor that the High Court's permissive-inference jurisprudence treats errors of that type as similarly not amenable to harmlessness analysis. (See AOB 134 and cases cited.) Respondent tries to show harmlessness the way some of the precedents which it maintains are controlling found no error, insisting that other instructions would have negated any problem with CALJIC No. 2.15. (RB 56.) In doing so, respondent states that appellant "fails to interpret CALJIC No. 2.15 in the context of all the instructions given the jury." (RB 56.) Not so. It is respondent who again ignores the most logical and common-sense way for the jury to interpret the instructional package, which is that the erroneous instruction explained how the general rules on determining elements of a crime could be applied in the concrete circumstances of robbery and grand theft. This Court has held that that is the purpose of the instruction,[15] and respondent offers no reason why the jury would have understood it differently.

Respondent also reprises, in the harmlessness context, the contention that the jury was only permitted—not required—to infer guilt on the basis of insufficient evidence, as if this somehow protected appellant from prejudice. (RB 56.) Permission was enough to do harm, however, and it leaves respondent unable to meet its burden of establishing that no jurors took the faulty option offered them.

Finally, respondent opines that appellant's statement that the evidence of robbery, as opposed to theft, was entirely equivocal "is patently absurd." (RB 56.) In doing so, respondent transforms the question into whether force was applied to the victims, which is, of course, incontestible. Respondent

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[15] *People v. Najera*, *supra*, 43 Cal.4th at pp. 1138–1139.

ignores the prosecution's real challenge: proving that the intent to steal was formed before or during the application of force, as opposed to after it.

Respondent's failure to engage the real issues that pertain to its burden of showing harmlessness betrays its inability to meet that burden. The entire judgment must be reversed.

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VI. AN ERROR IN THE INSTRUCTION ON THE EFFECT OF AFTER-ACQUIRED INTENT ON A ROBBERY CHARGE MISLED THE JURY ON A CRUCIAL ELEMENT OF DEATH-ELIGIBLE MURDER

CALJIC No. 9.40.2 affirmatively misled the appellant's jury on one of the elements elevating theft to robbery, as it focused instead on the embezzlement/theft distinction.

Embezzlement is the wrongful appropriation of another's property that originally had lawfully come into the embezzler's possession. In contrast, for a taking to be a theft, the perpetrator must have had the intent to steal at the time he or she took possession. (*People v. Green* (1980) 27 Cal.3d 1, 54.) And for it to have been a robbery, the intent to steal must have arisen earlier than the taking: before or during an application of the force or fear that was used to render a taking from the victim possible. (*People v. Bolden* (2002) 29 Cal.4th 515, 556.) Appellant's jury was given the rule distinguishing theft from embezzlement but was told that it was the robbery rule.[1] Respondent does not dispute this fact, nor the legal principles just stated. Respondent urges this Court to hold that the mistake did not matter, because the correct principle could have been deduced from more general instructions that were correct. (RB 58–60.) Respondent is mistaken: jurors could not reasonably have been expected to discard the rule given by the court, in favor of their own

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[1] "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his or her property *before or at the time that the act of taking the property occurred.* If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed." (CT 9: 2674, emphasis added; see also RT 11: 2358–2359.) The italicized phrase should read, "before or at the time that the perpetrator applied force or induced fear."

penetrating analysis of other instructions which arguably implied a different rule.

Respondent also offers a perfunctory, and groundless, protest that review of the instructional error was forfeited.

Respondent does not dispute that it would have to show that any error was harmless. Respondent attempts to do so by relying on another instruction which, according to respondent, states that force must have been applied for the purpose of stealing. Respondent's characterization of the instruction is incorrect, however. Respondent also repeats that, under the facts, the time of formation of intent was indisputable but is unable to show this to be true.

A. No Objection Was Required to Preserve the Right to Review of the Instructional Error

Respondent invokes the principle that, "[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Palmer* (2005)133 Cal.App.4th 1141, 1156, quoted at RB 58.) Appellant's complaint, however, is not that an instruction correct in law was too general or incomplete; it is that the instruction misstated the law. The applicable rule is that no objection is required for a defendant to challenge on appeal an instruction that affects his or her substantial rights. (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505--506.)

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B. Cases Dealing With When a Killing Took Place in Relationship to a Robbery, to Determine If There Was a Robbery-Murder, Shed No Light on When Intent Must Arise in Relationship to Use of Force, to Determine If There Was a Robbery; Nor Do Cases Finding No Need to Instruct on After-Acquired Intent Justify Instructing Erroneously on the Issue

Neither party has found a case upholding the plain language of the instruction. Respondent cites four cases for the proposition that instructions which define robbery as a taking accomplished by force or fear and which state that a robbery-murder special circumstance applies to a murder committed during a robbery "adequately cover the issue of the time of the formation of the intent to steal." (RB 58–59, quoting *People v. Hendricks* (1988) 44 Cal.3d 635, 643.) Two of those cases do not even arguably apply here. In *Hendricks* and in *People v. Hayes* (1990) 52 Cal.3d 577, 625–626, the question had to do with whether a jury deciding if a homicide was robbery-murder was adequately told that the intent to steal had to be formed before the fatal shots were fired, for the killings to have taken place during the perpetration of a robbery. There was no issue about when intent arose in relationship to the initial application of force, no question of how the jury was to determine whether a robbery had taken place. *Hendricks* held, and *Hayes* reaffirmed, that instructions defining robbery and stating that robbery-murder required that the killing be a result of the robbery handled the question at issue.[2] Since the jury was told that the killing had to have taken place during the robbery, it was clear that the intent

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[2]The instructions are quoted in *People v. Hayes*, *supra*, 52 Cal.3d at p. 626, fn. 9.

to steal could not have been formed later.[3] CALJIC No. 9.40.2, which does not purport to help define felony-murder, was not discussed.

People v. Hughes, *supra*, 27 Cal.4th 287, another case cited by respondent, does appear to deal with the jury's ability to understand the elements of robbery, although the discussion moves back and forth between that question and the robbery-murder elements at issue in *Hendricks* and *Hayes*. To the extent that *Hughes* addressed robbery instructions, however, it dealt only with a claim that the jury should have instructed sua sponte on the matter which CALJIC No. 9.40.2 seeks to cover. The opinion held that the temporal element was implied by a number of instructions considered together. (*Id.* at pp. 359–360.) Assuming that this is true,[4] there is a significant difference between whether a trial court has a sua sponte duty to elaborate on the implications of general principles (*Hughes*), and whether a direct but but badly flawed attempt to do so is error. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [error to give misleading instructions; if a court "does choose to

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[3]See also *People v. Hughes* (2002) 27 Cal.4th 287, 360 (quoting instruction given in *Hendricks*).

[4]*Hughes* relied on the giving of a general instruction that offenses which had a specific-intent element in their definitions required a union of the act and specific intent. (*Id.* at p. 360, citing CALJIC No. 3.31) It is doubtful that a lay juror would have any idea what this meant, much less deduce from it the necessary relationship between the application of force and the timing of the formation of an intent to steal. The opinion also relied on the giving of the standard felony-murder special-circumstance instruction, which requires that, rather than a robbery being merely incidental to the murder, the murder must have been committed to facilitate the robbery. Again, however, this at best implies the answer to a different timing question, not the one that defines whether or not there was a robbery. See also the discussion of *Hughes*, which respondent ignores, at AOB 140, fn. 87.

instruct [on an issue], it must do so correctly"].) Here the court below elaborated on the issue in a specific, clear, and wrong fashion.

Finally, respondent cites *People v. Zamudio* (2008) 43 Cal.4th 327, 361. *Zamudio* relied on *Hughes*, the only difference being that in *Zamudio* there was a request for an instruction on after-acquired intent, rather than a claim about a sua sponte duty. The *Hughes* holding that general instructions covered the point was sufficient to dispose of the issue. (*Ibid.*) Again, there was no question about misleading instructions being given.

C. The Instruction Significantly Misstated the Applicable Rule

According to respondent, there was no error in instructing with CALJIC No. 9.40.2, "as it explained to the jury that the intent to steal needed to occur before the taking of the property, a true statement of law." (RB 59.) Respondent's point seems to be that the fact that the line could have been accurately drawn still earlier (intent occurring before or during application of force) does not make the guidance given the jury (intent occurring before or during taking) untrue. This is like telling someone who asks what the speed limit is that they will be speeding if they go over 45, when in fact they are in a 30-mile-an-hour zone. The advice will be "a true statement of law," but grossly misleading. Similarly, if a court goes out of its way to tell a jury that a robbery is not a robbery unless the intent to steal had arisen by the time of the taking, no juror will think that the intent might have to arise earlier. Nor would he or she mine the definition of robbery for an implication to that effect.

Moreover, respondent's premise is wrong. The instruction did not merely state "that the intent to steal needed to occur before the taking of the property." (RB 59.) It permitted a finding of robbery if the intent to steal was formed "before *or at the time* that the act of taking the property occurred." (CT 9: 2674, emphasis added.) No party propounded a theory that appellant

took Shirley Jenks's pendant and ring during the assault on either person, and the evidence would not have supported such a theory. So if intent to steal was formed "at the time" of the taking (CT 9:2674), i.e., after the application of force, the theft was not a robbery. An instruction permitting a robbery conviction on such facts was not "a true statement of law." The instruction failed to relate the formation of intention to steal to the time of the application of force, misdirected the jury towards another time being the critical one, and thus affirmatively invited a wrongful conviction.

D. Respondent Fails to Show Harmlessness

Appellant has shown that the error violated several of appellant's federal constitutional rights and that the *Chapman* standard of harmlessness applies. (AOB 140–141.) Respondent does not dispute that, if there was error, *Chapman* applies. Given the lack of anything happening at appellant's trial that would have undone the error or made it irrelevant (e.g., arguments of counsel explaining the correct rule, overwhelming direct evidence that property was taken during the application of force or of a pre-existing plan to steal, or verdicts showing adoption of a premeditated-murder-to-rob theory), misdirecting the jury on the issue of when intent was formed was not harmless.

While not disputing the harmlessness standard, respondent erroneously asserts that it can meet its burden, relying on three points.

1. The Jury Was Not Told That Appellant Had to Have Used Force for the Purpose of Stealing

First, respondent claims that another instruction, CALJIC No. 9.40, made clear that appellant had to have "intentionally acted with force or fear for the purpose of stealing." (RB 60.) Respondent's point appears to be that a perpetrator applying force or fear in order to steal would necessarily intend to steal at that point. This logic would be valid if the instruction said what

respondent attributes to it, but it does not.

While it is true that force must have been applied for the purpose of stealing,[5] the instruction does not say that. No. 9.40 states only that *the taking* must have been "with the specific intent permanently to deprive that person of the property."[6] The intent element applies to the act of taking, and it certainly would be met as well in a post-homicide theft as in a robbery. The instruction does also say that the taking must have been "accomplished by means of force or fear." However, if the conditions permitting a post-homicide theft (i.e., lack of resistance by the victim) were created by the homicide, the taking would have been "accomplished by force," even if the perpetrator did not decide to steal until after the homicide. For example, a fight occurs and a participant is killed. The survivor then sees that the victim has a watch and takes it. This would not be a robbery, but a reasonable juror could certainly conclude that the taking was "accomplished by force." Absent the force, there could have been no theft.

Even if the instruction somehow, by implication, indirectly bore on the timing of the formation of intent, it was more general than No. 9.40.2 and therefore less likely to be viewed as relating to the time-of-formation-of-intent question covered clearly and specifically by No. 9.40.2. More fundamentally, it in fact does not bear on the matter at all. The giving of No. 9.40 did not render the error in No. 9.40.2 harmless.

2. A Rational Juror, Considering the Issue Under Correct Instructions, Could Have Had a Doubt About the Time of the Formation of Intent to Steal

Respondent's harmlessness argument relies on two other points.

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[5]*People v. Bolden*, *supra*, 29 Cal.4th 515, 556.

[6]CT 9: 2673–2674, reprinted at RB App. 17–18.

"Given the strength of the evidence that appellant intended to rob and murder the Jenks, there is little if any likelihood the jury could have found robbery based on an invalid theory because of CALJIC No. 9.40.2" (RB 60.) Not so; the evidence was consistent with the prosecution's scenario but consistent with others as well. The evidence consisted of bodies of people clearly killed in a frenzied manner, some circumstances pointing to appellant as the perpetrator, and appellant's shortage of funds. From this neither party can directly prove what happened, but respondent's explanation is particularly speculative, given the absence of eyewitness testimony, admissions, real evidence of motive,[7] or evidence of planning or of a deliberate method. The hypothesis of spontaneous homicidal assaults followed by an opportunistic theft had at least as much to recommend it, and respondent cannot eliminate all reasonable doubt as to whether every properly-instructed juror would have doubted the prosecution's scenario.

Respondent postulates a calculated plan to hatchet-murder the Jenkses to obtain enough jewelry that, when pawned, could produce enough cash to tide him over for a few days. This explanation of what might have happened is weak because of the crudeness of the weapon; the golden-goose-killing irrationality of a plan to kill one's employers for a small, one-time-only haul; the gross absence of mental clarity of a killer-robber who would leave $113 in cash in a drawer he went through, then pawn some of the loot under his own

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[7]Keeping in mind that people with a shortage of funds are not normally motivated even to steal, much less rob or kill, and that those who do have money often want more, and that, therefore, the probative value of such evidence is so low that it is inadmissible as evidence of motive. (*United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108–1109; *People v. Koontz* (2002) 27 Cal.4th 1041, 1076; II Wigmore, *Evidence* § 392, p. 431 (Chadbourne rev. 1979).)

name, in the same small town, the day after the killings; and the prosecution evidence of an entirely different modus operandi in the Bettencourt jewelry theft. It has nothing to recommend it over alternatives, such as that appellant went to the Jenkses' desperately seeking work, a loan, or an advance against the earnings from his next job; was rebuffed; flew into a rage; attacked with the tool he always carried; and—still in a passionate state as it took far longer for movement and terrible cries or moans to stop than in television portrayals—switched to a knife. Looking for jewelry and other valuables could easily have been an afterthought. (See AOB 46–52 for supporting evidence and record citations; see also above, pp. 21 et seq., regarding respondent's more detailed attempt to make a case for pre-existing intent.)

Even if a rational juror could somehow have found that the evidence precluded such a view beyond a reasonable doubt, this Court cannot conclude—beyond such a doubt—that every rational juror *had* to see it that way. But this is what respondent would have to show, in order to prove harmless instructional error permitting jurors to find guilt even if the prosecution had not excluded after-acquired intent. (*Neder v. United States* (1999) 527 U.S. 1, 19; *Chapman v. California* (1967) 386 U.S. 18.)

3. The Prosecution Propounded a Robbery-Murder Theory as an Alternative to Premeditation, While Avoiding the Timing-of-Intent Question Altogether

Finally, respondent observes that nothing in the prosecutors' arguments sought to rely on the erroneous theory permitted by the instruction at issue. (RB 60.) The Achilles' heel of the prosecutors' case was the question of when the intent to steal was formed,[8] and nothing in their arguments acknowledged

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[8]Defense counsel raised the issue, albeit with neither the emphasis nor (continued...)

a need to prove anything about the issue; rather, they finessed it. All that either mentioned about the elements of robbery was this: "Robbery is pretty simple, familiar to you, it's just theft by force or fear." (RT 11: 2379.) But, as just pointed out regarding the instruction on the intent being "accomplished" by force, this formulation is consistent with force having created the opportunity for theft, regardless of whether that intention was in the perpetrator's mind when force was applied.

It is true that the emphasis in prosecutorial argument on the evidence was the theory that the murders were premeditated as part of a planned robbery. But the prosecutors obviously recognized what respondent now denies, that rational jurors could well have been left with reasonable doubts. Mr. Reinhart devoted six transcribed pages near the beginning of his argument to explaining the differences between felony murder and wilful, deliberate, and premeditated murder and emphasizing that the jury did not have to agree on one or the other in order to return first-degree verdicts. (RT 11: 2371–2376.)

In sum, the prosecution did emphasize the option of going with a robbery-murder theory if not every juror adopted its primary theory about planned murders for the purpose of robbery; all the instructions said about the timing of the formation of the intent to steal was that it had to be there by the time possession was taken of the property; and the arguments basically avoided the matter. With the prosecution so intent on letting the jury know it could go with a robbery-murder theory, respondent's current claim that "the

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[8](...continued)
the analysis which he might have given it. (RT 11: 2441–2442.) In any event, every element of the offense, including the union of act and intent, was before the jury, regardless of whether counsel said anything at all. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69; *People v. Flood* (1998) 18 Cal.4th 470, 505; *People v. Morse* (1964) 60 Cal.2d 631, 657.)

prosecutor's argument clearly theorized that appellant murdered the Jenks in order to fulfil his objective of stealing"[9] is not enough to meet its burden of showing harmlessness beyond a reasonable doubt. The robbery and murder verdicts must be reversed, along with the associated special-circumstances findings.[10]

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[9]RB 60.

[10]Perhaps another argument for harmlessness could emphasize the jury's "true" verdict on the robbery-murder special circumstance. The special circumstance required proof that "[t]he murder was committed while the defendant was engaged in the commission or attempted commission of a robbery" and "was committed in order to carry out or advance the commission of the crime of robbery." (RT 11: 2354; CT 9: 2672.) The theory would be that a jury that found that appellant killed while robbing must have concluded that he intended to steal when he attacked the victims.

Presumably, however, the jury took up the special-circumstance allegation after deciding that there was a robbery, since the robbery issue was involved in determining the degree of the murders. Having found the defendant guilty of first-degree murder and robbery, a true finding on the special circumstance may well have appeared to be a foregone conclusion, one that followed from the other verdicts, just as the finding on the multiple-murder allegation did. (Again, the jury the jury returned verdicts on all counts and allegations in four hours. [CT 9: 2647–2651.]) Therefore the possibility that the erroneous definition of robbery affected the finding on the robbery-murder special circumstance cannot be excluded beyond a reasonable doubt. That being the case, that finding would be an unreliable basis for ruling that the misinstructed jury nevertheless found all the necessary elements when it reached its robbery and murder verdicts. (*Chapman v. California*, *supra*, 386 U.S. 18.)

VII. FIRST-DEGREE MURDER VERDICTS WERE ENCOURAGED BY AN INSTRUCTION WHICH TENDED TO PLACE A BURDEN OF RAISING A DOUBT AS TO DEGREE ON APPELLANT AND A COMPLEMENTARY INSTRUCTION REQUIRING UNANIMOUS ACQUITTAL OF FIRST-DEGREE MURDER BEFORE A SECOND-DEGREE VERDICT COULD BE RETURNED

Respondent does not dispute that the Eighth Amendment's heightened-reliability requirement places stringent limitations on the state's use of procedures for determining guilt of a capital offense, and, in particular, that it prohibits "rules that diminish the reliability of the guilt determination" or a procedure which "enhances the risk of an unwarranted conviction" of a capital offense. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) Perfection is not possible, but states are prohibited from affirmatively creating avoidable risk of error. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; see also cases cited at AOB 146–147 and accompanying discussion.)

Here two instructions on how to determine the degree of murder did create such a risk, and they reinforced each other.

A. Declining to Affirmatively Tell the Jury of the Prosecution's Burden of Proof on the Matter of Degree, in Favor of Naming the Circumstance in Which the Jury Should Reduce the Degree to Second, Shifted the Burden of Proof and Was Biased

The parties agree that, as respondent puts it, CALJIC No. 8.71 "explains the process jurors must go through to determine the degree of murder." (RB 62.) They also agree that some of its language correctly explains that the defendant should receive the benefit of any doubt regarding degree. Unfortunately, and unlike its CALCRIM counterpart, it fails to affirmatively set forth the prosecution's burden of proving that the murder was of the first degree in order to obtain a first-degree verdict. Instead, it describes

how a *second-degree verdict* is arrived at: by making a unanimous finding *of a doubt* as to degree.[1] Thus it treated a first-degree finding as the default verdict if murder was proven, implying that appellant had the burden of raising a doubt to reduce the degree to second.[2] Moreover, in a syntactical twist unique among the instructions stating rules of law, it spoke of the need for unanimity in a context where, instead, each juror should have been applying the principle separately, to decide how to vote on the question of degree. This reinforced the burden-shifting implications of the instruction, since it seemed to require the entire jury to be convinced of the existence of a doubt before an obligation to vote for a second-degree verdict would apply.[3] This Court recently disapproved the instruction for this reason, although the procedural context obviated the necessity of deciding whether giving it is error or if another instruction cures the infirmity. (*People v. Moore* (2010) 51 Cal.4th 386, 409–412.) Similarly, the instruction violated the principle that rules of law should not be given in a negative formulation, one that requires deducing the applicable rule from its converse, and thus favoring the prosecution.[4] The infirmities in the instruction violated both the Eighth-Amendment reliability requirement and the Fourteenth-Amendment requirement of clearly placing on

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[1]The two instructions are quoted at AOB 148–149.

[2]This point is elaborated at AOB 148–149.

[3]See AOB 149–151, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 6 .

[4]See AOB 151, citing *People v. Moore* (1954) 43 Cal.2d 517, 526; see also *Reagan v. United States* (1895) 157 U.S. 301, 310.

the prosecution the burden of proving every element of an offense beyond a reasonable doubt, along with the corollary provisions of the state constitution.[5]

1. Respondent Tacitly Accepts That the Jury Needed to Understand That Second Degree Was the Default Verdict

Respondent does not dispute that, to obtain a first-degree verdict, the prosecution had the burden of proving, beyond a reasonable doubt, that the crime was of that degree. Similarly, respondent seems to accept the corollary, that just as a defendant is presumed not guilty of an offense unless and until the prosecution proves otherwise, once murder is proven, its degree is presumed to be second unless and until the prosecution proves otherwise. (See § 1157 and authorities discussed at AOB 146–147.) Nor does respondent directly dispute that the jury should have been informed of these principles. Respondent does, however, erroneously claim that this Court has upheld the instruction at issue here, that another instruction undid or precluded the damage, and that the instruction actually benefitted appellant.

2. No Prior Case Has Rejected the Challenge Presented Here

Respondent cites *People v. Dennis* (1998) 17 Cal.4th 468, 536–637, for the proposition that CALJIC No. 8.71 has been upheld "against the same constitutional attacks appellant now raises." (RB 62.) But the case deals only with the related but different issue, addressed separately by both parties here,[6] of whether an "acquittal-first" instruction was unduly coercive. The only mention of the instruction currently at issue was partial reliance on the portion

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[5]Respondent erroneously states that appellant has characterized the instruction as coercive. (RB 62, citing AOB 150; RB 63.)

[6]See Argument VII.B in both parties' briefing.

of it that favors a defendant in rejecting the acquittal-first challenge. (*Id.* at pp. 536–537.) Respondent also cites *People v. Morse* (1964) 60 Cal.2d 631, 656–657, again without justification. An instruction covering some of the same subject matter as the instruction at issue here, but without the language to which appellant now objects, was neither attacked nor upheld in *Morse*. It was cited by this Court in rejecting a claim that the jury's attention was not properly directed to the question of degree. (*Id.* at pp. 656–657.)

Respondent's only real authority for its claim that the instruction has been upheld is *People v. Pescador* (2004) 119 Cal.App.4th 252, 255–256. *Pescador* is more on point, as it considers something akin to the contentions made here. In it, however, the Court of Appeal, like respondent here, erroneously relied on *People v. Dennis*, *supra*, and *People v. Morse*, *supra*, as showing that this Court has "consistently upheld" CALJIC No. 8.71. (*Id.* at p. 257.) Moreover, in finding no error, the Court further relied on the giving of CALJIC No. 17.11, which was not given at appellant's trial. The instruction stated simply, using more typical language, if "you" have a reasonable doubt as to degree, "you must find him guilty of that crime in the second degree." (*Id.* at p. 257.) Like respondent here, the *Pescador* court also emphasized the giving of CALJIC No. 17.40, a standard instruction stating that both parties were entitled to the individual opinion of each juror. (*Ibid.*) This did not, however, solve any of the problems with No. 8.71. Presumably the thought is that the general injunction to exercise independent judgment somehow countered presenting the doubt-as-to-degree rule as one that applies only to a unanimous jury. Appellant has acknowledged that "there was no need to reiterate each juror's duty every time a new legal principle was explained" but also pointed out that no such principle "should have been encapsulated in a misleading statement that applied it only under conditions of unanimity."

(AOB 150.) Telling the jurors in concluding instructions to consult with each other, exercise independent judgment, and neither bow to the majority, refuse to consider others' points of view, or flip a coin (CALJIC No. 17.40) did not undo that error. And, as for No. 8.71's bigger problem—which is merely heightened and reinforced by the inclusion there of language about unanimity—of making first-degree the default verdict and thereby reversing the burden of proof, and the added issue of the bias inherent in any instruction that requires deducing a correct principle intended to benefit a party from a negative statement of the law, neither respondent nor the *Pescador* court claims that No. 17.40 provides any help at all. It does not.

Most puzzling in *People v. Pescador*, *supra*, is the Court of Appeal's conclusion: "In light of the instructions as a whole, the jury did not misinterpret CALJIC No. 8.71 as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*Id.* at p. 257.) This conflicts with the plain language of the instruction and the court's own summary of it: "CALJIC No. 8.71 requires the jury to find second degree murder if they are convinced beyond a reasonable doubt and unanimously agree that defendant committed a murder, but unanimously agree they have a reasonable doubt as to the degree." (*Id.* at p. 256.) At the same time, it *fails* to contradict the fact that the instruction conflicts with the presumption that a murder is of the second degree unless proven otherwise. In sum, *Pescador*—with its analysis of a claim supported by somewhat different contentions and its reliance on an instruction not given here, its mischaracterizations of this Court's precedents, and its faulty logic—does not provide a basis for finding no error in appellant's case.

3. Other Instructions Did Not Undo the Error, and the One at Issue Failed to Benefit Appellant

Respondent emphasizes the jurors' and this Court's duty to consider the instructional package as a whole. (RB 63, relying on CALJIC No. 17.40, discussed above.) Appellant agrees. And, in fairness, while the individual-opinion instruction pointed to by respondent does not help its case, for the reasons explained above,[7] another instruction sort of backed its way, in passing, into a statement implying that a first-degree verdict required all jurors to be convinced of its propriety beyond a reasonable doubt.[8] But respondent would have this Court pervert the principle about considering the instructions as a whole into one calling for affirmance if correct language can be found

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[7]Page 139.

[8]CALJIC No. 8.74 followed No. 8.71, the one at issue here. No. 8.74 explained that the jury could return a first-degree verdict without agreeing on which prosecution theory supported that verdict. (CT 9: 2671.) The explanation of the non-unanimity rule concluded, "It is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree . . . ." (*Ibid.*)

The instruction on how to reach a verdict (No. 8.71), therefore, set up first-degree murder as the default. The instruction on giving the prosecution the benefit of the non-unanimity rule expressed the non-unanimity principle using language that assumed the need for agreement on guilt of first-degree murder. At best, therefore, No. 8.71—in combination with the language in No. 8.74—triggers application of the rule regarding contradictory instructions described in the text above.

Moreover, the logic favoring respondent assumes that it is sufficient to require untrained jurors to combine and harmonize language from two different instructions, each clearly covering a different principle, in order to deduce that murder is presumed to be of the second degree unless the prosecution proves the higher degree, beyond a reasonable doubt, to a unanimous jury. This is far from a direct statement of the rule that would contradict the clear and erroneous implications of CALJIC No. 8.71.

somewhere into the instructional package, in effect *failing* to look at the entire package by pretending that only the correct instruction could have had an impact, not the incorrect one. Even if some instruction had directly contradicted CALJIC No. 8.71's setting up a first-degree verdict as the default, reversal would be required. When instructions are contradictory, a reviewing court is unable to find harmlessness on the basis of a correct statement of the law because it is unable to know whether the jury followed the right rule or the wrong rule. (*Francis v. Franklin* (1985) 471 U.S. 307; see also *People v. Ford* (1964) 60 Cal.2d 772, 796, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28.)

Finally, respondent dismisses appellant's contention as "ridiculous" because, "[i]f anything, the instruction benefits the defense, as a jury ready to convict appellant of murder but unsure of what degree must choose second degree murder." (RB 63.) Respondent conflates the fact that the rule of law is intended to benefit appellant with the question of whether the CALJIC committee effectively expressed it. No one was doing appellant any favors by reading an instruction on the defendant being entitled to any doubt as to degree and the prosecution's burden if it was to obtain the first-degree verdict—this is simply the law, and he was entitled to its benefit. As pointed out in the opening brief, the drafters of CALCRIM No. 521 had no difficulty expressing this. (See AOB 148.) While the CALJIC version does not fail entirely to say anything helpful to a defendant, it still sets up a first-degree verdict as the default; reinforces the implication that the defendant would need to raise a doubt by saying that the jury as a whole must be convinced of a doubt to return a second-degree verdict, rather than describing a rule for a juror deciding how

to vote;[9] and runs afoul of well-established principles[10] regarding biased and inverted formulations of rules intended to benefit a particular party.

B. Forbidding the Jury to Return a Second-degree Murder Verdict Unless it Could Unanimously Acquit Appellant of First-degree Murder Created an Unacceptable Risk of Coercing Jurors with Doubts Regarding Premeditation, Deliberation, and Pre-existing Intent to Steal

Respondent does not dispute the fact that the Eighth Amendment bars procedures which enhance the risk of an unjustified conviction of a capital offense. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 638.) This Court has recognized—and not retreated from its recognition—that CALJIC No. 17.10, permitting consideration of lesser charges like second-degree murder before a verdict is reached on a greater charge but forbidding any verdict and requiring a mistrial if unanimity cannot be obtained one way or another on a greater charge, can put coercive pressure on minority jurors left with doubts about the greater verdict. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1077, fn. 7; see discussion at AOB 157–158.) Respondent, however, disagrees. Moreover, in a detailed analysis which respondent does not engage, appellant shows that other jurisdictions—a majority[11]—have created uncoercive

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[9]Again, the problem is not that the statement about unanimity regarding a second-degree verdict is untrue, but that the emphasis is reversed from what it should be. The instruction does not even include a complementary statement that a first-degree verdict requires unanimity that its elements have been proven beyond a doubt.

[10]*People v. Moore*, *supra*, 43 Cal.2d 517, 526; see also *Reagan v. United States*, *supra*, 157 U.S. 301, 310.

[11]"[T]he weight of authority supports giving [a reasonable-efforts] instruction, at least when the defendant requests it." (Pattern Jury Instructions for the Tenth Circuit (2005) Comment to Criminal Instruction No. 1.33, quoted (continued...)

alternatives to protect the same interests sought to be served by the judicially-created acquittal-first rule. Finally, appellant has acknowledged that this Court has summarily rejected challenges to the rule, but he has also shown that none has addressed the capital-case imperative of eschewing avoidable procedural choices that increase the risk of error. Respondent cites the precedents favorable to its position without attempting to show why they should stand for the rejection of a proposition which they have not analyzed.

1. Respondent Is Unable to Show That Precedents Dealt with the Instant Claim

Because, in 1982, this Court promulgated the rule that a verdict on a greater charge may not be returned unless the jury unanimously acquits a defendant of a lesser charge, and because it has reaffirmed it since, appellant analyzed the pertinent authorities. (AOB 154–155.) The rule was adopted under Chief Justice Rose Bird to protect the defendant who has a double-jeopardy right, upon a mistrial because of a hung jury, to avoid retrial on the greater charge if the jury had agreed that it was not proven. The jury-coercion issue was not considered.[12] There was thus no need to consider alternatives, such as requiring a hung jury to report on whether it was hung on the greater or lesser charge and, where applicable, what verdict it had reached on the other charge, which would deal with the double-jeopardy and related problems.[13] The Court later refined the rule to deal with its impact in the situation where it was the greater offense on which the jury was disagreeing. The refinement

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[11](...continued)
in O'Malley, Grenig, & Lee, 1A Federal Jury Practice and Instructions (6th ed. 2008) p. 898.) "Reasonable efforts" is explained at p. 147, fn.19, below.

[12]*Stone v. Superior Court* (1982) 31 Cal.3d 503; see AOB 154–155.

[13]See AOB 165–166.

clarified that the jury should be permitted to *consider* the issues in any order but still not return a verdict on the lesser charge absent acquittal on the greater. The Court acknowledged the disagreement among jurisdictions regarding how to handle the problem but purported to refrain from entering the debate. What it did instead was simply conclude, without analysis, that the jury's deliberations would no longer be improperly restricted under the new modification to the acquittal-first rule. The Court also acknowledged, for the first time, the prosecution's interest "in requiring the jury to grapple with the prospect of defendant's guilt of the greatest offense charged." (*People v. Kurtzman* (1988) 46 Cal.3d 322.)

Later cases which contained any analysis at all, including every one cited by respondent,[14] either dealt with a claim that some form of the instruction violated the *Kurtzman* rule that the jury should not be precluded from deliberating on lesser offenses before reaching a verdict on the greater or with some other complaint about the instruction, but not the one raised here.[15] (See AOB 167–168 & fn. 99, distinguishing four of the five cases which respondent now cites.[16]) Subsequent cases summarily rejected

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[14]See RB 64.

[15]One case not claiming a *Kurtzman* violation was *People v. Mickey* (1991) 54 Cal.3d 612, 672–673, holding that an acquittal-first instruction did not interfere with consideration of evidence on an element of the greater offense. The only other such case cited by either party here was *People v. Fields* (1996) 13 Cal.4th 289, 308–311, dealing with whether a defendant could be retried after the court, in violation of the acquittal-first rule, received a guilty verdict on lesser offense from a jury deadlocked on the greater charge.

[16]The fifth case, *People v. Cox* (2003) 30 Cal.4th 916, was a summary denial, relying on two of the cases distinguished in appellant's opening brief. (*Id.* at p. 967, citing *People v. Dennis* (1998) 17 Cal.4th 468, 535–537, and (continued...)

constitutional claims without explaining the content of the challenge, citing (inaccurately) only the prior cases dealing with lesser challenges.[17] In sum, there is as yet no foundation in this Court's jurisprudence, and respondent has pointed to none in any other jurisdiction, for rejecting a claim that, in a capital case, the Eighth Amendment prohibits the acquittal-first rule. (RB 64.)

2. Under High Court Precedent, the Fact That the Instruction Can Benefit a Defendant in Some Tactical Situations Is Irrelevant

On the merits, respondent quotes *People v. Fields*, *supra*, 13 Cal.4th 289 for the proposition that the acquittal-first rule serves the interests of both defendants and prosecutors. (RB 64) Appellant dealt with this perspective already,[18] in an argument to which respondent has no answer. This Court's more specific formulation of the proposition stated in *Fields* clarifies that "an acquittal-first instruction appears capable of either helping or harming either the People or the defendant," depending on the state of deliberations in a given case. (*People v. Berryman*, *supra*, 6 Cal.4th 1048, 1077, fn. 7.) But the issue is not whether, in the entire class of defendants, some will benefit. That does not help the defendant who is harmed, nor prevent the rule from being one which "enhances the risk of an unwarranted conviction" of a capital offense. (*Beck v. Alabama*, *supra*, 447 U.S., *supra*, at p. 638.) Indeed, as noted in the opening brief, the high court confronted a similar situation in *Beck v. Alabama*, *supra*, and rejected the reasoning on which respondent now relies. "In any

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[16](...continued)
People v. Fields (1996) 13 Cal.4th 289, 303-305; see AOB 167, fn. 99.)

[17]E.g., *People v. Jurado* (2006) 38 Cal.4th 72, 125; *People v. Nakahara* (2003) 30 Cal.4th 705, 715, discussed at AOB 167–158 & fn. 99.

[18]AOB 162–163.

particular case," the Court acknowledged, the extraneous influences on a jury (caused, there, by failing to instruct on lesser offenses) "may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." (477 U.S. at p. 643.)

3. Respondent Cannot Avoid This Court's Conclusion That the Instruction Can Be Coercive

Respondent also claims that the acquittal-first rule is not coercive. In what a magician would call "misdirection," respondent seeks to avoid the inconvenient fact of this Court's explanation of the rule's potential to increase pressure on minority jurors to go along with the majority by instead focusing attention on distinguishing two of the many out-of-state cases cited by appellant, and criticizing one of them.[19] Moreover, respondent inaccurately

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[19]Respondent distinguishes *State v. LeBlanc* (Ariz. 1996) 924 P.2d 441, without acknowledging its reasoning on either the down side of the acquittal-first rule or the value of an instruction requiring a jury to make a reasonable effort to reach a verdict on a greater charge before returning one on a lesser charge. (RB 65–66.) The court's moving from a strict acquittal-first instruction (rather than California's modified version that permits *deliberating* on the lesser offense before acquitting of the greater) to a reasonable-efforts instruction does not weaken its reasoning. Respondent also notes the court's conclusion that the abandoned instruction was not unconstitutional but fails to recognize that it was a drunk-driving case, not a capital one involving Eighth-Amendment protections.

Respondent also discusses *State v. Williams* (La. 1980) 392 So.2d 619, erroneously claiming that "appellant attempts to analogize [its] ruling[] to garner support for his theory that the acquittal first rule forces jurors to convict rather than cause a mistrial." (RB 66.) Appellant acknowledged that the *Williams* holding involved a different situation. He cited the opinion only for its eloquent explanation of the reasons why fear of causing a mistrial could be a potent influence on a holdout juror, reasons which certainly could have (continued...)

claims that the point about coerciveness relies on the out-of-state authorities. (RB 64–67.) Moreover, respondent has no answer to the fact that the empirical evidence also supports this Court's recognition in *Berryman* that there is a significant tendency for jurors to go along with the majority.[20]

But, authorities aside, there is a *reason* why so many courts, including this one, have recognized a risk of coercion: the effects on a minority juror of having to make fellow jurors end up going through all the rigors of the trial for nothing, and of having to trigger the time, expense, distress to many witnesses, and rigors for future jurors of a retrial—assuming that the juror understands that the defendant will not simply go free.[21] Respondent does not acknowledge that this is the problem, seek to explain it away, or defend this Court's attempt to resolve it in *Kurtzman*.

Respondent points to other situations in which appellant contends that unanimity *should* have been required (e.g., on determining guilt of prior unadjudicated crimes) and notes the value of unanimous-verdict requirements for encouraging jurors to examine their own views and engage in discussions with others. (RB 67.) But the dynamics underlying this observation do not in any way diminish the coercive impact, on a juror with a doubt about a greater charge but who is ready to convict on a lesser, who sees that there is no way

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[19](...continued)
applied in appellant's case. (AOB 159–160.) Nevertheless, respondent not only distinguishes the case because its holding was on a different issue, but also goes to some lengths to observe that other courts have come to different conclusions on *that* issue. (RB 66–67.)

[20]One minority juror in six, according to one of the studies cited in *State v. Allen* (Ore.1986) 717 P.2d 1178, 1180–1181. See discussion at AOB 161–162.

[21]See AOB 159–160.

the majority will agree to acquit on the greater charge. Such a juror is still compelled to choose between forcing a retrial or simply going "Maybe I'm wrong" without *believing* he or she is wrong.

In the usual situation, unanimity is required regarding the verdict being returned, not a different verdict. Yes, there are always pressures to go along with a majority, and one generally hopes that an instruction like CALJIC No. 17.40 will sufficiently encourage jurors to re-examine their own views but not give up those that withstand the re-examination process. But in all the other contexts, the alternative to requiring unanimity for a verdict would be to permit a defendant's conviction despite the prosecution's inability to convince twelve jurors. Requiring unanimity is the best we can do to protect one facing charges against the power of the state (and to protect the prosecution's interest in a retrial rather than an acquittal not sanctioned by all jurors). That unanimity is required on an actual verdict is not a refutation of the fact that there is a coercive dynamic in making unanimous acquittal of a greater charge a precondition for a guilty verdict on the lesser charge. Indeed, the problem with the coercive dynamic is its tendency to undercut the protection afforded by the requirement of unanimity for a conviction.

Here, where the question is whether to require unanimity on a issue *other* than the one on which a verdict is to be returned, there are alternatives that do not have a greater detrimental impact on a reliable verdict, and requiring unanimity is not the best. The one embraced by most jurisdictions is to use an instruction much like CALJIC No. 17.40 to encourage jurors to use their best efforts to reach a verdict on the greater charge but ultimately allow them to return a guilty verdict on the lesser if those efforts fail (a "reasonable-efforts" instruction). The prosecution gets the conviction it truly won, a jury that fully considered the greater charge, and—with appropriate procedural

devices in place—the option of retrying the defendant on the greater charge.[22] And the defendant and the system get the benefit of a lack of *unnecessary* coercion, along with the right not to be retried on a greater charge if it actually was rejected by the jury.

Ironically, here and elsewhere respondent offers CALJIC No. 17.40 as the be-all-and-end-all and asks this Court to adopt the legal fiction that enjoining jurors to not decide a question in a particular way solely because a majority of jurors favor doing so always prevents them from bowing to the majority. Respondent does so despite the many circumstances—including the lesser-included-offense situation—in which jurors are treated as human beings who cannot follow all instructions in all circumstances.[23] Yet respondent fails to acknowledge any value in what would be a quite similar "reasonable-efforts" instruction in protecting the prosecution's interest in having a jury fully attempt to reach a verdict on a greater charge, or the fact that there would

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[22]See AOB 163–166 for a discussion of the means other jurisdictions use to allow retrial on the greater charge where appropriate, while avoiding hte double-jeopardy concerns that originally motivated the acquittal-first rule. Respondent has not pointed out any shortcomings in these.

[23]See *Keeble v. United States* (1973) 412 U.S. 205, 212–213, which required instructions on lesser offenses to be given because a defendant "should not be exposed to the substantial risk that the jury's practice will diverge from theory." The "theory" referred to: if not every element is proven beyond a reasonable doubt, a jury should acquit of the charged offense, even if that means setting the defendant free.

For other situations where due process demands recognizing that there are appropriate instructions which it cannot be assumed jurors can or will follow, see, e.g., *Bruton v. United States* (1968) 391 U.S. 123, 129; *Jackson v. Denno* (1964) 378 U.S. 368, 388–389; *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; *People v. Aranda* (1965) 63 Cal.2d 518, 525–529; see also *Adkins v. Brett* (1920) 184 Cal. 252, 258–259; Evid. Code § 352.

be no reason for a jury not to follow such an instruction.[24] Moreover, that interest is the only one countervailing the abandonment of the acquittal-first rule, and it is a less weighty one than the constitutional and moral imperative to avoid trial procedures that fail to guarantee, as much as is humanly possible, that a death sentence not be "imposed out of . . . mistake." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.); see also *In re Winship* (1970) 397 U.S. 358, 363–364 [even in non-death cases, due process tilts towards the accused because of the relatively greater consequences of erroneous convictions than acquittals]; see also *id.* at pp. 371–372 (conc. opn. of Harlan, J.).)

Finally, appellant has pointed out that if that part of the logic behind the acquittal-first rule which takes into account the prosecution's interests were applied consistently, it would lead to an absurd result. If that logic is truly compelling, jurors would also have to be told that they could not return murder verdicts unless they agreed on whether the special circumstances could be shown. Otherwise, per this logic, if they had some difficulty with the special-circumstances question, they could drop it in favor of a compromise verdict of murder without special circumstances. (AOB 164–165.) Respondent does not answer this point.

C. Each Instruction Exacerbated the Problem Created by the Other

As respondent frequently points out (e.g., RB 68), an instruction is to be considered in light of how the other instructions given would affect the way it is understood by the jury. Here, there were mutually-reinforcing aspects of the flaws in CALJIC Nos. 8.71 and 17.10. This is not a cumulative-error

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[24]See the fuller discussion at AOB 164–165, and cases cited.

claim. Rather, the point is that the acquittal-first rule (No. 17.10) made even more likely an understanding of No. 8.71 as setting up first-degree as the default finding once a defendant is found guilty of murder, unless the defendant succeeded in convincing all jurors that a doubt existed. And No. 8.71, rather than ameliorating the acquittal-first rule's coercive potential by explaining that a juror should vote for second-degree if not convinced that the prosecution had proven all the elements of a first-degree case, reinforced it by an inappropriate reference—as this Court has held[25]—to appellant's being given the benefit a doubt as to degree only if it was held by all jurors. These dynamics are explained in the opening brief. (AOB 168–169.) Respondent notes the point but does not attempt to dispute it, other than to repeat that, considered separately, there was nothing wrong with either instruction. (RB 68.) Appellant therefore relies on the opening brief.

D. Separately and Together, the Errors Were Prejudicial

Respondent does not dispute that, if there was a reasonable likelihood that CALJIC No. 8.71, alone or considered in light of No. 17.10, shifted the burden of proof as to degree, a harmlessness analysis is unavailable. (*Victor v. Nebraska*, *supra*, 511 U.S. 1, 6; see also authorities cited at AOB 170, fn. 101.) As to the general due-process error of the instruction being tilted towards the prosecution, respondent does not dispute that the *Chapman* test[26] applies. Nor does respondent reply to appellant's explanation[27] of the effect's being multiplied by No. 17.10 and other instructions and actions which eroded the reasonable-doubt standard: the special emphasis on the validity of a

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[25]*People v. Moore*, *supra*, 51 Cal.4th 386, 409–412.

[26]*Chapman v. California* (1967) 386 U.S. 18.

[27]AOB 170–171.

circumstantial case, the use of the infirm raspberry-pie example to illustrate that point, the attorneys' comments on reasonable doubt, the misleading instructions on how to determine if a robbery took place, and various actions giving the appearance of a judicial bias. Finally, respondent does not claim that, if it has the opportunity to show harmlessness, it can meet its burden by showing that no rational juror could have doubted that the homicides were first-degree murder.

Similarly, respondent does not explain why, in the circumstances of this case, a harmlessness analysis could be applied to use of No. 17.10, the acquittal-first instruction. (See AOB 171 & fn. 102.) Respondent does not dispute that, if a harmlessness analysis were to apply, it would have to deal with the prosecution's pointing out the rule three times in argument;[28] that the factors which, in the abstract, could create pressure to avoid putting others through the material and psychic costs of a retrial were present at a high level here; or that other actions at trial tending to indicate a pro-conviction bias would heighten the impact. Nor does respondent dispute that this Court's recognition that the impact of coercive pressure in a particular case is unknowable[29] makes its burden of demonstrating that no juror could have been "possibly influenced" by it[30] impossible to meet.

Finally, respondent does not controvert the observation that, if one instruction tended to mislead the jury as to how to determine the degree of murder and the other tended to coerce minority jurors with doubts on that

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[28]RT 11: 2466.

[29]*People v. Berryman*, *supra*, 6 Cal.4th at p. 1077, fn. 7; see AOB 172, fn. 103.

[30]*Chapman v. California*, *supra*, 386 U.S. at p. 23.

issue, the instructions were synergistic in their prejudicial impact, particularly in light of the climate created by other judicial and prosecutorial actions at this trial.[31]

Respondent contends, nonetheless, that any error in either instruction was harmless in light of all the instructions given. (RB 68–69.) Most of respondent's support for this claim relies on such truisms as that the jury was instructed on the elements of murder and on the difference between first- and second-degree murder.[32] But, as respondent stresses earlier, the issue with No. 8.71 is the way it "explains the process jurors must go through to determine the degree,"[33] and the same is obviously true regarding the acquittal-first directive. Telling the jurors what they must determine does not cure errors in telling them how to do it.

This leaves, in respondent's analysis, CALJIC Nos. 2.90 and 17.40 as the curative instructions. No. 2.90 defined *reasonable doubt* and told the jury that appellant was entitled to a not-guilty verdict if the prosecution failed to prove him guilty beyond such a doubt. This did not cure the error of presenting first-degree as the default verdict, nor did it negate the coercive pressure created by the acquittal-first rule. As to No. 17.40 (deliberating with others, exercising independent judgment, not deciding by coin toss, etc.), respondent and a lower-court case respondent cites also argued that it prevents there being any error in No. 8.71 in the first place. The fallacy of this position is explained in the discussion at pages 139–140, above, of *People v. Pescador*,

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[31]See AOB 173.

[32]In this portion of its discussion, respondent also mistakenly states that CALJIC No. 8.31 was given. (RB 69.)

[33]RB 62.

supra, 119 Cal.App.4th 252. The instruction failed to cure or render harmless the error of making a first-degree verdict the default one for the same reasons that it did not negate the presence of error. On the other hand, as to its impact on the coercive pressure created by the acquittal-first rule, one might hope that telling jurors not to bow to a majority might provide some countervailing support for a minority juror. To claim that it did so effectively—preventing any juror from deciding he or she was probably wrong when faced with not only unavoidable group pressure, but avoidably being the cause of a retrial at a great burden on taxpayers, witnesses, and other jurors—is to rely on sheer speculation as to what went on in such a juror's mind. Respondent cannot meet any burden based on such speculation, much less one of showing that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.)

Whether considered individually or together, the instructions on unrelated matters failed to render harmless the errors in the instructions telling the jurors how to reach a verdict on degree.

Respondent's final point is to claim, unaccountably, that appellant has cited no case in any jurisdiction in which similar instructions led to reversal. (RB 68.) Three of the cases cited in the opening brief as disapproving an acquittal-first instruction reversed for that error. (See *State v. Josephs* (N.J. 2002) 803 A.2d 1074, 1104–1105 [reversal because evidence would have permitted a reasonable doubt on the greater offense]; *State v. Brown* (N.J. 1994) 651 A.2d 19, 39–41 [same]; *State v. Allen* (Ore.1986) 717 P.2d 1178, 1181.)

The first-degree murder verdicts must be reversed. Because the rule requiring acquittal of a greater charge before returning a verdict on a lesser one

also applied to the robbery-versus-theft determination, the verdict in Count III (robbery) must be reversed as well.

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VIII. THE GIVING OF A BIASED CONSCIOUSNESS-OF-GUILT INSTRUCTION, WITH LITTLE FACTUAL BASIS, WAS PREJUDICIAL ERROR

CALJIC No. 2.03[1] makes a point of telling the jury that a willfully false statement may be considered to show consciousness of guilt. This Court has, in the past, rejected the claim that the instruction is argumentative. Appellant asks for reconsideration of this holding, pointing out the flaws in the 1992 opinion in which it is based and how, if this Court applied its own principles for identifying argumentative instructions, they would compel a different conclusion. In particular, it is proper to give a pinpoint instruction on directing a jury's attention to a theory of a case *that may not otherwise be evident*,[2] but improper to highlight specific evidence[3] or imply a conclusion to be drawn from it.[4] An instruction is argumentative if it fails to meet these criteria, even if it is neutrally phrased, referring, e.g., to the presence or absence of the evidence.[5] If the instruction highlights a possible inference that is already readily apparent or suggests what the jury may do with a specific item of

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[1]"If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (RT 11: 2337.)

[2]*People v. Sears* (1970) 2 Cal.3d 180, 190; see also *People v. Bolden* (2002) 29 Cal.4th 515, 558–559 (defendant entitled to pinpoint instruction "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions").

[3]*People v. Wright* (1988) 45 Cal.3d 1126, 1137.

[4]*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9.

[5]*People v. Daniels* (1991) 52 Cal.3d 815, 870.

evidence, it improperly emphasizes a party's theory and that party's version of the facts.[6]

These principles have been developed and consistently applied in rejecting proposed defense instructions. Therefore, due process, equal protection, and the heightened-reliability requirement of the Eighth Amendment require applying them to the prosecution-oriented[7] consciousness-of-guilt instruction. Respondent disputes neither the means for determining if an instruction is argumentative nor the constitutional requirement of applying them evenhandedly, but also fails to acknowledge and apply them in its analysis.

Moreover, in the circumstances of this case, the instruction was especially argumentative. As between appellant and others who provided evidence and who could also have had things to hide, it singled out appellant. In addition, it directed attention to a situation where he might not have been forthright, while treating as unworthy of judicial comment evidence tending to negate consciousness of guilt, such as his cooperation with a 3:00 a.m. interview and request to search his apartment, as well as with a later interview request. In addition, the factual predicate here—appellant's having given a willfully false or misleading statement—was in grave doubt, and the trial court's singling it out as the only item of evidence worthy of particular comment gave it a semblance of substantiality which it otherwise lacked.

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[6]*People v. Mincey* (1992) 2 Cal.4th 408, 437.

[7]There is older authority stating that the instruction is for the benefit of the defense. It is, however, mistaken, and—despite an explanation of that fact in the opening brief—respondent does not seek to argue otherwise. (See pp. 159–160, below, and cf. AOB 181–184 with RB 69–74.)

Finally, the permissive inference encouraged by the instruction failed the federal constitutional requirement that the conclusion be at least more likely than not true if the premise is true.[8] An innocent person, particularly an African-American ex-convict, could equally fear revealing the whereabouts of what homicide detectives who awakened him at 3:00 a.m. saw as a possible murder weapon. So could one whose only involvement was to dispose of two items of jewelry that came into his hands following the crime. Respondent has neither contested nor conceded the permissive-inference claim.

A. The Instruction Was Argumentative on Its Face

Respondent understandably notes that the instruction has been repeatedly upheld against challenges that it is argumentative, while failing, however, to supply any rebuttal to appellant's vigorous challenge to the reasoning of the precedents which respondent cites. (RB 70–71.) The most noteworthy problem with this line of cases is that it fails to invoke the general principles this Court has enunciated for determining whether an instruction is argumentative. The grandfather of the cases on which respondent relies, *People v. Kelly* (1992) 1 Cal.4th 495, miscited *People v. Green* (1980) 27 Cal.3d 1 for the proposition that the instruction is a cautionary one telling the jury not to convict based on a false statement alone. Therefore, to be balanced, according to *Kelly*, the instruction must also include a statement as to how the evidence may be used. (1 Cal.4th at pp. 531–532.) Appellant submits that both the premise and the conclusion are faulty. Contrary to *Kelly's* characterization of *People v. Green*, *Green* correctly characterizes the instruction not as a cautionary one, but one that states the pro-prosecution point about the use to be made of false statements and then *adds* the caution

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[8] *Ulster County Court v. Allen* (1979) 442 U.S. 140, 166, fn. 28.

that that alone is not enough to convict. (27 Cal.3d at p. 40.) Moreover, it is difficult to take seriously the idea that a jury would need to be told that such a statement does not in itself satisfy the reasonable-doubt test on all elements of all offenses, unless it had also heard an instruction singling out the potential value of an allegedly false statement. Finally, even if a cautionary instruction were needed, if it were given alone there would there be no danger of the jury's assuming that the evidence could not be used at all. Nothing in *Kelly* successfully refutes the facts that the instruction, on its face, is *aimed at* telling the jury that the evidence is good for the purpose of showing consciousness of guilt; that the point is obvious without the instruction;[9] that it refers to specific evidence; and that, therefore, the effect is the argumentative one of "invit[ing] the jury to draw inferences favorable to one of the parties from specified items of evidence."[10]

Although this was explained in the opening brief,[11] respondent does not seek to defend the reasoning of *Kelly* and its progeny. Respondent merely cites cases repeating the assertion that the instruction benefits the defense (RB 70, 73) and supplies its own rationale for the instruction, which it evidently considers more defensible:

> [The instruction] allows the jury to consider a defendant's statements or actions after an alleged crime to determine whether they are consistent with consciousness of guilt. The

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[9]Cf. *People v. Bolden*, *supra*, 29 Cal.4th 515, 558–559.

[10]*People v. Michaels* (2002) 28 Cal.4th 486, 539, quotation marks omitted; see also *People v. Virgil* (2011) 54 Cal.4th 1210, 1280 ("This proposed instruction was clearly argumentative because it invited the jury to draw inferences favorable only to one side").

[11]AOB 182–183 & fn. 107.

> instruction does not state a factual conclusion; it merely allows the jury to draw an inference if it finds certain facts to be true.

(RB 71.) This is emblematic of an argument that never states the test for whether or not instructions are argumentative. An instruction can be argumentative without telling the jury how the court sees the facts. Few, if any, litigants go so far as to seek such an instruction. Even if it neutrally refers to the presence or absence of evidence on an issue, an instructions which "ask[s] the jury to consider the impact of specific evidence" (*People v. Daniels*, *supra*, 52 Cal.3d 815, 870 [proposed instruction listing factors jury "may consider"]) or "impl[ies] a conclusion to be drawn from the evidence" (*People v. Nieto Benitez*, *supra*, 4 Cal.4th 91, 105, fn. 9) is argumentative. In the seminal case drawing the line between acceptable pinpoint instructions and argumentative ones, this Court held that a defendant is entitled to an instruction that did not pinpoint "specific evidence as such, but the *theory* of the defendant's case." (*People v. Wright*, *supra*, 45 Cal.3d 1126, 1137, quoting *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) The distinction is "between an instruction that pinpoints the crux of the defense and one that improperly implies certain conclusions from specified evidence . . . ." (*Ibid.*) The problem with argumentative instructions is that they unfairly "singl[e] out and bring[] into prominence before the jury certain isolated facts . . . , thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.) Respondent's point—that the instruction at issue here does not state a factual conclusion but only permits the jury to draw an inference if it finds the facts to be true—fails to negate that the instruction is argumentative because it highlights a potential factual conclusion, rather than just pointing out some non-obvious relationship between a certain type of evidence and the legal theories pertinent to the case.

(See *People v. Sears, supra*, 2 Cal.3d 180, 190, regarding appropriate pinpoint instructions, and discussion at AOB 179 of cases it cites.)

The other portion of respondent's new rationale (quoted above) for how this Court could have upheld the instruction is equally off the mark. The jury does not *need* an instruction allowing it to consider whether a defendant's statements imply consciousness of guilt, any more than it needs instructions spelling out that it may consider any other evidence to imply what the evidence implies. A juror does not need expert guidance to think, "He must have felt he had something to hide." In any case, prosecution argument can make the point in any event (and did so here[12]). Nor did the jury need an instruction which would "allow[]" it (RB 71) to so consider the evidence. Clearly it knew it was permitted to consider all the logical implications of any item of circumstantial evidence unless told it could not do so.

All of this is practically black-letter law when the shoe is on the other foot. Defense pinpoint instructions are properly refused when their point is "readily apparent" already (*People v. Bolden, supra*, 29 Cal.4th 515, 559), or when stating the defense view of the evidence and the legal consequence of that view "emphasize[s] to the jury" the defense theory and version of the facts (*People v. Mincey, supra*, 2 Cal.4th at p. 437). That being the case, CALJIC No. 2.03 should also not be upheld simply because it "advised the jury of inferences that could rationally be drawn from the evidence." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 128 [upholding No. 2.03]). Since it was advice the jury surely did not need, the effect was to emphasize a party's theory.

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[12]RT 11: 2466.

Attacks on the instruction have been frequent enough that most are rejected by this Court summarily, with citations to prior cases. The only ones that contain any reasoning other than *Kelly's* point about the instruction being primarily cautionary are in another line of cases. These seek to distinguish the instruction from the rejection of defense instructions as argumentative in *People v. Mincey* (1992) 2 Cal.4th 408, 437. These cases,[13] including *People v. Page*, *supra*, quoted by respondent,[14] sought to distinguish *Mincey* on the basis that the consciousness-of-guilt instruction addresses the law applicable to the evidence, not a particular party's version of the facts, while the defense instruction in *Mincey* described the predicate facts in argumentative language. However, the instruction at issue read, "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437, fn. 5.) The *Mincey* Court itself found the instruction argumentative not because of this language—the reason stated in later cases—but because "[i]n asking the trial court to emphasize to the jury the possibility that the beatings were" as characterized, "defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense." (*Id.* at p. 437.) Here, the problem was, similarly, an instruction emphasizing to the jury the possibility that appellant's statement was willfully false. Characterizing it as addressing the law applicable in such a situation—a characterization equally applicable in *Mincey*— does not negate this attribute.

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[13]*People v. Page* (2008) 44 Cal.4th 1, 50–51; *People v. Bonilla* (2007) 41 Cal.4th 313, 330, and *People v. Nakahara* (2003) 30 Cal.4th 705, 713.

[14]RB 73.

This point was set forth in the opening brief,[15] and respondent has no answer but to assert that the precedents should be upheld. Appellant also discussed *People v. Michaels*, *supra*, 28 Cal.4th 486, 539, another case distinguishable only in that the defendant was the proponent of the instruction,[16] and respondent again has no reply.

In sum, neither this Court nor respondent has sought to demonstrate, using the Court's analytical tools for discriminating between appropriate instructions and argumentative ones, why CALJIC No. 2.03 is not argumentative. It highlights particular evidence, rather than a non-obvious relationship between evidence and a theory of the case, and is an entirely unnecessary application of principles stated in the general instructions on declarants' credibility.[17] It is classically argumentative. Appending an equally

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[15]AOB 184.

[16]AOB 185.

[17]Respondent cites *People v. Page*, *supra*, 44 Cal.4th 1, in response to a supposed claim that the instruction is "duplicative" of other instructions. (RB 72, 73.) The issue is not duplication per se. It is that the need for an instruction explaining the relevance of certain facts to a legal issue arises only when the relevance is not obvious. (See *People v. Sears*, *supra*, 2 Cal.3d 180, 190, the cases it cites, and the discussion at AOB 179.) When, as here, the jury is adequately instructed on determining credibility in general and, further, it is obvious that a willfully false statement could tend to show that the defendant was hiding guilt of a crime, the lack of necessity for the instruction not only removes any justification for giving it. That lack of necessity is also part of what conveys to the jury the impression that the judge wants it to pay particular attention to the point covered.

People v. Page did reject a complaint that CALJIC No. 2.03 was duplicative of other instructions. It relied on the view that the instruction is a cautionary one, benefitting the defense by telling the jury that it cannot convict based on a false statement alone. Thus it was said to cover a matter which

(continued...)

obvious "balancing" statement that a false utterance does not alone suffice to convict does not change this fact.

B. The Instruction Was Particularly Argumentative in the Circumstances of This Case

Several factors increased the instruction's argumentative quality here. One was the particularly disputable nature of the possible fact highlighted as potentially showing consciousness of guilt. The purported falsity of appellant's statement about possibly losing his hatchet in his move to a new apartment depended on (a) Diana Williams's correctly perceiving and remembering, and (b) honestly testifying about, having seen appellant use it as a hammer after the move, as well as on (c) speculation that appellant was lying, rather than making an honest but mistaken guess about when he had misplaced the item, which happens to innocent people all the time. Its

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[17](...continued)
other instructions do not. (44 Cal.4th at p. 50.) But the premise (that the thrust of the instruction is cautionary, and that the caution is needed absent the argumentative portion of the instruction) is erroneous, as pointed out at pages 159–160. above.

Respondent separately seeks to distinguish *People v. Harris* (1989) 47 Cal.3d 1047, which rejected a defense instruction because it singled out a particular witness and because general instructions on evaluating witness credibility covered the same ground adequately. (*Id.* at p. 1099.) Respondent's view is that, in appellant's case, his jurors would have hypertechnically excluded him from the reach of the credibility instructions because he was not a witness. (RB 73–74.) The unlikelihood of such an interpretation, the ludicrousness of the proposition that even an uninstructed juror will fail to consider that a material out-of-court lie by a defendant could mean he was hiding participation in the crime, and the fact that the court could have adapted instructions pertaining to witnesses to cover the out-of-court situation (and avoided argumentatively singling out appellant) were all explained in the opening brief. (AOB 188–189.) Respondent has no answer. (See RB 74.)

evidentiary value also depended on a chain of inferences, well recognized as weak, involving assumptions such as that the reason for any false statement would be consciousness of guilt, as opposed to, for example, fear generated by consciousness of being an ex-convict who is the focus of an investigation for grave crimes. (See *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9 [noting four-link chain of inferences from action claimed to show consciousness of guilt to actual guilt].) Given its inapplicability, or, at best, slight applicability, the instruction elevated a minor and equivocal piece of evidence, which the prosecution nonetheless did stress in argument (RT 11: 2385–2386), to something which the trial court, too, deemed worthy of serious consideration.[18]

In replying to this point, respondent tacitly, and unjustifiably, puts Diana Williams and appellant in different categories, by assuming that Williams testified truthfully and that her recollection was accurate, then using this assumption to prove that appellant lied.[19] (RB 71; cf. *Holmes v. South Carolina* (2006) 547 U.S. 319, 330 [impropriety of treating contested prosecution evidence of guilt as true for purposes of determining admissibility of other evidence].) Williams could have been wrong as to what appellant used as a hammer in attaching speaker wire to the wall or she could have lied, given her potential biases and her status as the witness who also proved motive

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[18]See AOB 177–178.

[19]Because there was not even an implicit jury finding on whether appellant made a false statement, it would be inappropriate to assume that these facts were found in the prosecution's favor, much less that they would have been without the court's pointing to the theory as one worthy of special consideration.

and provided the only testimony linking most of the forensic evidence to appellant.

Respondent further argues that appellant could not have made an innocent mistake. This stance is based on the fact that the hatchet was among the items which appellant normally carried with him in his duffel bag. This, per respondent, equates to anyone else's losing "their car keys or wallet," and such a person "would know exactly when the crucial item went missing." (RB 71–72.) As any woman with a tendency to have "just-in-case" items floating around in her purse knows, however, an item routinely carried is not necessarily a crucial item, the loss of which would cause such an immediate and dramatic problem as inability to get into one's car or make a purchase. Appellant could have gone some time without needing the hatchet, and there was no testimony suggesting that the duffel was so small or lightly packed that the item's absence would be obvious the moment he picked it up. (Cf. RT 5: 1116–1117 [bag described as medium-sized]; 10: 2237 [bag described as large].) Notwithstanding respondent's speculation that appellant could not have made a mistake about when he lost the item, the premise for the consciousness-of-guilt inference was so weak that judicial highlighting of it as a possibility made the instruction especially argumentative here. Respondent also insists that "the jury was free to decide whether [appellant's] statement about the hatchet was true or not." (RB 73.) The claim, however, is not that the court told the jury what the facts were. It is that, as with any argumentative instruction, the court nudged the jury in the direction of a certain factual finding and one of several inferences that could have been drawn from it.

Second, unlike the general instructions on credibility, which were sufficient to cover the issue,[20] this instruction singled out appellant as the one person whom the judge considered to have a potential credibility problem. This despite the fact that key witness Diana Williams, who was also poor, could cash appellant's monthly disability check once he was incarcerated, and whose ex-girlfriend status might have created other biases. Similarly, Darryl Walker had an interest in convicting the man he had decided early in his investigation was the perpetrator. Both had not only biases, but also indicia of unreliability in parts of their testimony.[21]

Respondent denies that the instruction singled out appellant but does not attempt to explain this stance. (RB 73.) Respondent also seeks to distinguish *People v. Harris*, *supra*, 47 Cal.3d 1047, which held, "It is improper . . . for the court to single out a particular witness in an instruction, since by so doing the court charge becomes a comment on how the evidence should be considered, rather than a general instruction on a [party's] theory." (*Id.* at p. 1099.) *Harris* also relied, as respondent notes, on the superfluousness of the instruction, given that—as here—the general instructions on witness credibility would have covered the same matter. (*Ibid.*) Respondent seeks to distinguish *Harris* on the lack-of-necessity prong of its reasoning but ignores

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[20]Including CALJIC No. 2.20, which referred not only to "anything that has a tendency to . . . disprove the truthfulness of the witness," but also specifically "the existence or nonexistence of any fact testified to by the witness," as well as No. 2.21.1, providing guidance on evaluating discrepancies between different witnesses' accounts. (RT 11: 2339–2340.)

[21]On others' credibility problems, see AOB 91–92. On the impropriety of singling out a particular witness's testimony, see AOB 187–189 and cases cited.

what this Court said about singling out a particular person for comment on a matter with a possible negative impact on his credibility.[22] (RB 73–74.)

Finally, the instruction also was biased and argumentative in its focus on weak evidence of consciousness of guilt, while totally ignoring the quantitatively and qualitatively stronger evidence of appellant's acting like a man with little to hide. This again created the clear implication—from a juror's perspective—that the possible false statement was worthy of particular attention.[23] Respondent's reply: "Appellant was free to argue, as he did, that he cooperated with police, had nothing to hide, and did not make a willfully false statement." (RB 73.) This is all well and good, but if he had made such an argument,[24] he should only have had to counter a comparable prosecutorial argument, not an argumentative instruction from the court as well.

In sum, the instruction in the abstract crosses the line which this Court has drawn between acceptable pinpoint instructions (for a defendant, who is entitled to them for due-process reasons) and argumentative instructions. Offering it where the factual predicate was weak or arguably inapplicable, treating appellant's credibility issues differently from those affecting witnesses against him, and treating a possible instance of evasiveness differently from

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[22]As to whether the instruction here was necessary or superfluous, and respondent's view of that question, see p. 165, fn. 17, ¶ 3, above.

[23]See AOB 189–190, discussing appellant's cooperation with two interview requests, including inviting a detective into his apartment at 3:00 a.m., going voluntarily to the police station, and giving consent to a search of the apartment.

[24]Respondent gives no record citation for the claim that the argument was made. Trial counsel's weak defense did not include this argument or otherwise respond to the prosecution's emphasis (RT 11: 2385–2386) on the purportedly false statement. (See RT 11: 2417–2443.)

his more striking degree of cooperation with the police—all of these made the court's comments particularly argumentative in the circumstances of this case. This was clearly an instruction which was "singling out and bringing into prominence before the jury certain isolated facts . . . , thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin, supra*, 170 Cal. 657, 672.) Giving the instruction was error.

C. In the Circumstances of This Case, the Instruction Invited an Irrational Permissive Inference

An innocent person—or one who suspected that a couple of items of jewelry that came into his hands may have been tied to a serious crime—could also give an evasive or false answer to homicide detectives who awakened him at 3:00 a.m. to ask, among other things, about a possible murder weapon. The permissive inference encouraged by the instruction therefore failed federal constitutional standards regarding the required degree of confidence in the rationality of the inference. In his opening brief,[25] appellant explained why the conclusion permitted by CALJIC No. 2.03 did not "more likely than not flow from" the fact proved in the circumstances of his trial. (*Ulster County Court v. Allen, supra*, 442 U.S. 140, 166, fn. 28.)

Respondent has not addressed this contention, and appellant relies on the opening brief.

D. Combined With Other Guilt-Phase Errors, the Instructional Error Was Prejudicial

The parties disagree about the standard of prejudice and the scope of matters that should be considered in a prejudice analysis. The standard for federal constitutional error should apply, given the due-process violation of weighing in on the prosecution's side and the potential threat such an action

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[25]AOB 191–193.

had to the even greater reliability required in capital proceedings. (U.S. Const., 8th and 14th Amends.) Without addressing this contention,[26] respondent applies a purported "reasonable likelihood" standard, citing *People v. Holt* (1997) 15 Cal.4th 619, 677, and *People v. Cain* (1995) 10 Cal.4th 1, 34. (RB 74.) There is a reasonable-likelihood standard for whether there was error at all in certain contexts;[27] there is no such standard regarding the assessment of harmlessness. The cited page of *People v. Holt* contains no prejudice analysis, and the phrase *reasonable likelihood* does not appear in the opinion at all. *People v. Cain*, too, analyzed only whether there was error, not prejudice, and did not refer to a reasonable likelihood of anything. The term at issue comes up elsewhere in the opinion, but only in its proper context—whether there was error because of a reasonable likelihood that an ambiguous instruction could have been understood as lowering the prosecution's burden of proof, or whether certain comments by counsel could have been understood in a way detrimental to the defendant. (See 10 Cal.4th at pp. 35–37, 48, 51.)

Employing its purported standard, respondent's only attempt to meet its burden of showing harmlessness is to state, "Considering the entire charge to the jury and all of the evidence against appellant, there is no reasonable likelihood that the jury convicted appellant because they were misled by CALJIC No. 2.03." (RB 74.) Respondent levels its attack at a straw man and, in doing so, evades appellant's actual claim. That claim: even if it could be known beyond a reasonable doubt that the instruction, standing alone, was not

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[26]Made at AOB 193, 195.

[27]See, e.g., *Victor v. Nebraska* (1994) 511 U.S. 1, 2–3 (reasonable likelihood test for determining whether instruction lowered burdenof proof).

an action which "might have contributed to" jurors voting the way they did,[28] it potentiated other judicial actions which tended to throw the trial court's considerable weight onto the prosecution's side.

First, the error, considered alone, had significant power. No other evidentiary point made by counsel for either party in their summations was singled out for comment during the instructions. And as pointed out in the opening brief, the instruction, though routine and well-known to this Court, could only create for naive jurors the impression that the trial court saw the purportedly false statement as worthy of the special attention which it received.

Second, as respondent emphasizes in other portions of its argument, an instructional error should not be considered in isolation. Here this means that this Court should consider the error's synergy with other judicial actions that seemed to indicate encouragement to hold appellant accountable for the crimes charged against him. The complete package included the extensive exhortation to consider a circumstantial case sufficient, the pointing to possession of recently stolen property as nearly sufficient to make such a case, *and* the special effort to mention a statement that could show consciousness of guilt, isolated from any comment on others' credibility or from the considerable evidence implying consciousness of innocence.

Respondent's only acknowledgment of this point is to express indignation at appellant's use of an analogy, from a television commercial, to illustrate it. (RB 74, fn. 5; cf. AOB 194–195.) Respondent's interpretation notwithstanding, the illustration is not intended to be humorous. Neither appellant personally nor his counsel considers either what happened at the Jenks residence or the true subject of the analogy—the way the trial court kept

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[28] *Chapman v. California* (1967) 386 U.S. 18, 23.

giving the jury indicia of an apparent interest in seeing a guilty man convicted—to be a laughing matter. As to the actual point made—that prejudice from the error cannot be considered in isolation from actions having a similar impact, and that together they were devastating—respondent has no answer. Accordingly, the judgment of guilt must be reversed.

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IX. ADMISSION OF AN UN-CROSS-EXAMINED, OUT-OF-COURT STATEMENT, IN VIOLATION OF THE HEARSAY RULE AND THE CONFRONTATION CLAUSE, PREJUDICED BOTH THE GUILT AND THE PENALTY DELIBERATIONS

Using an item of double hearsay, the prosecution eliminated what it saw as an important basis for a doubt about its case and supplied an equally important point in aggravation. Darryl Walker testified that (a) his report said that (b) Oscar Galloway had told him that a duffel bag of appellant's was in Galloway's car when appellant's apartment was searched not long after the murders. The evidence was offered to answer questions about the absence of jewelry, bloody clothing or shoes, or a hatchet among appellant's belongings during the search. (See RT 10: 2408–2411.) The Walker report also attributed to Galloway a statement that he drove appellant to a casino to gamble the day after the murders, which the prosecution used to argue that appellant took these terrible crimes casually. (RT 10: 2237, 13: 2854.)

Admission of the report violated the federal Confrontation Clause. (U.S. Const., 6th Amend.) Respondent brings out a point which appellant originally missed: there was no Confrontation-Clause violation if appellant had a true opportunity at trial to cross-examine the declarant. (*Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9.) However, here there was no meaningful opportunity to cross-examine: Galloway could not recall the original incidents, any part of the conversation that the Walker report purported to summarize, or his state or other conditions that could affect his credibility on either day. Thus he was clearly incapable of even credibly testifying that he told the truth to Walker or that he was not subject to external influence. (See RT 10: 2208–2213.)

The report was admitted as past recollection recorded, under Evidence Code section 1237.[1] To be admissible, it had to be a writing which "[w]as made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made." (Evid. Code § 1237, subd. (a)(2).) The report was not made by Galloway or under Galloway's direction, nor was it made at the time of Galloway's actual statement. Walker did not even take notes at the time, much less write up his report then, and he admitted the possibility that he either wrote or revised the report days later. (RT 10: 2219–2220.)

Perhaps the report was *Walker's* past recollection recorded—a writing made by him stating what he remembered witnessing (Galloway speaking). That, however, would cover only one part of the double-hearsay problem. Without, however, a hearsay exception that would have permitted Walker to testify directly about Galloway's out-of-court statement, the contents of Walker's recorded recollection of the statement remained inadmissible. The trial court's findings on the admissibility of the report failed to mention the requirement that the record have been made when the statement was made. (See RT 10: 2231.) Even now, respondent fails to address this temporal prerequisite. (See RB 81–82; cf. AOB 198–199.) Walker's report itself being an out-of-court statement, the best that section 1237 could arguably give the prosecution was the right to introduce it *if* the substance of that report was admissible.[2] But it was not; the substance was a hearsay statement by

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[1]Sometimes referred to below simply as "section 1237."

[2]While the rules of evidence in general would compel this result, the section permitting use of past recollection recorded also specifically requires that the witness's "statement would have been admissible if made by him (continued...)

Galloway, as to which Walker could not have testified even if he claimed to remember every detail of the conversation. Appellant has pointed this out, and respondent is silent on the matter.[3] No further analysis is required to show that the report was inadmissible under state law, and none is provided in the remainder of this argument.

Respondent does address the statutory problem on which it can at least make a colorable argument: whether the prosecution met the statutory requirement[4] that Galloway testify that what he told Walker was true. In form, Galloway did so testify.[5] The credibility of the answer, however, was fatally undermined by Galloway's inability to remember much of anything from the period in question,[6] and his explanation that he always answered people's

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[2](...continued)
while testifying." (Evid. Code § 1237, subd. (a).) Walker's recounting of Galloway's statement to him would not have been admissible, absent some hearsay exception applicable to Galloway's words spoken out of court.

[3]In discussing whether another foundational requirement for admission of the testimony under state law was met, respondent invokes an abuse-of-discretion standard assertedly applicable to trial-court findings about the existence of foundational facts. (RB 81.) Respondent has over-generalized (see p. 181, below), but here it does not matter. Because the trial court made no finding that the statement was recorded under one of the circumstances required by the statute, there is no finding to uphold under any deferential standard; this Court must determine the matter de novo.

[4]Evidence Code section 1237, subdivision (a)(3).

[5]The opening brief erroneously presented this testimony as an answer to a leading question. (AOB 200, citing RT 10: 2012.) As respondent points out, the question and answer simply recapitulated an earlier answer to a non-leading question. (RB 75, citing RT 10: 2011.)

[6]See RT 10: 2207–2215, discussed at AOB 196, 200.

questions honestly.[7] Respondent contends that, even under these circumstances, Galloway's "yes" was enough.

A. Although the Declarant Testified, His Appearance Was Pro Forma, Did Not Provide an Opportunity for Real Cross-Examination, and Therefore Failed to Place His Statement Outside the *Crawford* Prohibition

As to the Sixth Amendment issue, respondent observes that *Crawford* is concerned with the admission of out-of-court testimonial statements in the situation where the declarant was not called as a witness and therefore could not be cross-examined. The Confrontation Clause does not prohibit the use of all hearsay; the problem arises when the declarant cannot be confronted, in front of a jury viewing his or her demeanor, with questions about his or her truthfulness and capacity to perceive and remember. Thus "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9, quoting *California v. Green* (1970) 399 U.S. 149, 158.)

The problem here is that Oscar Galloway could not "defend or explain" his statement. Nor could he say anything else about it, other than his belief that it was the truth. But that opinion could have come only from his general belief that he always told the truth,[8] given his inability to recall the events in question or what—during the same time frame—he told Walker about those events. (RT 10: 2211–2215.) "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 56, fn. 7.) Galloway could not shed any light on whether that potential was

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[7]RT 10: 2212.

[8]See RT 10: 2212.

realized here. Walker had several days earlier focused on appellant as his suspect and already knew of his problem with finding nothing in appellant's possession connecting him with the crime. The Oscar Galloway produced at trial could have had no idea whether Walker had led him where he wanted him to go, nor whether Walker had accurately summarized his statement when he later wrote a report about it. Respondent's position requires holding that Galloway was unavailable for direct examination, because of his memory loss, but that he was somehow available for cross-examination on the same subject matter.

Respondent points out that in *United States v. Owens* (1988) 484 U.S. 554, confrontation concerns about an out-of-court statement were satisfied when the declarant—who had suffered severe memory loss and was unable to explain the basis for a prior identification of the defendant—was cross-examined about his lack of recollection of an assault that was the subject of his prior statement, did not recall that he had numerous visitors while hospitalized after the assault, and could not say whether any of them had suggested that the defendant had been his assailant. (*Id.* at 558.) Similarly, respondent cites *People v. Cummings* (1993) 4 Cal.4th 1233, where "[t]he bias, lack of recall, use of memory-affecting drugs, and all matters relevant to the credibility of the witness, both at the time he made his statement and at the time of his testimony were fully explored" on cross-examination. This satisfied the Confrontation Clause, even though the declarant-witness could recall neither the conversation in which he made the prior statement nor the incident which was its subject. (*Id.* at p. 1292, fn. 32.) Here, however, the case was more like *Douglas v. Alabama* (1965) 380 U.S. 415, where a witness refused to answer questions at all. Cross-examination on whether Galloway had actually told the truth, whether Walker had led him in any way, whether he had any motivation at the

time to try to please Walker, and whether Walker's report on what he had said was accurate—in general or in any particular detail—would have been useless, because Galloway simply would have been unable to answer. Again, he simply was not available to "explain or defend" his purported statement. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9.)

B. State-Law Requirements for the Hearsay Exception Were Unmet

1. Respondent Does Not Dispute the Inadequacy of Walker's Later Recording of His Own Memory of Galloway's Statement

For the hearsay exception for past recollection recorded to apply, the record must have been made (1) by the witness, or (2) under that person's direction, or (3) "by some other person for the purpose of recording the witness' statement at the time it was made." (Evid. Code § 1237, subd. (a)(2).) Appellant has pointed out that the statute was not complied with in any of these ways, and that the trial court made a finding only about Walker's purpose in writing his report, without saying anything about the recording being contemporaneous. (AOB 198–199.) Respondent's analysis of the statutory issue ignores this point. (RB 81–83.) The exception did not apply.

2. Pro Forma Testimony by a Declarant That He Told the Truth, When He Lacked Knowledge of Whether He Did or Not, Did Not Satisfy the Statutory Requirement

There was another reason that the prosecution was unable to avoid the hearsay rule. To meet the exception, the Evidence Code further requires that the witness must "testif[y] that the statement he made was a true statement of such fact." (Evid. Code § 1237, subd. (a)(3).) In his June 15, 1998, testimony, Galloway did state that he had told Walker the truth August 9, 1997, but Galloway could not know whether he told the truth or not. No reasonable

reading of the statute permits accepting a pro forma statement by a witness not competent to testify credibly about whether he told the truth.

"[F]oundational prerequisites are fundamental to any exception to the hearsay rule." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57.) Such prerequisites are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Ibid.*) They "relate[] to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence"; absent proof of those circumstances, the evidence is "too unreliable to be evaluated properly" by a jury. (Legis. Com. com., 29B, Pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 405, p. 41 ["Comment to § 405"]; see also 3 Witkin, Cal. Evidence (4th Ed. 2000) Presentation at Trial, § 63, p. 94.)

"As the proponent [of evidence objected to on hearsay grounds], the burden of producing evidence sufficient to establish the necessary foundation fell" on the prosecution. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; see also Comment to § 405, *supra*, p. 42; 3 Witkin Cal. Evidence, *supra*, Presentation at Trial, § 63, p. 94.) Galloway's testimony about the truth of his purported statement was not "evidence sufficient to establish" its truth. He could recall very little from the period in question;[9] it was therefore clear that the only basis for the answer was his stated belief that he *always* responded to others' questions honestly;[10] he had made an intentional and largely successful decision to "block everything" from his mind but his health and had no reason

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[9]See RT 10: 2209–2215, discussed at AOB 196, 200.

[10]RT 10: 2212.

to have made his conversation with Walker an exception;[11] and he appeared as a witness, in obvious discomfort and complaining of the emotional toll his disease was taking on him, while in the midst of radiation and chemotherapy for his metastasised lung cancer and while taking at least two kinds of pain medication, as well as medication for asthma, diabetes, and high blood pressure.[12] The fact is, Galloway did not know if he told the truth August 9 about the August 5 events which he could no longer remember, or if he was impacted by some kind of suggestion, pressure, bias, or other influence which he also could no longer remember. Respondent contends that, even under these circumstances, Galloway's "yes" was enough to satisfy the statutory requirement and the reliability considerations underlying it.

Preliminarly, respondent proposes an abuse-of-discretion standard of review for "questions about the existence of the foundational facts necessary to satisfy a hearsay exception." (RB 81.) However, a "trial court's findings of fact are reviewed for substantial evidence . . . ." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712.) Respondent cites *People v. Alvarez* (1996) 14 Cal.4th 155, 201, but *Alvarez*, in dealing with a relevance ruling (not foundational facts for a hearsay determination), only states that "broadly speaking," evidentiary rulings are reviewed for abuse of discretion. (*Ibid.*) Respondent also cites *People v. Poggi* (1988) 45 Cal.3d 306, 318. *Poggi* does not state respondent's purported rule either. It concerned the spontaneous-utterance hearsay exception and dealt specifically with the tests for determining whether such an utterance was made under circumstances making them "sufficiently trustworthy to be presented to the jury." (*Ibid.*, quoting

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[11]RT 10: 2211.

[12]RT 10: 2207, 2209–2212.

Showalter v. Western Pacific R.R. Co. (1940) 16 Cal.2d 460, 468.) Given the nature of that particular determination, there was "necessarily some element of discretion in the trial court." (*Ibid.*, again quoting *Showalter.*) *Poggi* neither states nor provides a rationale for the general applicability of an abuse-of-discretion standard to a trial court's determination of foundational facts. Here, whether Galloway credibly testified that he told the truth was like any other evidentiary fact, and sufficient deference to the trial court's ability to observe his demeanor is provided by the substantial-evidence rule.

On the merits, this case is analogous to *People v. Simmons* (1981) 123 Cal.App.3d 677, where a medically amnesiac witness could only authenticate his signature on his transcribed statement and testify that, to the best of his knowledge, he had no reason to lie when the statement was prepared. The Court of Appeal found that the witness could not provide the support for the reliability of the statement which the statute requires. (*Id.* at pp. 682–683.) Respondent contends that *Simmons* should be distinguished because here, at least, Galloway recalled making a statement and testified that it was truthful. (RB 82.) Respondent fails to explain how the bare fact of recalling speaking to Walker lends sufficient credibility to the statement about truthfulness. Galloway's willingness to state that he told the truth was based on the same cognitive state as that of the *Simmons* declarant. Both knew themselves to generally tell the truth.[13] Since Galloway could not recall events from the period of the interview or what was said during it, he, like the *Simmons* witness, was unaware of any reason he would not have done so then. The only difference here was that Galloway was allowed to express his conclusion that

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[13]Galloway: "[W]hen somebody asked me something, I just answer[ed] whatever was in my mind then." (RT 10: 2212.)

he told the truth, while the *Simmons* declarant's testimony was limited to the more accurate statement that he was unaware of any reason he would have lied. But clearly that is all that Galloway knew about his statement as well.

Respondent cites *People v. Cummings* (1993) 4 Cal.4th 1233, another case involving a witness who could no longer recall the events related in a previous conversation with an investigator. In *Cummings* this Court cited *People v. Simmons* with approval, in holding that admissibility turned on whether a declarant's testimony that he told the truth at the time he made a statement was reliable. *Cummings*, as appellant noted previously,[14] represents the outer limit of what can meet that requirement. This Court distinguished *Simmons*, observing that the *Cummings* declarant testified that he recalled speaking while the events were fresh in his mind and recalled telling the truth. Moreover, at trial he was able to give some details—otherwise corroborated—regarding the situation described in his out-of-court statement. (Respondent erroneously claims that the declarant had no recollection of the conversation with the detective, citing a portion of the opinion stating the appellant's version of the facts, which the Court concluded was unsupported by the record.[15] [RB 83, citing 4 Cal.4th at pp. 1292–1293].) Further, the trial court had made clear its understanding that the issue was the reliability of the testimony that the statement was true. (*Id.* at p. 1294.) As appellant pointed out in the opening brief, here, in contrast, the trial court made no detailed

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[14]AOB 201.

[15]"Cummings argues that . . . [the declarant] had no recollection either of Cummings's statement to him or of his own statement to [Detective] Holder. He had no recall of even talking to Holder. [¶] The record does not support this claim. [The declarant] testified that he spoke to Holder a few days after the bus ride with Cummings, that the conversation he related was then fresh in his mind, and that he told Holder the truth." (4 Cal.4th at p. 1293.)

analysis of the credibility of Galloway's bald claim that he told the truth, no testimony showing that he recalled the circumstances of the conversation was elicited, and the corroboration relied on in *Cummings* were absent here. Like the *Simmons* witness, the only evidence on the issue was that Galloway's condition prevented him as much from testifying about his interaction with Walker as it did his interaction with appellant. Respondent does not seek to refute the explanation of why *Cummings* should be distinguished and *Simmons* applied.

Respondent also relies on *People v. Gentry* (1969) 270 Cal.App.2d 462, "where a declarant could not remember at trial what had happened, but testified that she did remember speaking with the officer at the time of the incident and had told the truth." (RB 83.) *Gentry* is a textbook example of the proper application of section 1237, which, of course, is needed and applicable only when a witness cannot remember the events described in the recorded statement but can testify as to knowledge that the statement was the truth. The witness, a child who had no reason to lie, did recall speaking with an officer shortly after the events in question and recalled telling the truth. Unlike here, there was nothing about her situation at trial shedding doubt on her capacity to remember that she had told the truth. Her lack of recollection of some of the underlying events, in contrast, could be explained both by their traumatic nature and by remarks during objections by defense counsel that the Court of Appeal found contumacious and likely to frighten her. (*Id.* at pp. 468–470 & fn. 11.) Here there was no reason why Galloway's recollections at trial of the events of August 5 and of the August 9 conversation concerning them would not have been equally affected by his physical and psychological deterioration, his being heavily medicated, and the conscious effort he had been making to put out of his mind everything unrelated to taking care of himself. (RT 10:

2207–2212) Had the trial court recognized that a key issue was the reliability of his answer when he stated that he told the truth, a finding that sufficient reliability existed would have lacked substantial evidence. The prosecution had the burden of producing evidence "sufficient to establish the necessary foundation," and the evidence was insufficient. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1177.

In sum, the report was inadmissible hearsay because it was not written by Galloway, under his direction, or contemporaneously by Walker for the purpose of recording Galloway's statement. (Evid. Code § 1237, subd. (a)(2).) In addition, the key statutory reliability-ensuring requirement that the declarant testify that the statement was true was met in form only. (Evid. Code § 1237, subd. (a)(3); *People v. Cummings*, *supra*, 4 Cal.4th 1233, 1294 [testimony as to truth of statement must be reliable].) State law required exclusion of the statement. (Evid. Code § 1200 [hearsay is inadmissible unless an exception applies].)

C. Admission of the Galloway Statement Was Prejudicial

1. Respondent Ignores How the Prosecutor Used the Evidence to Prove Guilt

The parties agree that if there was only state-law error, appellant must show a reasonable probability of a more favorable verdict if the testimony had been excluded,[16] while a Confrontation-Clause violation requires respondent to establish harmlessness beyond a reasonable doubt.

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[16]This requires only "a *reasonable chance*, more than an *abstract possibility*," that the error "affected the verdict." (*College Hospital, Inc.*, v. *Superior Court* (1994) 8 Cal.4th 704, 715 [explaining the reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d 818, 836]; accord, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–801.)

Ignoring the prosecution's actual use of the Galloway statement in argument, respondent hypothesizes that the evidence was offered "presumably to rebut appellant's attempt at undermining Williams' testimony about appellant's whereabouts the week of the murders and to refute appellant's alleged opportunity to commit the crimes." Respondent then concludes that the prosecution had ample other evidence on those issues. (RB 83.) These matters, however, were *not* raised by the defense, and respondent does not cite the record to attempt to document its assertion that they were. Moreover, the prosecution was explicit about its use of the evidence, which was far more necessary than respondent now contends. In closing argument, Deputy District Attorney Reinhart explained,

> But we have other evidence. And that was from Mr. Galloway. . . . And it's a very significant piece of information in this puzzle, especially in light of what I anticipate the defense will be.
>
> Where was the axe and the other items when Moes and Blodgett came calling at three o'clock in the morning?

(RT 11: 2409–2410.) The "other items" that could have expected to be discovered the night after the night of the crime were bloody clothing, bloody shoes, and jewelry. The prosecution's answer to this gap in its identity case: per Galloway, appellant left his duffel bag in Galloway's car overnight, and the items must have been in the bag. (RT 11: 2410–2411.)

After minimizing the use to which the hearsay evidence was put, respondent recites the remaining evidence in favor of the jury's finding that appellant was the perpetrator, concluding that any error was harmless under any standard. (RB 84.) By considering only inculpatory evidence, respondent engages only half the analysis, the part that would be determinative if appellant contended that there was insufficient evidence for a rational jury to identify

him as the perpetrator. But this is not an insufficiency claim. This Court recently reversed a Court of Appeal opinion that followed respondent's method here. I.e., the lower court had found harmlessness in an instructional error by focusing on the evidence in favor of the verdict:

> Although we agree that this evidence would be sufficient to sustain a finding of [an element not instructed on] on appellate review, under which we would view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence [citation], our task in analyzing the prejudice from the instructional error is [to determine] whether any rational factfinder could have come to the *opposite* conclusion.

(*People v. Mil* (No. S184665, 1/23/2012), __ Cal.4th __, __ [slip opn., pp 19–20].) This Court then proceeded to examine the evidence in the defendant's favor, concluding, "Under these circumstances, a rational juror, given proper instructions, could have had a reasonable doubt whether defendant" had the requisite mental state for his crime. (*Id.* at __, [slip opn., p. 21].)

Even under a state-law harmlessness test, this Court would have to review *all* the evidence to determine whether an error could have affected the decision reached by appellant's jury.[1] And the need is heightened under the

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[1]As Witkin explains, in discussing even civil cases,

> **Review of Entire Record.** [¶] The court must be convinced of the injurious nature of the error after an examination of the entire record. In other words, it must, to some extent, weigh the evidence, for the probability of injury from the error may be dependent on the state of the evidence.

(9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 418, pp. 476–477; see also Cal. Const., art. VI, § 13 [harmlessness analysis must include "an examination

(continued...)

constitutional standard, where the Court's task is to decide if it can exclude, beyond a reasonable doubt, the possibility that a rational juror could have had a reasonable doubt as to the identity of the perpetrator, absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 19; *Chapman v. California* (1967) 386 U.S. 18.) Rational jurors do not look only at the prosecution case.

Respondent ignores what the police did not find, which was as noteworthy as what they did, given that the attacks were anything but methodical. Investigators found no trace at the scene of appellant's hair, skin cells under the victims' nails, fingerprints, semen, or saliva; they found little of the stolen jewelry; and there was no sign of blood on appellant's belongings (other than his glasses—but see below) or in his apartment.[2] During the penalty phase, it came out that hair and some kind of fibers were found on Shirley Jenks's body (RT 13: 2689), but no testimony tied them to appellant. If her nightgown or the bedding was tested for body fluids that might be linked to the perpetrator, no evidence of that fact was introduced. Appellant's hatchet had a 3/4" square head opposite the blade, without a cross-hatched pattern; the weapon used on Fred Jenks left a 1 1/4" round bruise and appeared to have a crosshatch pattern. (RT 5: 1117; 7: 1576; 6: 1399, 1427–1428.) The footprint evidence was only that appellant often wore the same, very popular *brand* of sneakers as the perpetrator had worn, not that

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[1](...continued)
of the entire cause, including the evidence"]; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570 [harmlessness review includes "the degree of conflict in the evidence on critical issues"], 578 [state-law test is the same in criminal cases]; *People v. Gonzales* (1967) 66 Cal.2d 482, 493 [need to review entire record]; see also *People v. Garcia* (2005) 36 Cal.4th 777, 805–806 & fn. 10, 807, fn. 11.)

[2]See AOB 18–20, and cited portions of record.

the shoes were a comparable size or model. If the word "Nike" was in the footprints—which is by no means clear from the exhibits—it was in the heel portion of the shoe.[3] However, both Diana and Quentin Williams testified that the word "Nike" was in the center, i.e., the instep portion, of the sole of appellant's Nike sneakers, which had previously belonged to Quentin.[4] No officer or criminalist verified that the band-retaining-pin in the watch found at the scene tended to come loose, as Diana Williams testified was the case with appellant's watch. Nor was there evidence of tests for appellant's fingerprints or DNA on the watch. (Cf. RT 8: 1712–1713 [evidence of appellant's DNA on his glasses was unsurprising because sloughed-off cells adhere to personal items].) The evidence tending to show that appellant often wore Nikes, the identification of the watch left at the scene, and claims that some of appellant's clothes were missing post-arrest all came from the uncorroborated testimony of an ex-girlfriend,[5] a single mother who herself was clearly among the working poor and who could keep (and had the power to cash) appellant's SSI check if he was out of the picture.[6]

The most damaging evidence was the blood speck on the frame of appellant's glasses, where it met the lens. But a juror could easily have harbored a reasonable doubt about its origin if he or she considered:

- the thinness of the remainder of the case against appellant;

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[3]RT 5: 1244; 11: 2395–2396; Exs. 12, 17, 35–38; see also RT 8: 1799 (note from juror who could not see "Nike" when exhibit was projected in the courtroom).

[4]RT 7: 1544–1545, 1568–1569, 1605–1607.

[5]See AOB 15 et seq. and cited portions of record.

[6]RT 7: 1526–1529, 1531, 1535–1536, 1578.

- the occasional, and at the time well-publicized,[7] tendency of a subset of law-enforcement officers to dishonestly strengthen cases against people they believe are guilty;
- the strangeness of Walker's account of noticing a pinhead-sized speck of blood, on dark-tinted lenses, when he was going to return them to appellant but "stopped for a moment and . . . looked at the glasses," especially given his poor eyesight and inability to be sure—even with a magnifying class—that there was a spot there;[8] and
- Walker's switching from saying he took the glasses to examine them for evidence, to acknowledging that he took them so he could examine appellant's eyes (after he slipped on cross-examination and mentioned being about to return them to appellant at one point).[9]

The prosecution also had appellant's pawning of a pendant and ring.[10] As they were but two of many pieces of jewelry missing from Shirley Jenks's

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[7]The trial took place three years after Mark Fuhrman pleaded guilty to perjury during the O.J. Simpson trial, based on an accusation of planting a bloody glove at Simpson's estate. (See RT 11: 2471; *Excerpts From the Ruling on the Fuhrman Tapes*, N.Y. Times (Sept. 1, 1995), p. A16.) Appellant was tried a month after Los Angeles's police chief created a task force to investigate evidence of Ramparts Division officers' framing of suspects. (*Frontline: Rampart Scandal Timeline* <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> [as of Nov. 30, 2007].)

[8]RT 6: 1313, 1315.

[9]Compare RT 5: 1277, 1313, with RT 6: 1313–1314.

[10]RT 8: 1809–1810, 1812–1815, 1819–1822, 1828, 1839–1841, 1848–1852, 1860–1862.

collection,[11] and nothing else was recovered in intensive searches of appellant's belongings, they could have been given to him by a person who (a) knew about the Jenks jewelry collection, from appellant or in some other way, and (b) hoped to pin the crimes on him.[12] The same scenario would explain the use of a weapon that would be associated with appellant.

There was circumstantial evidence tending to show that an informant turned the investigation towards appellant extremely early. Appellant was interviewed at 3:00 a.m. Wednesday, i.e., eight hours after the bodies were found. (RT 10: 2098.) During that interview, which took place before the autopsies on the victims' bodies that supposedly disclosed the likely type of weapon, investigators asked him about his hatchet.[13] Similarly, when investigators examined pawn slips on Thursday, they looked for items appellant had pawned, rather than examining jewelry pawned after the crimes, identifying the stolen items, and seeing what the documents showed about who pawned it. (RT 8: 1837.) No explanation for this immediate focus on appellant was before the jury. Since there were no witnesses who testified about seeing appellant nearby when the crimes could have happened, the police must have received a tip. Similarly, there was no testimony that appellant made incriminating statements to anyone.[14] Jurors could reasonably have considered the possibility of a tipster with a nefarious motive.

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[11]RT 5: 1309–1310; 10: 2118, 2141–2144.

[12]See *People v. Najera* (2008) 43 Cal.4th 1132, 1138 (""The real criminal . . . may have artfully placed the article in the possession . . . of an innocent person"").

[13]RT 10: 2098, 2101, 2146–2147.

[14]Even the "Where's your hatchet?" conversation was later.

Finally, the completeness of the investigation was questionable because of its early focus on appellant. The expert examining the many fingerprints taken at the scene was asked to look for matches for appellant and the Jenkses but not to run the unmatched prints which he had against a computerized database. (RT 8: 1895–1897.) As noted earlier, neither the car found in the garage with its door open and battery dead, nor the home office, which the perpetrator had gone through, were tested for prints.[15]

A conclusion that appellant was set up was not compelled by the evidence, but it also cannot be ruled out as irrational. (*Neder v. United States*, *supra*, 527 U.S. 1, 19 [for harmlessness of constitutional error, test is "whether the record contains evidence that could rationally lead to a contrary finding" to that which resulted in verdict] (opn. of Rehnquist, C.J., for the Court).) A doubt based on this possibility would not be irrational, which means that significant error cannot be ruled out as contributing to a juror's ultimate vote. (*Ibid.*) And allowing the prosecution to provide the Galloway duffel-in-the car answer to the question about why a search so soon after the crimes uncovered no trace of the weapon, booty, or bloody clothing was not an insignificant error. It cannot be said that the guilty verdict "was surely unattributable"[16] to reasoning which the prosecution thought could contribute to it based on "a very significant piece of information in this puzzle."[17]

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[15]RT 5: 1207; RT 8: 1897–1898.

[16]*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.

[17]RT 11: 2409–2410.

This analysis, along with all the facts reviewed here, was in the opening brief,[18] and it is unchallenged by respondent. Instead, respondent relies on a one-sided recapitulation of the evidence that is inappropriate in a harmlessness analysis and its claim that the evidence was "presumably" used only to refute a suggestion—never made—that appellant's whereabouts would not have given him an opportunity to commit the crimes. (RB 83–84.)

2. Presenting Appellant as Callously Going Gambling, Versus Using the Pawn Proceeds to Buy Food, Prejudiced the Penalty Determination

a. Harmlessness Review Must be Concerned with the Potential Impact of the Error on Jurors' Unknowable Subjective Processes, Not with the Relative Strengths of Aggravation and Mitigation

This Court has applied two different modes of analysis to determining whether error affecting penalty was harmless. Since the late 1980's it has often weighed the relative strengths of aggravating and mitigating circumstances, as they appear to this Court from the record, to determine whether it can be determined, beyond a reasonable doubt,[19] that error could not have contributed to a juror's vote for death.[20] It has also sometimes followed the traditional practice that had been in place from 1959, that of reversing a penalty judgment on the basis of any error of substance, unless it simply further proved a fact already incontrovertibly before the jury, or was clearly

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[18]Pp. 90–94.

[19]Regarding the harmless-beyond-a-reasonable-doubt standard, see *Chapman v. California*, *supra*, 386 U.S. 18, 24 (federal constitutional error); *People v. Ashmus* (1991) 54 Cal.3d 932, 965 (state-law test for error potentially affecting penalty is equivalent to *Chapman* test).

[20]E.g., *People v. Welch* (1999) 20 Cal.4th 701, 761–762.

rendered harmless by other actions taken at trial (e.g., an effective judicial admonition), because of a number of factors that render a reviewing court unable to know that any other error had no impact.[21] Because which mode of analysis is chosen is likely to determine the outcome, appellant explained in detail why the traditional approach, rather than appellate reweighing, is appropriate.

In brief, it is necessary to apply literally and rigorously the *Chapman* command to reverse if the error "might have contributed to" the result[22] because of appellant's right to have his fate decided by a jury not influenced by error, not an appellate court hypothesizing such a jury; the inability of a reviewer of the record to observe witnesses' demeanor and to sense the emotional environment of the courtroom; the unknowability of what goes into jurors' subjective weighing processes; their being permitted to rely on mercy or sympathy and being required to exercise their own normative judgment as to the significance of each fact; as a result of this last factor, the surprise life verdicts that juries sometimes return in highly aggravated cases; the requirement of reversal if one juror might have decided differently if not influenced by error; and the deep concern for reliability required in both the making and the review of a state's decision to execute one of its citizens. Each of these points is fully supported by authorities in the opening brief, as is the

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[21]E.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243–1244; cf. *id.* at pp. 1245, 1247 (dis. opn. of Baxter, J.); see also *People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; *People v. Terry* (1962) 57 Cal.2d 538, 569; *People v. Love* (1961) 56 Cal.2d 720, 733; *People v. Linden* (1959) 52 Cal.2d 1, 27. The continuing validity of the the reasoning and conclusion of the older cases is explained at AOB 371–374.

[22]*Chapman v. California, supra*, 386 U.S. at p. 24.

conclusion that, absent certain exceptions, any substantial error requires reversal.[23]

In reply, respondent simply "submits that there is no reason to retreat from the Court's present harmless error approach," without acknowledging that it has not been consistent in that approach. (RB 129.[24]) In the main, then, appellant relies on the opening brief on the question of whether an appellate judgment that aggravation was great in comparison to mitigation can justify rejecting the possibility that error "might have affected [the] capital sentencing jury." (*Satterwhite v. Texas* (1998) 486 U.S. 249, 258.)

In addition to its statement that appellant has given no reason to evaluate harmlessness according to a standard that recognizes the difficulty of knowing that a substantial error could not have influenced a penalty jury, respondent adds, erroneously, "This Court's current approach has been upheld by the Supreme Court. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258–259; *Clemons v. Mississippi* (1990) 494 U.S. 738, 741.)" (RB 129.) It is unclear why respondent cites *Satterwhite*, which did not address how harmlessness review should be conducted. The case only held that error affecting penalty could be subject to harmless-error analysis. The opinion did, however, acknowledge one of the reasons a court should be cautious in arrogating to itself the power to decide what a jury would have done with a different evidentiary picture before it: "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." (486 U.S. at p. 258.)

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[23]AOB 204–207, with the further elaboration in the Appendix, which begins at p. 353.

[24]The page is unnumbered in Respondent's Brief but is three pages after page 126, the last numbered page.

Clemons v. Mississippi, supra, the other case cited by respondent, is arguably analogous, but it relied heavily[25] on two pre-*Apprendi*[26] cases, *Cabana v. Bullock* (1986) 474 U.S. 376, which is no longer good law after *Apprendi* and *Ring v. Arizona* (2002) 536 U.S. 584,[27] and *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 93, which was directly overruled by *Apprendi*. The five-person majority in *Clemons* held that, after a jury was permitted to weigh an invalid aggravating circumstance in sentencing a defendant to death, an appellate court could—if permitted to do so by state law—reweigh the aggravation/mitigation balance without the invalid circumstance and uphold the judgment. This was not inviting a harmlessness analysis, but a rejection of a Sixth-Amendment claim that the jury must be the sentencer in favor of the possibility that the appellate court could determine the appropriate sentence.

In a portion of the opinion not cited by respondent, and seriously questioned by the four dissenters, the *Clemons* majority, in a very brief statement, went on to hold that, in principle, at least, the state supreme court could also reweigh aggravation and mitigation to find the error harmless. (494 U.S. at pp. 752–753; cf. *id.* at p. 773, fn. 23 [dis. opn. of Blackmun, J.].) The majority relied on language in *Barclay v. Florida* (1983) 463 U.S. 939 which

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[25]See *Clemons v. Mississippi, supra*, 494 U.S. at pp. 745–746.

[26]*Apprendi v. New Jersey* (2000) 530 U.S. 466.

[27]"Little remains of *Cabana* after *Ring*." (*Hall v. Quarterman* (5th Cir. 2008) 534 F.3d 365, 386; see *Ring v. Arizona, supra*, 536 U.S. 589 (overruling *Walton v. Arizona* (1990) 497 U.S. 639, which, the Court explained [536 U.S.at p. 598], drew support from *Cabana v. Bullock, supra*); see also Comment, *See No Evil, Hear No Evil, Speak No Evil* (2007) 27 St. Louis Univ. Public L.Rev. 235, 259–263.

did not command the assent of a majority in that case. (*Clemons v. Mississippi*, *supra*, 494 U.S. at pp. 752–753, citing *Barclay v. Florida*, *supra* 463 U.S. at p. 958 (plur. opn.); cf. *Barclay* at pp. 959 et seq. (opn. of Stevens, J., concurring in judgment).) Even the *Clemons* majority concluded with strong cautionary language on both issues:

> Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible.

(*Id.* at p. 754.) Appellant has argued that, in fact, the United States Supreme Court has never itself applied the kind of reweighing in a penalty-phase harmlessness analysis that respondent relies on,[28] and respondent has not shown otherwise.

Respondent's only attempt to support its position are its two sentences asserting that there is no reason for this Court to retreat from what respondent mistakenly considers a single current approach, and its ill-founded claim that *Satterwhite* and *Clemons* upheld it. (RB App. B, at what would be p. 129.) In sum, respondent has not refuted the multiple reasons why state law long recognized—and the federal constitution requires—penalty reversal for error that was neither insubstantial, nor cured, nor simply proving a fact that was already conclusively established by other evidence. (See AOB 204–207, the

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[28]AOB 368; and see analyses there of *Clemons* and of *Jones v. United States* (1999) 527 U.S. 373, where the Court declined an invitation to engage in such analysis.

expanded analysis in the AOB Appendix, pp. 353 et seq., and authorities cited in both places.)

b. Harmlessness Cannot Be Shown

On the merits, respondent argues penalty-decision harmlessness as it argues harmlessness on the guilt issue—by illegitimately pointing only to the evidence favoring the verdict reached. Then respondent argues that the evidence provided by the Galloway statement "was the least of it." (RB 84.) Preliminarily, it is irrelevant whether or not Galloway's evidence was "the least of it." A jury weighs all the evidence. It is the cumulation of all the unfavorable testimony that helps produce a death verdict. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 725 [surveying facts which, added together, likely led to death verdict].) The question, therefore, is whether this Court can rule out, beyond a reasonable doubt, the possibility that erroneously admitted testimony, when added to the other evidence which respondent martials, pushed a juror over the line, not whether other aggravating facts were more egregious.

It is true that the entire picture before the jury included crimes that could be viewed as heinous, and appellant had a prior record that was not negligible, but it was not extreme, either.[29] On the other hand, he had at best a difficult upbringing; he suffered from serious mental illness, a fact reconfirmed shortly before the offenses; he manifested a great deal of humanity in his family relations; he had sought to remove himself from an environment which encouraged his criminality; the Jenkses appreciated his reliable work; and there was a basis for lingering doubt. All of this was

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[29]Its gravity within this range depended, of course, on whether the testimony regarding unadjudicated rape allegations was believed.

elaborated on, with specific facts and citations to the record, in the opening brief,[30] and respondent disputes none of what was said there.

Nor does respondent dispute that, practically at the close of its penalty-phase argument, the prosecution used the Galloway evidence to portray appellant as taking these terrible crimes casually, having coffee with Diana Williams the next morning and then going "off to the casino gambling." (RT 13: 2854.) Moreover, while the prosecution case would otherwise have left jurors believing that appellant was motivated by being so desperately broke that he could not buy food, a possible mitigating circumstance, the testimony replaced that image by one of a man willing to kill two people to fund a brief visit to the slot machines. Finally, to the extent that the portion of the statement relating to the duffel bag contributed "a very significant piece of information," as a prosecutor put it,[31] to help remove doubts on guilt, it may have helped remove the kind of lingering doubt in this circumstantial case that could have produced a vote for life without parole. Making appellant out as unbelievably callous and casual after the murders, not desperate for means to live after all, and beyond-a-shadow-of-a-doubt guilty was hardly so insubstantial that respondent could meet its burden of showing that no juror was "possibly influenced" by the purported information. (*Chapman v. California*, *supra*, 386 U.S. 18, 23; see also *People v. Hines* (1964) 61 Cal.2d 164, 169 [any substantial error pertaining to penalty normally met *Watson* standard for error].)

Since the error was not cured, and the evidence introduced did not merely tend to prove specific facts undeniably established by other evidence, the penalty judgment must be reversed.

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[30]AOB 208–213.

[31]RT 11: 2409–2410.

X. THE ELDERLY-VICTIM ENHANCEMENTS ARE INVALID

Appellant's sentence included a four-year determinate term that was unauthorized by statute and which was based on evidence that would not survive even the civil substantial-evidence test.

The trial court imposed two two-year enhancements, based on allegations that appellant murdered people who were over age 65. Respondent concedes that there was no statute authorizing the enhancements alleged. Further, respondent is correct in observing that one two-year elderly-victim enhancement would have been available for the single robbery count, had the prosecution charged it, presented sufficient evidence, and obtained a jury verdict on that allegation. Citing this fact, respondent improperly urges this Court to somehow transfer one of the enhancements to the robbery count. In addition, there was insufficient evidence that the Jenkses were over age 65, but respondent disagrees.

A. This Court Lacks the Power to Accept Respondent's Proposal That it Impose a Sentence for an Enhancement Which Was Neither Alleged Nor the Subject of a Verdict

Respondent cites no authority for its suggestion that appellant be sentenced for something for which he was neither charged nor convicted, because the enhancement which it would have this Court impose de novo is close enough to the invalid ones on which there were jury verdicts. (RB 85.) Perhaps appellate reworking of the allegations actually pled and found true into one that *could* have been pled and presumably *would* have been found true does not offend everyday conceptions of justice. It would, however, require this Court to fashion an unprecedented procedure that would threaten principles that do protect justice: requiring trial-level pleading, and jury findings, on the actual matters on which punishment is to be exacted. (U.S. Const., 6th [jury-trial right] and 14th [due process] Amends; Cal. Const., art.

I, §§ 7, 15, 16; § 1170.1(e) [enhancement must be pled and admitted or found true by trier of fact]; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *People v. Hernandez* (1988) 46 Cal.3d 194, 197 [pleading and proof of enhancements are required by due process and are implied in statutes even if not spelled out].) Respondent's novel suggestion should be rejected.[32]

B. A Report Based on Multiple Layers of Hearsay from Unspecified Sources, Combined With Vague, Conclusory Lay Opinion Evidence, Could Not Prove the Jenkses' Ages Beyond a Reasonable Doubt

It is undisputed that for the jury's verdict on the allegations to stand, a rational trier of fact had to have been able to find them proven beyond a reasonable doubt, i.e., to have reached "a subjective state of near certitude." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see also *id.* at p. 319.) Here, too, respondent encourages this Court to relax critical constitutional norms, stating that "[t]he age of the victims was not in dispute." (RB 86.) "But the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69; see also *People v. Flood* (1998) 18 Cal.4th 470, 505.) The evidence still needed to meet the constitutional standard if a verdict based on it is to stand.

As to the actual evidence presented, respondent points to pathologist Dollinger's bare statement that the Jenkses "appeared to be" the ages that someone had told him they were.

Respondent notes that evidence regarding the victims' dates of birth "was also introduced through certified copies of their death certificates." (RB

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[32]If it were not, the newly-imposed enhancement would have to be stayed, because the underlying sentence for robbery was stayed under section 654 (CT 10: 2929). (*People v. Guilford* (1984) 151 Cal.App.3d 406, 410–412.)

85.) Appellant referred to the death certificates in the opening brief, mistakenly assuming that they had been prepared by Dr. Dollinger and that the information in them was only as good as his.[33] In fact, the death certificates were prepared by a funeral home, though it had to obtain the coroner's signature on the part dealing with the circumstances of death. (Exs. 60, 61. See Health & Saf. Code § 102780.) The funeral home listed one Jonathan Sibson, a nephew of Shirley's, as the "informant" regarding the victims' demographic information. The certificates' status as government records may have made them admissible, and a reasonable juror could have speculated that the balance of probabilities met a preponderance-of-the-evidence standard. But it fell far short of meeting the level of reliability needed to support imprisoning a person for four years, i.e, proof beyond a reasonable doubt.

The primary purpose of a death certificate is not to record reliable information about date of birth. There was no evidence about the source of Mr. Sibson's information, his competence and level of certainty, who took a report from him, whether it passed through other hands to be typed on the certificates, and the procedures, if any, in place to guard against error. This evidence, as to which both the sources and the number of layers of hearsay were unknown, might be sufficient where the decision requires an educated guess as to whether the information was accurate, but not one where all other reasonable possibilities must be excluded. (*People v. Yrigoyen* (1955) 45 Cal.2d 46 [proving guilt through circumstantial evidence requires all other hypotheses be shown unreasonable]; *People v. Bender* (1945) 27 Cal.2d 164, 174–177.)

The corroboration supplied by Dollinger's bare statement that the victims "appeared to be" the age they were "reported" to be does not change

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[33]AOB 217, fn. 138.

the result.[34] (RT 6: 1397–1398; see also 7: 1440.) It is telling that he initially dodged the question about how old Fred "appeared" to be, answering, not with his opinion, but with another unspecified hearsay report: "He was reported to be 73 years of age." (RT 6: 1397–1398.) Dollinger's eventual unelaborated statements about how old the victims appeared to be did not give the basis for his opinion, suggest that he was in any way relying on his expertise, or indicate that he had been told before or during the autopsy that his opinion would be needed. People make guesses as to how old others appear to be all the time, and they are often wrong. Adding Dollinger's guesses to the multiple and unelucidated levels of hearsay in the death certificates could not have produced "a subjective state of near certitude." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315.) Even if an appellate court could charge and convict appellant of robbing people over 65, because the prosecution and jury might have done so, the evidentiary basis for the enhancement is insufficient.

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[34]Regarding the unspecified layers of hearsay involved in whatever Dollinger heard, see AOB 217 (pathologist most likely to have spoken to investigator who attended autopsies, who perhaps obtained purported information from neighbors who called police, who at best got it from the Jenkses).

XI. APPELLANT'S INABILITY TO PAY THE RESTITUTION FINE REQUIRES ITS REDUCTION TO THE STATUTORY MINIMUM

Appellant's sentence includes a $10,000 restitution fine. (CT 10: 2929.) Contrary to statute and to appellant's rights to substantive and procedural due process, equal protection of the laws, and to not be subjected to an excessive fine (U.S. Const, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17), it was imposed in the face of his inability to pay and in fact imposes extreme hardship. Because his ability to pay was litigated in the court below and his inability to pay was uncontested, the appropriate remedy, under this Court's precedent, is reduction of the fine to the statutory minimum of $200.[1]

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[1]The only accurate information before the trial court was presented in a motion to modify the fine. In a three-word parenthetical phrase, supported by neither authority nor argument, respondent characterizes the trial court's decision to rule on the motion as being beyond its jurisdiction. (RB 86.) Respondent does not contend that the asserted lack of jurisdiction affects either the appealability of the sentence or the merits of the appeal.

This Court ignores unbriefed contentions. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also Cal. Rules of Court, rule 8.204(a)(I)(B).) Should the Court nevertheless find that respondent has raised an issue here, that respondent has not waived it, and that the matter might be relevant, appellant requests that it review the briefing on the matter in the court below. (Attachments to Appellant's Motion to Augment the Record on Appeal ["Attachments" or "Attachments to Motion to Augment"], p. 9–10 [arguing that, as a sentence imposed unconstitutionally, it was an unlawful one which could be corrected at any time, and, alternatively, offering two other options for court to acquire jurisdiction]; see also p. 70 [prosecutor contests jurisdiction without responding to defense analysis].)

The facts are not in dispute and were not disputed in the trial court.[2] The trial court, presumably, originally thought that it was taking appellant's ability to pay into account when its probation officer addressed the issue and stated, erroneously, that appellant would have the ability to earn wages while in prison.[3] As a condemned prisoner, however, no such opportunity was or is available to him.[4] The Department of Corrections and Rehabilitation encourages the general inmate population to behave well enough to maintain eligibility to work, and to actually work, by creating a need for substantial canteen purchases. It does so by supplying woefully inadequate food,[5] almost no toiletries, insufficient clothing and supplies for cleaning cells and clothing, and no writing materials or stamps for maintaining contact with the outside

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[2]The facts in the opening brief were taken verbatim from the memorandum before the trial court (Attachments to Motion to Augment, pp. 3–8). The District Attorney's memorandum in opposition stressed the seriousness of appellant's crimes, stated that their brutality compelled imposition of the maximum punishment, and recharacterized the deprivations imposed as an "inconvenience." It did not dispute the facts. (Attachments, pp. 69–71, quotation at p. 71.)

[3]CT 10: 2919 (probation report).

[4]Exhibit A (Attachments, p. 20).

[5]The evidence before the trial court was that, as of 2005, the Department's food budget was $2.45 per inmate per day and had not been changed in six years, and it was well below the national average even when last set. (Attachments, p. 6, citing Pringle, *Jail Food Can Be a Hard Sell*, L.A. Times (Jan. 8, 2005), p. A1.) More details, unchallenged here or in the court below, about food and other needs unmet without commissary purchases are summarized at AOB 223–227.

world.[6] Replacing a pair of glasses or purchasing an audio player to help pass the time also would have to come from personal funds.[7]

In the year preceding the filing of a motion to reduce the restitution fine, appellant's income averaged $35 per month in gifts from his mother and his appellate attorney.[8] When the motion was heard, the Department deducted (and still deducts) 55% of this towards payment of his restitution fine and an administrative charge, as it did with every other prisoner with such a fine,[9] leaving him with $15.88 a month. All of this was documented in exhibits and by citations to published sources, and none of it has been questioned by respondent, except for whether the deduction is 44% or 55%. It is, however, collected pursuant to a published regulation, and the amount was and is 55%.[10]

Respondent has not challenged the conclusion appellant draws from this information: that the fine imposes severe hardship. Nor is there disagreement over whether the governing statute required and requires considering the appellant's ability to pay. Appellant contends that the state and federal

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[6]Attachments, pp. 7–8, and cited exhibits.

[7]Attachments, p. 8, and cited exhibits.

[8]Attachments, p. 5, and cited exhibits.

[9]Cal. Code Regs., tit. 15, § 3097(f).

[10]Cal. Code Regs., tit. 15, § 3097(f). Respondent claims that the trial court "found" that the figure was 44% (RB 87, fn.7), and respondent later treats the figure as being possibly 44% or 55% (RB 88.) The only information before the court was appellant's statement, citing the regulation, that the deduction was 44% as of the filing of the motion and would go up to 55% the following month, i.e., January 1, 2007. (Compare Cal. Code Regs., tit. 15, § 3097(e) and -(f).) The court simply repeated that it was "44 percent, currently," not realizing that the amount had already gone up by the time the motion was heard. (2/27/07 RT 6.)

constitutions require the same; respondent does not directly contend otherwise but seeks to distinguish some of the cases relied on by appellant. The primary disagreement is over the application of the law to the facts. The questions are: (1) whether an initial determination based on materially false information provided by an arm of the court met the requirement of considering ability to pay; (2) whether a statewide regulation imposing a levy of 55% on an inmates earnings or gifts, regardless of whether the person's resources are $10 or $1000 a month, takes into account an individual's ability to pay; and (3) whether a decision that imposes on appellant such choices as deciding whether to wash his clothes or to supplement a health-threateningly inadequate diet appropriately took his ability to pay into account.

A. The Trial Court Failed to Take Into Account, in Any Genuine Way, Appellant's Inability to Pay, and the Failure Violated Section 1202.4

Section 1202.4 provides that a minimum fine of $200 must be imposed regardless of a defendant's inability to pay, but that a decision regarding whether to impose a greater fine must take into account, among other things, any inability to pay. (§ 1202.4, subds. (c), (d).) Respondent accepts that this is the law but argues that the trial court took appellant's ability to pay into account during the 2007 hearing on the motion to reduce the fine. The trial court made two points purporting to deal with the subject. First, that the 44% that it believed was being taken was a minimal burden in comparison to the tremendous harm caused by appellant. Second, the Department's choice to confiscate the standard percentage, rather than all of appellant's resources, represented a taking into account of his ability to pay.[11] While it was

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[11]The court's entire statement was as follows:

(continued...)

appropriate to also consider, in setting the fine, the suffering caused by appellant's conduct, per section 1202.4, subdivision (d), a comparison of the burden to appellant and the degree of harm he caused does nothing to elucidate whether a fine over the minimum exceeds appellant's ability to pay. It is not clear that the court below thought otherwise—it is respondent who quotes this portion of the court's remarks and concludes that they show that the court below "expressly took appellant's ability to pay into account." (RB 86.) Respondent later argues more elaborately that appellant deserves the maximum fine available but still fails to show that this somehow makes him able to pay it.[12] (RB 88.)

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[11](...continued)

> In the Court's view, what Counsel has described here, in essence, is a circumstance where there's—not the entire amount of his resources and income is being seized, but a percentage. 44 percent, currently. It's a—and that seems a minimal buden considering the incredible loss that was inflicted, not only on the victims, but on their daughter, who suffered catastrophic emotional consequences. We currently don't have any evidence of her current status. The last time the Court had information, it would appear she was still suffering and would probably always be disabled because of the emotional trauma that she experienced.
>
> I see no reason to revisit the Court's earlier order and modify that restitution fine. The defendant's ability to pay is taken into consideration by the Department of Corrections when it makes its deductions and makes payments toward that restitution liability. So I'm going to deny the motion.

(2/2/07 RT 6.) The only written order regarding the motion is the minute order for February 27, 2007, filed in this Court March 18, 2009, in response to its augmentation order. It simply records the arguing and denial of the motion.

[12]Respondent adds, without citing the record, that appellant "spent his (continued...)

As to the notion that the Department accounts for ability to pay when it avoids seizing all of an inmate's funds, this simply does not make sense. Neither the trial court nor the Department considered the dollars available to appellant and whether collecting the fine in the manner which the Department does so imposes undue hardship. Respondent notes that the trial court's had "in front of it all of appellant's exhibits attesting to his meager income and the financial demands of prison life." (RB 88.) But the court did not mention that evidence, and its reasoning failed to take it into account in any way. A 55% deduction from a prisoner who received $225 a month would leave him with the $100 a month that appellant showed[13] an inmate typically needs to get by. Appellant's 55% deduction, however, leaves him, on average, with $15.88.[14] The Department is not taking this into account. The trial court's contrary assertion does not establish that the court took appellant's ability to pay into account in any meaningful fashion either.[15]

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[12](...continued)
life before being incarcerated stealing and robbing innocent victims to get what he wanted whenever he wanted it." (RB 88.) This is a major exaggeration. Appellant had two convictions for unarmed robberies and three for auto thefts. These were spread over an 18-year period, which ended 12 years before the current offenses. (See portions of record cited at AOB 25 and RB 14.) Later respondent also describes appellant as a serial rapist. (RB 89.) There was evidence tending to show two rapes, which is not to be minimized, but it also fails to support respondent's characterization. (See AOB 25–26, RB 15–16.)

[13]Attachments, p. 6.

[14]During the year prior to filing of the motion to modify, irregular gifts to Mr. Potts averaged $35.29 per month. (Attachments, pp. 46–47, 50.) The 45% share passed on to him, therefore, averaged $15.88 per month.

[15]Respondent advocates review of a restitution award for abuse of (continued...)

Concluding its statutory argument, respondent also asserts that the court below took into account appellant's ability to pay when the fine was initially set, based on the probation officer's mistaken representation that appellant would be able to earn funds while in prison. (RB 89.) As appellant pointed out previously,[16] the probation department is an arm of the trial court,[17] and its error was imputable to the court. While the probation officer's mistake was perhaps understandable, guessing—wrongly—at facts that would show an ability to pay cannot be equated with taking the matter into account. In any event, respondent has not disputed the fact that a sentence based on materially false information violates state and federal procedural due process.[18]

B. Respondent Cannot Show That a Fine So Large as to Deprive a Person of Necessities of Life Is Permitted by the Excessive Fines Clauses

The $10,000 restitution fine, imposed without genuine regard to appellant's ability to pay, violated the Excessive Fines Clauses. (U.S. Const, 8th Amend; Cal. Const., art. I, § 17.) One of the four factors required to be considered in a constitutional analysis is the defendant's ability to pay. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707,

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[15](...continued)
discretion or error of law. (RB 87.) Appellant has no quarrel with this standard, which requires reversal here under either prong. It is an error of law to equate the leaving of an inmate with some funds—regardless of amount or need—to constitute taking into account inability to pay. If it were not, it would surely be an abuse of discretion to do so in appellant's circumstances.

[16]AOB 228.

[17]*People v. Villarreal* (1977) 65 Cal. App. 3d 938, 945.

[18]See AOB 231, citing *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754–755; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719.

728.) Respondent seeks to distinguish *Reynolds Tobacco* on its facts, without explaining how doing so invalidates the opinion's explanation of the applicable legal standards. (RB 89.) Respondent also goes to some lengths to distinguish a case[19] which appellant cited only for the proposition that high court case law on the Excessive Fines Clause was sparse.[20] (RB 89–90.) What respondent does not even try to do is show that a trial court may impose a substantial fine without taking into account, in a genuine way, the defendant's ability to pay. Nor does respondent dispute that, "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Roper v. Simmons* (2005) 543 U.S. 551, 560.) Resentencing is constitutionally required because of the failure to take into account appellant's ability to pay, with a result that fails to protect appellant's dignity, in that it deprives him of the necessities of life.

Appellant has acknowledged that, like the statute, the Excessive Fines Clauses also permit taking into account the seriousness of the conduct being punished. This should not, however, be done in isolation, as if there were no other punishment being exacted. The death sentence is the primary punishment for appellant's conduct, and, while respondent repeatedly brandishes its characterizations of the heinousness of the crimes of which appellant was convicted, it has no answer to this point. (Compare RB 86–90 with AOB 230.) Exacting serious privations during appellant's long years of imprisonment cannot be justified by citing conduct which is to be punished by death as well.

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[19] *United States v. Bajakajian* (1998) 524 U.S. 321.

[20] See AOB 230.

C. Respondent Does Not Dispute That Sentencing Appellant Based on Material Misinformation and Reaffirming the Sentence Without Accounting for Appellant's Inability to Pay Would Violate Procedural and Substantive Due Process

Respondent does not challenge appellant's statements that state and federal due process require taking ability to pay into account when imposing a fine, nor that they require sentences to be based on accurate information and that the commands of state law be followed. (See AOB 231.) Respondent's only challenge to appellant's due process claims is to point out, accurately, that they rest on the premise that his ability to pay was not effectively considered, and to restate that the premise is false. (RB 90.) Since it is not, an uncorrected sentence would violate due process.

D. Respondent Does Not Dispute That Fining Appellant Without Due Consideration of His Inability to Pay Would Violate Equal Protection

Because the amount of the fine was not determined in a manner to avoid imposing severe and undue hardship, and because all other legal obligations to pay money—including the payment of restitution fines by out-of-custody prisoners—are collected in a manner to avoid such hardship, the failure to collect appellant's restitution fine in a similar manner violates equal protection of the laws. (See AOB 232–235.) Respondent's only disagreement with this aspect of the claim is its statement that the matter was handled at the point of imposition of the fine. (RB 90.) Appellant therefore relies on the authorities and analysis in his opening brief.

E. The Appropriate Remedy is to Modify the Judgment to Impose the Minimum Fine of $200

If the record lacked information regarding appellant's ability to pay, the appropriate remedy would be a remand for the trial court to consider the matter. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) In *Vieira* a remand was

required because the statute did not require taking ability to pay into account when the matter was initially heard, and the record on that issue was therefore unclear, although the appellant was contending that he was unable to pay.[21] This Court implicitly determined that, for a defendant who is unable to pay, the fine should be the $200 minimum, regardless of the seriousness of the offense. The Court held that, if the prosecution did not contest the matter on remand, the fine should simply be reduced to the minimum, even though the defendant had committed four capital murders. This Court thus appropriately determined that inability to pay would, alone, be determinative.[22] (See AOB 228–229; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1038.)

Here, in contrast, the issue of ability to pay was litigated below and all of the information, none of it disputed, is in the augmented record on appeal. Appellant can only pay the fine by giving up some of the basic necessities of life, a situation not amounting to an ability to pay under either a statute calling

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[21]Cf. the AOB in *People v. Vieira*, No. S026040, Vol. 3, p. 512 (arguing that the inability to pay could be implied from facts in the record and lack of opportunity to work on death row) with RB 110 in the same case (arguing a possible contrary indication in the record).

[22]Respondent tries to distinguish *Vieira* because of a difference in the procedural setting. (RB 89.) In *Vieira*, as respondent points out, a remand was required because the defendant was entitled to the benefit of a statutory amendment enacted while the case was on appeal. (35 Cal.4th at p. 305.) Thus it was appropriate to give the sentencing court an opportunity to elicit the facts needed to apply the statute in the first instance. This case is distinguishable only in its lack of need for a remand, because here the trial court had the facts and the law before it. Respondent makes no attempt to explain how this Court's evident determination in *Vieira* that the fine should be the minimum if the defendant could not pay could depend in any way on the procedural posture of the case.

for taking ability to pay into account or the constitutional provisions cited previously. This Court should simply reduce the fine to $200.

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XII. THE TRIAL COURT IMPROPERLY EXCUSED JURORS FOR BEING DEATH-SCRUPLED

A. Respondent Tacitly Accepts That a Prospective Juror Is Excludable Only If He or She Would Be Unable to Consider Both Penalties but Then Misstates the Standard of Review and Erroneously Contends That a Trial Court Has No Duty to Discern a Juror's Fitness to Serve If Trial Counsel Does Not Object to Exclusion

Appellant here addresses the applicable law. The parties appear to agree regarding a trial court's duties in dealing with death-scrupled potential jurors. However, respondent misstates the standard of review and erroneously contends that trial counsel's failure to object to excusals both forfeits the claims and renders them substantively without merit.

1. Strong Reluctance to Impose a Death Sentence Is Not Cause for Excusal, Because a California Juror Is Substantially Impaired Only if Unwilling to Consider a Death Sentence at All

The opening brief sets forth in detail the jurisprudence from this Court and the United States Supreme Court on standards for excluding a prospective juror because of the person's opposition to, or reluctance to impose, a death sentence. (AOB 236–241.) Respondent acknowledges some of the principles set forth there and disputes none of them. (RB 97, 102–103.) In brief, this Court and the high court have both emphasized that some death-scrupled jurors will set aside their views and follow the law.[1] Therefore, even having "'a fixed opinion against'. . . capital punishment" is not enough, in itself, to justify exclusion.[2] The parties agree that the Sixth Amendment permits exclusion

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[1] *Wainwright v. Witt* (1985) 469 U.S. 412, 421; *Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Stewart* (2004) 33 Cal.4th 425, 446.

[2] *Boulden v. Holman* (1969) 394 U.S. 478, 484.

only if "the juror's views would prevent or substantially impair the performance of his duties . . . ."[3] What those duties are depends on the law of the jurisdiction. In California they are merely to conscientiously consider both sentencing alternatives,[4] as respondent acknowledges,[5] rather than invariably voting for a particular penalty without regard to the strength of aggravating and mitigating circumstances.[6] Having "views [which] would make it very difficult for the juror ever to impose the death penalty" is not enough to impair a juror in doing what California law requires.[7]

Before a court may conclude that a death-scrupled juror is unable to consider both alternatives, it must have "*sufficient* information . . . to permit a *reliable* determination" on that issue. (*People v. McKinnon* (2011) 52 Cal.4th 610, 647, quoting *People v. Stewart*, *supra*, 33 Cal.4th at p. 445, emphasis added in *McKinnon*; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Respondent does not contest this point, but, as shown below, erroneously claims that it applies only if trial counsel objected to dismissing the juror.

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[3]*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see RB 102.

[4]*People v. McKinnon* (2011) 52 Cal.4th 610, 635; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.

[5]RB 102.

[6]*People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.

[7]*People v. Stewart* (2004) 33 Cal.4th 425, 447.

Respondent also does not dispute that improper excusal of a single juror because of hesitation or doubts about the death penalty requires reversal of the penalty judgment.[8]

2. The Standard of Review Where the Trial Court Found a Person Substantially Impaired Is Whether Substantial Evidence Supports the Finding

Respondent notes that *People v. Waidla* (2000) 22 Cal.4th 690 applies an abuse-of-discretion standard to questions about excusals for cause. (*Id.* at p. 715, cited at RB 97.) Respondent fails to acknowledge that *Waidla* goes on to explain,

> As for each of the subordinate determinations [i.e., subordinate to the propriety of the ultimate excusal], [a reviewing court] employs the test appropriate thereto. Thus, it examines for substantial evidence any finding as to "whether and how the prospective juror's views on" the death penalty "would affect his performance as a juror."

(*Ibid.*, citation omitted; see also *People v. Pearson* (2012) 53 Cal.4th 306, 327–328 ["When the juror has not made conflicting or equivocal statements regarding his or her ability to impose either . . . sentence . . ., the court's ruling will be upheld if supported by substantial evidence"].) Later respondent cites three cases[9] as supposed authority for the proposition that "[a]ssessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court." (RB 102.) None even mentions the word *discretion*. All note that, to be accepted by a reviewing court, a trial court's

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[8]*Gray v. Mississippi* (1987) 481 U.S. 648; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart, supra*, 33 Cal.4th 425, 454.

[9]*People v. Hamilton* (2009) 45 Cal.4th 863, 890–891; *People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Cunningham, supra*, 25 Cal.4th at p. 975.

determinations must be supported by substantial evidence or fairly supported by the record.

Parenthetically, this rule is compelled not only by consistency with the general standard for appellate review of a trial court's factual determinations. It is also compelled by the nature of the underlying substantive rule. A trial court's obligation to discern whether or not a juror who could have difficulty imposing the death penalty would nonetheless be able to fully consider the penalty options would be nugatory if the trial court could make its finding without substantial evidence. Indeed, this is why *Stewart* reversed without reference to the trial court's discretion; the record clearly showed that the trial court lacked sufficient information to make its finding. (See 33 Cal.4th at pp. 447–449.)

The trial court's decisions would have entered the realm of discretion only at the point where substantial evidence had been elicited to support its factual findings and it applied the correct legal standard to those findings. Appellant, however, is not challenging discretionary decisions; he is challenging implicit findings of substantial impairment in some cases, and the explicit application of other, erroneous standards, in others.

Respondent is correct, however, in noting that where an orally-examined juror's answers are conflicting and a decision as to the juror's true state of mind is dependent on an assessment of the person's demeanor, the reviewing court must defer to the trial court's judgment.[10] That being said, the principle applies to none of the jurors whose excusal is now challenged. Rather, acknowledgment of that principle is the reason why appellant is not seeking review of the removal of the one prospective juror whom trial counsel

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[10]See the authorities cited in the previous footnote.

suggested should remain. Although at points Christine Wilson said she could consider both penalties, her statements were conflicting, and the trial court relied in part on observations of her demeanor and body language. (See RT 3: 752–767.) Her excusal is not challenged here.

3. Objection Is Not Required Either to Trigger a Trial Court's Duty to Ascertain Whether a Person Being Considered for Exclusion Is Qualified or to Preserve the Right to Appellate Review; Nor Is Failure to Object Proof That the Juror Was Unqualified

The consistent practice of the court below was to propose excusing a juror for cause and then ask if counsel would be willing to stipulate.[11] It is on this basis that appellant has characterized counsel's actions as acquiescence in the court's proposals. Respondent vehemently takes issue with this characterization, while not disputing the underlying sequence of events in each case. (RB 95; cf. *People v. Coogler* (1969) 71 Cal.2d 153, 175 ["defense counsel . . . acquiesced in the court's suggestion, which the prosecution likewise accepted, that there be a stipulation to excuse" a potential juror].) Terminology aside, respondent cites counsel's acceptance of the trial court's proposals in three contexts: as forfeiting appellate review, as negating the trial court's duty to obtain sufficient information to determine whether a death-scrupled juror is truly unqualified before excusing the person, and as

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[11]RT 2: 452–453 (Silveira ["I am going to invite a stipulation"]), 501 (Donnell); RT 3: 706 (Sisco); RT 4: 890 (Montoya), 943 (Hathaway), 949 (Sanchez).

There must have been an off-the-record conversation with regard to Vicki Brannon, as she was in a group of what the court described as "the jurors that we think are going to be summarily excused," based on their declarations, and nothing in the record explains how that expectation developed. (RT 4: 812.) When the court brought up the subject, the prosecutor offered to stipulate and the defense attorney said he would do the same. (RT 4: 812.)

circumstantial evidence that the person actually was unqualified. Respondent is mistaken on each point.

a. Respondent's Forfeiture Argument Ignores Controlling Precedent Regarding *Witt/Witherspoon* Claims and Relies on Authorities Dealing With Other Situations

As appellant noted in the opening brief,[12] "failure to object does not forfeit a *Witt/Witherspoon* claim on appeal." (*People v. Hoyos* (2007) 41 Cal.4th 872, 904, fn. 16.) This Court had explained that the rule was established by the United States Supreme Court, in summary reversals of two state cases holding to the contrary.[13] Respondent claims that the jury-selection issue is forfeited, without mentioning these cases or the rule for which they stand.

Subsequent to the filing of respondent's brief, this Court reaffirmed that it has been applying "the rule that a defendant's failure to object to a *Witherspoon* excusal at trial does not forfeit the issue on appeal " but held that it would require objection in cases tried after the opinion became final. (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 636, 643.) Nonetheless, in an abundance of caution, appellant replies to respondent's contention.

Instead of acknowledging the case law regarding what this Court in *McKinnon* called "no-forfeiture rule with respect to Witherspoon/Witt excusal

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[12]AOB 240, fn. 154.

[13]See *People v. Velasquez* (1980) 26 Cal.3d 425, 443, vac. on other grounds sub. nom. *California v. Velasquez* (1980) 448 U.S. 903, reaff'd in *People v. Velasquez* (1980) 28 Cal.3d 461, discussing *Wigglesworth v. Ohio* (1971) 403 U.S. 947 and *Harris v. Texas* (1971) 403 U.S. 947.

error,"[14] respondent relies on *People v. Rogers* (2006) 39 Cal.4th 826, 858–859, which dealt not with a *Witherspoon/Witt* claim, but a claim that "the unwarranted granting of hardship excusals systematically excluded wage earners in violation of his . . . rights to an impartial jury drawn from a fair cross-section of the community." (*Id.* at p. 858; see RB 95–96.) Respondent seeks to strengthen its position by also citing the cases cited in *Rogers*, but none of them contradicts the special rule for *Witherspoon/Witt* claims reaffirmed in *People v. Hoyos*.[15]

Respondent next cites *People v. Mitcham* (1992) 1 Cal.4th 1027, which does provide limited support for respondent's argument. There this Court summarily found appellate review of *Witherspoon/Witt* claims forfeited because the parties had stipulated to the excusals of the two jurors in question, so that "the trial court was not called upon to decide whether these prospective jurors could properly be excused for cause." (*Id.* at p. 1061.) It appears that the *Wigglesworth/Harris* holding acknowledged in cases such as *People v. Velasquez*, *supra*, 26 Cal.3d 425 and *People v. Hoyos*, *supra*, 41 Cal.4th 872 had not been brought to this Court's attention, as it was unmentioned in *Mitcham*. That is not the case here, and respondent is evidently unable to show that *Velasquez* and *Hoyos* are wrong about the rule which this Court considered compelled by United States Supreme Court precedent at the time of appellant's trial.

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[14] 52 Cal.4th at p. 636.

[15] See RB 96, citing *People v. Ervin* (2000) 22 Cal.4th 48, 73 (appellate review of challenges to entire selection procedure forfeited by agreeing to procedure at trial); *People v. Champion* (1995) 9 Cal.4th 879, 906–907 (systematic exclusion of wage earners); *People v. Mickey* (1991) 54 Cal.3d 663–665 (hardship excusals without adequate basis).

Echoing the *Mitcham* opinion, respondent concludes this portion of its argument with a "see" cite to *People v. Coogler*, *supra*, 71 Cal.2d 153, 174–175. *Coogler*, a 1969 opinion, preceded the 1971 high court cases that this Court concluded compelled it to adopt a different rule. Moreover, besides opposition to the death penalty, the juror had presented two other reasons for not serving, including antagonism towards a critical part of the intended defense, and defense counsel had abandoned reservations expressed about excusing her. Given this record, this Court concluded,"We are, therefore, not here involved in a case in which a venireman was improperly excused because of her attitude on the imposition of the death penalty." (*Id.* at p. 175.) The opinion does not support respondent's forfeiture argument here.

Finally, respondent asserts that a preservation requirement at least applies "to the jurors excused for hardship," quoting *People v. Mickey*, *supra*, on that point. (RB 96.) However, respondent, in its discussions of the two jurors (Helen Donnell and Paul Silveira) who were excused on the basis of statements in their hardship declarations, acknowledges the indisputable fact that neither was actually excused for hardship. (RB 91; see also AOB 241, 243–244.) The fact that they successfully sought excusal by putting their information out early, technically but innocuously misusing the hardship declaration form, does not somehow create a preservation requirement that would not have existed if the trial court had insisted that they submit the information on questionnaires. *Mickey* dealt with hardship excusals; the present challenge does not.

The need to exclude the segment of the population who would never consider a death sentence unavoidably skewed the panel to a certain extent. The trial court had an independent duty to examine the jurors well enough to avoid any unnecessary accentuation of the dynamic. Here, as the record

regarding the individuals at issue shows, the court was intimately involved in making the determination and—despite respondent's taking issue with appellant's statements that his trial counsel "acquiesced" in the court's solicitation of stipulations—initiated all of the excusals now challenged. I.e., this is not a case where counsel agreed to an initial screening procedure that left the court uninvolved. (Cf. *People v. Ervin*, *supra*, 22 Cal.4th at p. 73.) Respondent's attempt to show that appellant failed to meet a preservation requirement fails.[16]

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[16]Respondent emphasizes, "Appellant not only failed to object, he stipulated to all of the excusals he now challenges on appeal." (RB 96.) Since respondent does not acknowledge the no-objection-needed rule, it is unlikely that this is a contention that a stipulation is distinguishable from failure to object. In an abundance of caution, however, appellant here addresses that possibility.

As documented above (see p. 219, fn. 11), in each case the court solicited the "stipulation." In the context of this voir dire, agreeing was no different in substance than uttering the words "No objection" would have been. Thus with one group of hardship declarations, the court explained, "These I am proposing to excuse without further question . . . . You want to stipulate on this one, Counsel? The top one, Donnell?" After both attorneys answered, "Yes," the court said, "And there's no objection on any of the others proposed, right?," and both attorneys agreed. (RT 2: 501.) The terms clearly were used interchangeably.

The outcome of this appeal, therefore, should not turn on which form the court adopted, i.e., whether it asked if there were objections or asked if there was a willingness to "stipulate."

b. The Trial Court's Independent Duty to Acquire Enough Information to Ensure That It Convened a Jury Not Biased Towards Death Was Not Relieved by Trial Counsel's Failure to Object to Improper Excusals

As just explained, the trial court had an independent duty to excuse jurors with doubts about imposing a death sentence only if constitutional standards for doing so were met. A necessary corollary to this duty is a requirement that the court acquire sufficient information before making its determination. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448.) Respondent, however, repeats its forfeiture argument in a different form, claiming that language in *Stewart* implies that there was no duty to acquire sufficient information to avoid improperly excluding a death-scrupled juror if the defendant did not object to the exclusion. (RB 100.)

The authorities establishing the non-waiver rule did not explain the basis for their holdings.[17] Clearly, however, they must have assumed an independent judicial duty to ensure that death-scrupled potential jurors were not unnecessarily excluded, and they created such a duty. As respondent points out in citing cases where a preservation requirement does apply, its purpose is to require the attorneys for the parties to alert a trial court to potential problems at the point when they can be solved. (RB 96, quoting *People v. Mickey*, *supra*, 54 Cal.3d 612, 664.) Removing that duty from trial counsel in a particular situation can only mean that it rests independently with

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[17]*People v. Velasquez*, *supra*, 26 Cal.3d 425, 443, accepted what it considered to be the compulsion of federal precedent, explaining that *Wigglesworth v. Ohio*, *supra*, 403 U.S. 947 and *Harris v. Texas*, *supra*, 403 U.S. 947 were summary reversals (i.e.,without opinions) of lower-court holdings that *Witherspoon* error had been waived. *People v. Hoyos*, *supra*, 41 Cal.4th 872, 904, fn. 16, relies on *Velasquez*.

the court, just as sua sponte instructional duties represent a non-delegable judicial task. There are obvious reasons why this would have been true of the substantial-impairment question: the critical nature of the right at issue; the singularity of the task and the time available to pursue it—as opposed to the variety and multiplicity of evidentiary and instructional issues that otherwise confront a trial judge, often requiring a spontaneous ruling; and the pressures on trial counsel to expedite the time-consuming jury-selection process and perhaps not press for extended individual voir dire.[18]

What the high court precedents regarding jury selection did was establish "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Clearly, since the standard relies on a finding of fact, the matter cannot be "determin[ed]" without sufficient information, else the standard could be violated unknowingly or intentionally, and with impunity. Thus this Court unanimously recognized in *People v. Stewart* that the issue is whether the information before the trial court was "fully adequate . . . to support a determination by the court that each prospective juror's views would prevent or substantially impair the performance of his or her duties as a juror . . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) Put differently, the question is whether the "information [before the trial court] was insufficient to support an assessment, required by *Witt* . . ., that any of the . . . prospective jurors would be unable faithfully to

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[18]Appellant's appointed attorney was paid an annual flat fee for his indigent-defense work. Every hour he did not spend on that he could devote to his fee-producing criminal and civil practice. (Supplemental Augmented Record of Clerk's Transcript on Appeal per Hearing of 1/18/2005, 199–202, 209–225 [contracts with county]; see also *id.*, p. 255, ¶ 29 [authenticating contracts].)

perform the duties required . . . ." (*Id.* at p. 451.) There can be no separation of the question of whether the evidence was sufficient to support exclusion, from whether the prospective juror could be properly excused.[19]

Respondent proposes such a separation, however, arguing that the trial court would have had a duty to acquire enough information to support its decisions only if appellant's counsel had objected to them. Respondent's stance rests on a phrase in *People v. Stewart*, *supra*: "Before granting a challenge for cause concerning a prospective juror, *over the objection of another party*, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination . . . ." (33 Cal.4th at p. 445, emphasis added.)

Appellant has already acknowledged that, in this sentence, the *Stewart* opinion cautiously limited its holding to the situation before it, i.e., one in which trial counsel had objected. (AOB 240, fn. 154.) The opinion contains no elaboration of the qualifying language. The *Stewart* defendant appealed no decisions regarding jurors whose exclusion had not been objected to, so the *Wigglesworth/Harris/Velasquez* no-objection-required rule was not even before this Court. Nor was the question now raised by respondent—whether the duty to avoid improper excusals could extend to situations where there is no objection while the need to acquire sufficient information to carry out that duty does not. In short, nothing in *Stewart's* reasoning supports respondent's claim that the phrase at issue was a genuine limitation on the principle which it applied. And respondent provides no reasons of its own explaining why

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[19]Cf. *People v. Waidla*, *supra*, 22 Cal.4th 690, 715 (reviewing court "examines for substantial evidence any finding as to 'whether and how the prospective juror's views on' the death penalty 'would affect his performance as a juror'").

there should be, or how there could be, such a limitation. Since the trial court's duty regarding jury selection, which was independent of counsel's actions, could only be fulfilled if it acquired sufficient information to make a correct finding, respondent's attempt to recast its forfeiture argument as one permitting the court below to excuse death-scrupled jurors without sufficient information fails.

Basically, the procedural situation that respondent would equate to a genuine stipulation initiated by the parties was that the court was indicating its tentative ruling and giving the parties an opportunity to object. Assuming—without conceding—that party pre-screening and stipulation could relieve the court of its duty to acquire sufficient information, there is no rationale under which issuing a tentative ruling before the final one could do so. If the tentative ruling was to become a final one, it had to be backed by sufficient information to support it.[20]

c. Trial Counsel's Failure to Object Does Not Tend to Prove That Potential Jurors Were Unqualified

Respondent also propounds appellant's attorney's failure to object as evidence that particular jurors were properly excluded. The logic evidently is

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[20]As noted previously, *People v. McKinnon*, *supra*, 52 Cal.4th 610 overruled the no-forfeiture rule prospectively. In doing so, it cited *People v. Scott* (1994) 9 Cal.4th 331, 357–358. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 643.) *Scott* explained that a defendant should not be penalized on appeal for failure to object, where existing law held that no objection was required.

McKinnon's recognition of this principle would be undermined if this Court were to hold that--even though, at the time of appellant's trial, his counsel could rely on the trial court's independent duty to assure that no death-scrupled jurors were unnecessarily excluded—objection was required to trigger an facet of that duty required for it to have any practical effect (i.e., the need for sufficient information).

that, with the juror in front of him, if even defense counsel did not see a basis for further exploration, the trial court's assessment was likely correct. (E.g., "[T]he trial court and the parties were in the best position to evaluate [Helen Donnell]" [RB 98]; "The court and the parties were correct in their unanimous assessment that Sisco should be excused" [RB 106].) In some cases, perhaps, such reasoning is appropriate. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 644.) Here, however, respondent's assertions can be evaluated only in the context of the overall pattern of trial counsel's diffident approach to voir dire.

Appellant noted previously that his trial attorney objected to only one of 30 excusals for cause.[21] To be more specific, 16 people were excused for opposition to, or reluctance to impose, the death penalty.[22] Two more, who could have been helpful to the defense for other reasons, were excused after review of their questionnaires alone, for causes other than their views on penalty, matters which also could have been explored during voir dire.[23] Of these 18 jurors, 12 were excused without being questioned.[24] Of those who

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[21]AOB 240, fn. 167.

[22]Edward Almanza (RT 3: 515–516), Maribel Guzman (RT 3: 516–517), Eugene Heskett (RT 3: 620), Sergio Parra (RT 3: 682–684), David Selby (RT 3: 682–684), Dale Wright (RT 3: 682–684), Mike Sisco (RT 3: 706), Christine Wilson (RT 3: 766), Vicki Brannon (RT 4: 812), David Lucero (RT 4: 812), Janice Hansen (RT 4: 812–813), Jennifer Montoya (RT 4: 890), Roland Rosa (RT 4: 895–896), Debra Wenzel (RT 4: 895–896), Richard Hathaway (RT 4: 943), Ruth Sanchez (RT 4: 949).

[23]Elizabeth Cano (RT 4: 812; see also CT 7: 1838 et seq.); Nola Collins (RT 4: 843; see also CT 7: 1886–1909).

[24]Edward Almanza (RT 3: 515–516), Maribel Guzman (RT 3: 516–517), Sergio Parra (RT 3: 682–684), David Selby (RT 3: 682–684), Dale Wright (RT 3: 682–684), Vicki Brannon (RT 4: 812), Elizabeth Cano (continued...)

were voir dired, counsel did not suggest or pose further questions of any, either before or after the court proposed excusing them.[25] This was even true of Christine Wilson, the one person whom counsel briefly suggested should be passed for cause. (RT 3: 765.) Even this single instance of withholding consent was lukewarm and reflected counsel's collaborative style: "[W]hile I agree that Mr. Reinhart has a concern and possibly is entitled to it, I don't think that she's substantially impaired and as a result shouldn't be excused, and I'll submit it."[26] (RT 3: 766.)

Overall, everyone who was called in for individual voir dire because of indications of difficulty voting for a death verdict was ultimately excused, again without a single attempt at rehabilitation.[27]

The reasons for, and propriety of, trial counsel's approach are not at issue in this direct appeal although, as noted previously, every hour spent in voir dire was effectively uncompensated time that could have been devoted to paying work, and counsel's collaborative method no doubt shortened what

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[24](...continued)
(RT 4: 812), David Lucero (RT 4: 812), Janice Hansen (RT 4: 812–813),Nola Collins (RT 4: 843), Roland Rosa (RT 4: 895–896), Debra Wenzel (RT 4: 895–896).

[25]Heskett, Sisco, Wilson, Montoya, Hathaway, Sanchez. See record citations in fn. 22, above.

[26]The only actual reason given for this conclusion: "[W]hen one looks at her background in psychology and the like and you look at the answers and they're that sort of objective equivocal kind of answers that I see sometimes . . . ." (RT 3: 766.)

[27]See RT 3: 557–681, 701–771; RT 4: 819–895, 911–992.

could have been a prolonged voir dire.[28] The point here is that counsel's acquiescence in the exclusion for cause of any particular death-scrupled juror has no probative value on whether the person's unsuitability had actually been established, for that acquiescence was forthcoming as a matter of course. Similarly, respondent's references to purported facts like "appellant and the prosecutor wanting him [Richard Hathaway] excused"[29] are entirely unjustified. The record does not show what counsel wanted.

In sum, while respondent's frequent repetition of a fact seemingly favorable to its position, i.e., trial counsel's not objecting to the trial court's actions, is understandable, that fact is without legal significance. Any failure of the trial court to perform its independent duty to exclude a death-scrupled juror only when cause had truly been shown is—under the law applicable to this pre-2011 trial—reviewable without objection; its corollary duty to acquire information sufficient to support such a decision did not depend on counsel's actions; and in the circumstances of this case, failure to object to a particular excusal is not circumstantial evidence that the person was substantially impaired. The trial court's determinations must be reviewed on their merits.

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[28]See p. 225, fn. 18, above. The reasons for counsel's choices will never be explored fully. If a habeas corpus petition is filed in this case, appellant expects it to show that his attorney, who was disbarred in 2005 and later admitted he suffered from alcoholism, passed away in 2009 at the age of 56. Habeas counsel had not (and has not) been appointed, so it is unlikely that the reasons for trial counsel's conduct will come to light.

[29]RB 108.

B. The Trial Court Excused Seven Jurors Without Sufficient Justification

1. Helen Donnell Was Excused Because of a Combination of Mere Opposition to the Death Penalty and an Equivocal Indication of Possible Ineligibility

The trial court reviewed the hardship declarations and proposed[30] excluding Helen Donnell based on her hardship declaration which, in its entirety, stated, "I was told, that if you have a felony on your record, that by law a person cannot serve on any jury trial. I am also against the death penalty." (CT 6: 1736.) Both sides accepted the court's proposal. (RT 2: 501.) Respondent concedes that this potential juror's mere statement of opposition to the death penalty was insufficient to support an excusal for cause. (RB 97; see also RB 98 [referring to "*potentially* disqualifying . . . information," emphasis added]; *Boulden v. Holman* (1969) 394 U.S. 478, 484.)

The trial court did not explain the basis for its decision regarding Donnell. Respondent hypothesizes that her use of the hardship declaration to provide information "outside the confines of the contemplated topics of the declaration" showed that "she was unable or unwilling to follow instructions." (RB 98.) This speculation is unfounded and contradicted by the trial court's consistent practice in similar circumstances. Other prospective jurors, given a list of personal hardships that could lead to being excused, cited instead hardship to their employers, but their failure to follow instructions did not lead to their being rejected. (RT 2: 376–377, 383–384.) Similarly, the court did explain its reasons for excusing two others whom it recognized had used the

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[30]At RT 2: 501.

form to bring up non-hardship grounds for their excusals, and with neither did it express concern about following instructions.[31] (RT 2: 453.)

Respondent claims that "[i]t appears from Donnell's own plain statement that she had a felony conviction." (RB 97.) The statement was anything but plain. Respondent has no answer to appellant's point[32] that she did not say whether the purported felony on her "record" was an arrest or a conviction; whether she was among the many citizens who do not know the difference between a misdemeanor and a felony; and whether, if convicted of a felony, she had received a certificate of rehabilitation, which would qualify her to serve notwithstanding the conviction. Respondent claims that "the trial court and the parties were in the best position to evaluate her." (RB 98.) This Court recognizes that deference to the trial court is inappropriate when the determination has been made solely on the basis of a written statement. In that situation, this Court has "the exact same information" that the trial court did. (*People v. Stewart*, *supra*, 33 Cal.4th 425, 451; accord, *People v. Thompson* (2010) 49 Cal.4th 79, 100.)

Without providing authority or reasons, respondent also proposes that the trial court's obligations regarding ascertaining the degree, if any, of a clearly death-scrupled juror's actual impairment are implicated only if the record "affirmatively establish[es] that" a juror "was excused because of her anti-death penalty views." (RB 97.) Appellant, too, is unaware of authority governing the situation where the trial court fails to state its reasons for an

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[31] As the court put it, Paul Silveira "expressed religious objections," and Naomi Saldana "expressed lack of English proficiency." The court simply said, "Even though these aren't hardship excuses, I will just excuse them along with the hardship jurors then." (RT 2: 453.)

[32] AOB 242.

excusal, but the principles underlying this area of law provide an answer different from respondent's. The fundamental issue is objective, i.e., independent of a court's intentions: "[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment . . . ." (*Uttecht v. Brown* (2007) 551 U.S. 1, __, 127 S.Ct. 2218, 2224; *People v. McKinnon*, *supra*, 52 Cal.4th at p. 643.) Unnecessary exclusion of known death-scrupled jurors produces exactly that effect, regardless of the purported reason. Moreover, if the requirement of sufficient information to determine Donnell's excludability (*People v. Stewart*, *supra*, 33 Cal.4th 425, 445, citing federal law) did not apply because the trial court's ruling may have been based on her statement about a felony record, the *Witherspoon/Witt* requirements for avoiding bias in jury selection could readily be evaded pretextually, based on collateral facts that may or may not be true about the juror. Thus, once the trial court knew that the prospective juror was death-scrupled, it was constitutionally bound to acquire sufficient information about *any* possible need to exclude her before doing so. Even if the trial court's ruling was based on her statement about a felony record, the lack of sufficient information to determine her eligibility deprived appellant of his right not to have a death-scrupled juror removed without a well-founded determination of necessity.

Moreover, it is highly probable that her statement about being against the death penalty played a part in the trial court's thinking when it proposed excusing Donnell. Two other prospective jurors were excused on the basis of their written expressions of opposition to, or discomfort with, the death penalty. (RT 2: 453 [Paul Silveira, for, as the court said "religious

reservations"]; 4: 812–813 [Vicki Brannon[33]].) The trial court's handling of the four jurors questioned and excused because of discomfort with returning a death verdict also shows the degree of its sensitivity to the issue. It is inconceivable that Donnell's death penalty views were not in the court's mind when it decided to excuse her without taking the time for voir dire. In common-sense terms, it appears that the court's view was, "One way or another, it doesn't seem worth the time and trouble to go further with this person." This may have been an understandable point of view to some extent, but it led to an impermissible course of action.

2. Paul Silveira Was Excused on the Basis of a Religious Belief Regarding Sentencing Another to Death, and Respondent Fails to Marshal Evidence That It Would Have Impaired His Performance as a Juror

Paul Silveira's hardship declaration stated a deeply-held religious belief that he had no right to decide whether another should live and asked that he be released from service. (CT 6: 1723, quoted at AOB 243.) Respondent first disputes, without explanation, that Silveira was "excused based on attitudes towards the death penalty." (RB 97; see also RB 100 [contention that he was "excused because of [his] death penalty views is mere speculation"].) Silveira's brief declaration gave no other basis for excusing him, and the trial court noted that he was "seeking to be excused because of religious considerations." (RT 2: 452; see also 453.)

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[33]The court did not state its reason for excusing Brannon, and respondent contends that the record is unclear on whether it was because she had seen pretrial publicity or because of her views on the death penalty. (RB 99.) However, many venirepersons had been exposed to publicity; the court stated its intention to voir dire individually those who had; and that was its practice. Some whose questionnaires showed far more problematic publicity exposure than Brannon's actually sat on the jury. See pages 257–259, below.

The court was duty-bound to determine whether, despite his desires and beliefs, Silveira would be willing to perform his civic duty, and whether he would be able to do so, by setting aside those beliefs and conscientiously considering both penalties. (*Darden v. Wainwright* (1986) 477 U.S. 168; *People v. Stewart*, *supra*, 33 Cal.4th 425, 448; see discussion of both cases at AOB 244.) Respondent does not disagree that this is the law.

Respondent later appears to concede the basis for Silveira's excusal and points out that sometimes written questionnaire answers can establish that a prospective juror is unwilling to temporarily set aside his or her own beliefs. (RB 98, citing *People v. Avila* (2006) 38 Cal.4th 491, 531.) In *Avila*, in response to a very detailed questionnaire, all four of the jurors at issue stated they would automatically vote for life without parole regardless of the circumstances, and their other answers buttressed the credibility of this response. (*Id.* at pp. 531–533.) In contrast, the only information which the trial court had about Silveira was exactly what cases like *Darden v. Wainright*, *supra*, and *People v. Stewart*, *supra*, considered insufficient—significant opposition to the death penalty.

Respondent counters that "Silvieri's [sic[34]] statement that he 'deeply' believed in his religion that prevents him from judging another, certainly implies that he would not be able to temporarily set aside his religious beliefs to be a juror" (RB 98) and concludes that the trial court did not abuse its purported discretion (RB 99). Preliminarily, if the trial court had found that Silveira would be substantially impaired, that finding would be reviewed not for abuse of discretion, but for whether it was supported by substantial

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[34]Respondent refers to the man as "Silvieri," but neither his hardship declaration nor the Reporter's Transcript uses that spelling.

evidence,[35] keeping in mind the trial court's duty to obtain enough evidence to ascertain the truth.[36] Second, the court made no finding that Silveira would be substantially impaired. It merely expressed its doubt that "it's worthwhile spending the time to put him through a questionnaire."[37] (RT 2: 452.) This only indicated a belief that further information would probably show Silveira to be substantially impaired, not a finding that he was. Finally, Silveira's statement "implie[d]" inability to set aside his views only in the sense that it adds something to a probabilistic assessment that he would be unable to do so, but it certainly failed to establish that fact, just as similar written answers in *People v. Stewart*, *supra*, were only enough to trigger a need for further inquiry.[38] *Witherspoon*, *Witt*, and their progeny, including their progeny in this

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[35]*People v. Waidla*, *supra*, 22 Cal.4th at p. 715 (standard on review of cause excusals).

[36]*People v. Stewart*, *supra*, 33 Cal.4th at p. 445; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.

[37]Respondent claims, "The court and the parties opted not to require him to fill out a questionnaire, since he was illiterate, and instead agreed to excuse him" based on his statement about not having the right to decide if another was to live. (RB 98.) Respondent does not cite the record, which contains no support for the claim that literacy issues were part of the court's decision-making. (See RT 2: 452–453.) The prospective juror wrote out a coherent statement on his hardship declaration, albeit with misspellings. Any difficulties he might have had in completing a questionnaire could have been easily cured with assistance from court staff or by examining him orally.

[38]"To be sure, Prospective Juror No. 8's . . . [written answer] provided a preliminary indication that the prospective juror might prove, upon further examination, to be subject to a challenge for cause. Absent clarifying follow-up examination by the court or counsel, however—during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that (continued...)

Court, recognize that—while many people in that segment of the population with strong religious or moral scruples will be unqualified—some of them will be qualified. The trial court did not know, could not know, and did not purport to know, into which group Silveira fell.

Respondent's final point is that the parties stipulated to the court's suggestion of excusing Silveira without further investigation. This has no legal significance, either in affecting the right of review or how the facts appear on review. As explained above, trial counsel could not waive the court's independent duty to comply with Eighth Amendment requirements regarding excusing death-scrupled jurors. And here, as with Donnell, the trial court and counsel had no more information than this Court does. Silveira was not before them; all they had were the few written sentences that are in the record before this Court. What is different is that they were focused on expediency, while this Court is required to correct the errors that such a focus can introduce.

3. The Trial Court Elicited Statements from Jurors Montoya, Sisco, Hathaway, and Sanchez Regarding Difficulty Following the Law After Misleading Them as to What the Law Could Require

In the sub-section after this one, appellant resumes analyzing the excusals separately. However, a pattern emerged with prospective jurors Jennifer Montoya, Mike Sisco, Richard Hathaway, and Ruth Sanchez that is best understood when their voir dires are looked at together. Respondent's

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[38](...continued)
person's ability to weigh a death penalty decision—the bare written response was not by itself, or considered in conjunction with the checked answer, sufficient to establish a basis for exclusion for cause." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448.)

argument regarding each is also similar. Each of these people was asked whether they could follow the law, and each expressed doubt, but the court had misled all into believing that the law could require a vote for death under some circumstances.[39] Respondent does not contend that California law can require such a vote but disagrees that prospective jurors were misled, emphasizing the undisputed point that the trial court had a right to ask if jurors could follow the law.

Respondent does not dispute that California law limits a penalty juror's discretion only by requiring the juror to make the decision by considering enumerated—but general—aggravating circumstances and any mitigating circumstances,[40] assigning whatever moral weight they think each circumstance deserves, and deciding which sentence seems appropriate.[41] The weighing process is a subjective one.[42] Jurors may temper their decisions with

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[39]As will be shown below, Montoya was excused for a reason other than her statements about following the law. (See RT 4: 890.) However, respondent contends that those statements justified her excusal. (RB 105.)

[40]Section 190.3.

[41]"[A] juror . . . is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors. . . . California's 1978 death penalty law does not require any juror to vote for the death penalty . . . unless [that juror is convinced] that death is the appropriate penalty under all the circumstances. . . . [T]he task that the jury performs . . . is essentially normative." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 470, citations and quotation marks omitted, bracketed expression in original.)

[42]*People v. Clark* (1992) 3 Cal.4th 41, 166 ("The subjective assignment of weights is the very means by which the jury arives at its qualitative and normative decision"); *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 470 (jury applies "its own moral standards" to the evidence).

sympathy and mercy.[43] Thus no set of factual findings can compel a vote for death.[44] To follow the law, therefore, a juror need only set aside beliefs that would prevent considering both alternatives[45] and cause an automatic vote for a particular penalty without regard to the actual circumstances.[46] Personal beliefs do not get interfere just because they "would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or . . . would make it very difficult for the juror ever to impose the death penalty"[47] Similarly, this Court has held that a pro-death juror who was "not sure" she could be fair but added, "It would be very difficult, but I think that I can" was able to act "with entire impartiality."[48] Respondent takes issue with none of this, even quoting in part—without disputing it—appellant's summary statement that "California law gives a decisive role to a juror's personal

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[43]*People v. DePriest* (2007) 42 Cal.4th 1, 59.

[44]*People v. Samayoa* (1997) 15 Cal.4th 795, 853 ("neither death nor life is presumptively appropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror"); *People v. Fierro* (1991) 1 Cal.4th 173, 247 (contrasting the erroneous view that "the law" could require a death sentence with each juror's responsibility "to individually consider and assign moral weight to the evidence").

[45]*People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.

[46]*People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.

[47]*People v. Stewart, supra*, 33 Cal.4th at p. 447.

[48]*People v. Foster* (2010) 50 Cal.4th 1301, 1325–1326. The issue was whether actual bias had been shown, actual bias being defined as a state of mind which would "prevent the juror from acting with entire impartiality." (*Ibid.*)

evaluation of the moral weight of such broad issues as the circumstances of the crime and anything that might be deemed mitigating." (AOB 258, quoted at RB 104.)

These principles are not obvious to an uninstructed panel, which knows nothing about the process. During voir dire, however, the court below—as it had done in explaining the relationship of reasonable doubt to circumstantial evidence—read part of the standard instructions, omitted others, and supplied its own ad hoc explanations. The simplest way to determine whether a juror with apparent bias towards one penalty or the other was qualified nevertheless would be to explain that the law requires both penalties to be honestly considered, while never requiring a particular penalty to be imposed, and to probe whether the juror could do that or would automatically vote a certain way. If a court elaborates and explains that enumerated factors are to be weighed, it would be necessary to explain that the main ones are quite general, that each juror decides the weight to factors deemed relevant, and that in that light each juror is to vote for the penalty he or she feels is appropriate. In contrast, the court here instructed only that there would be a weighing of "certain factors" to determine whether death was warranted, and then repeatedly asked jurors if they could follow the law and vote for death if appropriate, creating the impression that—once they determined the facts—the law would determine what penalty was appropriate.

Thus, in both her questionnaire[49] and voir dire,[50] Montoya repeatedly stated that she could vote for either penalty. But the court asked her to

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[49]CT 8: 2217. Her questionnaire expressed a strong pro-death stance. (See AOB 247, quoting CT 8:2207, 2215–2216.)

[50]See AOB 248–250, quoting and analyzing RT 4: 884, 887–888.

"promise" that she could make her "decisions . . . based upon the law" as it applied to her evaluation of the evidence. (RT 4: 883.) This would be unproblematic if she had been told what this meant, but she had been led in the opposite direction, so that a decision "based upon the law" seemed to mean the decision which the law required. In opening remarks to her panel, the court mentioned the weighing of "certain" aggravating and mitigating factors. (RT 4: 810–811.) Respondent makes much of the fact that the court used the word *weighing* and mentioned that the weighing was qualitative, not quantitative. One familiar with the death-penalty scheme and educated enough to understand the difference between qualitative and quantitative evaluation knows that this description is consistent with the jury's task. Moreover, at the end of a trial, penalty-phase arguments give counsel an opportunity to explain this skeletal directive. In the voir dire, however, there was no such explanation; the factors were not named; and nothing was explained about the breadth and generality of matters like factors (a) and (k).[51] Significantly, the court did not include the standard instruction on each juror's need to determine, based on his or her values, the moral weight to assign the evidence pertaining to each factor. Instead, the court stated, "The point I'm trying to emphasize at this juncture is that the determination of which of the two

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[51]As respondent points out, the instruction which was read did specify sympathy as a possible mitigating factor. (E.g., RT 4: 809–810.) This was, indeed, a bit of a breach in the conceptual framework created by questions like, "[Is it true that] that you cannot assure me that you'd be able to strictly follow the law? And—and vote for death?" (RT 4: 889), questions which clearly implied that the law could require such a vote. For those of us who understand California's penalty-selection scheme, it could seem like a significant breach, but for a juror who is hearing these explanations and questions for the first time, it was entirely insufficient to explain what a qualified California juror need and need not be prepared to do.

possible penalties to be imposed must be a determination that's based upon the facts of the case and the law." (RT 4: 811.) This was true as far as it went but still left the jurors with the impression that the facts and the law would determine the outcome.

The same was true when the other jurors were introduced to the penalty-determination process. First came a simplified version of the standard instructions, omitting, among other things, CALJIC No. 8.88's statements about "assign[ing] whatever moral or sympathetic value you deem appropriate" to each factor and deciding "which penalty is justified and appropriate." (RT 3: 697–698; RT 4: 908–909; cf. CT 10: 2890 [CALJIC No. 8.88].) Then, when the court elaborated with Hathaway and Sanchez, it said,

> The jurors are not permitted on their own, using their own subjective standards, to decide whether a particular defendant should be given a death penalty or life without parole. That decision has to be based upon some consideration of these *objective criteria* that you'll be instructed on. The important thing that I need to find out is whether you'll be able to follow those instructions and make a decision that is consistent with the facts of the case and the law, and a decision whether it be death or life without parole *is one which is guided by those objective legal criteria and factual findings.*[52]

(RT 4: 908–909, emphasis added.) It is true that jurors are not entirely "on their own" in deciding penalty. But they are on their own a great deal, and the court's contrasting being on their own with applying "objective criteria" was

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[52]Respondent emphasizes that "[t]he court even used the term 'guided discretion'" in its explanation to this panel. (RB 107, quoting RT 4: 908.) But it then explained the term, which by itself would mean nothing to prospective jurors, in the language quoted above.

grossly misleading, creating the direct implication that they could have to vote for a penalty that did not seem right to them personally

Respondent claims, without citation of authority, that the criteria truly are objective ones, adding, "The trial court's use of the term 'objective' relates to the criteria that the jurors must consider in making their own (subjective) determinations about whether the death penalty is warranted." (RB 107–108.) The factors are objective, according to respondent, because the jurors can only consider certain specified factors in aggravation. Respondent conflates *objective* with *exclusive*. For a factor to be "objective," its existence or non-existence would have to be independently verifiable; any person with the same information would arrive at the same conclusion concerning the factor. This could apply to the existence of prior convictions, but not to whether this or that circumstance of the offense is grossly aggravating, somewhat aggravating, neutral, or mitigating, or whether evidence offered in mitigation is truly mitigating and, if so, to what extent.

In any event, the parties differ not on semantics, but on the actual meaning conveyed to the jurors. The judge had said not only that the juror's *process* had to include considering both sentences according to certain factors, but that a juror must "make *a decision* that is consistent with the facts of the case and the law." (RT 4: 909, emphasis added.) This clearly implied what the whole tenor of the voir dire did: that the facts and the law could dictate the outcome. While *respondent's* statement quoted in the previous paragraph alludes to jurors' "own (subjective) determinations" about the appropriate penalty, respondent can point to nothing similar in *the trial court's* remarks. Similarly, respondent notes that "the weight given to various factors is up to each individual juror to determine," without acknowledging that no prospective juror was told that fact. (RB 108.)

Sisco's panel did not receive the ad libbed explanation contrasting applying "objective legal criteria" to the facts with making a "subjective" decision. However, since the pre-instructions said nothing about the individual assigning of weight to the factors or deciding for himself what penalty was appropriate, when he was asked if he could apply a law inconsistent with his personal philosophy, he, too, was left without guidance as to the scope of the discretion the law would be giving him and how much his personal philosophy could impact his evaluation of the case.

The impression that, depending on the facts, following the law could mean having to vote for death was reinforced in each individual voir dire. Montoya was told over and over that jurors' decisions had to be, e.g., "based on the legal standards and not a religious philosophy that might be your own or something that you—that you feel that your [sic] obliged to follow that's outside of this trial."[53] (RT 4: 886; see also RT 4: 883 [twice], 884, 885 [twice], 889.) Although it was appropriate to tell her that she was not to follow externally-imposed dictates, painting the legal standards as controlling and as leaving no space for any influence of the impact of her own philosophy was not. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447 [jurors are to "take into account their own values in determining whether aggravating factors outweigh mitigating factors"].) As noted above, near the point where the court announced its tentative decision that she should be excused, it asked her if she could "strictly follow the law . . . and vote for death,"[54] clearly implying that the law could require such a vote. To respondent, in asking if she "could strictly follow the law, which could at times cause . . . her to make a decision

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[53]The other examples cited here are quoted at AOB 258, fn. 167.

[54]RT 4: 889.

contrary to religion or other philosophy, the court was insuring appellant and the people's right to a jury who followed the law." (RB 105.) However, she was not specifically asked if she could make a decision contrary to her beliefs. More importantly, it would have surely been appropriate to ask if a juror could set aside personal views to the extent that they conflicted with the law. However, doing so while providing no inkling of how much room the law left for personal views, and while speaking as if "strictly follow[ing] the law" could require a "vote for death," rendered the question about following the law misleading and the answer unrevealing.

This was consistent with the court's telling Richard Hathaway that the law could compel a decision one way or the other:

> [Y]ou'll be required to make a decision that's going to be based upon certain listed criteria and you'll have to look to those criteria in making your decision. Do you think that even guided by those—let's say you've reviewed all those elements and you're convinced that it is a case where, *in fairness and consideration of those objective criteria, the only real rational decision to make is a death penalty decision*, are you saying you're not sure you could join in that decision because of your personal views?

(RT 4: 942, emphasis added.)

The problem was less blatant with Ruth Sanchez and Mike Sisco. Sanchez was simply asked, "[I]f all those circumstances and factors pointed towards death being the appropriate disposition rather than life without parole, would you be able to follow the law and impose that death penalty . . .?" (RT 4: 949.) While there was no repetition of the "objective criteria" language that she had heard during group voir dire,[55] there was also no indication that the appropriateness of a death sentence would be up to her, and that to follow the

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[55]RT 4: 908–909.

law meant only that she consider what she was required to consider, then vote for what she felt was appropriate.

Similarly, Sisco was just asked if he could follow the instructions and the law even if inconsistent with his personal philosophy. (RT 3: 705–706.) While there was no explicit language about doing what the law required, there was also no explanation of the degree to which his philosophy and values could affect his choice-making. He was left with no reason to think that the law allowed room for any personal philosophy that did not require an automatic vote for death. (See RT 3: 697–698 [group voir dire].)

With each of these people, then, the court set too high a bar when asking in general terms if they could follow the law. Implicitly (Sisco) or explicitly (Montoya, Hathaway, Sanchez), each prospective juror was left to conclude that the law could require them to not only consider both options and vote for death if they thought it was appropriate under the circumstances, but to vote for such a sentence regardless of their personal sense of its propriety.

Beyond this, the facts in each instance vary, and the remainder of this argument considers these prospective jurors individually.

4. Jennifer Montoya Was Excused to Avoid Confronting Her With Difficult Choices and, Possibly, Because of Doubts She Could Do What the Law Does Not Require

Jennifer Montoya moved from a pro-death stance to realizing that voting for a death sentence could be difficult for her, but she continued to maintain that she could vote for either penalty.. (CT 8: 2215–2217; RT 4: 884, 887–890.) The trial court pressed on with its questioning, however, and ultimately excused her to avoid placing her "in a position where you might have to do something that you're uncomfortable with." (RT 4: 890.)

Respondent characterizes Montoya's answers as conflicting and equivocal, calling for deference to the trial court. Montoya was not equivocal. A conflict between her original answers and her final one arose, but only when the court convinced her that the law could require a vote for death independent of her own moral evaluation of the balance of aggravation and mitigation, at which point she finally expressed doubt that she could cast such a vote. More fundamentally, respondent calls upon this Court to ignore the explanation that the court below, to which respondent would supposedly have this one defer, gave for its action, in favor of respondent's own argument for why Montoya was excludable.

a. The Court Did Not Explain the Subjective Weighing Process When it Mentioned Montoya's "Evaluation of the Evidence"; It Merely Meant That She Would Determine the Facts from the Evidence

In both her questionnaire[56] and voir dire,[57] Montoya repeatedly stated that she could vote for either penalty, a fact which respondent does not deny. As explained more fully in the opening brief, which recounts her voir dire in detail, this should have been the end of the matter. (See AOB 247–250.) Respondent, however, would have the excusal upheld on the basis that she ultimately was led to acknowledge doubts that she would "be able to strictly follow the law . . . and vote for death." (RT 4: 889; see RB 104–105.) It is true that—after lengthy probing—the trial court finally elicited statements that Montoya had doubts whether she could follow the law. (RT 4: 889.) As

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[56]CT 8: 2217. Her questionnaire expressed a strong pro-death stance. (See AOB 247, quoting CT 8:2207, 2215–2216.)

[57]See AOB 248–250, quoting and analyzing RT 4: 884, 887–888.

explained above,[58] however, it had failed to inform her about the degree to which California law incorporates a juror's personal beliefs and values into the juror's penalty decision, instead creating the impression that the law could require a vote for death that she might not subjectively support. (E.g., RT 4: 885; see *People v. Samayoa*, *supra*, 15 Cal.4th 795, 853; *People v. Fierro*, *supra*, 1 Cal.4th 173, 247.)

As discussed next, doubts about whether Montoya could follow the law were not the reason the trial court gave for excusing her. In the opening brief, appellant anticipated respondent's reliance on her answer in this regard and explained why this Court should not indulge in assuming that the trial court put on the record unconstitutional reasons for excluding Montoya, while privately relying on an appropriate basis.[59] Respondent fails to explain why the assumption should be made nevertheless.

On the merits of respondent's supposition, as shown above[60] and in more detail in the opening brief,[61] Montoya expressed doubts only when she thought she was being asked to do what the law did not require. Respondent answers that the court told her that she would have to personally evaluate the evidence, as if in doing so it advised her of her discretion. (RB 105, citing RT 4: 882–883.) But respondent ignores the context. First, the court was contrasting her own evaluation of the facts with following generalized dictates

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[58]Pages 241, 244.

[59]AOB 255, citing 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 349, p. 395; *U.S. Elevator v. Associated Intern. Ins.* (1989) 215 Cal.App.3d 636, 648 (mis-cited as at 15 Cal.App.3d in the AOB); *People v. Huston* (1989) 210 Cal.App.3d 192, 223.

[60]Pages 241 (regarding remarks to her panel), 244 (individual voir dire).

[61]AOB 256–260.

of her church, not with a non-normative approach to the penalty determination. (RT 4: 882–883.) Moreover, as already noted,the court made repeated statements about doing what the law requires and specifically stating that her personal philosophy could not be a part of her decision-making.[62] The only way Montoya could have understood references to her "evaluation" of the evidence was as a reference to her task of deciding what the facts were, so that she could "be guided by the facts of the case and the law," without being influenced by her "religious views." (RT 4: 885.) Respondent's interpretation of the court's remark about evaluating evidence requires taking the remark outside of the context in which it was made.

b. The Trial Court Repeatedly Expressed Its Adherence to the Wrong Standard

In insisting that Montoya was excluded for expressing inability to follow the law, respondent seeks to have her excusal upheld as a reasonable exercise of the trial court's discretion. (RB 105.) In doing so, however, respondent tries to justify the court's decision based not on the reason which the court put on the record or the standards which it said it was applying (avoiding making her go against her beliefs), but, rather, on respondent's own post facto characterization of the young woman's answers to the court's questions (as showing inability to follow the law). Reliance on a rationale other than that used by the trial court is not the deference to that court's discretion which respondent repeatedly calls for.[63]

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[62]See discussion at page 244, above.

[63]In any event, as pointed out previously, a finding of substantial impairment is reviewed for substantial evidence, not under an abuse-of-discretion standard. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 715, discussed at p. 217, above.)

Respondent does not dispute that there are jurors who will impose a death sentence even if doing so violates their religious beliefs, or that the Constitution prohibits their exclusion solely because they might be compelled to do so. (See *Darden v. Wainwright*, *supra*, 477 U.S. 168, 178 [no exclusion simply for having "conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable[,] without violating your own principles[,] to vote to recommend a death penalty"]; see also *People v. Stewart*, *supra*, 33 Cal.4th at p. 446, and further discussion at AOB 253–255.)

Respondent asserts, however, that appellant's use of the trial court's explanation of the excusal capitalizes on a "brief comment" which the court made to the juror when excusing her.[64] (RB 103–104.) The comments and a related question, however, were multiple and consistent, and they represented the court's only effort to put on the record why it was considering excusing Montoya and then did so:

"We don't expect you to violate your own personal religious tenets by participating. but we do expect you to honestly tell us whether you can serve on this trial without a violation, and if not, then we'll excuse you." (RT 4: 885.)

"Do you feel that you can do that [vote for either penalty] without violating your religious tenets or your religious beliefs." (RT 4: 888.)

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[64]Respondent also characterizes the one comment which it acknowledges as "utterly irrelevant since the court had already decided to excuse her." (RB 104.) A court almost always puts the basis for its decision on the record after having made the decision, although it may announce the ruling at either the beginning or the end of that process. The only way to decide *after* explaining the basis for a decision is for the court to literally think out loud as it makes its analysis and works towards a conclusion.

"I'm going to excuse [you], Miss Montoya. I don't want to violate your religious convictions or cause you to be in a position where you might have to do something that you're uncomfortable with." (RT 4: 890.)

Lest there be any doubt as to what these remarks meant, it should be noted that the court soon gave the same explanation for excusing Ruth Sanchez: "We don't want you to be in a position where you would be required to do something that might violate your own religious and personal beliefs, however, and so I'm going to excuse you from further participation on this trial." (RT 4: 950.)

Rather than finding out if Montoya would be substantially impaired in considering both penalties, the court below excused her based on its own lower standard: whether her religious beliefs conflicted with her doing so, regardless of whether she could set them aside.

Even if the court was also privately taking into account what she said about following the law, while putting an invalid reason on the record, this was not a juror whose excludability had been established.

5. Most of Mike Sisco's Answers Indicated Openness to Both Penalties, and the One That Showed Hesitation Was an Uninformed Response to a Misleading Question

Mike Sisco's questionnaire included three statements about the death penalty being appropriate in some circumstances, a rationale for its use, and a statement that he would not automatically vote for either penalty. (CT 6: 1566–1568.) He was voir dired on his death-penalty views, however, because he had checked "no" on a question about whether he could personally

vote for death.[65] (CT 6: 1568; see also RT 3: 700 [court intends to explore the inconsistency orally].) When asked about it, he said it was not his intended response and did not represent his feelings. (RT 3: 705–706, quoted at AOB 261–262.)

In a footnote, respondent suggests that Sisco's "No" in voir dire was not an answer to the questions he was asked (whether the written answer was intended and represented his current feelings), that he elected instead to repeat his answer to the questionnaire item itself (whether he could vote for death), that the court and counsel for both parties somehow divined this fact, and that this Court should defer to what respondent thus speculates was the trial court's "finding." (RB 93, fn. 8.) The question and answer are quoted in full in the opening brief. They provide no support for respondent's interpretation, and no one in the courtroom put on the record anything indicating either nonverbal responses from Sisco or a court finding that would provide such support. (AOB 261–262, quoting RT 3: 706.)

Respondent's inversion of Sisco's reply does have the virtue of providing an explanation for the court's seeking a stipulation for Sisco's

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[65]Respondent observes that Sisco's questionnaire responses also included statements that his beliefs prevent him from judging another and condemning people and indicating that his belief in giving people a second chance could prevent him from being a fair juror. (See CT 6: 1558, 1562.) While the trial court explored the "second chance" idea, neither its pre-voir-dire statement of areas requiring followup nor its actual voir dire touched on these other matters. (RT 3: 700–701 [statement of issues to be explored], 701–706 [voir dire].) Respondent does not claim that they were a basis for excusal.

Respondent also mentions Sisco's having a bias against law enforcement, at least in Tulare County. (RB 92.) However, respondent does not claim that this was a basis for the court's excusing him (see RB 105–106), and it was not. (See AOB 261 and cited portions of the record).

excusal. However, it does so at the cost of requiring this Court to decide, with no evidence, that the trial court knew that Sisco meant the opposite of what he said. This is in the face of the court's not asking Sisco to clarify (e.g., "Do you mean 'No, you could not vote for a death sentence' or 'No, you didn't mean to write that'?"). It is also in the face of all the other questionnaire answers indicating his openness to either penalty, along with the court's own stated recognition that the answer at issue was inconsistent with those other answers, creating a need for the oral follow-up question about whether he meant that answer. (RT 3: 700.)

A more reasonable interpretation is that the court—having just heard Sisco's one problematic voir dire answer, about whether he could set aside his beliefs (see below)—misinterpreted Sisco's next response as one reinforcing that answer. Nothing in the man's demeanor, however, could have turned "No" into "Yes." Nothing in the context made the questions and answer ambiguous. Respondent's suggestion should be rejected.

All that was left as a basis for excusal was a very brief exchange, in which the court brought up Sisco's religious belief that every person should get a second chance,[66] stated that there would not be a second chance in a penalty phase, and asked if Sisco could "follow those instructions and apply that law even though inconsistent with your personal philosophy." Sisco replied, "I don't think so." (RT 3: 705.) Strangely, there was no antecedent for *those* and *that*. Moreover, there was no explanation of what circumstances might require action in conflict with Sisco's personal philosophy. So there was nothing here to justify any court action other than further questioning.

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[66]The opening brief has an erroneous citation for the questionnaire responses stating that belief. They were at CT 6: 1558, 1562.

The question answered was extremely abstract. Given that Sisco thought that a death sentence would be appropriate in some circumstances and that he would not automatically vote for either penalty, the court could not know what aspect of his philosophy he was imagining he might be called upon to violate. (Not getting "another chance" could apply to life without parole as well as a death sentence. Although this might have raised a concern about whether Sisco could vote for either penalty, that, too, would have required followup questioning.)

As with other jurors, neither the court's brief remarks outlining the legal framework during Sisco's group voir dire,[67] nor anything said in Sisco's short individual voir dire, explained the degree to which his philosophy and values could affect his choice-making. Sisco, had he been more proactive, could have asked the court to elaborate on its question. As it was, neither the trial court nor this one can know what he meant when he said he did not think he could follow unspecified instructions and a partially explicated law. Although the trial court did follow up with the questions about whether checking "No" next to the questionnaire item about whether he could vote for a death sentence was his intended answer and represented his current feelings, it unfortunately misunderstood his response.

Respondent disagrees. Respondent mentions voir dire "answers" confirming doubts raised in the questionnaire, but cites only the answer about not thinking he could apply the law if it conflicted with his personal philosophy, which was in fact the only problematic one. As to that answer, respondent maintains that the court did "explain the nuances of California law which might not have been inconsistent with Sisco's religious beliefs . . . ."

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[67]RT 3: 697–698.

(RB 106.) By way of explanation, respondent claims that the court's voir dire to Sisco's group set forth "what the jury's role was and . . . that the jurors would be expected to weigh aggravating and mitigating factors to assign the appropriate penalty." (*Ibid.*, citing RT 3: 553–554.) Apart from the fact that Sisco was not present for the remarks cited by respondent,[68] even respondent's paraphrase fails to claim that the subjective, highly discretionary nature of the weighing process was set forth. As already explained,[69] the instruction that Sisco did hear[70] was no more complete than the one cited by respondent. What was needed was for the court "to further explain the role of jurors" in the process, as this Court has suggested is appropriate in the situation;[71] then ask Sisco if participation would conflict with his beliefs; and—if the answer was affirmative—to ask him if he could set aside those beliefs and serve nonetheless. As it was, nothing Sisco heard informed him that only a personal philosophy requiring an automatic penalty choice (which his questionnaire said was not true for him[72]) needed to be set aside and that, beyond that, he would be required to make no choice that felt wrong according to his values, as long as he was willing to consider the statutory criteria.

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[68]See RT 3: 536–537 (roll call of group called in for the voir dire cited in RB).

[69]Pages 244 and 246, above.

[70]RT 3: 697–698. (See RT 3: 682–684 [Sisco to be included in afternoon voir dire, and that group called in], 697–698 [relevant portion of explanations to the group], 701 [Sisco's individual voir dire begins].)

[71]*People v. Stewart*, *supra*, 33 Cal.4th at p. 448 (explaining the use of voir dire for separating unqualified from qualified death-scrupled jurors).

[72]CT 6: 1568.

Respondent claims, "Appellant's counsel had an opportunity to attempt to rehabilitate [Sisco's] answers, but instead stipulated to Sisco being excused. (3 RT 706.)" (RB 106.) Just to be clear, there was no invitation to ask further questions, only the usual suggestion to stipulate,[73] although presumably a request for further questioning would have been honored. In any case, given the court's sua sponte duty to determine whether this prospective juror was qualified to serve, counsel's accepting the court's proposal to stipulate has no legal consequence.

Similarly, respondent refers to what it calls the court's and parties' "unanimous assessment that Sisco should be excused for cause," in an apparent suggestion that this is proof that they were correct. (RB 106.) However, as explained at pages 227–230, above, appellant's attorney cannot be assumed to have "assessed" matters with a view to excusing only jurors definitely shown to be substantially impaired in performing the duties required of a California juror. It is inconceivable that he could have employed that standard and agreed on the propriety of excusing 17 of 18 jurors more likely to be friendly to his client's cause (including the 7 whose excusals are challenged here)—without seeking further information from any of them—in a procedure that excluded every juror who indicated discomfort with the death penalty.

6. Only Vicki Brannon's Ideas About What Was Required to Support a Death Verdict Could Have Prompted Her Excusal, and They Were Insufficiently Explored

Respondent points out that the court never gave a reason for excusing prospective juror Vicki Brannon after examining her questionnaire, adding that

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[73]RT 3: 706.

the record shows only that "the court suggested excusing her, and both parties agreed . . . ." (RB 99.) Respondent notes that a questionnaire answer showed that she recalled some pretrial publicity, "expos[ing] a potential bias against appellant which may have been a concern to both parties and the court." (*Ibid.*) Respondent concludes that there is therefore no support for treating her as a person excused for her views on the death penalty. (*Ibid.*)

With the jurors excused on the basis of questionnaire answers alone, the trial court frequently did not give reasons, apparently considering them self-evident. (See, e.g., RT 4: 796–797 [proposing excusing Brannon and four others], 812–183 [stipulations obtained for the five].) Thus the reason has to be discerned from their questionnaires, the method respondent employs here as well.

As to respondent's suggestion that Brannon's questionnaire shows that publicity was an issue, she indicated that she had seen a television report or reports on the case but that she had not expressed opinions about it or otherwise discussed it with anyone. (CT 6: 1805–1806.) What she recalled was "that 2 people were killed in Hanford, they were older people, and that the grounds keeper was accused of doing it." (CT 6: 1805.)

The hypothesis that this prompted her excusal is unfounded. Kings County has a small population, and the parties knew they were not going to get a jury that had not heard about this sensational case. As the court stated,

> well, I think that we have quite a number of them who indicated some exposure to publicity, and the answers are sufficiently ambiguous that it's probably appropriate to follow-up and ask them whether they're going to—how much they heard and whether they can set it aside, I intend to do that.

(RT 3: 520.) This is what happened, when the issue truly was publicity, but it did not happen with Brannon. Another potential juror, Jacob de Jong, had

heard about the case from "newspaper, television, News Radio 58, and friends" and recalled that "[t]he suspect is suspected for many crimes or robberies, the murders were brutal or committed on the elderly." (CT 3: 843.) He was, accordingly, voir dired concerning pretrial publicity, and he satisfied the court that he would judge the case based on the evidence. (RT 3: 573–574, 579.) Craig Peden had read about the case and heard about it on television, picking up information similar to that read by Brannon: "Defendant was accused of killing an elderly couple in their home, he had worked for them in the past." (CT 5: 1300.) Unlike Brannon, he had spoken of it with others—his family—and they had discussed the horror of the crimes, the closeness of the scene to their own neighborhood, and that "you couldn't trust anyone anymore." (CT 5: 1301.) After the matter was explored briefly on voir dire, he was passed for cause. (RT 3: 722–724.)

Of the jurors who not only were passed for cause, but actually served, Number A-41 had read about the case, talked with her family about it, and concluded, "Seems pretty the defendant is guilty. [sic]" (CT 4: 939–940.) In her voir dire she stated that she had followed the news about the case fairly closely, and from that he appeared guilty, but she believed she could disregard that and go by the evidence. (RT 3: 597–598.) Similarly, Number A-46, who became an alternate, had read about the case and told his wife that, if the defendant was found guilty, he should die, and she agreed. (CT 4: 1011–1012.) He, too, was voir dired on the issue and satisfied the court and parties that he could decide the case based on the evidence. (RT 3: 646–647.)

The examples could be multiplied, but clearly there is no merit to the suggestion that—contrary to its handling of these more problematic cases—the court below might have sent Brannon home, without voir dire, because her questionnaire indicated that she had read that two elderly people had been

killed and that their groundskeeper had been accused of the crime. The reason has to be found elsewhere. Both parties to this appeal have scrutinized her questionnaire[74] and found nothing else, other than what appellant has put forward—her views on the death penalty.

These were described and analyzed in the opening brief. (AOB 264–266.) Respondent has disputed neither appellant's portrayal of them nor the conclusion that they did not justify her exclusion from the jury without further exploration. In brief, what would have called for that exploration were her stating twice that the death penalty was appropriate only under the "special circumstances" of the crimes' being gruesome and proven without a doubt, and her doubts that the penalty serves any purpose. (CT 7: 1807–1808.) This was all that could have motivated her excusal, but it was nowhere near enough, for reasons explained in the opening brief. (See AOB 265–266, citing *People v. Stewart*, *supra*, 33 Cal.4th at p. 449; *People v. Velasquez*, *supra*, 26 Cal.3d at p. 439.)

Beyond its unfounded claim that Brannon's excusal should not be reviewed as one based on her attitude towards the death penalty, respondent's only suggested basis for upholding the trial court's action is that "appellant stipulated to her excusal and thus cannot show on appeal that the trial court abused its discretion in excusing her." (RB 99.) Preliminarily, the question, again, is not whether the court below abused its discretion, but whether there was substantial evidence to support a finding of substantial impairment. (*People v. Waidla*, *supra*, 22 Cal.4th 690, 715, discussed at p. 217, above.) And, for reasons also already explained, trial counsel's accepting the court's

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[74]CT 6: 1790–CT 7: 1813.

suggestion is irrelevant to the analysis. Brannon's excusal was improper and requires reversal of the penalty judgment.

7. Richard Hathaway Was Misled into Stating That He Could Not Follow the Law

As shown above[75] and in more detail in the opening brief,[76] Richard Hathaway was told that a lawful penalty decision would be "guided by . . . objective legal criteria and factual findings" and that the law and facts could put him in a situation where "the only real rational decision to make is a death penalty decision." (RT 4: 909, 942.) When he finally said he did not think he could follow the law, he was answering a question as to whether he could do so in that situation. (RT 4: 942.) Respondent's argument that what he was told about the law was sufficient is also answered above. (Pp. 242–243.)

In addition, respondent claims,

> Hathaway's answers communicated, first, that he completely changed his mind between the time he filled out the questionnaire and the time he was questioned (which may have contributed to appellant and the prosecutor wanting him excused), and that he did not think he was capable of returning a death verdict under any circumstances. (4 RT 943.)

(RB 108.) First, a reading of the voir dire in any capital trial, including this one, will show that a central preoccupation of courts and prosecutors is uncovering those jurors who support the death penalty in the abstract but find—when confronted with the reality of possibly imposing it on another human being—that they are not so sure. Thus changing one's mind—the first purported problem stated by respondent—is not a problem per se. Second, defense counsel's acquiescence in virtually every cause excusal of a death-

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[75]Pages 242–243 (remarks to his panel), 245 (individual voir dire).

[76]AOB 266–268.

scrupled juror belies the implication that his doing so here, too, meant he was "wanting" Hathaway to be excused. (See pp. 227–230, above.) Third, Hathaway never said that he did not think he was capable of returning a death verdict under any circumstances. He said nothing at all on the page cited by respondent—by then the questioning was over. The question which he did answer in the negative was not whether he could return a death verdict under any circumstances. It was whether he could join in a decision where, "in fairness and consideration of those objective criteria, the only real rational decision to make is a death penalty decision." (RT 4: 942.) This was in a context where he had already been led to believe that the facts and the law could compel a death sentence and been given no inkling that his own values would be determinative, as long as he applied them to the correct factors.[77]

Once again framing the question in a manner at odds with both the facts and the law, respondent concludes, "[T]he trial court properly exercised its discretion in accepting the parties' stipulation to excuse Hathaway." (RB 108.) The trial court did not accept the "stipulation"; it proposed it. (RT 4: 942–943.) And its implied finding of substantial impairment required sufficient evidentiary support before its ultimate decision entered the realm of discretion (*People v. Waidla*, *supra*, 22 Cal.4th at p. 715 [standard of review is substantial evidence]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445 [court must have sufficient information before it to justify a finding that a death-scrupled juror is unable to consider both alternatives].)

The only real dispute here was whether there is substantial evidence that Hathaway could have correctly understood a penalty juror's task when he

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[77]Again, see above, pages 242–243 (quoting remarks to Hathaway's panel), 245 (quoting his individual voir dire).

indicated he he could not perform it, or whether he was led to believe that the law could require imposition of a sentence he did not support. Because of the trial court's misguided efforts, he was misled, and so the excusal was error.

8. Ruth Sanchez Was Excluded Because She Did Not Know Whether She Could Do Something Which California Law Does Not Require

With Ruth Sanchez, too, respondent erroneously relies on an abuse-of-discretion standard and the parties' acceptance of the trial court's invitation to stipulate. (RB 109.) The court did put on the record its reason for the excusal, but, as with Montoya, respondent marshals others that it speculates were in the court's mind and made both parties actively desire her removal (temporarily on pain medication that sometimes caused sleepiness[78] [see CT 8: 2340], was contemplating becoming a Jehovah's Witness). (RB 109.) The trial court's explanation: "We don't want you to be in a position where you would be required to do something that might violate your own religious and personal beliefs, however, and so I'm going to excuse you . . . ." (RT 4: 950.) This was the same standard articulated for Montoya, and it was wrong, for the reasons explained in the discussion of Montoya's excusal. Perhaps it could be thought that the explanation regarding Sanchez—since it was addressed to her—was mere sugar-coating for her benefit. However, the court's last question before indicating an inclination to excuse her was if she could impose a death sentence "without violating your own conscience." (RT 9: 949.) That could have been appropriate as a lead-in to asking whether she would be willing to put aside her conscientious beliefs if necessary, but that question

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[78]This was not enough of a concern that she was even voir dired on the subject. (See RT 4: 945–950.) If she had been, obvious questions would have been whether she expected to still be using the medication when opening statements were anticipated, and how sleepy it made her.

never came. The information obtained on this issue was only enough to justify the reason actually given for the excusal, and that reason was insufficient. (*Darden v. Wainwright*, *supra*, 477 U.S. 168; *People v. Stewart*, *supra*, 33 Cal.4th 425, 448.)

Perhaps the court also had in mind closely-related answers about Sanchez's ability to follow the law. But, as with others who seemed to disqualify themselves with answers to questions about following the law, she was never told that following the law required only honestly considering both penalties[79] and was led to believe that the law could require a vote for death. Her one expression of doubt as to whether she could send anyone to their death[80] was admittedly a broad statement, if considered in isolation. Its meaning, however, cannot be separated from a context in which she believed that she could be required to do so "by those objective legal criteria and factual findings that you've made." (RT 4: 909.) This is because, to answer the court's question about sending someone to their death, she had to imagine herself in the situation of rendering a verdict. The answer could well have been different if what she imagined was a situation where, according to her own values, and after considering the statutory criteria, she believed a death sentence to be appropriate, rather than feeling that she could be compelled by the law to render a verdict which she did not feel was right. But this Court will never know, because the court below conducted its voir dire, and ended it, without obtaining this essential information.

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[79]*People v. Jones*, *supra*, 29 Cal.4th 1229, 1246; *People v. Cunningham*, *supra*, 25 Cal.4th 926, 975.

[80]RT 4: 949.

Respondent disagrees that Sanchez was inadequately informed about the law. (RB 108.) Appellant briefed that question above, and he refers the Court to that discussion. (Above, pp. 242–243 [regarding group voir dire], 245 [regarding portion of individual voir dire not discussed here]; see also AOB 271–272.) Given both a voir dire that seemed to ask only if Sanchez could do something not required of a juror, and the court's explicit focus on protecting her from having to set aside her beliefs when deliberating, her excusal was error and, like the other excusals, requires reversal of the penalty judgment.

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XIII. APPELLANT WITHDRAWS THE CLAIM THAT THE JURY INSTRUCTIONS ERRONEOUSLY IMPLIED THAT THE JURORS COULD DETERMINE FOR THEMSELVES WHAT FACTS MIGHT BE AGGRAVATING

In the opening brief, appellant argued that CALJIC No. 8.88 impermissively broadens the statutory list of aggravating circumstances by stating that "an aggravating factor is *any* fact, condition, or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences[,] which is above and beyond the elements of the crime itself." (Emphasis added.) The contention was that this language would permit treating as aggravating a number of facts—like appellant's alcoholism—which cannot legitimately be used for that purpose. (See examples cited at AOB 276–277.)

Respondent erroneously implies that certain authorities have rejected this challenge. (RB 109–110.) Respondent also argues, however, that the phrase *any fact* was limited to the circumstances of the crime. (RB 110.) Upon further reflection, and in light of the instruction's reference to such a fact "attending the commission of a crime," along with this Court's broad interpretation of *circumstances of the crime* (see Argument XVIII.B), appellant withdraws this claim of error.

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XIV. THE COURT'S FAILURE TO INSTRUCT ON THE PROPER USE OF VICTIM IMPACT EVIDENCE WAS PREJUDICIAL ERROR

At one point in its brief, respondent correctly observes that "gut-wrenching victim impact testimony" was admitted during the penalty phase of appellant's trial. (RB 84.) Admission of such testimony has always been controversial. What has not been controversial is that there are serious risks inherent in its use, risks which must be guarded against.[1] At appellant's trial, what would be the jury's appropriate use here of the victim-impact evidence was obscure, while inappropriate uses appeared to be the reasons for its admission. The trial court, therefore, should have given a limiting instruction, explaining the proper use of the evidence and cautioning against its misuse.

> The trial court was required, on its own motion, to instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.

(*People v. Breverman* (1998) 19 Cal.4th 142, 154, quotation marks and citation omitted.) Limiting instructions should be given when evidence is admissible for one purpose but not another, for which the jury might nonetheless (mis)use it, but if the general rule regarding sua sponte instructions is inapplicable, a trial court is required to give a limiting instruction only upon request. (Ev. Code § 355; *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43; 1 Witkin, Cal. Evidence (4th Ed. 2000) Circum. Evid, § 30, p. 360.)

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[1]See the numerous authorities, including from this Court and the high court, quoted at AOB 281, fn. 203.

Evidence in aggravation is relevant only to the extent that it bears on a defendant's moral culpability. (*Monge v. California* (1998) 524 U.S. 721, 731–732; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; and other authorities cited at AOB 284–285.) Victim-impact evidence has been held to do so only to the extent that it reminds jurors—any who need reminding—that murder is a truly serious act with grave consequences for real and unique human beings, after a trial where the guilt phase might have been dry forensic evidence and the penalty phase would otherwise focus entirely on evoking sympathy for the defendant. (*Payne v. Tennessee* (1991) 501 U.S. 808, 820, 822, 825; *People v. Edwards* (1991) 54 Cal.3d 787, 835.) In appellant's trial, uninstructed jurors were far less likely to divine this purpose than to assume certain others.

To begin with, because prosecution penalty-phase evidence was generally about circumstances in aggravation, jurors would naturally assume that the testimony of Clarence Washington and Billie Lou Hazelum was support for the proposition that appellant's crime was more at the death-worthy end of the homicide continuum because of its awful consequences. Even non-death-eligible murders, however, as well as lesser homicides, generally produce comparable harm, so any use of the evidence in this manner would have been both misguided and outside its proper function of countering any tendency to view the crimes and their victims as abstractions. (See AOB 282–283 and cited authorities.)

Moreover, without guidance, the evidence inevitably appeared to be pitted against the testimony from appellant's mother, setting up a contest in which the question was which family most deserved the jury's sympathy, further taking the focus away from appellant's culpability. (See AOB 282 and authorities cited.) Third, it created the impression that the enormity of the survivors' losses, not appellant's culpability, was the issue, and that the only

appropriate response to a crime which caused such suffering was the maximum punishment available—again because the jury was without guidance as to the fact that the suffering was unfortunately typical and shed no light on whether the crime was "the worst of the worst" or a tragically average special-circumstances case. Finally, it was so emotionally compelling—"gut-wrenching"[2]—that the jury needed to be cautioned to avoid "a verdict impermissibly based on passion, not deliberation." (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 836 (conc. opn. of Souter, J.) I.e., it needed to be instructed in a manner that would cause it to "face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.)

Respondent argues that review of any error was forfeited, that no instruction was necessary because the trial court's general instruction on being fair and impartial covered the issue, and that any error was harmless. The only real question, however, is the second, the one about whether another instruction dealt with the matter. A sua sponte duty, by definition, is in which failure of fulfillment is remediable on appeal without a party's action at trial. And respondent's harmlessness argument depends on the claim that other instructions adequately informed the jury how to use the victim-impact testimony. As to that claim, respondent relies on this Court's summary rejections of related contentions, none of which dealt with appellant's specific arguments, and all of which were based on an analysis which appellant's opening brief showed was inapplicable to this case. (See AOB 287–288.)

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[2]RB 84.

A. Respondent's Forfeiture Argument Is Inapposite

Quoting *People v. Boyer* (2006) 38 Cal.4th 412, 465, respondent contends that the instant claim has been forfeited by trial counsel's failure to request a limiting instruction. (RB 111–112.) *Boyer* involved an instruction on a different issue and no claim that it should have been given sua sponte. (*Ibid.*)

As noted above, if review of a trial court's failure to fulfill a sua sponte duty could be forfeited by a party's inaction at trial, the entire category of sua sponte duties would be rendered meaningless. Respondent's forfeiture claim is a logical contradiction. (See *People v. Fuiava* (No. S055652, Feb. 6, 2012) 53 Cal.4th 622, __, fn. 11, ["the appellate claim is of a kind (e.g., failure to instruct sua sponte . . .) that required no trial court action by the defendant to preserve it"].)

B. Respondent Disputes Neither That the Testimony Was Subject to Serious Misuse nor That Its Proper Use Would Not Have Been Evident to an Uninstructed Jury

In his opening brief appellant explained in depth why jurors would assume that illegitimate uses of the testimony were legitimate, citing authorities documenting the risks. (AOB 280–284.) Respondent's only attempt to dispute these risks is to mischaracterize appellant's enumeration of them as an "implicit assertion that the victim-impact testimony injected unfair, inflammatory evidence into appellant's trial." (RB 113, fn. 9.) Respondent then knocks down this straw man by citing authorities holding generally that victim-impact evidence may be admitted without violating the United States Constitution. (*Ibid.*) But respondent does not dispute appellant's real assertion: that both the opinions originally banning victim-impact testimony and those later allowing its use recognize its dangers, including confusing the jury as to its task.

Respondent also does not challenge appellant's premise regarding the limited relevance of victim-impact testimony (keeping the crime and victim real when the defendant has been humanized). Nor the lack of obviousness of that limited relevance, to a jury to which it has not been explained.[3]

C. Respondent Fails to Show That General Instructions on Fairness Told the Jury How to Use and Not to Use the Testimony at Issue or That This Court Has Promulgated a Reasoned Holding to That Effect

1. No Other Instruction Covered the Matter

In its only attempt to answer appellant's claim on the merits, respondent cites *People v. Morgan* (2007) 42 Cal.4th 593, 624, for the proposition that other instructions covered the matter, rendering a limiting and cautionary instruction unnecessary. In *Morgan* the defendant contended only that an instruction regarding proper use of victim-impact evidence was needed to avoid emotionality overcoming reason, and neither cited the various forms of likely misuse of the testimony raised here nor argued that the reason for its admission would be obscure to an uninstructed jury. This Court rejected the *Morgan* defendant's contention in a single sentence, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 454, for the proposition that an instruction proposed by the defense would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1. Appellant discussed *Ochoa* in the opening brief, quoting the version of CALJIC No. 8.84.1 given to appellant's jury, pointing out that it was a general admonition to be fair and

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[3]As respondent points out in its harmlessness argument, CALJIC No. 8.85 tells the jurors to weigh the statutory factors in aggravation and mitigation to determine if death is warranted. The instruction does not explicitly state that culpability is the issue, however, or inform the jury as to the nature of the presumed relevance of victim-impact testimony to that issue.

follow the law—of a sort given in every trial—and explaining that an instruction that did not even refer to the victim-impact evidence could not have admonished the jury on how it was to be used and how it was not to be used. If instructions like No. 8.84.1 could cover even the situations where (a) there are obvious ways a jury can misuse evidence and (b) the appropriate use is less than obvious, neither cautionary and limiting instructions nor instructions on the use of particular items of evidence would ever be needed. This is manifestly not the case. (AOB 287–288.) There is nothing in *Morgan*, *Ochoa*, or respondent's brief seeking to rebut this reasoning.

Respondent also cites *People v. Zamudio* (2008) 43 Cal.4th 327. *Zamudio* relied in part on *Ochoa's* treatment of CALJIC No. 8.84.1 as well, again without further elaboration, and without addressing the contention raised here, about how a general admonition to be fair to both sides was not enough. (*Id.* at p. 368; see also p. 369.)

2. The Impact of a Crime on Victims' Families Is Not, In Itself, a Broad, Open-Ended Circumstance In Aggravation

In *People v. Zamudio*, this Court also rejected instructions proposed by the defendant because they suggested that emotions may play no part whatsoever in a juror's decision to vote for a death penalty.

> Although jurors must never be influenced by passion or prejudice, at the penalty phase, they "may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] may exercise sympathy for the defendant's murder victims and . . . their bereaved family members. [Citation.]" ([*People v.*] *Pollock* [2004] 32 Cal.4th [1153,] 1195 . . . .)

(*People v. Zamudio*, *supra*, 43 Cal.4th at p. 368, italics omitted.) Unlike the *Zamudio* defendant, appellant is not saying that emotions may play no part at all, but that, overall,"the jury must face its obligation soberly and rationally,

and should not be given the impression that emotion may reign over reason." (*People v. Haskett, supra*, 30 Cal.3d 841, 864.) There is an obvious difference between acknowledging that understanding the seriousness of the offense can include sympathy—which is an emotion—regarding the suffering which it inflicted, and adopting an "anything-goes" attitude towards all emotions, including the passion or prejudice that would lead jurors to want to avenge the deaths of the victims.

However, out of context, *Zamudio's* quotation from *People v. Pollock* could seem to cast doubt on a premise of appellant's argument. It could appear to permit evidence of the impact of the crimes on family members as a potentially limitless aggravating circumstance of the crime, rather than simply as a way of ensuring that the jury understands that a real human being was killed, with serious consequences for the bereaved. It could also, perhaps, be stretched to support an assertion that the jury may properly view its decision as based on which family deserves more sympathy.

There is nothing, however, in California or federal constitutional law which permits turning the penalty determination, which must focus on a defendant's individual culpability and moral guilt,[4] into a balance-of-sympathies contest. The key sentence in *Pollock* was only explaining the rejection of a limiting instruction telling the jury that it could not even be

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[4]"[F]actor[] (a) . . . direct[s] the sentencer's attention to . . . facts about the defendant and the capital crime that might bear on his moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595). Regarding the constitutional imperative for this focus, see *Monge v. California, supra*, 524 U.S. 721, 731–732; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319; *Enmund v. Florida* (1982) 458 U.S. 782, 801; *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605. See also *People v. Beeler* (1995) 9 Cal.4th 953, 991; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (evaluating circumstances of the offense as they aggravated the defendant's culpability).

"influenced" by sympathy for the victims' families, and this Court's words should not be taken to mean more than that.[5] (32 Cal.4th at p. 1195.) Similarly, the phrase characterizing the impact on the family as aggravation should not be broadened into a general principle, one that opens up an entirely new rationale for the admission of—and a new use for—victim-impact evidence. This Court did not undertake to re-analyze that question when, in a brief and straightforward exposition, it rejected the proposition that a jury must not be "influenced" by sympathy for the victim's family. Moreover, it would be fallacious to reason from the premise that the statutory admissibility of victim-impact evidence is based on its relating to a circumstance of the crime, to a conclusion that it may be used as broadly as any other such circumstance. (See AOB 284–285.)

3. The Holdings of Other States' Supreme Courts Are Instructive and Persuasive on This Issue

Appellant has noted sister jurisdictions where the giving of a limiting instruction is required or strongly encouraged. (AOB 284.) Respondent denigrates the list as a "short" one. Respondent fails to acknowledge that none of the cited authorities found the proposition controversial, that neither party has found a jurisdiction, other than California, rejecting a claim that a sua

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[5]The statement in *People v. Pollock* about sympathy being appropriate was made in reliance upon *People v. Stanley* (1995) 10 Cal.4th 764. (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1195.) *Stanley* held only that there was no prosecutorial misconduct in a brief, unemotional request that the jury consider not only sympathy for the defendant and his family, but also for the victims and their families. The holding was based on the general constitutionality of victim-impact evidence and argument. (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 831–832.) Nothing in *Stanley* broadened the relevance of victim-impact testimony beyond the original need to ensure that the defendant was not the only person to be humanized.

sponte instruction is needed, and that the authorities come from a broad spectrum of state courts.

Respondent contends that these holdings "should not be considered here, where this Court has soundly held that California's instrucitons [sic] adequately explain how evidence is to be evaluated." (RB 113.) Given that each of those states undoubtedly both admonishes jurors to be fair and follow the law and also explains the general principles for making the penalty decision under state law, there is nothing unique about California's instructions that would render the logic of these other authorities inapplicable here.

D. Respondent Effectively Concedes That Any Error Was Prejudicial.

Respondent asserts, "Appellant cannot show that the trial court's failure to give a limiting instruction prejudiced him." (RB 113.) In placing a burden of showing prejudice on appellant, rather than shouldering its own burden of showing harmlessness beyond a reasonable doubt, respondent seems to assume that any error would be one of state law only. (Compare *People v. Watson* (1956) 46 Cal.2d 818 with *Chapman v. California* (1967) 386 U.S. 18.) However, appellant has claimed federal constitutional error, and respondent has made no attempt to show that any error would have been one of state law only.[6] Moreover, even state-law error is subject to a standard equivalent to the federal one if it is asserted to have affected the penalty choice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1144–1145.)

Respondent's only argument for its statement that prejudice cannot be shown is to repeat that other instructions told the jury how to use victim-

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[6]Compare AOB 279, 286, 288–289 & fn. 214 with RB 111–113.

impact evidence. (RB 113.) Respondent's reliance on CALJIC No. 8.84.1 merely repeats the basis for claiming that there was no error, rather than showing that any error was harmless. Respondent does add that the jury also heard CALJIC No. 8.85, which listed the circumstances which it could consider aggravating. These include the circumstances of the crime, the factor under which victim-impact evidence is considered to be relevant. But just as with No. 8.84.1, this general instruction provided no guidance on victim-impact evidence in particular, which is not mentioned in the instruction. Neither function called for here—informing the jury as to how to use the evidence, and cautioning it how not to use it—can be fulfilled by telling the jury that it is to weigh, among other things, the circumstances of the crime, without naming the problematic evidence on which guidance is required.

In his opening brief, appellant reviewed how the lack of guidance could have affected a juror's penalty vote and therefore cannot be found harmless. (AOB 289–290.) Respondent's only answer is its claim that guidance was in fact given. The penalty judgment must be reversed.

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XV. THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FOLLOWING A CALJIC-INITIATED ELIMINATION OF THIS COURT'S FORMER UNANIMITY REQUIREMENT FOR CHARGES OF UNADJUDICATED CRIMINALITY

The trial court committed prejudicial constitutional error by instructing that any juror who was convinced beyond a reasonable doubt that appellant committed a prior offense charged under factor (b) could consider the offense as an aggravating circumstance, i.e., that the jury did not have to unanimously consider the charge true. Defendants in other automatic appeals have raised this claim as a "generic" one to preserve it,[1] but appellant briefed it fully on the merits. Among other things, he pointed out a troubling history in which from 1965 through 1987 unanimity was required, after which, in its first automatic-appeal decision following the removal of three members of the Court in 1986, this Court ratified a CALJIC-initiated change without acknowledging that it was making new law. On the merits, appellant acknowledged this Court's precedents rejecting similar claims, but he raised several arguments not previously addressed in this Court's opinions on the issue and noted critical ways in which factor (b) allegations differ from other aggravating circumstances, which are more normative than strictly factual and often less weighty in the sentencer's scale. (AOB 291–316.)

Respondent, however, treats the claim as a generic one, omitting most aspects of appellant's reasoning from its summary, citing precedents upholding the instruction used in appellant's trial, and responding to only one of the points made by appellant.[2] (RB 114.) Rather than assisting the Court in

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[1]See *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.

[2]In that response, respondent cites *People v. Salcido* (2008) 44 Cal.3d (continued...)

evaluating appellant's actual claim, respondent simply asserts that "[a]ppellant offers no compelling reason to reexamine sound and recent precedent." (RB 114.) Although this Court has the power to arrive at a similar conclusion after analyzing the argument and authorities presented in the opening brief, it should not accept respondent's invitation to do so without such analysis.

Given the lack of a substantive response on this claim from respondent, other than the one replied to in the second footnote in this argument, appellant otherwise relies on his opening brief.

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[2](...continued)
93, 167, and *People v. Williams* (2008) 43 Cal.4th 584, 649, for the proposition that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny do not require juror unanimity on aggravating factors. Neither those cases, nor any other case appellant has encountered, nor respondent's brief addresses either appellant's criticism of that general proposition (AOB 308–311) or his explanation of why, even if it is true, factor (b) determinations are distinguishable and should be an exception (AOB 311–312.)

XVI. THE CUMULATIVE EFFECT OF THE CHALLENGED ACTIONS OF THE TRIAL COURT, PROSECUTOR, AND DEFENSE ATTORNEY—WHETHER INDIVIDUALLY THEY WERE ERRORS OR NOT—WAS TO DEPRIVE APPELLANT OF A FAIR TRIAL AND A RELIABLY-DETERMINED SENTENCE

Appellant fully briefed his contention that he is entitled to reversal if his trial was unfair or its result unreliable. (U.S. Const., 8th & 14th Amends., and other authorities cited at AOB 318–321.) Unlike the principle invoked in a standard cumulative-error claim, this proposition applies irrespective of whether appellant's individual claims of error regarding challenged events in the court below are sustained or rejected, whether because of the scope of a trial judge's discretion, the forfeiture doctrine, or for other reasons. (AOB 317–321; see also *Chambers v. Mississippi* (1973) 410 U.S. 284.) Respondent acknowledges that appellant set forth this premise and does not dispute it. (RB 115.)

Appellant also explained with specificity how actions in the court below which were challenged in the preceding portions of the brief—whether cognizable error, merely problematic, or problematic only in the context of other occurrences at trial—synergistically created effects on the jury that undermine confidence in both the guilt and penalty outcomes, to a degree that the judgment cannot constitutionally be affirmed. (AOB 321–325.) As with the preceding claim, respondent declines to engage the actual analysis. Respondent simply asserts that there were no errors,[1] that the trial was fair, that appellant deserves his sentence, and that any errors were harmless individually

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[1]Respondent treats this statement as dispositive, despite its failure to contest the proposition that the cumulative impact of all of the challenged actions can create error, whether or not they are cognizable as errors individually.

and cumulatively. (RB 115–116.) Appellant therefore relies on the opening brief, trusting that the Court will review, consider, and respond to the analysis set forth therein.

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XVII. APPELLANT'S JURY SHOULD HAVE BEEN REQUIRED TO AGREE THAT HE COMMITTED EITHER WILLFUL, DELIBERATE, AND PREMEDITATED MURDER OR FELONY MURDER

Appellant urges this Court to reconsider its holdings that jury unanimity on the basis for a first-degree murder conviction—felony-murder or premeditation—is not required. (AOB 328.) Respondent urges the Court not to reconsider that holding. (RB 116.) Appellant relies on his opening brief.

XVIII. CALIFORNIA'S DEATH-PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION, FALLS SHORT OF INTERNATIONAL NORMS, AND VIOLATES INTERNATIONAL LAW

Appellant urges this Court to reconsider its holdings that various aspects of the California death-penalty statute, as interpreted by this Court and applied at appellant's trial, separately and together violate the United States Constitution, fall short of international norms, and violate international law. (AOB 329–351.) Respondent urges the Court not to reconsider those holdings. (RB 117–125.) Appellant relies on his opening brief.[1]

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[1]In support of the claim that the jury should have been instructed on the prosecution's burden of persuasion as to death being the appropriate penalty, appellant has cited the Evidence Code and appellant's due-process right to state-law protections. (AOB 335–337.) Respondent, recognizing that this is "a new twist," beyond what this Court has previously considered, has responded substantively, but only to a subsidiary point regarding a hypothetical penalty retrial in which no evidence has been presented and the jury has before it only the guilt-phase verdicts. (RB 121–122.) Using this logical extreme to illustrate the need for some allocation of a burden of persuasion, appellant pointed out that absent such allocation, a defendant could be sentenced to

(continued...)

CONCLUSION

For all of the reasons stated above, the convictions on counts I through IV and the death judgment must be reversed; retrial should be permitted only on charges of second-degree murder (because of the insufficiency of the evidence of a greater offense at the first trial); the purported elderly-victim enhancements must be stricken; and—should any judgment of guilt stand—the restitution fine should be reduced to the statutory minimum of $200.

DATED: April 30, 2012

Respectfully submitted,

Michael P. Goldstein,
Attorney for Appellant Thomas Potts

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[1](...continued)
death even in that situation. (AOB 336.) Respondent answers that such a jury could not impose a death sentence because it could not conclude that aggravating circumstances outweighed mitigating ones. (RB 121.) Respondent overlooks that factor (a), the circumstances of the offense, includes any special circumstances that were proven. Since at the opening of a penalty retrial the special-circumstances verdicts are before the jury, it could, in fact, conclude that aggravation outweighed mitigation.

More importantly, the point was ancillary to appellant's argument. The basic statutory/due-process claim is unanswered. Here, as well, therefore, appellant relies on the opening brief.

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

I, Michael P. Goldstein, am the attorney appointed to represent Thomas Potts in this automatic appeal. I conducted a word count of this brief, using the word-processing program used to prepare the brief. On the basis of that count, I certify that this brief is 81,343 words in length, excluding the tables and certificates.

Dated: April 30, 2012

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Michael P. Goldstein