IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT MARK EDWARDS, Defendant and Appellant.	)	Supreme Court Crim. S073316 Orange County Superior Court No. 93WF1180

APPELLANT'S REPLY BRIEF

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE
THE HONORABLE JOHN J. RYAN, JUDGE

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INTRODUCTION

In this brief, Appellant does not reply to those Respondent's arguments which are adequately addressed in his opening brief. The failure to address any particular argument or allegation made by Respondent, or to reassert any particular point made in the Opening Brief, does not constitute a concession, abandonment or waiver of the point by Appellant (*see*, ***People v. Hill*** (1992) 3 Cal.4th 959, 995 fn. 3, *cert. denied*, (1993) 510 U.S. 963), but rather reflects Appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I.

THE TRIAL COURT VIOLATED APPELLANT'S CALIFORNIA AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT IMPROPERLY REFUSED TO REQUIRE THE PROSECUTION TO PROVIDE A RACE-NEUTRAL EXPLANATION FOR ITS EXERCISE OF A PREEMPTORY CHALLENGE TO STRIKE THE ONLY AFRICAN-AMERICAN WOMAN ON THE PANEL

A. Introduction

Appellant made a timely ***Wheeler/Batson*** objection when the prosecutor excused the only African-American woman who was on the panel after she affirmed, under oath, that she was ready to vote for a death verdict, if the allegations against him were proved beyond a reasonable doubt. (C.T. 3775.) Any objective assessment of the prospective juror's background supports the conclusion that she would have been a fair – and even "pro-prosecution" – juror. She was a member of the Neighborhood Watch and an intelligence specialist in the Naval Reserves; she had already served on a jury that reached a verdict in a criminal case. (AOB 27.)

There is a notable and revealing disparity between the prosecution's painstaking examination of non-black prospective jurors regarding their attitudes towards the death penalty before he exercised preemptory challenges and the single query posed to Ms. Mickens about her "personal

thoughts" regarding the penalty before he summarily dismissed her. As noted in Appellant's Opening Brief, although Ms. Mickens replied that she had not resolved those "personal thoughts" about "whether society should or should not have the death penalty," her sworn written and unequivocal position on whether she would vote for death was expressed as follows:

> "I thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states, we have it so therefore I am prepared to obey the law of the land. On a personal level, I will continue to ponder." (C.T. 3773.)

No fair assessment of this strong and forthright statement of intent can characterize it as "equivocation about the death penalty." (RB 31.)

Respondent does not attempt to discuss or distinguish the precedent favoring Appellant's position cited at page 34 of his Opening Brief. As set forth below, Respondent's own citations are easily distinguishable and, indeed, in one important aspect, squarely contradicts one of the arguments which it advances to oppose Appellant's demand for a new trial. Respondent also does not dispute Appellant's contention that the passage of time since the trial makes a remand, in lieu of a new trial, impractical. (AOB 36.) Having said all of this, Respondent's contentions can be dismissed as either legally irrelevant or factually unsupported by the record.

B. A Prima Facie Case of a Race-Based Challenge was Made Since the Trial Court Used the Wrong Standard to Evaluate Appellant's Challenge

The trial court held that Appellant did not make a prima facie showing of discrimination because it failed to meet its "burden of showing that there (was) a strong likelihood that Mr. Brent excused this lady because she was African-American, not because she had some reservations about the death penalty." (R.T. 1809, Lines 11-15; emphasis supplied.) In so doing, the trial court expressly applied an incorrect – and far too demanding – standard to evaluate Appellant's challenge.

In ***Johnson v. California*** (2005) 545 U.S. 162, the United States Supreme Court reversed ***People v. Johnson*** (2003) 30 Cal.4th 1302, wherein the California Supreme Court confirmed that the established California standard to show a prima facie case was that it was "more likely than not" that the challenges were based on group discrimination. (***People v. Johnson***, *supra*, 30 Cal.4th at 1312-18.) The United States Supreme Court held this standard to be too demanding for federal constitutional purposes. Under ***Batson***, the Court said, the prima facie burden is simply to "produc(e) evidence sufficient to permit the trial judge to draw an inference that

discrimination has occurred." (***Johnson v. California***, *supra*, 545 U.S. 162, 170.)

As in ***People v. Zambrano*** (2007) 41 Cal. 4th 1082, *cert. denied*, (2008) 128 S. Ct. 1478, Appellant's trial occurred years before ***Johnson v. California*** announced that California was applying the wrong legal standard. In ***Zambrano***, the trial judge did not state which standard he applied so there was no certainty that he applied the correct standard. In such a case, ***Zambrano*** held that the reviewing court cannot defer to the trial judge's prima facie ruling. (***People v. Zambrano***, *supra*, 41 Cal.4th 1082, 1105.) The appellate court should "assume, without deciding, that defendant did satisfy the first, or prima facie, step of ***Batson*** and ***Wheeler***" and proceed directly to the second and third steps of the analysis. (***People v. Zambrano***, *supra*, 41 Cal. 4th at 1106.)

Here, the argument to disregard the trial court's finding is even more persuasive than in ***Zambrano*** since the trial court explicitly rejected the challenge upon a standard than was too high. In any event, even under the trial court's erroneous standard, a prima facie showing was made. As the defense argued below, "(Ms. Mickens) indicated that she could be fair. She indicated that she would have an open mind at the penalty phase. She indicated that she could impose either penalty." (R.T. 1809, Lines 21-24.)

A race-neutral explanation was therefore required so that the trial court could discharge its obligation to make a "sincere and reasoned" attempt to determine whether the challenge was motivated by "purposeful racial discrimination." (***People v. Hall*** (1983) 35 Cal.3d 161, 167-68.)

C. The Prosecution did not Satisfy its Burden to Provide a Race-Neutral Explanation for its Challenge

Citing ***People v. Harvey*** (1984) 163 Cal.App.3d 90, 111, Respondent concedes that the exclusion of even a single prospective juror may be the product of an improper group bias, but argues that "as a practical matter ... the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (RB 30.) Undoubtedly, a pattern of anything is difficult to establish from one of two examples, but this readily apparent circumstance is irrelevant since this court has had held that "a ***Wheeler*** violation does not require systematic discrimination (*case cited*) and is not negated simply because both sides have dismissed minority jurors or because the final jury is 'representative.'" (***People v. Arias*** (1996) 13 Cal.4th 92, 136 – 137, *cert. denied.* (1997) 520 U.S. 1251.)

Respondent's argument that there was no "theoretical gain" for the prosecution to improperly exclude a person of color from the jury is both

speculative and, again, legally irrelevant. (RB 31.) As the trial court recognized, a defendant need not be a member of the excluded minority to raise a ***Wheeler/Batson*** challenge. (R.T. 1809, Lines 5 – 6.) Accordingly, controlling precedent focuses on the prospective juror's background and responses to determine whether a race-neutral explanation can be inferred to justify the preemptory challenge.

The record before the trial court shows that there was no "theoretical gain" for the prosecution to exclude Ms. Mickens on any other ground but her race. The prosecution had every reason to retain Ms. Mickens as a juror, based upon her professed attitudes and background; there was nothing – save her race – to distinguish her from the unchallenged jurors. Indeed, the prosecution had no apparent hesitation seating a non-African-American juror whose responses during voir dire displayed far a greater "pro defense" bias than those of Ms. Mickens. Francine Kulp was asked, "How so you feel about people who have drug and alcohol problems?" She replied, "I feel sorry for them." (R.T. 1724.) From informal discovery, the prosecution well knew by that point in the proceedings that Appellant's guilt and penalty phase defense was likely to rest upon proof that he suffered a drug and alcohol-induced blackout on the night of the murder. (R.T. 154.) Nevertheless, after characterizing Ms. Kulp's reply as "very human, very

compassionate," the prosecution allowed her to be sworn in as a juror, without a murmur. (R.T. 1724.)

Respondent alleges that the record shows a race-neutral reason for excusing the prospective juror, yet fails to identify it. (RB 31.) Compare, (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1118, where, after a detailed analysis of the jurors' voir dire responses, the opinion accepted the prosecutor's race-neutral explanations challenging African-American prospective jurors who expressed either "significant" religious, moral, or other qualms that would have made it "very difficult" for them to have voted for death, unique personal experiences that would have impaired an ability to properly evaluate circumstantial evidence, or evasive attitudes when asked about political views on the death penalty." Moreover, even if Respondent could hypothesize a theoretical justification ten years after the trial, the law places the burden upon the prosecutor himself to advance a race-neutral explanation when, as here, the totality of the record gives rise to an inference that he acted with a discriminatory purpose against a cognizable group.

Respondent misplaces its reliance upon ***People v. Cornwell*** (2005) 37 Cal.4th 50, to support its argument that the record in this case is "devoid of any suggestion that the basis of the challenge ... was even close or

suspicious." (RB 31.) In ***Cornwell***, the African-American who was challenged had a wealth of attitudes and opinions that rebutted an inference that a race-based decision was made to remove her. These included an aunt who the juror believed had been wrongfully convicted of homicide, an opinion that blacks were treated worse than whites by the justice system, and a belief that law enforcement had not thoroughly investigated crimes against her family solely because of its race. When faced with this record, the ***Cornwell*** opinion concluded:

> "... her voir dire disclosed a large number of reasons other than racial bias for any prosecutor to challenge her, including but not limited to her personal experience with an allegedly unfair homicide prosecution of a close relative and her express distrust of the criminal justice system and its treatment of African-American defendants ... nor do we find anything else in the record to supply a basis for an inference that the prosecutor was motivated by race or prejudice. (***People v. Cornwell***, *supra*, 37 Cal.4th 50, 70)."

Lastly, unlike here, the prosecutor in ***Cornwell*** advanced a plausible race-neutral explanation for his challenge, even though he was not required to do so by the trial court. He reasonably explained a concern that the juror might not give the prosecution a fair hearing in a case involving a black defendant because she believed that blacks were treated unfairly by the judicial system and "she had relatives ... treated like Rodney King." (*Id.* at 69.) Here,

because the trial court failed to require an explanation, the record is devoid of any direct or circumstantial evidence that reasonably supports a conclusion that the preemptory challenge was not impermissibly motivated by race.

D. Conclusion

The United States Supreme Court "assumed that in ***Batson*** that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. (It) did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainly – that the challenge was more likely than not the product of purposeful discrimination." (***Johnson v. California,*** *supra*, 545 U.S. 162, 170.) Appellant requested nothing more than for the prosecutor to advance a race-neutral explanation for his challenge to an ostensibly well-qualified, intelligent, and neutral juror who had repeatedly and under oath voiced her readiness to follow all aspects of the law, including voting for the death penalty, if appropriate. There was nothing in her background or responses to suggest that her thoughts on a "personal

level" would interfere with her expressed willingness to impose the death penalty. Indeed, the prosecutor never asked her about the nature of those personal thoughts, their basis, how long she had held them, or any other inquiry that would have supported a good faith assessment of her fitness to serve; he simply summarily excused her, leaving her race as the only reasonably inferred basis for his otherwise inexplicable decision. As in ***Miller-El v. Dretke***, in view of Ms. Mickens' outspoken willingness to follow the death penalty law of the land, "it would be reasonable to expect that the prosecution would have asked further questions to resolve any doubts he had about (her willingness) to impose it before getting to the point of exercising a strike, if such doubts were truly his motivation." ((2005) 545 U.S. 231.) His failure to do so, when combined with Ms. Mickens' pro-law enforcement background and responses, surely met the "minimal" prima facie burden that Appellant was required to meet to compel an explanation of his decision. ***St. Mary's Honor Center v. Hicks*** (1993) 501 U.S. 502, 506. ***Batson/Wheeler*** error is prejudicial per se and reversible because of the fundamental right involved. (***People v. Wheeler*** (1978) 22 Cal. 3d 258, 283.) Accordingly, the conviction must be reversed.

II.

THE PANEL THAT OVERHEARD A PROSPECTIVE JUROR'S PREDICTION, BASED UPON YEARS OF EXPERIENCE AS A PRISON GUARD IN CALIFORNIA, THAT APPELLANT WOULD TO POSE A DANGER TO THE SAFETY OF OTHERS IF HE WAS NOT EXECUTED SHOULD HAVE BEEN DISMISSED SINCE THAT PREDICTION CREATED A "STRUCTURAL ERROR" WHICH COULD NOT BE CURED BY AN ADMONITION

Appellant's failed attempt to shield himself from the prejudice of Randy B.'s experiences and conclusions by fashioning an admonition to the jury does not necessarily resolve the issue of whether the panel was irreparably tainted when, as here, a timely objection and motion to dismiss the panel was made. Likewise, Appellant's timely objection and effort to fashion an admonition hardly operates as a waiver of his right to raise the issue, as Respondent contends. (RB 40) Unlike ***People v. Ramos*** (2004) 34 Cal. 4th 494, upon which Respondent relies, Appellant was not on notice from the jurors' responses to a written questionnaire that potentially prejudicial remarks might be forthcoming so that an *in camera* examination could be requested. The trial court simply asked Randy B., "Can you be an objective juror?" A lengthy narrative about the continuing danger that inmates posed to their keepers then sallied forth.

In ***Mach v. Stewart***, the remark of a prospective juror who was a children's social worker that she had never been involved in a case in which a child had falsely accused an adult of sexual abuse created a "structural error" that required reversal, even though an admonition was given by the trial court and there was no direct evidence that any juror was improperly influenced by the remark. (***Mach v. Stewart*** (9th Cir. 1998) 137 F.3d 630, *cert. denied*, ***Mach v. Schriro*** (2006) 546 U.S. 1218; *see*, ***People v. Hines*** (1997) 15 Cal.4th 997, 1038, *cert. denied*, (1998) 522 U.S. 1077, a mistrial is required if an error cannot be cured by an admonition or instruction.) Thus, while jurors are generally presumed to understand and follow instructions, precedent recognizes that those self-same instructions are not always effective to prevent unfair prejudice. Moreover, as the trial court recognized, Appellant's reluctance to voir dire the jury about the impact of those remarks was reasonable, since to do so would increase their prejudicial impact by attracting attention to them. (R.T. 1715, Lines 19 – 25.)

Respondent seeks to distinguish this case from the record in ***Mach*** by drawing a false distinction between the mere "personal opinions" expressed by Randy B. and the responses by the juror in ***Mach***, which was "information specific to the case." (RB 38.) In both cases, the prospective jurors related personal experiences in their professions that were directly

relevant to a case-related issue. In ***Mach***, it was the question of whether an accusation of abuse by a child against an adult was generally reliable; here, it was a question of whether life imprisonment was an effective deterrent to future violence.

No fair reading of Randy B.'s pointed and graphic observations and conclusions about the potential threat that hundreds of inmates with whom he was experienced posed to the safety of his fellow correctional officers can support a characterization that they were merely "personal opinions" about the California Youth Authority, as Respondent alleges. (RB 38.) Rather, as in ***Mach***, the jury was informed of professional experiences, which bore upon a material issue that they would be called upon to decide. Similarly, Randy B.'s preference for the death penalty, based upon his professional experiences in prison, cannot be compared to a juror who generally stated that he could not be fair because of his law enforcement background. (RB 39.) In the latter example cited by Respondent, the jury is not informed of specific professional experiences, which are likely to prejudice their fair evaluation of a material issue. Indeed, neither the trial court nor the prosecution viewed Randy B's disclosures in a dismissive light, as evidenced by their willingness to admonish the jury to disregard them. (R.T. 1735 – 1736.)

Respondent's attempt to analogize the record to that in ***People v. Cleveland*** (2004) 32 Cal.4th 704, is similarly misguided. In ***Cleveland***, the prospective juror did not regale the panel with professionally-based experiences and conclusions which were directly relevant to issues that some of them would be called upon to resolve. He simply stated his opinion that the death penalty was too seldom used because of unspecified "legal obstructions." (*Id.* at 735.) No request was made, as here, to dismiss the panel. No request was made, as here, for an admonition to the jury to disregard his remarks. The trial court in ***Cleveland*** quickly conducted the balance of the voir dire *in camera*, once it became evident that the jury held potentially prejudicial attitudes. (*Id.* at 735.) Here, even after Randy B stated that if "(inmates) just have life ... they are still effecting people ... there are still victims inside correctional institutions ..." (R.T. 1700), the trial court pursued the point before the entire panel and elicited an account of an inmate in Chino who recently beat someone to death, as well as Randy B.'s conclusion that it would be "very hard not to go for the death penalty" because "I deal with hundreds of them that are in for life, and I know what it is like in there." (R.T. 1700 – 1701.)

Finally, in ***Mach***, the appellate court found that a reversal was necessary even after the trial court emphasized to the panel that it was to

base its decision on the evidence at trial and even after the trial court received no response when it asked the jurors if anybody disagreed with that statement. (***Mach v. Stewart***, *supra*, 137 F.3d 630, 633.) The record in this case does not even provide this pale assurance, found wanting in ***Mach***. Here, notwithstanding responses from the panel that assured the trial court that virtually all of them overheard Randy B's prejudicial remarks, it only asked the panel if any of them had any "questions" about those remarks; no juror was ever asked, or ever said, that they would ignore the remarks or follow the admonition delivered by the court. Accordingly, since Randy B.'s comments constituted "structural error," the trial court erred when it denied Appellant's motion to dismiss the panel; a new trial is required.

III.

EVIDENCE OF THE DELBECQ MURDER, COMMITTED SEVEN YEARS BEFORE THE CHARGED OFFENSES, AND OVER 5,000 MILES AWAY, WAS INADMISSIBLE TO PROVE IDENTITY

A. The Evidence Need Only be Analyzed as to whether it was Admissible to Prove Identity, requiring the Highest Degree of Similarity under California Law

Respondent begins its analysis by noting that Evidence Code section 1101 authorizes the admission of "other crimes" evidence to prove a number

of potentially relevant circumstances, including identity and intent, and that a defendant's plea of not guilty placed them at issue for purposes of deciding the admissibility of the uncharged misconduct. (RB 45.) While this generality may be true, it obscures a key fact about this particular record, conceded by the trial court and prosecutor: without the admission of the Delbecq murder to prove the identity of the assailant in the charged offense, the evidence against appellant was insufficient as a matter of law. (AOB 94 – 101; Argument III (D) (4) (b) and citations to the record therein.) As developed in the Opening Brief, this key circumstance is of the first importance when evaluating the probative value of the proffered evidence and its potential for undue prejudice. In the latter connection, all parties below agreed that because the prosecution's case against Appellant was legally insufficient unless the jury was allowed to consider evidence of the Delbecq murder, that evidence need only be evaluated under the most rigorous standard of admissibility: that used to determine whether it was admissible to prove identity.

"The Court	This is an I.D. case. Either we let it in for I.D. purposes and then whatever else may be relevant or it don't [*sic*] come in. If it doesn't come in for I.D., the case is over. Finished, at least based on what you have told me so far.
Mr. Brent	That is true.

(R.T. 1199, Lines 1 – 6.)

* * *

The Court	Now, on the I.D. issue, if the jury doesn't find the acts are similar enough, there is going to be an acquittal.
Mr. Brent	That is right.

(R.T. 1942, Lines 6 – 11)."

B. The Justification Advanced to Admit the Uncharged Murder was a Rhetorical Device, deeply Prejudicial and Never Proven

In order to be admissible to prove identity, the uncharged offense, when compared to the charged offense, must "display a pattern and characteristics ... so unusual and distinctive as to be like a signature." ***People v. Ewolt*** (1994) 7 Cal.4th 380.) Respondent argues that "the inference of identity does not depend on one or more or nearly unique common features because features of substantial but lesser distinctiveness may result in a distinctive combination when considered together." (RB 48.) Again, while this generality may be true, it obscures the central theme advanced by the prosecution in support of the admissibility of the Delbecq murder: the alleged use of a hair mousse can to assault both women. (AOB 58.)

Respondent is much truer to the evidence than the prosecutor below; it argues that the evidence supports "an inference" that the injuries to Mrs. Deeble's genital area were "consistent" with those inflicted by a mousse can. (RB 49.) Respondent's choice of words is no accident; it does not contend that the record establishes even a probability that the mousse can caused the injuries suffered by Ms. Deeble, nor could it. In this regard, Respondent's modest contention goes a long way to demonstrate that the prosecution failed to meet its burden to demonstrate that the circumstances of the Delbecq murder had "substantial probative value" to establish the identity of Ms. Deeble's assailant. (***People v. Ewolt*** (1994) 7 Cal.4th 380, 404.) Moreover, as set forth in detail in Appellant's Opening Brief, even the modest factual assertion made by Respondent is unsupported by the record. (AOB 58 – 64; Argument III (D) (1) (b)).

Dr. Fukumoto did not testify that there was any reasonable inference that Ms. Deeble's injuries were caused by the canister discovered next to her bed or, indeed, that her injuries were caused by non-consensual sex. (R.T. 2153; R.T. 2162.) He admitted that he did not know what caused the injuries; it was "something that ... did not have any sharp edges." It was only upon the explicit prompting of the prosecutor that Dr. Fukumoto allowed that the mousse can was "consistent with an object that could have

caused these various injuries." (R.T. 2138.) This expansive causal universe was projected into infinity when Fr. Fukomoto was asked about the cause of the dilation of Ms. Deeble's rectum; he simply didn't know. (R.T. 2148.)

The serological evidence linking the can and its alleged cap to the assault on Ms. Deeble was similarly insubstantial. The test that reacted positively to the substance on the cap and the hair mousse can also reacts positively to substances other than blood. The substance was never proved to be blood (much less Ms. Deeble's) with the slightest degree of certainty; indeed, there was no credible evidence that the cap even belonged to the can. (AOB 61.)

Appellant's Opening Brief cited and discussed the records of numerous reported opinions, all of which support his argument that the probative value of the signature advanced by the prosecution was far, far too insubstantial to justify the conclusion that the crimes were uniquely similar. (AOB 61 – 64.) Respondent did not discuss this comparative analysis of the records with the prevailing case law nor cite a single case where "other crimes" evidence was admitted upon evidence of an alleged signature which is as inconclusive as here.

A survey of the leading reported decisions where "signatures" were found sufficient to justify the admission of other crimes evidence to prove

identity shows the reason for this omission; in each of them, the factual probability that the alleged "signature" existed was established with a degree of probability that far exceeds the ambiguity present here. For example, in ***People v. Carter*** (2005) 36 Cal.4th 1114, *cert. denied*, (2006) 547 U.S. 1043, cited by Respondent for the proposition that the "signature crimes need not be mirror images of each other," the degree of similarity was in dispute, but the fact the alleged signatures existed was not. In ***Carter***, there was no dispute that both sets of victims were strangled one day apart and that they were sexually assaulted and that their belongings were found approximately one week later in the defendant's possession. Here, as set forth above, it is the very existence of the alleged signature (assaults by mousse can) that Appellant disputes, along with the requisite degree of uniquely shared similarities. (*See also*, ***People v. Rolden*** (2005) 35 Cal.4th 646, 706, *cert. denied*, 546 U.S. 986, where the facts of the signature swap meet robberies were never in dispute, only their distinctiveness; compare, ***State v. Barriner*** (Mo. 2000) 34 S.W. 3d 139, cited at page 62 of the AOB, where admission of other crimes was rejected because the alleged signature itself was never established in the record.)

In absence of the "signature" that was advanced to justify the admission of the Delbecq murder, the balance of the "shared characteristics"

proposed by the Respondent do not come close to establishing the degree of unusualness and distinctiveness demanded by case law. Some the "shared marks" are common to home invasion robberies and assaults; it is not surprising or distinctive that victims in those cases are bound with materials found in their homes or that their possessions were ransacked. Others cited by Respondent were never established with any degree of probability at trial (*e.g.*, that "both Deeble and Delbecq ... suffered fractured noses" and "jewelry was missing from both." (RB 51.) Still others advanced by Respondent as similar were inconsequential generalities, rejected as distinctively shared marks by the trial court: viz, both apartments were on the first floor. (RB 51; R.T. 1186 – 1188.)

Appellant re-invites this court's attention to the opinion in ***People v. Rivera*** (1985) 41 Cal.3d 388 and ***People v. Alcala*** (1984) 36 Cal.3d 604, *cert. denied*, (1993) 510 U.S. 877, discussed at length at pages 68 – 69 of the Opening Brief, but ignored by Respondent. These cases reversed lower courts' decisions to admit other crimes evidence because it was not persuaded by "laundry lists" of alleged similarities that were not truly distinctive. Respondent also fails to comment upon Appellant's citation to the record of many dissimilarities between the charged and uncharged offenses, including the geographical and temporal distance between the two

crimes, the pronounced difference between the amount of physical trauma that each victim suffered, and the absence of any persuasive evidence that Ms. Deeble was the victim of a sexual assault. It is well-settled that dissimilarities such as these, as well as alleged similarities, must be evaluated to determine whether evidence introduced to prove identity is uniquely similar to the charged offense. (***People v. Balcom*** (1994) 7 Cal.4th 414, 427.)

C. Even Assuming that the Offenses were Sufficiently Similar to Justify the Admission of the Uncharged Offense, the Evidence should have Been Excluded under Evidence Code Section 352 Since the Probative Value of the Delbecq Murder to Establish the Assailant's Identity was Low and its Potential for Undue Prejudice was High

As set forth above, the probative value of the Delbecq murder to prove the identity of Ms. Deeble's assailant was extremely low, given the failure of proof that the "signature" of the crimes occurred, the balance of undistinguished similarities advanced by the prosecutor, and the substantial dissimilarities of place, time, and method between the two homicides. Respondent's citation of ***Ewolt*** to support its argument that that the probative value of the evidence was enhanced because it came from independent sources is inapposite. This circumstance was a relevant

consideration in ***Ewolt*** because the charged and uncharged offenses involved allegations of molestation from two of the defendant's step-daughters; the danger of fabricated similarities could not be ignored. (*Id.* at 405.) Here, Appellant does not contend that the circumstances of a murder which occurred seven years after the charged offense were fabricated to resemble it; rather, they simply don't match to any degree that case law has held to be sufficiently probative to justify admission of the uncharged act.

The potential for unfair prejudice is obvious. Indeed, the trial court said as much, commenting that the evidence of the uncharged crime was "highly prejudicial," but ruling that it could come in notwithstanding Appellant's challenge under Section 352 because it was "so highly probative (to prove identity) (I) don't see how we would ever find its evidentiary value would be substantially outweighed by its probative value." (R.T. 1943, Lines 13 – 14; R.T. 1951, Lines 12 – 16.) Yet, the relative strength of the evidence linking Appellant to the charged and uncharged offenses was as dissimilar as it could be; Appellant admitted to the jury that he had been convicted of the Delbecq homicide; without the evidence of that crime, the prosecution could not proceed against him in the Deeble homicide.

One searches in vain for precedent where the disparity in relative proof between the charged and uncharged offenses was anywhere near as great as it undisputedly is in this case. This disparity makes the danger of undue prejudice overwhelming, especially when the only argument advanced by the prosecution that Appellant committed the charged offense – from his opening remarks to his closing address – was "the Tale of Two Mousse Cans." (R.T. 1190; 1953; 3092; 3103) (*See*, ***Davis v. Woodford*** (9th Cir. 2004) 384 F.3d 628, 638 – 639, where the Court of Appeals found no undue prejudice from the joinder of two offenses because the evidence was "cross-admissible on the issue of identity and intent" and the state did not "join a strong evidentiary case with a much weaker case in the hope that the accumulation of evidence would lead to convictions in both cases. (*Case cited*)."

Lastly, the prejudicial impact from the improper admission of the Delbecq homicide was punctuated by the trial court's failure to properly instruct the jury about evaluating so-called "other crimes" evidence. All parties recognized that CALJIC 2.50 needed to be modified to conform to ***Ewolt***. (C.T. 935; R.T. 3120, Lines 22 – R.T. 3121, Line 23.) The instruction eventually delivered to the jury contained an incomplete recitation of the relevant, new standard of evaluation of other crime evidence

announced in ***Ewolt***. The instruction proposed by the defense added relevant, essential, and legally correct information, derived from the language of the opinion itself. (C.T. 881.(Respondent seeks to minimize the court's decision to truncate the relevant quotation from ***Ewolt*** by arguing that the two instructions are "almost identical." This assertion is untrue.

The instruction proposed by the defense went beyond instructing the jury that it must find some degree of distinctiveness and informed them how to do it. Respondent does not contend that the additional language was legally incorrect; rather, it contends that the language was "repetitious." In this regard, Respondent fails to distinguish the opinion in ***People v. Grant*** (2003) 13 Cal.App.4th 579, despite the lengthy discussion in the Opening Brief and obvious relevance to this case since that opinion held that the trial court erred when it failed to give a defense instruction regarding the use of other crimes evidence. (AOB 88 – 89.) There, as here, the defense instruction gave the jury guidance as to the degree of similarity necessary to find the proffered evidence relevant to prove identity.

Respondent also contends that the balance of the quotation from ***Ewolt*** proposed by the defense was argumentative because it "invited the jury to draw inferences favorable to Edwards on disputed issues of fact,

namely the dissimilarity or similarity of the Deeble and Delbecq murders." Respondent does not state what "favorable inference" the balance of the Supreme Court's quotation proposed by the defense encouraged the jury to make.

In fact, a fair reading of the proposed quotation incorporated into the instruction reveals that it does not encourage any inference; it simply tells the jury how to properly determine whether the two crimes are "sufficiently" distinctive to support an inference that the perpetrators are identical; that is, "the pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature." Appellant contends that this language in the proposed instruction from the *Ewolt* opinion is similar to the instruction improperly denied in ***Grant.*** The ***Grant*** instruction told the jury that the strength of the inference that the crimes shared a perpetrator should depend on the number and degree of the shared marks. Here, the proposed instruction told the jury that the strength of that same inference depended upon whether the characteristics were so unusual and distinctive as to be like "a signature." If anything, the evaluative standard proposed by the defense was more comprehensible to the jury then the formula discussed in ***Grant***; in any event, unlike ***Grant***, this Court found the language to be sufficiently informative, necessary, and non-repetitive to include it in the ***Ewolt*** opinion

itself. Accordingly, the court's refusal to deliver proper instructions on a pivotal issue rendered the trial fundamentally unfair and created an unreliable verdict. A new trial is required. (***People v. Petznick*** (2003) 114 Cal. App. 4th 663, 681.)

IV.

THE TRIAL COURT'S ADMISSION OF APPELLANT'S CONVICTION OF THE "SIMILAR ACTS" MURDER TO IMPEACH HIS CREDIBILITY VIRTUALLY GUARANTEED HIS CONVICTION OF THE CHARGED OFFENSE

A. Respondent's Application of the ***Beagle*** Factors Ignores Crucial Aspects of the Record, as well as Finesses several Legal Points raised by Appellant

Evidence Code Section 352 compels the trial court to evaluate the probative value to prove dishonesty that the crime used for impeachment carries. While the so-called Victim's Bill of Rights authorizes the admission of any prior felony for purposes of impeachment, it is not mandatory. Thus, it is necessary to recognize that "acts of violence ... generally have little or no bearing on honesty or veracity" in order to properly evaluate the ***Beagle*** factors. (***People v. Rollo*** (1997) 20 Cal.3d 109, 118; AOB 108.) As former Chief Justice Burger commented, "in common human experience, acts of

deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence ... generally have little or no direct bearing on honesty or veracity. A 'rule of thumb' should be that convictions which rest on dishonest conduct relate to credibility where as those of violent or assaultive crimes generally do not...." (***Gordon v. United States*** (D.C. Cir. 1967) 383 F.2d 936, 940 – 941, cited with approval, ***People v. Beagle*** (1972) 6 Cal.3d 441, 453. The trial court not only ignored this set of rule, it inverted it by finding that the Delbecq homicide was "a crime of moral turpitude, the worst kind of moral turpitude. Highly relevant on credibility. I don't know how I say, okay, Mr. Brent, you can't use it." (R.T. 2607, Lines 10 – 13.)

It is evident from the trial court's subsequent evaluation of the remaining ***Beagle*** factors that it gave vastly disproportionate weight to the mistakenly "highly" probative value that the murder conviction carried to impeach Appellant's credibility as compared to other factors: the murder conviction's similarity to the charged offense, and whether that conviction's admission was even necessary to present a fair picture of Appellant's credibility as a witness. These factors, all of which supported the conviction's exclusion as impeachment, received "short shrift," so to speak, by the trial court's fatally flawed analysis. (R.T. 2607 – 2614.)

B. The Jury was Told Throughout the Trial that the Murder Conviction, which was only Admitted to Impeach Appellant was, in fact, Identical to the Charged Offense and Irrefutable Proof that He Committed the Deeble Homicide

As a similarity of the conviction admitted to impeach a defendant increases to the charged offense, so does the danger that the jury will improperly consider it as proof of his guilt. (***People v. Castro*** (1986) 186 Cal.App.3rd 1211, 1216; *see*, ***People v. Gray*** (2007) 158 Cal.App.4th 635, 642: "By 'sanitizing' his convictions, (the trial court) reduced the potential prejudice of those `convictions. The court thus focused the jury's attention on how these crimes might affect (the defendant's) credibility rather than on how similar those crimes were to the offense for which he was on trial.") Here, Appellant's conviction was not "sanitized;" the opposite occurred. Appellant's jury was urged to consider the facts underlying the conviction for an "identical crime," admitted solely to impeach him, as proof that he committed the offense to which there was otherwise admittedly insufficient evidence to prove his guilt. Respondent's only reply to the unique potential for prejudice which the admission of a "similar act" conviction poses when it is admitted for impeachment purposes is to dismiss it as "one factor"

against the admission of that conviction. In truth, it is "one factor" above all others that should have persuaded the trial court to exclude it.

C. Even if the ***Beagle*** Factors Supported the Admission of the Murder Conviction as Impeachment, It Had No Probative Value Since There Were Ample Theft-Related Convictions Available for that Purpose

Finally, and most importantly, the body blow that was delivered to the defense was unnecessary as it was devastating. There was simply no need to admit the murder conviction to impeach Mr. Edwards; the prosecutor had ample felony convictions in 1994, 1998, and 1984 to impeach appellant's credibility without relying upon the additional fourth felony in 1994 of murder. These conviction were all for theft-related offenses which, as previously noted, far exceeded the murder conviction as probative evidence on the issue of credibility. This crucial and undeniable fact was never placed in the 352 balance by the trial court; yet, it illustrates beyond a doubt that the probative value of adding a superfluous conviction to the substantial felonies already available to impeach the defendant was vastly outweighed by the danger of improper, devastating prejudice.

In ***People v. Muldrow*** (1988) 202 Cal.App.3d 636, the appellate court approved the admission of prior felonies because, to do otherwise, would

imbue the defendant with a "false aura of veracity." (*Id.* at 647.) By stark and obvious contrast, the Edwards jury would not have been misled about his credibility if the trial court had admitted theft-related felonies in 1994, 1988, and 1984, but excluded a felony 1994 for an act of violence. The trial court's failure to choose the simple expedient of admitting three felonies involving crimes of deceit, yet excluding a superfluous conviction for an allegedly identical offense that carried an unsurpassed potential for unfair prejudice, denied Appellant a fair trial and ignored the cautionary admonition from this court in ***Beagle***:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. Where multiple conviction of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the evitable pressure on lay jurors to believe if he did it before he probably did so this time. As a general guide, those convictions which are for the same crime should be admitted sparingly. ***People v. Beagle***, *supra*, 6 Cal.3d 444, 453."

D. The Improper Admission of the Delbecq Murder Conviction Guaranteed Appellant's Conviction of the Charged Offense

The probability that the jury would improperly consider a conviction introduced solely for impeachment as proof of the charged offense is

unsurpassed in this case compared to any reported opinion. The jury heard throughout the trial that the two murders were identical, united as the "Tale of Two Mousse Cans." The trial court appeared to recognize the danger of prejudice which accompanies the admission of the underlying facts of a conviction admitted solely for impeachment when it cautioned the prosecutor to introduce "just the facts" of the burglary convictions and "nothing further on them." (R.T. 2614, Lines 9 – 14.) Yet, the jury was inundated with the details of the Delbecq murder. Indeed, as pointed out in the Opening Brief, Appellant's name wasn't even mentioned during the proof of the Deeble murder; a substantial portion of the evidence was devoted to the proof of the underlying facts of the Delbecq homicide. (AOB 98 – 100.)

Respondent suggests that the prejudice from the improper admission was mitigated because "the evidence of the Hawaii murder was strong and already presented to the jury.... (RB 67.) To the extent that defense counsel's final argument did not expressly controvert the prosecution's contention that Appellant was responsible for the death Muriel Delbecq, it is reasonable to find – based upon the trial record – that this tactical decision was compelled by the improper admission of his conviction for that crime.

During its opening statement, the defense did not concede Appellant's responsibility for the Delbecq murder; it merely acknowledged that the People's evidence would include a number of "strong indications" of his presence at the crime scene. (R.T. 1975; R.T. 1980.) While the defense acknowledged that the latent prints that were discovered at the Delbecq crime scene "resembled" Appellant's palm and footprints, there was no concession that they were his. Indeed, the defense opening statement was followed by a vigorous attack on the allegation that Appellant's palm and footprint were at the crime scene during the cross-examination of Sgt. Russell Crosson, the People's fingerprint expert. (R.T. 2259 – 2266.) Defense counsel's comment to the court that that he would not attack the People's evidence that Appellant's palm print was at the murder scene only followed his acknowledgment that the court had ruled that the murder conviction was coming into evidence, despite his objection. (R.T. 2613-13; R. T. 2608, Lines 16 – 23; R.T. 2611, Lines 4 – 8.) Based upon this record, any failure of heart by defense counsel to follow through with this vigorous attack upon the prosecutor's proof that Appellant committed the Delbecq murder can only be attributed to one obvious event at trial: The trial court's decision to admit a conviction that he did so.

Second, as defense counsel argued below, admission of Appellant's conviction of the Delbecq murder made it even more likely that the jury would ignore the limited "similar acts" instruction and conclude that since he was convicted of one brutal murder, he must also be guilty of the charged offense. (R.T. 2607, Lind 26 – R.T. 2608, Line 8) Again, this record is unique since the jury was asked to ignore two natural, but wholly improper conclusions to be drawn from the admission of the evidence of the "identical" Delbecq murder and Appellant's conviction for that offense: first, that the conviction conclusively established his responsibility for the Delbecq murder and, second, that this murder showed his propensity to commit the charged offense. Here, there was a certainty that the jury would consider the conviction as proof-positive that Appellant committed the Delbecq homicide, an otherwise disputed fact up to that point in the trial, as well as a virtual certainty that the conviction would be used as proof-positive that Appellant committed the Deeble homicide, rather than as impeachment of his credibility. There is simply no other reported case in which an instruction to the jury to consider a conviction solely for the purpose of impeachment is more clearly "a naïve presumption (that) all practicing lawyers know to be an unmitigated fiction...." (***Bruton v. United States*** (1987) 391 U.S. 123, 129.)

V.

THE INDIVIDUAL, AND SURELY THE CUMULATIVE, IMPACT OF THE TRIAL COURT'S EXCLUSION OF EXCULPATORY EVIDENCE DENIED APPELLANT A FAIR TRIAL

A. The Trial Court Unfairly Permitted the Prosecution's Expert to Offer an Opinion as to the Cause of Ms. Deeble's Injuries, but denied that same Opportunity to the Defense Expert Witness

Respondent does not contest that the hypothetical posed to Dr. Wolfe about the cause of Ms. Deeble's injuries was relevant; plainly, it was. Indeed, it was "uber-relevant" since the very same hypothetical had been posed to the prosecution expert to buttress its central claim of the "Tale of Two Mousse Cans:" that both women were assaulted in the same "signature" fashion. Instead, Respondent seeks to defend the trial court's different treatment of the parties' expert by arguing that the basis of Appellant's hypothetical was "speculative" and error, if it occurred, harmless. Respondent dismisses the trial court's decision to prevent Appellant's expert from testifying about the cause of Ms. Deeble's injuries by ignoring controlling precedence as well as pertinent aspects of the record.

Respondent asserts that since Paul Roy's testimony about his romantic relationship with Ms. Deeble was introduced *after* the court refused to allow the defense to offer expert testimony about the cause of her injuries, "the court's ruling was proper at that time." (RB 72.) Yet, as noted in the Opening Brief, this court has held that an expert opinion "need not be limited to evidence already admitted into evidence...." (AOB 122, *citing* ***People v. Boyette*** (2002) 29 Cal.4th 381, 449.)

Respondent also denigrates the foundational basis for Appellant's inquiry into whether Ms. Deeble's injuries were "consistent with vaginal and rectal intercourse" by arguing that there was no evidence regarding "actual contact" between Ms. Deeble and Mr. Roy on May 15th; therefore, the hypothetical was "not rooted in evidence." (RB 72.) The unspoken implication of Respondent's argument is that the relevant hypothetical was not rooted in direct evidence of sexual contact on the day of the murder. Not surprisingly, no authority is cited for this proposition. The prosecution's expert based his opinion that Ms. Deeble's injuries were consistent with those inflicted by the can found in the same room as her body on flimsier circumstantial evidence, as illustrated by his admission that he could not say what caused the injuries: "All I can say that it is something that – does not have sharp edges." (R.T. 2138 , Lines 8 – 19.) Although Respondent fails

to mention it in its summary of the alleged factual basis underlying the question posed to the defense expert (RB 72), the evidence not only established that Mr. Roy was actively attempting to see Ms. Deeble at the time of her murder, it also included testimony that the two had a "romantic relationship" at the time of the murder. (R.T. 2770 – 2771.) The message that he left on Ms. Deeble's telephone answering machine on the day her body was found called her "sweetheart." (R.T. 2773, Lines 13 – 18.)

Under these factual circumstances, the defense expert should have been allowed to "connect the dots," so to speak, in the same way that prosecution's expert was allowed to do so on the central factual contention that underpinned the prosecution's legal argument that the Delbecq and Deeble homicides were sufficiently "similar" to admit evidence of the uncharged murder and, ultimately, its argument to the jury that the alleged use of the mousse can to assault Ms. Deeble inexorably pointed to Appellant as her assailant. Unlike the prosecution expert, Dr. Wolfe was never allowed to squarely offer an opinion that the injuries to Ms. Deeble's genitalia were "consistent" with any particular causal agent. The probative value of Dr. Wolfe's eventual testimony that "medical literature" established that "microscopic changes to the tissue of the vagina and rectum" could be caused by both consensual sex and sexual assault, and that those injuries

could have been caused by a finger or a penis, is hardly comparable to the opinion allowed the prosecution's expert. (R.T. 2694.) While Dr. Wolfe eventually testified that he believed that the injuries could have been caused by "consensual sex as opposed to having been caused by sexual assault" based upon the medical literature (R.T. 2495), the probative value of that testimony was crippled by the earlier rulings by the trial court that his opinion regarding the cause of those same injuries was based on "facts not in evidence." (R.T. 2490 – 2492.)

B. The Trial Court's Exclusion of Edwards' Statements of Present Memory was Improper Under Code Section 1250(b) and did not Constitute Harmless Error

Without citation of authority, Respondent argues that the exclusion of testimony of Edwards' description of his then-existing memory of past events was proper under Code Section 1250(b). Section 1250(b) of the Evidence Code excludes the admission of evidence of a statement of memory or belief to prove the fact remembered or believed. Thus, "I remember that the traffic light was red" is not admissible under the "state of mind exception" to the hearsay rule because it is merely a declaration as to past events. (See generally, ***Witkin***, California Evidence, Section 203, Vol. I, 4th Edition.)

By contrast, the testimony offered about Edwards' description of his memory of past events (*e.g.*, a bag of perishable groceries and a physical assault by a former girlfriend) was not offered as an impermissible "bootstrap" to prove those past events but, rather, as argued by counsel below, to prove Edwards' than existing state of mind about those events. His ability to remember events after drinking was plainly relevant; the excluded testimony was, therefore, classically admissible under Section 1250(a) which provides that evidence of the statement of the declarant's then existing state of mind is not made inadmissible by the hearsay rule "(if) offered to prove the declarant's state of mind at that time ... when it is itself an issue in the action."

Respondent argues that the testimonies of Vincent Portillo and Janis Hunt about specific instances where Appellant confessed that he could not remember events preceded by a night of heavy drinking was cumulative since "according to Hunt, there were occasions where Edwards drank so heavily he actually experienced alcoholic blackouts." (RB 80.) Yet, the sum total of the testimony relied upon by Respondent to exclude all further testimony to circumstantially establish blackouts was as follows:

Q. Do you remember any occasions where Mr. Edwards was so intoxicated that he actually had alcoholic blackouts?

A. Yes. (R.T. 2639, Lines 14 – 17.)

All further attempts by Appellant to lay a foundation for this testimony as to time, place and actual events were excluded. (R.T. 2636 – 2646.) Therefore, testimony by other witnesses as to specific failures of recollection was in no way cumulative of what little the jury had been allowed to hear.

Lastly, the argument that the exclusion of this corroborative evidence was harmless because the jury rejected Edwards' testimony that he did not recall the events on the night that Ms. Deeble was murdered is simply not borne out by the record, as illustrated by the prosecution's closing argument. (RB 80.) As pointed out in the opening brief (AOB 139), the prosecution argued to the jury that Appellant's testimony that he was "blacked out" should be rejected precisely <u>because</u> it was uncorroborated by any witness:

> "And so the only words you have, the only person that knows whether or not that he had a blackout was Mr. Edwards. And you are back to the same issue, why do you believe Mr. Edwards? Why do you believe a wise, convicted burglar and a convicted murderer? Why would you believe him? (R.T. 2944, Lines 19 – 25.)"

The response to this highly effective rhetorical question was excluded by the trial court: the jury should credit Appellant's testimony because of the highly corroborative evidence from two independent witnesses that on a

number of occasions Appellant said that he could not remember various events after drinking and that, unlike his trial testimony, these statements by Appellant are conclusively reliable because he had no motive to feign forgetfulness at the time the statements were made.

C. The Trial Court's Exclusion of Mrs. Deeble's Statement to Paul Roy about her Daughter's Habit of Taking Things from her Apartment without Permission was Relevant to Prove Her Future Conduct

Respondent argues that Mrs. Deeble's confession to Mr. Roy that her daughter removed her personal belongings from her apartment without permission was irrelevant and inadmissible hearsay because "Edwards' offer of proof never specified, nor was the foundation established, as to when Mrs. Deeble made those statements to Mr. Roy." No challenge was made below to the temporal foundation of the proffered testimony. Indeed, defense counsel was cut-off during his discussion of the relevance of the testimony by the court's comment that it was "disingenuous;" the remark was followed by an immediate adverse ruling. (R.T. 2764, Line 15 – R.T. 2765, Line 4.) The abrupt truncation of the legal argument precludes a finding of an implicit weighing by the trial of the prejudice against the probative value of the proffered evidence. Rather, the record demonstrates that the trial court abused its discretion by failing, expressly, or even implicitly, to weigh the

prejudice of excluding testimony compared to its probative value. The potential prejudice of admitting the evidence was never mentioned by the prosecution or the trial court during the colloquy about the admissibility of Mrs. Deeble's statement to Mr. Roy. (R.T. 2761 – 2765.) (*Compare*, ***People v. Padilla*** (1995) 11 Cal.4th 891, 924, where arguments of counsel and comments by the trial court about potential prejudice were sufficient to infer the court engaged in the requisite weighing process" with ***People v. Meacham*** (1984) 152 Cal.App.3d 142, 156, where the record revealed a prima facie abuse of discretion as a matter of law because the trial court simply ruled it would deny a motion to exclude evidence without engaging in the required deliberative process.")

In any event, the potential prejudice of admitting this statement was low, neither Mr. Roy nor the declarant had any motive to fabricate their statements, nor was one suggested below or by Respondent. Conversely, as detailed in the opening brief (AOB 141 – 145), the relevance of Mrs. Deeble's accusation was high. The issues of whether the Appellant had access to a key hidden in Mrs. Deeble's apartment, and whether jewelry was taken during her assault, were undeniably in play. Based upon the inferential nature of the prosecution's proof that these facts existed, the jury was surely entitled to consider a reliable statement made by the victim that

her daughter was, in effect, stealing from her to infer (1) her future conduct (e.g., the removal of the key from outside her apartment and (2) that the missing jewelry was not taken by Appellant). (*See*, ***People v. Griffin*** (2004) 33 Cal.4th 536, 578 – 579, Section 1250 authorizes the admission of an out-of-court declaration of a 12 year old to prove the probability of her future behavior.)

D. The Summary Exclusion of Bondage Material Addressed to Mrs. Deeble's Son was a Prima Facie Abuse of Discretion and Prevented the Presentation of Key Rebuttal Evidence to the Prosecution's Central Claim that the Murders were Committed in a Uniquely Identical Fashion

A letter addressed to Steven Deeble, containing a newspaper article about a bondage murder, was found in the southwest bedroom of his mother's residence during the murder investigation. The letter and its contents were strikingly similar to the circumstances of Mrs. Deeble's homicide. The envelope was postmarked on May 3, 1986, less than a month before the murder. The victim had her hands bound behind her, just like Mrs. Deeble, and was partially unclothed, just like Mrs. Deeble. The bondage victim was murdered, just like Mrs. Deeble, and the cause of her death was lack of oxygen, just like Mrs. Deeble. The letter and its contents was offered by the defense as evidence, but summarily denied; the

prosecution did not specify a reason for its objection to the admission of the evidence nor did the court explain the cause of its exclusion. (R.T. 2842 – 2845.) As such, a prima facie abuse of discretion is established as a matter of law. (***People v. Meacham***, *supra*, 152 Cal.App.3d 142, 156.)

Respondent's argument that admission of the exhibit would have necessitated "a mini trial on Steven Deeble's involvement" (RB 91) is a parade of horribles that is not anchored in the record nor in common sense. Appellant had a right to present a complete defense under the Sixth Amendment and Article I, section 15 of the California Constitution. (*Holmes v. South Carolina* (2006) 547 U.S. 319.) The Constitution does not tolerate the exclusion of defense evidence if that exclusion is arbitrary or disproportionate to the purpose the exclusion was designed to serve. (*Id.*) The right to present a defense includes evidence that tends to show that someone other than the defendant committed the charged offense. (***People v. Avila*** (2006) 38 Cal.4th 491, 577-78.) Here, the evidence showed that Steve Deeble had moved out from his mother's home, but was living close by and was still receiving mail addressed to her house that contained material depicting Charles Manson and women in bondage. (R.T. 2043, 2089, 2094.) Steven Deeble's interest in a man who launched a spree of torture-murders in Southern California, as well as in photographs of women

in bondage, is undeniably and disturbingly similar to his mother's fate, more so when one considers the fact that this material was sent to the site of her death about two weeks before it occurred and was even present at its scene. While the similarity may not have been exact, its admissibility does not require so high a threshold. Even when there is compelling evidence of a defendant's guilt, the proffered evidence need not definitively prove his innocence in order to be admissible. (*see,* ***People v. Cash*** (2002) 28 Cal.4th 703, 727: "Evidence that fall short of exonerating a defendant may still be critical to a defense.") The evidence pointing to Steve Deeble may have been circumstantial, but the evidence pointing to Appellant was equally so. Indeed, unlike Appellant, there was direct evidence tying Steve Deeble to the decedent (a familial relationship) and the scene of the murder (receipt of mail there). The admission of Exhibit C would not have been time-consuming nor confusing, unless one includes within that term evidence that logically points in a different direction from that espoused by the prosecution. In that sense, all defense evidence is "confusing."

In any event, the exclusion of Exhibit C ignores the additional, stand-alone relevance of the exhibit as it could have demonstrated to the jury that the supposed unique identity of the murders, pointing to a single assailant, was a rhetorical argument and not grounded in reality. The exhibit would

have allowed Appellant to respond that "bondage murders, are all-to-common fantasies as shown by the ironic fact that Ms. Deeble's own son indulged in them.

VI.

THE TRIAL COURT'S ERRONEOUS ADMISSION OF CONCLUSIONARY HEARSAY MADE IT IMPOSSIBLE FOR APPELLANT TO TEST THE RELIABILITY OF CLAIMS THAT UNSPECIFIED "SCIENTIFIC TESTING" ELIMINATED ALL SUSPECTS BUT HIM, AND THAT THE INJURIES SUFFERED BY THE VICTIM WERE INFLICTED BEFORE DEATH AND WERE PAINFUL ENOUGH TO CONSTITUTE "TORTURE"

A. Dr. Fukumoto's Opinions were both Inadmissible Hearsay and Lacked any Foundation

1. The Appellate Claim is Not Waived

Despite Appellant's repeated and timely objections to Dr. Fukumoto's testimony on foundational grounds, Respondent asserts that he has waived his right to raise the error because he did not specifically argue that its admission violated the Confrontation Clause. The decision in ***Crawford v. Washington*** (2004) 541 U.S. 36, which rejected the limited view that the admission out-of-court statements was outside the protection of the

Confrontation Clause and depended largely on state statutory rules of evidence, post-dated the trial by eight years. Yet, citing ***People v. Alvarez*** (1996) 14 Cal.4th 155, 186, *cert. denied*, (1997) 522 U.S. 829, Respondent contends that "(i)t remains the rule that in order to preserve an issue for appeal, there must be an objection on a specific basis." (RB 95.) Relevant case law after ***Crawford*** does not support Respondent's argument.

Constitutional claims are not waived when pertinent law at the time of trial "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. (*Cases cited.*)" (***People v. Turner*** (1990) 50 Cal.3d 668, 703) Here, as evidenced by case law, counsel could not have anticipated the ***Crawford*** opinion that substantially changed the standard for determining whether the admission of an out-of-court statement violated Sixth Amendment guarantees. (*see, generally*, ***People v. Geier*** (2007) 41 Cal.4th 555, 597 (***Crawford*** abandons the indicia of reliability test of admissibility; ***People v. Saffold*** (2005) 127 Cal.App.4th 979, 984, no waiver of confrontation challenge to hearsay evidence of proof of service to establish proper notice because "(a)ny objection would have been unavailing under pre-***Crawford*** law;" ***People v. Johnson*** (2004) 121 Cal. App. 4th 1409, 14411, fn.2, "failure to object was excusable since governing law at the time of the hearing afforded scant grounds for objection.")

2. Dr. Fukumoto's Description of Another's Observations and Conclusions was Testimonial Hearsay and a Violation of Appellant's Sixth Amendment Right to Confrontation.

Autopsy reports such as that relied upon by Dr. Fukomoto are testimonial hearsay within the meaning of ***Crawford.*** The report relied upon by Dr. Fukomoto was testimonial hearsay because it was made by a law enforcement agent (Dr. Richards) who prepared it with the express purpose of that report being offered at a criminal prosecution. (R.T.2122-24.) As a statement made by an agent of law enforcement in preparation for litigation, it implicates the core concern of ***Crawford***: the presentation of evidence against a defendant by the government without the opportunity for the defendant to cross-examine the witness who prepared that evidence. Notably, one of the cases cited by ***Crawford*** in support of its holding that testimonial hearsay is not admissible is ***State v. Campbell*** (1844) 1 S.C. 124. In ***Campbell***, the state court held that a statement obtained by a coroner was inadmissible because the witness had died and had not been cross-examined. The issue of the testimonial character of scientific reports has been hotly debated across the country and has split state courts. Indeed, in ***Melendez-Diaz v. Massachusetts***, No. 07-591, the United States Supreme Court granted certiorari to decide the following question: "Whether a state forensic

analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in ***Crawford v. Washington*** (2004)."

Against this background, Respondent has not cited any case that squarely approves the admission of autopsy results, performed by another. Its reliance upon ***People v. Geier*** (2007) 41 Cal.4th 555, to meet Appellant's challenge is unavailing, for a number of reasons.

a. ***Geier*** was Wrongly Decided

The ***Geier*** holding appears to be based upon a mixture of theories: both a business record act finding and a determination that laboratory analysis's report does not actually bear witness against the defendant at trial, but is merely a neutral recordation of facts. This holding is at odds with ***Crawford*** and ***Davis v. Washington*** (2006) 547 U.S. 813.

Preliminarily, there is no support for the application of the business record exception to Dr. Richards' statements, to which ***Geier*** alluded by noting that the analyst prepared the report during the conduct of her business activities. The common law exception for regularly kept business records does not encompass records generated for prosecutorial use. (*See*, ***Palmer v. Hoffman*** (1943) 318 U.S. 109, 113 – 114, records calculated for use in

litigation fall outside common law rule admitting business records.) The Federal Rules of Evidence likewise typically find documents prepared for the purpose of litigation, such as autopsy reports, to be inadmissible as exceptions to the hearsay rule. (Federal Rule of Evidence 803(6); *see*, ***Scheerer v. Hardee's Food Systems, Inc.*** (8th Cir. 1996) 92 F.3d 702, 706 – 707, *cert. denied*, (1999) 525 U.S. 1105, incident report prepared in anticipation of litigation found inadmissible; ***United States v. Blackburn*** (7th Cir. 1993) 992 F.2d 666, 670, *cert.denied*, 510 U.S. 949, lensometer report prepared at FBI's instruction, with the knowledge that that the information produced would be used in an ongoing criminal investigation, was produced in anticipation of litigation and therefore inadmissible.) This approach mirrors the requirement that records of law enforcement investigations can not come in under the public records exception to the hearsay rule. (*See*, Federal Rule of Evidence 803(8), or come in through the "back door" as business records; s*ee*, ***United States v. Bohrer*** (10th Cir. 1986) 807 F.2d 159, 162 – 163.) (IRS contact card not admissible as business record because the card was maintained for the purpose of prosecuting the defendant.)

Second, the high court observed in ***Crawford*** that "(i)nvolvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse – a fact borne out time and

again throughout history with which the framers were keenly aware." (***Crawford v. Washington***, *supra*, 541 U.S. 36, 56, fn. 7.) A forensic report, such as prepared by Dr. Richards, falls squarely within this class of evidence. As noted above, Dr. Richards' autopsy report prepared at the behest of law enforcement for later use at trial. As such, it was "an obvious substitute for live testimony because it does precisely what a witness does on direct examination; (it) is inherently testimonial." (***Davis v. Washington*** (2006) 547 U.S. 813, 830; *cited with approval,* ***People v. Osorio*** (2008) 165 Cal. App. 4th 603, 612.) Yet, arguably, ***Geier*** exempts a forensic report from the classic testimonial evidence merely because the analyst is making a contemporary recordation of his observations.

Geier's attempt to distinguish ***Crawford*** based upon the admission of "objective" recordation of facts is also inconsistent with Confrontation Clause protections, as construed by the Supreme Court. The argument that there was no Confrontation Clause violation because Dr. Richards merely recorded "objective facts" is unsupported by ***Crawford***. Such analysis leaves virtually untrammeled discretion to the trial judge to determine what type of recordation is an objective finding of fact, as opposed to an inadmissible matter of opinion or interpretation. The principle itself is not without controversy. Reasonable judgments may differ as to whether

descriptive and non-analytical findings are actually subject to differences in judgment and opinion. Accordingly. the application of an essential constitutional principle will now vary from judge to judge

This difficulty is not theoretical; it arose time and again during Dr. Fukumoto's testimony, much of which was a repetition of Dr. Richards' opinions, rather than his objective findings. Thus, Dr. Fukumoto testified that, according to Dr. Richards' descriptions, the lacerations on Ms. Deeble's right ankle were "caused by wires probably coming together and inflicting the injury." (R.T. 2130, Lines 11 – 13.) While this particular opinion of the absent declarant may not have been hotly contested, others most certainly were, including Dr. Richards' opinion that the break in Ms. Deeble's left ear drum was "incisional in type." Dr. Fukumoto used this opinion as the basis for his heavily contested conclusion that it was caused by the insertion of a "sharp pointed object." (R.T. 2127; R.T. 2151 – 2153). Similarly, Dr. Fukumoto reported Dr. Richards hotly disputed opinion that the "crescent on the bridge of the victim's nose was consistent with a fracture." (R.T. 2130 – 2131; R.T. 2142 – R.T. 2144.) These interpretative conclusions are hardly the objective recordation of facts that do not need to be tested under the Confrontation Clause. The devastating consequence of the untested opinions conveyed by Dr. Fukumoto is illustrated by the

prosecution's closing argument in which he relied upon them to persuade the jury that the victim was savagely beaten and tortured by Appellant. (R.T. 2924 – 2925; AOB 156 – 157, Argument VI (A) (2) (c).)

The ***Crawford*** court observed that admitting statements deemed reliable by a judge, without testing by the adversary process, is fundamentally at odds with the right of confrontation. The Confrontation Clause's goal is to ensure reliability of evidence, by a procedural guarantee. It is not satisfied if the trial court unilaterally declares the evidence to be "reliable." The Clause requires that the reliability of the evidence must be established in a particular manner: by testing it in the crucible of cross-examination. (***Crawford v. Washington***, *supra*, 541 U.S. 36, 61.)

In the recent case of ***Giles v. California***, No. 07-6053 (decided June 25, 2008), the United States Supreme Court rejected the approach of the ***Geier*** opinion, allowing the trial judge to make a case-by-case decision of whether an exception to the Confrontation Clause exists. In ***Giles***, the Supreme Court considered an argument that the Sixth Amendment did not prohibit the prosecution from introducing statements from a victim of domestic abuse to the police if the trial judge found that the defendant committed a wrongful act that rendered the witness unavailable at trial.

While the hearsay statements were accepted as "testimonial" by the Supreme Court, its conclusion that Sixth Amendment protection should not be abridged by judicially created exceptions undercuts the ***Geier*** formula of admitting out-of-court statements prepared for the express purpose of aiding the prosecution:

> "(T)he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions court's from time-to-time consider 'fair.' It is not the role of the courts to extrapolate from the words of the Sixth Amendment values behind it, and then enforce its guarantees only to the extent they serve (in those courts' views) those under lying values. The Sixth Amendment seeks fairness indeed – but seeks it through very specific means (one of which is confrontation that were the trial rights of Englishmen." (***Giles v. California***, supra.)

Thus, the test created by the ***Geier*** decision for determining whether statements are testimonial ignores ***Crawford*** and is inconsistent with the most recent pronouncement from the United States Supreme Court pertaining to the Confrontation Clause.

Other jurisdictions have also found that the results of so-called "objective scientific testing" are subject to ***Crawford*** Confrontation Clause Guidelines. Such evidence has been admissible only if the person who performed the tests testified at trial, or was unavailable and was previously

cross-examined by the defendant. In ***State v. Crager*** (Ohio Ct. App. 2005) 844 N.E. 2d 390, a DNA report was admitted at trial without the testimony of the analyst who actually conducted the testing. The appellate court held that that even though the report might otherwise constitute a business record under state law, it was testimonial because it was prepared as part of the police investigation which would be later available for use at trial. Although the witness stated that he had reviewed the analyst's work, the admission of his testimony about the results of that work was erroneous, since there was no showing that the analyst who conducted the testing was unavailable or had been cross-examined by the defendant; therefore, the court reversed the judgment. (*see also*, ***People v. Rodgers*** (N.Y.App.Div. 2004) 8 A.D. 3d 888, the admission of test results as a business record violates the Confrontation Clause since it was generated at the direction of the prosecution.) Here, Respondent does not challenge the Opening Brief's assertion that, at the time of trial, Dr. Richards was not "unavailable" within the meaning of the Evidence Code. The record reflects that Dr. Richards was simply retired at the time of Dr. Fukumoto's substitution. (R.T. 2122, Lines 4 – 10.) Appellant respectfully requests this court to reconsider its holding in ***Geier.*** Under the most recent precedent from the United States Supreme Court, Dr.

Fukomoto's testimony about the results of Dr. Richards' autopsy should have been excluded.

b. Admission of Dr. Richards' Observations and Opinions Fail Constitutional Muster, Even under the Three-Step Analysis Announced in the ***Geier*** Opinion

The hearsay statements of Dr. Richards were by a law enforcement agent. The declarant was under contract to the Sheriff's Office to produce the autopsy report. As ***Geier*** stated "... it is the single 'involvement of government officers in the production of testimonial evidence' that implicates Confrontation Clause concerns. (*Case cited.*) In this respect, we use the term agent not only to designate law enforcement officers, but those in an agency relationship of law enforcement. (*Id.* at 605.) Moreover, as with the DNA reports in ***Geier***, Dr. Richard's autopsy report was made for possible use at trial.

Geier found that the Confrontation Clause protections were not violated if the hearsay statement involved a "contemporaneous recordation of observable events rather than documentation of past events." (*Id.* at 603.) While the prosecution below made an attempt to establish a foundation for admitting Dr. Richards autopsy report as a business record, including

testimony that its entries were "fairly contemporaneous with the specific autopsy that (was) performed" (R.T. 2122 – 2124), is apparent from the record that the repetition of Dr. Richards' previously-described opinions fall outside the ambit of ***Geier's*** "contemporaneous recordation of observable facts" which are not protected by the Confrontation Clause.

Preliminarily, observations that were made "fairly contemporaneously" with a subsequent report are not identical to either the recordation of observation of the DNA analysis as she "was actually performing her task" found in ***Geier*** nor the California Evidence Code requirement that the "writing be made at or near the time of the act...." (California Evidence Code, Section 1271(b).) More importantly, Dr. Richards' opinions are plainly distinguishable from "observable facts." In the latter case, cross-examination is less likely to inform the trier of fact or otherwise yield useful information to the defendant. With regard to opinion testimony, however, the foundational bases are a necessary condition to the proper evaluation of the reliability of the testimony. As set forth above, much of Dr. Fukomoto's testimony simply relayed hotly contested opinions of Dr. Richards' which the defense had no ability to test by cross-examination. In any event, even assuming that no Confrontation Clause violation occurred by Dr. Fukomoto's recitation of another's opinions, that

testimony nevertheless should have been excluded because it lacked proper foundation.

4. Dr. Fukumoto's Opinions Lacked the Foundation to Enable the Trier of Fact Evaluate their Reliability; Therefore, They Should Not Have Been Admitted

Respondent argues that the lack of foundation for Dr. Fukumoto's key opinions regarding whether the wounds were inflicted before death and were "extremely painful" did not bar their admissions since "a failure to elaborate on the basis of his opinion goes to the weight of the evidence and not its admissibility. Thus, Edwards' objections that the opinions were conclusionary should be rejected." (RB 106.)

Respondent does not discuss or distinguish this court's opinion in ***People v. Cole*** (1956) 47 Cal.2d 99, 108 – 111, cited at page 172 of the Opening Brief for the proposition that expert opinion without adequate foundation should be excluded entirely from evidence. There, as here, it was argued that the absence of foundation went to the opinion's weight and not to its admissibility. (*Id.* at 109.) In a concurring opinion, Justice Schauer emphasized that the burden is upon the proponent or the evidence to establish adequate foundation; without "a factual base upon which the doctor

... could intelligently and reasonably support (his) opinion ... that opinion should not have been received in evidence." (*Id.* at 110.) Here, Dr. Fukomoto's cryptic comment that a "microscopic examination" supported his opinion that the wounds were "highly painful" and occurred before death falls far short of the ***Cole*** foundation requirements; the record is utterly silent as to what Dr. Fukumoto saw during his examination that led him to the opinion that the injuries were antemortum, and why those observations supported his otherwise counterintuitive belief that the microscopic injuries were "highly painful.". Similarly, there was no explanation from Dr. Fukumoto as to the reason that the lacerations that he observed in an area "full of lots of nerve endings, such as the victim's burst ear drum and the lacerations on her neck" would be highly painful, rather than merely painful or uncomfortable. Indeed, as noted in the Opening Brief, Dr. Fukumoto only expressed those expert opinions in response to improperly leading questions from the prosecution. (AOB 171.)

Finally, while Respondent argues that Dr. Fukumoto's expert opinions were necessary to assist the jury to determine whether the wounds caused "extreme physical pain," it also claims that "the evidence that Deeble suffered from extreme pain was overwhelming, even without Dr. Fukumoto's testimony." (RB 104.) The unspoken assumption of the latter

claim is that the jury was capable assessing pain from the injuries without the assistance of expert testimony; this claim is one of many advanced by Appellant as a reason for excluding Dr. Fukumoto's opinions. In any event, the jury's theoretical ability to disregard expert testimony, as with any evidence, does not render its improper admission harmless; were that the case, no evidence, no matter how prejudicial, would be barred from a jury's consideration.

4. The Admission of Dr. Fukumoto's Testimony Requires Reversal

Respondent's attempt to minimize the prejudicial impact of Dr. Fukumoto's testimony is belied by the record itself, which includes the prosecutor's heavy and repeated reliance on the physician's opinions throughout his closing argument to prove key elements of his case against Appellant. (AOB 175 – 176; Argument VI (A) (5).) Thus, even assuming that the evidence was admissible, its minimal probative value because of its pervasive lack of foundation was far outweighed by its prejudicial impact and a reversal is required.

B. The Unspecified Information on an Unknown Basis about the Results of Scientific Testing Conveyed to Sgt. Jessen by an Unknown Declarant Should Have Been Excluded

Respondent argues that testimony that unspecified information conveyed to Sgt. Jessen by unspecified laboratory personnel was admissible to rebut the defense claim that "the police investigation was less than thorough, and Edwards was improperly targeted by the police." (RB 116) On the contrary, Sgt. Jessens' state of mind and DNA testing were wholly immaterial to the limited attack on the adequacy of the investigation. That attack, such as it was, centered upon the investigation's failure to pursue a comparison between hairs found at the crime scene and exemplars of a number of individuals other than Appellant who were under suspicion. Although Respondent argues that an inquiry into Sgt. Jessens's state of mind was necessary to explain this investigative choice (RB 113; 115), it is plain from his own testimony that he knew nothing about that decision and that the choice to abandon the comparison had nothing to do with any DNA testing that may have occurred. (R.T. 2702, Lines 1-7; see Argument IX (A) (1), AOB pages 72-78.)

As a preliminary but important point, the claim that the police failed to pursue adequate testing of hair samples because DNA testing had eliminated all the suspects other than Appellant was never made by Sgt. Jessen in any reliable fashion; he was never asked by the prosecution to

describe the reason that he did not take a sample of urine or tissue from Ms. Deeble's toilet bowl or compare other hair exemplars besides Appellant's to hair found at the crime scene. Rather, as he did repeatedly throughout the trial with key witnesses on key points of proof, the prosecutor improperly led the witness to attest that the alleged results of DNA testing had caused him to suspend the investigation of other suspects. (R.T. 2818 – 2820; R.T. 2838 – 2839.) This persistent practice is not a mere niggle. It calls into question how much, if at all, DNA testing truly influenced the conduct of the investigation. Indeed, it calls into question whether DNA testing was done at all.

The foundational question of what scientific testing was done, when, where, by whom, and with what results, was never resolved on the record, despite a defense accusation that "(Sgt. Jessen) has no basis to form the opinion as to whether these people were eliminated by the DNA testing in the first place." (R.T. 2821, Lines 16 – 18.) Respondent ignores this central, foundational problem and simply assumes that the DNA testing occurred and supported the prosecution's decision to inject it into the trial, under the guise of rebuttal. Yet, elsewhere in its brief, Respondent acknowledges that " ... the record is not at all clear whether (the allegations that DNA testing was not performed) was accurate or not...." (RB 177.)

At a minimum, Due Process required the trial court to investigate the defense assertion that DNA testing did not eliminate others as donors before it allowed the prosecution to use that claim as rebuttal evidence. Instead, it did nothing to explore the foundational basis of the question, despite timely objections by the defense. Fundamentally, if testing never occurred, or if the results that were communicated to Sgt. Jessen at some unspecified time by some unspecified person did not "eliminate" other donors, the admission of the results of unspecified scientific testing was improper regardless of whether it was theoretically proper rebuttal.

Respondent's argument that the evidence was "highly relevant" and "more probative than prejudicial" is unpersuasive to any experienced advocate. A defense claim that more should have been done during an investigation is easy to make. By its very nature, that claim is speculative as to whether "more" would have assisted the defendant or simply accumulated "more" evidence of guilt. As a consequence, the claim is rarely successful when evidence beyond a reasonable doubt is introduced by the prosecution. Accordingly, the notion that an explanation by Sgt. Jessen was especially necessary is not self-evident. In any event, as rebuttal evidence, the punishment has to fit the crime, so to speak. Here, as set forth above, there is a serious question whether Sgt. Jessen abandoned the forensic testing of

other suspects because of DNA testing; he was never asked the reason for his decision, if indeed he made one, in any fair and open-ended fashion that would have produced a reliable response. The probative value of his testimony was further reduced to ground zero by the fact that there was no foundational inquiry conducted by the trial court to determine what scientific information the witness received, by whom, and when at the time he allegedly decided to abandon forensic testing of others. The trial court's failure to do so was astonishing in light of the assertions by the defense that the question lacked foundation. In any event, the probative value of Sgt. Jessen's testimony that "testing" influenced his investigative choices was wanting, to say the least.

Respondent concludes that the prejudice of introducing the unspecified results of scientific testing was less than its probative value. (RB 117.) It is difficult to imagine anything more prejudicial than the back door presentation to the jury of "scientific testing" that eliminated all suspects to save Mr. Edwards, in a case where all parties conceded that the evidence of guilt was otherwise insufficient as a matter of law, without the admission of "other crime" evidence whose similarity was hotly contested. Any fair reading of the record would conclude that the unpresented results of this "testing" must have given the jury a high degree of confidence in the

reliability of the prosecutor's claim that the assailant in crimes separated by seven years and thousands of miles of ocean was the defendant, standing alone among potential suspects at the conclusion of a scientific, objective analysis of evidence discovered at the scene of the Deeble homicide.

VII.

THERE WAS NOT SUBSTANTIAL EVIDENCE TO PERSUADE ANY REASONABLE JUROR THAT THE TORTUROUS ACTS CAUSED DEATH, THAT "EXTREMELY PAINFUL" INJURIES OCCURRED BEFORE DEATH, AND THAT THE ASSAILANT ENTERED THE RESIDENCE WITH THE INTENT TO COMMIT A BURGLARY

A. There was no Credible Evidence that the Victim Died as a Result of Torture, rather than Asphyxiation due to Ligature

The special circumstance allegation of torture requires proof of a first degree murder. The elements of torture by murder place the burden on the prosecution to prove that the torture caused the victim's death. Here, death was caused by asphyxiation due to ligature strangulation; no other contributory causes were established in the record. (R.T. 2139.) Nevertheless, *citing* ***People v. Proctor*** (1992) 4 Cal.4th 499, 430, Respondent contends that this court should consider all of Ms. Deeble's wounds to

determine whether torture caused her death. (RB 122 – 123.) While ***Proctor*** considered the "continuum of sadistic violence" to find death by torture, it is plainly distinguishable on its facts.

In ***Proctor***, the opinion rejected the appellant's contention that certain wounds were not inflicted for the purpose of causing death because it "ignored the additional evidence that her death was caused by manual and ligature strangulation after she not only had been bound, beaten, and stabbed ... but also had received a series of additional injuries ... inflicted over her entire body." (***People v. Proctor***, *supra*, at 530.) (*Emphasis supplied.*) Here, the sequence of the various injuries identified during Dr. Fukumoto's testimony was never established, with the single exception of those to her genitalia. Thus, Respondent's lengthy description of the injuries and bindings as a "continuum" of torture leading to Ms. Deeble's death is simply an argument without any foundation of the record – all of those acts, wounds, and bindings may have occurred after her death, including the abrasions on her neck. Indeed, Respondent identifies these additional injuries, including a fractured nose, blunt force trauma and lacerations to the head, and damage to the pancreas, as non-contributing factors to her death. (RB 125) Even assuming one credits Dr. Fukumoto's unelaborated assertion that the microscopically identified injuries to Ms. Deeble's genitalia

occurred before her death, and that those injuries demonstrated an intent to cause extreme and prolonged pain, there is no evidence whatsoever that those injuries were part of a continuum of torture that led to Ms. Deeble's death; those injuries certainly did not contribute to Mrs. Deeble's death. In sum, there was insufficient evidence that the victim suffered extreme and prolonged pain, that her assailant had the intent to inflict it, and, just as importantly, that the injuries that allegedly caused extreme and prolonged pain and that were allegedly inflicted before her death were the cause of her death.

B. There was Insufficient Evidence that the Victim Suffered "Extreme Pain" from Injuries Inflicted Before Death

One of the essential elements of the special circumstance of torture-murder which must be proved beyond a reasonable doubt is "the infliction of an extremely painful act upon a living victim." (***People v. Davenport*** (1985) 41 Cal.3d 247, 271, *cert. denied*, (1996) 519 U.S. 951.) (*emphasis supplied.*) The question of whether the injuries were inflicted before death is well-suited to expert opinion. Here, the only injuries that were identified by Dr. Fukumoto as pre-mortem were those that were so slight that they could

only be detected microscopically: vaginal and rectal lacerations and bruises. (R.T. 2146 – 2147.) Dr. Fukumoto described these pre-mortem injuries "just inside the opening of the vagina." (R.T. 2155, Line 25) as follows:

> "The bleeding in this case microscopically is submucosal. There is no bleeding on the surface, but from the microscopic slides, I can't give you an indication as to the actual size." (R.T. 2146, Lines 8 – 11.)

The injuries "just inside the anus" (R.T. 2156, Line 21) were similarly submucosal and unquantified. (R.T. 2137, Lines 14 – 19.)

These pre-mortem injuries stand in stark contrast to the vicious knife wounds to the victim's neck and back found to be sufficient in ***People v. Crittenden*** (1994) 9 Cal.4th 978, *cert. denied*, (1995) 516 U.S. 849, one of which was described as "a wound on the upper left chest caused by a large knife having been driven completely inside the body with a great amount of force, as if someone had stepped on the knife or had used a heavy object (such as a fire extinguisher found near the body) to pound on it. (*Id.* at 109.) Based upon these injuries, even though the forensic pathologist did not testify that they caused "extreme pain," this court found that the evidence, when considered with the photographs of the injuries themselves and the

victim's facial expression, amply supported the determination that the victim suffered extreme pain. (*Id.* at 140.)

Similarly, in ***People v. Proctor*** (1992) 4 Cal.4th 499, wounds expressly identified by the corner as pre-mortem, including knife "drag" marks across the chest, revealed a "relatively slow, but methodical approach by the assailant consistent with extremely painful injuries." (*Id.* at 531 – 532.) By contrast, ill-defined injuries expressly identified by Dr. Fukumoto as both "pre-mortem" and "highly painful" could not, either by themselves or in conjunction with the expert's foundationless testimony, form an adequate basis for any reasonable juror to reach that conclusion.

Respondent also argues that the circumstantial evidence reasonably supports a conclusion that the abrasions on Ms. Deeble's neck occurred before death:

> "Dr. Fukumoto testified that the victim struggled against the ligature because there was abrasions and some wrinkling of the skin ... around the neck which indicated that Deeble struggled from side to side against the ligature before she died. Dr. Fukumoto opined that struggling against belt would have been extremely painful." (RB 125.)

Although circumstantial evidence could support a conclusion that an injury was suffered before death, none is in the record. As set forth above, Dr. Fukumoto did not opine that any injury was suffered before death, other than to the genitalia; he did not adopt Respondent's argument that the abrasions found on the neck were caused by the struggles from side to side before Ms. Deeble's death. Rather, the prosecutor below included that conclusion in a characteristically leading question to the expert. Even so, Dr. Fukumoto did not clearly adopt it in his answer to the following argumentative and compound question:

"Q.	The ligature of the belt around the neck, the struggling against the belt, you would agree, these – those would be extremely painful?
A.	I would say yes.
Mr. Bates	Objection, no foundation
The Court	Overruled." (R.T. 2128, Lines 8 – 14.)

While Ms. Deeble died from asphyxia from the ligature, it does not reasonably follow that the abrasions on her neck were necessarily caused by her struggles before death, as opposed to her assailant's manipulation of the belt after death. Indeed, although Respondent asserts that "the autopsy revealed that the victim actually struggled against the ligature" (RB 125), the

record does not support that claim. Dr. Fukumoto expressly cautioned that the autopsy did not necessarily indicate that the victim's struggles caused the injuries:

Q.	And then you have noted here for us today on direct examination that the second ligature mark could be due to side-to-side motion of Ms. Deeble while the ligature is being applied; is that correct?
A.	No. As I said, there are features in the furrow which seem to indicate that the victim at one time has a side-to-side motion trying to loosen that ligature.
Q.	All right. That is within the deeper furrow itself?
A.	That is correct.
Q.	Could that also be caused by hand motions in the individual applying the ligature back and forth?
A.	Yes, in other words, somehow the ligature, either the subject was moving or the ligature. (R.T. 2159, Lines 2 – 17.) (emphasis supplied)

Finally, while Dr. Fukumoto speculated that the damage to Ms. Deeble's eardrum "could be due to a massive increase in pressure as a result of the struggle of the victim in his or her attempt to get breath," that speculation is hardly a basis upon which a reasonable juror could find that the damage to Ms. Deeble's eardrum was pre-mortem. (R.T. 2128, Lines 2 – 7.)

The combination of Dr. Fukumoto's foundationless opinion that abrasions were suffered before death, combined with the nature of the

abrasions themselves as depicted in the photograph admitted into evidence as People's Exhibit 28, did not support a reasonable finding that they caused her "extreme pain," as compared to the injuries described in the applicable precedent cited in the Opening Brief. Indeed, during his closing remarks, the prosecutor below did not specifically contend that the abrasions to Ms. Deeble's neck were "highly painful injuries." People's Exhibit 1 and 33 were commended to the jury's attention as evidence of extreme pain by the prosecutor. (R.T. 2906 – 2907.) However, neither of these exhibits reflected injuries that were reliably inflicted before death. In sum, although Respondent argues that the compendium of injuries to Ms. Deeble's ear drums, eyes, scalp, and pancreas all are evidence of "highly painful injuries," – there is not one jot of credible evidence – expert or otherwise – that these injuries were suffered before death.

C. There was No Substantial Evidence to Persuade a Reasonable Juror that the Assailant Harbored an Intent to Commit a Burglary at the Time He Entered the Residence

Appellant contends that there was insufficient evidence to prove either a theft or a penetration with a foreign object ever occurred. (AOB 216 – 217, Argument VII (D) (2) (b). (see, ***People v. Abilez*** (2007) 41 Cal.4th 472, 508, *cert. denied*, 128 S.Ct 720, *citing*, ***People v. Du Bose*** (1970) 10

Cal.App.3d 544, 551 ("there is no better proof that (defendant) entered (the victim's) house with the intent to commit a robbery than a showing he did in fact commit a robbery after his injury.") But even assuming that either of these predicate crimes were proven by sufficient evidence, the record lacks any "evidence that reasonably inspires confidence" and is "of solid value" to demonstrate that Appellant entered Ms. Deeble's residence with the intent to commit these felonies and that murder and these felonies were part of one continuous transaction. (***People v. Redmond*** (1969) 71 Cal. 2d 745, 755) Respondent's arguments on these essential elements reveals this inadequacy.

Respondent argues that the "ransacked bedroom and missing jewelry" indicate that Edwards entered Ms. Deeble's home with the intent to commit a theft." (RB 133.) This is a non sequitur unless one agrees that in every instance where there is simply evidence of a residential theft, the perpetrator is presumed to have entered the home with the intent to steal. Plainly, the law requires more. (*See, e.g.*, ***People v. Sears*** (1965) 62 Cal.2d 737, 744, overruled on other grounds, ***People v. Cahill*** (1993) 5 Cal.4th 478, (where the burden of proof to demonstrate an intent to assault the victim before the defendant entered the house was satisfied by evidence that he did so with a piece of reinforced pipe underneath his shorts).

The absence of any evidence, circumstantial or otherwise, to establish that the assailant had the intent to burglarize Ms. Deeble's residence before he entered her home is revealed by recent precedent. In ***Abilez***, the "substantial evidence" of a pre-existing intent of robbery included a demand to the victim for money shortly before she was murdered and frequent argument with the victim over money. In ***People v. Lewis*** (2008) 43 Cal.4th 415, 464, there was "strong evidence" of an intent to commit a robbery before the murder in the form of an admission to the police by the defendant. In ***People v. Tafoya*** (2008) 42 Cal.4th 147, 171, *cert. denied,* 128 S. S.Ct. 1895, the intent to steal that pre-existed the murder was shown by evidence that the defendant needed money and planned the robbery. Here, there is simply no evidence showing actions or words by Appellant, or personal circumstances such as revenge or the need for money, to establish a pre-existing intent to rob or sexually assault Ms. Deeble before he entered her home.

Similarly, without explanation or elaboration, Respondent alleges that since Edwards entered Delbecq's apartment with the intent to assault her with a foreign object, the same inference can be made with regard to his state of mind seven years earlier. (RB 135) Respondent does not cite any portion of the record to support its claims; in fact, the record is devoid of any

evidence regarding his intent at the time he entered the Delbecq residence. He didn't even know her.

Respondent seeks to supply a motive for Appellant to sexually assault Ms. Deeble by claiming that there was "bad blood" between them. (RB 135.) Typically, the phrase "bad blood" was interjected into the record by the prosecutor; the actual event was simply that the Appellant damaged Katherine Valentine's truck (not Ms. Deeble's), and Ms. Deeble asked him to fix it, which he did. (R.T. 2075 – 2076.) This is a weak reed indeed upon which to rely to advance an argument that Appellant harbored an intent to sexually assault Ms. Deeble to pay her back for..... what? Ms. Deeble did not yell or curse at Appellant as a result of the accident. (R.T. 2110 – 2112.) The incident did not impair Kathy Valentine's relationship with her mother. (R.T. 2093.) Indeed, during her testimony, Kathy Valentine confessed that she did not even know how her mother felt about Mr. Edwards. (R.T. 2106 – 2107.) Even assuming that Mr. Edwards harbored ill will towards Ms. Deeble, that is no proof whatsoever that he entered her home with the intent to either sexually assault or burglarize her, even if one assumes that he did so with the intent to murder her.

Finally, there is no evidence of "solid value" or otherwise to support a finding that the alleged theft was part of a continuous transaction with the murder nor could such argument be made since the time of the alleged thefts relative to the homicide (if indeed they occurred) is a matter of complete speculation. Similarly, the relative time of the alleged penetration vis-à-vis the homicide is a matter of complete speculation, even if one credits the foundationless expert testimony that it occurred before death. The record stands in stark contrast to that in ***People v. Abeliz***, where there was powerful circumstantial evidence that could have allowed a jury to reasonably infer that the defendant wished to injure and humiliate the victim before killing her in retaliation for past injustices, including the victim's abandonment of him and denigration of the woman who raised him in her stead. (41 Cal.4th 471, 511 – 512.)

"Nil posse creari de nilo" (Nothing can be created from nothing). Here, the evidence introduced to prove the special circumstances allegations is nothing more than one unfounded assumption piled on the next. (1) One has to assume Appellant committed the murder of Ms. Deeble. (2) One has to assume that the microscopically detected injuries to her genitalia occurred before death. (3) One has to assume that those pre-mortem injuries caused her "extreme pain." (4) One has to assume that a theft occurred. (5) One

has to assume that Appellant entered the house with the intent to commit the theft and sexual assault. (6) One has to assume that the theft and sexual assaults were part of one continuous transaction. These assumptions are built upon neither "substantial" nor "solid" evidence; they are a veritable house of cards. Accordingly, the special circumstance finding must be reversed.

VIII.

THE EVIDENCE WAS INSUFFICIENT TO PROVE MURDER BY TORTURE

As set forth in Argument VII(A), there is no evidence that Mrs. Deeble died as a result of torture, an essential element of the crime of torture murder. The evidence of a felony-murder is equally absent since there is no credible evidence that establishes that Appellant entered the residence with the intent to commit a burglary. Respondent suggests that Mr. Edwards had the intent to kill Ms. Deeble because of "bad blood" between them. This speculation, if true, demonstrates the futility of using the record to establish that Mr. Edwards had the requisite intent to commit a burglary, rather than a vengeful homicide, at the time he allegedly entered Ms. Deeble's residence.

As previously outlined in Argument VII (C), the record is absolutely devoid of any fact to establish that Ms. Deeble's assailant planned a burglary, in addition to a homicide, as he entered the residence; indeed, the evidence is to the contrary since the bindings and hood used to immobilize her during the robbery and prevent her from identifying the thief were fashioned from material found by the assailant at the scene of the murder, rather than items brought into the house for the purpose of immobilizing and assaulting her. Ms. Deeble's hands were bound with part of her nightgown and a piece of telephone wire was pulled from the wall of the southeast bedroom to secure her. (R.T. 2011; R.T. 2036 – 2037; R.T. 2054.) She was allegedly assaulted with a can of hair mousse. (R.T. 2014; R.T. 2046 – 2047.) It is reasonable to assume that this hair mousse belonged to her; no contention has ever been made otherwise. Thus, even assuming that a burglary occurred, and that Appellant committed it, there is no evidence whatsoever to suggest that it is anything more than incidental to the murder itself.

IX.

THE PATTERN OF PROSECUTORIAL MISCONDUCT THROUGHOUT TRIAL HAD A CUMULATIVE EFFECT OF DENYING A FAIR CONSIDERATION OF THE ADMISSIBLE EVIDENCE BY THE JURY

A. The Prosecutor Asserted to the Jury, without a Good Faith Foundation, that All Suspects but Mr. Edwards had been Eliminated by DNA Testing from Semen and Fluids Discovered at the Deeble Residence

1. There was No Basis for the Allegation

Respondent asserts that the prosecutor had a good faith belief that DNA testing caused the police to focus exclusively upon Appellant because "the record shows ... that the individuals who the defense emphasized gave inadequate hair samples were not within the possible donors of the semen stains found on Ms. Deeble's thighs and bed." (RB 137.) As argued elsewhere, the trial court denied Appellant a fair trial by failing to adequately explore defense counsel's charge that this representation was false. (AOB 187 – 188, Argument VI (C) (2).) In any event, "the record," such as it was, does not establish that the prosecution had a good faith basis

to believe that Sgt. Jessen discarded all suspects but Appellant because of DNA testing.

First of all, Respondent argues that "even if DNA testing was not done, any harm caused by the brief, one-time mention of DNA was quickly dispelled" by the trial court's instruction to disregard it. (RB 176.) Respondent's readiness to shift the focus from whether the prosecution's assertion of about DNA was true to the adequacy of the trial court's efforts to limit the damage caused by that assertion is understandable, but consistent with a conclusion that DNA testing which eliminated all suspects save Appellant was not performed.

The defense squarely alleged that the prosecutor's assertion that DNA testing had eliminated other suspects was untrue. Any reasonable prosecutor, when faced with this attack upon his integrity and an explicit demand by the defense for proof that testing occurred (R.T. 2888, Lines 2 – 5) would have met it with an irrefutable response, if one existed: a documentary proffer displaying the results of that alleged testing would have been made or, at a minimum, a verbal description of who, what and when would have been made. The prosecutor's actual response was simply to repeat that his assertion was true, without any effort to back it up, and then a

quick and telling shift to an argument that "even if (the defense) was right," and no DNA testing had been performed, the error was harmless. (R.T. 2888, Lines 11 – 16.)

Secondly, Sgt. Jessen never identified the basis, if any, of the prosecution's allegation nor has that basis, if any, yet been identified by Respondent twelve years after the trial has ended. The prosecutor's good faith posing the question to Sgt. Jessen in the first place is open to question.

The alleged foundation for the question was to provide an explanation for law enforcement's failure to pursue an investigation of the suspects who furnished inadequate hair samples. That aspect of the investigation was handled by Criminologist Richard Brown of the Orange County Coroner's Office, who notified Detective Vic Canto of the Los Alamitos Police Department that the hair standards were not adequate for purpose of comparison. (R.T. 2795; R.T. 2801; RB 116.) Although the prosecutor was given a full and fair opportunity at trial to ask percipient witnesses Brown and Cantu the reason they did not pursue the other suspects by getting adequate hair samples, he did not. (R.T. 2030; 2800-01.)There was no testimony from these relevant witnesses that the results of the DNA testing had anything to do with apparent suspension of the hair comparison

aspect of the investigation. Ironically, when the defense attempted to establish the reason Sgt. Jessen suspended his efforts to pursue other suspects through hair exemplars, it was prevented from doing so:

"Q. (by Mr. Severin)	Now, you had some ongoing telephone contact with the Orange County Sheriff's Office Crime Lab during your investigation on this homicide case; is that right, Sgt. Jessen?
A. (Sgt. Jessen)	That is correct.
Q.	And were you aware that there was some hair comparisons that were taking place?
A.	Yes, I believe so.
Q.	Did you – do you recall having contact with the Orange County Sheriff's Office Crime Lab on October 26, 1987 with respect to some hair comparison results?
A.	I can't be sure of the date unless I see the report.
Q.	Showing you what appears to be a copy of your homicide log, Sgt. Jessen, does that highlighted portion refresh your recollection as to the contact you may have had with the crime lab?
A.	Yes. In that contact, we were informed that it would take approximately three months to make comparisons with all the submitted hair standards?
Mr. Brent	Objection, relevance, calls for hearsay.
The Court	Sustained.
Q. (by Mr. Severin)	On that occasion, on October 26, 1987, did you request that some hair comparisons be made?

Mr. Brent	Objection – objection, relevance.
The Court	Overruled.
The Witness	Yes.
Q. (by Mr. Severin)	And did you in fact request that only Mr. Edwards hair standards be compared at that time?
A.	Yes
Q.	And was that because you were told that it would take some three months to compare all the submitted standards?
A.	I am not sure if that is my reason, but I did request that Mr. Edwards' sample be compared at that time.
Q.	But were you told that it would take three months to make a comparison of all the submitted standards?
A.	Yes.
Q.	By November the 6th of 1987 you had knowledge that based on hair comparison samples with Mr. Edwards' submitted standards that he had been eliminated as a suspect with respect to hair comparison only – at that time only?
Mr. Brent	I am going to object, no foundation, it calls for conclusion. It is based upon hearsay.
The Court	Sustained.
Q. (by Mr. Severin)	Sgt. Jessen, showing you a report that appears to be prepared by a Richard Brown from the Orange County Sheriff's Office Crime Lab, have you ever seen that report before?
Mr. Brent	Objection, relevance as to whether he has seen a criminologist report, Your Honor.

The Court Sustained. (R.T. 2700 – 2702.)

At a subsequent sidebar, the defense made a detailed offer of proof that at the time Sgt. Jessen failed to pursue other suspects who had furnished inadequate hair samples, Appellant had been eliminated as the donor of pubic hair found at the scene. (R.T. 2719, Line 21.) The court replied that the defense had "the wrong witness" to establish the results of the hair comparison. (R.T. 2720, Lines 14 – 16.) The defense subsequently established through the testimony of criminologist Richard Brown that a hair comparison had indeed eliminated Appellant as the donor of hair found next to Mrs. Deeble in her bed as well as in her bathroom. (R.T. 2797-99.)

In any event, Sgt. Jessen's responses to the defense interrogation about the reason he only pursued a hair comparison of Mr. Edwards did not establish that he made the investigative choice because of DNA testing results: He could not give a reason for that choice. (R.T. 2702, Lines 1 – 3.) The record suggests that he abandoned the pursuit of other suspects because the results of the comparison of Appellant's hair standards eliminated him and because he was told that it would take three months to make a comparison of all the submitted standards, and not because of the results of DNA testing. (R.T. 2702, Lines 4 – 7.)

Based upon this record, the defense did not open itself to the prosecution's assertion-laden so-called "question" to Sgt. Jessen about the results of DNA testing to establish the reason for his investigative choices. DNA testing was never mentioned by the defense. If the prosecution asked the right question about this decision to abandon the comparison of other hair exemplars to the right witness (Detective Cantu, who received Richard Brown's report that additional hair standards were necessary), Appellant's constitutional right to a fair trial, free from an untrue and damaging assertion of fact by the prosecutor, would have been protected.

Thirdly, the record cited by Respondent – which consists of a few lines of confused discussion of testing by counsel – does not support a reliable conclusion that the prosecutor had a good faith belief that the results of DNA testing caused Sgt. Jessen to make an investigative choice to focus upon Appellant. The trial court was never told – in any comprehensible and reliable fashion – that DNA testing had eliminated other suspects as donors of the semen stains. (R.T. 2827; R.T. 28 – 31; RB 113) A fair summary of that record follows.

The prosecutor alleged that at some unspecified time, by some unspecified agency, in some unspecified manner, DNA testing eliminated all

hair donors but Edwards as to the semen stains on Ms. Deeble's thighs and her bed. (R.T. 2827, Lines 3 – 10.) The defense responded by stated that testing established that both Steven Deeble and Appellant were donors of the thigh stain and that there was "no showing" that the stain on the bed and thigh were put there by the same person. (R.T. 2827, Lines 11 – 22.) In the face of defense counsel's protest that DNA testing had never been litigated as the law requires, the court then concluded – based upon the forgoing exchange – that other suspects were not tied to the semen stain. (R.T. 2830, Line 24 – R.T. 2831, Line 3.)

The trial court's conclusion was not supported by the record. There was an ample basis for the trial court to conclude – even without further inquiry – that the prosecution did not have a good faith basis for the question. The court had been advised by the prosecution during pre-trial proceedings that are RFLP DNA testing was completed and that, in his opinion, it did "not generate any kind of meaningful results." (R.T. 9, Lines 2 – 4.) He allowed that some attempt had been made to try to do the PCR analysis, but he was leaning against a presentation of DNA evidence. All parties agreed that if things changed, an evidentiary hearing would be necessary, at least for a couple of days. (R.T. 10.) Later, during the trial itself, the prosecutor (1) did not present evidence of DNA testing, despite the

court's invitation to do so; (2) did not provide the court with laboratory reports to corroborate his claims of DNA testing or rebut defense counsel's assertions that no such testing had been performed or, even, (3) verbally describe to the court as to when, where, or how but when, where, how or by whom the alleged testing was made. (R.T. 2823 – 24; R.T. 2820 – 2821; R.T. 2888; R.T. 2885 – 2889.)

Finally, in addition to the foregoing, there is substantial other evidence of prosecutorial misconduct discussed at length in Argument IX(C)-(H) and Argument XV (AOB 238 – 262; AOB 328 – 349). The pattern of other prosecutorial misconduct – advising the penalty jury that Hawaii did not have a death penalty for no reason whatsoever than to improperly encourage it to return a death verdict in California, asking improper and inflammatory questions, despite repeated directions by the trial court not to do so, and the like – provide powerful corroborative evidence that he did not have a good faith basis to parade the alleged results of DNA testing before the jury under the guise of rebuttal re-direct examination.

2. The Prosecutor's Assertion to the Jury that DNA Testing Eliminated all Suspects to the Deeble Homicide but Appellant Irreparably Prejudiced Appellant's Right to Due Process of Law and Requires a New Trial

Citing ***People v. Smithey***, (1999) 20 Cal.4th 936, 960, *cert. denied*, (2000) 529 U.S. 1026, Respondent seeks to minimize and dismiss the prosecutor's unwarranted and apparently calculated effort to bolster his case by telling the jury that DNA testing pointed to Appellant as a isolated instance in an otherwise well-conducted trial. On the contrary, the prosecutor's misbehavior was not isolated; it was repeated and characteristic, despite the trial court's efforts to "rein him in" by admonitions, stricken testimony, and curative instructions.

Contrary to Respondent's contention, the evidence against Appellant was not "overwhelming;" the court and parties all agreed that it was legally insufficient without the hotly-contested "other crime" evidence of the Delbecq murder seven years later, an ocean away. (R.T. 144, Lines 11-13.) It is entirely reasonable to assume that the jury, as humans, derived substantial reassurance from the alleged results of objective scientific testing about the reliability of the prosecutor's otherwise circumstantial argument that Appellant "must have" committed the Deeble murder because of its similarity to the Delbecq homicide. Under these circumstances, the cautionary instruction to disregard DNA testing was of no use since, over a defense objection, the same question, thinly disguised as "scientific testing" was permitted by the trial court to establish Sgt. Jessen's state of mind as to

the reason that the investigation of other suspects was suspended. (R.T. 2838-39) This is especially true since the court did not receive any assurances from the jury that it would or could follow the curative instruction.

X.

THE TRIAL COURT PREVENTED DEFENSE COUNSEL FROM EFFECTIVELY ARGUING THAT THERE WAS A FAILURE OF PROOF ON A KEY ELEMENT OF THE CRIME OF MURDER AND THE SPECIAL CIRCUMSTANCE ALLEGATION: THE INTENT TO INFLICT EXTREME PAIN

As defense counsel progressed through his closing argument, he asserted that the assailants' delivery of a "knock out" blow, which rendered Ms. Deeble unconscious and incapable of feeling any pain, was inconsistent with a "willful, deliberate, and premeditated intent to inflict extreme and prolonged pain" upon her. This intent to cause the victim to experience extreme pain is a key element of both the crimes of murder by torture and the special circumstance of murder involving the infliction of torture, even though the prosecution need not prove that the victim was actually aware of that pain. (R.T. 3132, Lines 8 – 23; R.T. 3138, Lines 4 – 12.) Thus, the law creates an important distinction between what the assailant hoped would

happen by his actions and what actually occurred. The consequences of the prosecution's all-to-common attempt to influence the jury by a "speaking objection" that argued to the jury that "unconsciousness is irrelevant and Mr. Bates knows it" was to improperly dismiss a relevant argument, adding the wholly gratuitous and unfair suggestion that defense counsel was intentionally attempting to mislead the jury. Whether intentional or not, the prosecutor's assertion to the jury had the net effect of confusing apples with oranges; yes, the prosecution need not prove actual suffering, but that does not mean that "unconsciousness is irrelevant" because it was highly relevant circumstantial evidence bearing on the assailant's intent to inflict extreme pain. Respondent fails to address this key distinction that defense counsel was attempting the draw and simply joins with the prosecutor below in asserting the tautology that since awareness of pain is not an element of proof, unconsciousness is therefore "irrelevant" for all purposes. This is simply not "clearly established by case law," as Respondent suggests. (RB 165.)

As noted in the Opening Brief, case law is to the contrary. The court held in ***People v. Cole***, (2004) 33 Cal. 4th 1158, that evidence that a murder victim actually suffered pain is relevant to prove defendants' intent:

> "Graphic evidence in murder cases is always disturbing and never pleasant. Although the evidence of Mary Ann's suffering was indeed disturbing, it was not unduly shocking or inflammatory, especially considering that proof of the torture-murder special circumstance required evidence of the commission of a kind of act calculated to cause extreme pain, and both murder by torture and the torture-murder special circumstance required evidence of intent to inflict extreme pain. (*Id.* at 1197.)"

Respondent also suggests that defense counsel's argument to the jury that "no one intending to cause prolonged pain would ligature strangle the victims so that ... they were conscious in less than a minute" renders any error harmless. (RB 166) This comment was made after the trial court sustained the prosecutor's objection. Respondent's suggestion might be more persuasive if the prosecutor voiced his objection fairly, without an improper evidentiary argument or attack on defense counsel. As it was, the trial court's ruling had the natural effect of adopting the prosecutor's comment, magnifying and giving credence to the dual improper suggestions that unconsciousness was "irrelevant" and defense counsel "knew it." Defense counsel's effort to continue this line of argument after this exchange is hardly an example of "a full assertion of the constitutional right of an accused to present a closing argument in a criminal proceeding, including the opportunity to comment upon conflicts in the evidence and the

complexity of legal issues." (***In re William F.*** (1974) 11 Cal.3d 249, fn. 5, *overruled on other grounds,* ***People v. Bonin*** (1988) 46 Cal. 3d 659) This is especially true since the prosecutor took advantage of the court's erroneous ruling during his rebuttal argument to the jury and further obfuscated the distinction between consciousness of pain as an element of proof, as distinguished from relevant circumstantial evidence that the assailant did not intend to inflict extreme pain:

> "The defendant must have had an intent to inflict extreme pain of long duration. But then the instruction goes on and talks about the pain itself does not have to be of long duration. See, it is – it seems inconsistent. It is not. It is the defendant's intent. The fact that the victim dies along the way and it doesn't last very long, if it didn't – I am not saying it didn't here. I am saying just the opposite. Mr. Bates spent a long of time on that. The victim doesn't have to be aware of pain. The defendant doesn't benefit if he knocks her unconscious. He doesn't benefit that she mercifully would not feel the pain." (R.T. 3096, Line 20 – R.T. 3097, Line 6.) (emphasis supplied)

Thus, the error is not harmless.

XI.

THE TRIAL COURT'S FAILURE TO DELIVER A JURY INSTRUCTION THAT ATTEMPTED THE LIMIT THE PREJUDICIAL IMPACT OF THE PROSECUTOR'S UNTRUE AND UNFAIR ASSERTION THAT DNA TESTING HAD ELIMINATED ALL SUSPECTS BUT APPELLANT DENIED HIM A FAIR TRIAL

As argued elsewhere (AOB Arguments VI(C) and IX(B), the record powerfully suggests that the prosecution's assertion about the results of DNA testing was both irrelevant and untrue; at the very minimum, there was no basis whatsoever for the trial court to believe that it was reliable. If the prosecutor's assertion about DNA testing was false, case law requires an instruction to the jury explaining the reason to disregard the assertion in order for the curative instruction to have had a chance to have been effective. (*See*, ***People v. McAfee*** (1927) 82 Cal.App. 389; discussed at Argument XI (A) (3) of AOB.) As such, the defense proposed instruction was not duplicative, but accurate and necessary.

The probability that the existing instruction effectively met the challenge posed by the prosecution's decision to interject the alleged results of DNA testing into the trial was exceedingly low. The defense instruction

was not duplicative; unlike the trial court's instruction, it told the jury the reason to disregard DNA testing: because it never occurred. The trial court's instruction told the jury to ignore DNA testing, but not why. The instruction was not argumentative; the prosecutor was given every provocation, invitation, and opportunity to demonstrate that its assertion was not untrue, as the defense expressly charged. Yet, he failed to do so. The jury never indicated on the record that it understood, much less that it would or could follow, the court's admonition. The effectiveness of the perfunctory admonition was further weakened by the trial court's decision to allow the prosecution to introduce evidence that "(unidentified) scientific testing" of other suspects eliminated them as donors of various semen stains at the crime scene. (R.T. 2838, Lines 4 – 9.) Finally, the decision to reject the curative instruction was not harmless; the consequences of failing to adequately rebut a false and express statement by the prosecutor that DNA had "fingered" Appellant can only be evaluated in light of the total absence of any proof, scientific or otherwise, linking him to the Deeble murder other than the hotly disputed "similar" murder seven years later.

XII.

THE TRIAL COURT UNCONSTITUTIONALLY PROHIBITED APPELLANT FROM ASKING TWO JURORS WHO ACTUALLY SAT IN JUDGMENT OF HIS CASE WHETHER THEY COULD RETURN A VERDICT OF LIFE WITHOUT PAROLE, BASED UPON THE CIRCUMSTANCES OF THE CRIME, AS PLED IN THE INFORMATION

A. The Prohibited Inquiry Did Not Ask the Juror to Pre-judge the Case

It is well-settled that a challenge for cause may be based on a juror's response when informed of facts or circumstances likely to be present in the case being tried. (***People v. Kirkpatrick*** (1994) 7 Cal.4th 988, 1005, *cert. denied,* (1995) 514 U.S. 1015.) This court has extended this principle to include circumstances that would be determinative for a juror, even if not alleged in the charging document. Accordingly, this court has endorsed questions that are specific enough as to some circumstance that would be shown by the trial evidence to flush out bias; these have included "whether a prospective juror could impose the death penalty on a defendant in a felony-murder case, a defendant who did not personally kill the victim, a young defendant or one who lacked a prior murder conviction, or only in

particularly extreme cases unlike the one being tried." (***People v. Cash*** (2002) 28 Cal. 4th 703, 721 *cert denied,* 537 U.S. 1199.)

Citing ***People v. Jenkins*** (2000) 22 Cal.4th 900, *cert. denied*, (2001) 531 U.S. 1155 and ***People v. Sanders*** (1995) 11 Cal.4th 475, *cert. denied*, (1996) 519 U.S. 838, Respondent contends that the question posed to Jurors 116 and 212 which contained only the general allegations of the information, together with the modest additions that the crimes involved "strangulation" and "blows to the head," improperly asked the jurors to pre-judge the case. (RB 189) Advising the jurors that the case involved "strangulation" and "blows to the head" was just that type of unpled details likely to present in the case that, together, might reveal attitudes that would substantially impair the performance of their duties and therefore permissible under ***Cash***. (*Id.* at 721.) The voir dire disallowed in a precedent cited by Respondent is so obviously distinguishable from the generalized, relevant inquiries prohibited to Appellant that they actually highlight the error committed by the trial court in this case.

In ***Jenkins***, the opinion upheld the trial court's decision to prohibit any inquiry into death penalty attitudes which contained a "rather detailed account of the facts of the case." (*Id.* at 991.) While the opinion did not

elaborate, ***Sanders*** gives an example of the almost risible amount of fact-related detail that exceed permissible boundaries:

> "Two men go into a restaurant in the early morning hours. They herd eleven people, two customers and nine employees, into the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie down on the floor. They put them all in a freezer. The people follow all the orders and instructions that the two men give them ... they are told to get on their knees and face the wall. They do that ... and the two men open fire ... even though one of the victims pleads for his life ... they leave everybody in the darkened freezer where people are dying and ... moaning. (***People v. Sanders***, *supra*, 11 Cal.4th 475, 538.)

Plainly, the questions posed by counsel for Appellant did not come within shouting distance of this type of voir dire.

Respondent also asserts that the errors were harmless because, at other points in the voir dire, defense counsel was permitted to ask questions which were "ample" to determine bias. (RB 190.) The truncated inquiries cited by Respondent were not the functional equivalents of the prohibited questions. Thus, asking Juror No. 116 whether automatic death should be imposed in every double homicide and whether he would be "open" to considering "all the facts" did not adequately inform the Appellant of the outcome. determinative circumstances as plead in the information, such as the use of

torture. Similarly, the questions cited by Respondent that were posed to Juror No. 212 did not explore his or her attitude towards torture, a key element of the murder and special circumstance allegations against Appellant. (RB 190 – 191.) Respondent's attempt to rely on the alleged fact that defense counsel was able to "discuss" torture with other jurors than the one's whose voir dire was restricted and who actually sat in judgment (RB 191) needs no comment other than that precedent, and common sense, focuses upon the prohibited inquiries posed to each particular juror and not "discussions" of facts with their fellows.

In one of the most recent decision of this court pertaining to the proper scope of voir dire, this court stated that it was unconstitutional for the trial to refuse "to allow defense counsel to ask prospective jurors about a general fact or circumstance ... that could cause jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances. (Case cited.)" (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1112, *cert. denied,* (2008) 128 S.Ct. 1478.) The decision went on to note that an allegation that a defendant had previously murdered his grandparents was an example of such a question, as it had held in ***People v. Cash***. The ***Zambrano*** opinion went on to rule that the condition of the victim's body when it was discovered (dismembered) was not a circumstance that would

cause a reasonable juror – i.e., one's who's death penalty attitudes otherwise qualified him to sit on a capital case – invariably to vote for death. (*Id.* at 1122.) In reaching this decision, the opinion explained that "no child victim, prior murder, or sexual implications were involved ... nor would there be evidence that (the victim) was dismembered while alive." (*Id.*) Finally, the opinion noted that the defense had been otherwise able to voir dire the panel on specific facts of the case and that there was mitigating information about the dismemberment which might materially influence the juror's response to that circumstance. (*Id.* at 1122 – 1123.)

Here, the factual circumstances of the alleged crime that were excluded by the trial court fell within the outcome determinative examples cited by ***Zambrano***; indeed, they almost exactly conformed to the ***Zambrano*** list of circumstances that could be outcome determinative. The circumstances prohibited by the trial court included "sexual implications" (that is, a sexual assault with a foreign object), evidence of a gruesome nature, such as proof that the victim was dismembered while living (that is, "torture" blows to the head and strangulation), and evidence of a previous murder. These circumstances were not peripheral. They were pled in the charging document against Appellant, with the sole exception of a description of some of the alleged torture. These details were necessary to

get a true read on whether evidence of that torture would cause a juror to invariably vote for death, regardless of mitigating circumstances.

B. The Unconstitutional Restriction on Voir Dire Requires Reversal

Respondent argues that there where no restriction has occurred, reversal is not required. Thus, "(t)his court stated in ***Cash*** that any error may be deemed harmless if the defense was permitted to use voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case or if the record establishes that none of the jurors had a view about the circumstances of the case that would disqualify the juror." (RB 191; *emphasis supplied.*) Here, however, as discussed in the previous section, defense counsel's attempt to determine whether key elements of the case, both pled and unpled, would substantially impair the performance of the jurors' duties were frustrated. Precedent supported these questions. They were never posed to the jurors elsewhere in the proceedings. The jurors went on to vote for the death verdict. Under these circumstances, California courts have held that insufficient voir dire is presumptively prejudicial since it strikes at the heart of the constitutional guarantee of an impartial verdict. "No inquiry as to the sufficiency of evidence to show guilt is indulged and a conviction by the jury so selected

must be set aside." (***People v. Wheeler*** (1978) 22 Cal.3d 258, 283; *see also*, ***People v. Mello*** (2002) 97 Cal.App.4th 511, 519; ***People v. Gilbert*** (1992) 5 Cal.App.4th 1372, 1379.)

XIII.

THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY BY IMPROPERLY RULING UPON CHALLENGES FOR CAUSE

A. The Trial Court Improperly Sustained a Challenge to a Juror who Expressed Personal Reservations about the Death Penalty

A personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case. (***People v. Stewart*** (2004) 33 Cal.4th 425, 440, 445.) Here, Juror No. 180 expressed no more.

While the prospective juror's hesitancy to vote for death may have been ample grounds for the prosecution to excuse her with a preemptory challenge, she never unequivocally expressed an unwillingness to deliberate in a capital case and, if necessary and appropriate, vote to impose death. Contrary to Respondent's contention, Juror No. 180 did not emphasize time and again that she would not be able to vote for the death penalty even if she

felt it was deserved, nor do its brief's citation to the record support that contention. (RB 195.)

The juror's "great deal of difficulty," "very hard time," and other speculations about her prospective vote are all distinguishable from the records in the most recent authority cited by Respondent: *See, e.g.*, ***People v. Harrison*** (2005) 35 Cal.4th 208, 227 – 228, cert. denied, 546 U.S. 890(several times during voir dire, the juror stated that he could not vote for the death penalty); ***People v. Haley*** (2004) 34 Cal. 4th 283, the juror agreed that she didn't believe in the death penalty, based upon religious convictions); ***People v. Griffin*** (2004) 33 Cal.4th 536, 558 – 561 (two prospective jurors stated that they could not vote for death; a third, who was a prison guard, was concerned that vote for death would adversely effect security at the prison). Thus, the trial court's finding based upon the record and its observations that the juror was "very emotional" and "near tears" and that therefore "there (was) no way, no matter what the evidence, no matter what the law that (she) could ever vote for ... death ... or vote at all" was hyperbole rather than a conclusion based on substantial evidence that she was constitutionally impaired. Accordingly, the death verdict must be reversed. ***People v. Heard*** (2004) 31 Cal.4th 946, cert. denied, 541 U.S. 910

(improper granting of even a single challenge for cause requires that the death verdict be set aside).

B. The Trial Court Improperly Denied a Challenge to a Juror who Expressed an Unwillingness to Consider Alcohol or Substance Abuse as a Mitigating Circumstance

Juror No. 254 stated in her questionnaire, and reiterated during voir dire, that imprisonment for a deliberate murder was "a waste of time;" based upon this response, it is understandable that counsel thought it unnecessary to ask her opinion about imprisonment for an individual convicted of a torture/sexual assault double homicide. Interestingly, Respondent asserts that the same level of equivocation expressed by Juror No. 180 about voting for death was not disqualifying when expressed by Juror No. 254 about her willingness to consider substance abuse as a mitigating factor.

Respondent complaints that Appellant's lengthy citation to the record in support of his position that the juror could not be fair was taken out of context. (RB 199) Juror No. 254's supposed readiness to consider substance abuse as a mitigating factor also deserves context. Not only did this juror repeatedly re-affirm her opinion that penalty phase deliberations for a deliberate murder was a "waste of time," she also added at various

points during her voir dire that substance abuse was "a choice" for which an individual bore responsibility and that she "couldn't see" substance abuse as a mitigating factor. The juror's qualification that she held these opinions without having heard the evidence is cold comfort. Every juror in every case, including Juror No. 180, could make the same hedge. Juror No. 254's strong expressions regarding death for those who commit a single intentional homicide and unwillingness to consider substance abuse as anything as a personal failing provide this court with an ample basis to conclude that the trial court's decision was not based upon substantial evidence of true impartiality.

C. Waiver

Respondent argues that Appellant "waived any claim of error with respect to the trial court's refusal to grant his motions to excuse for cause because he failed to exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so. (RB 197-98.) In arguing waiver, Respondent misinterprets Appellant's argument on appeal.

The actions of the trial court and prosecutor combined to produce a jury culled of all those who revealed that they had conscientious scruples

again capital punishment in violation of Appellant's right to a fair and impartial jury. These improper actions were compounded by "stacking" the jury with individuals who had an auto-death penalty bias. The United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against were otherwise opposed to capital punishment." Such a scrubbed jury violates the Sixth, Eighth, and Fourteenth Amendments. (***Adams v. Texas*** (1980 448 U.S. 28, 43; accord, ***Witherspoon v. Illinois*** (1968) 391 U.S. 510, 520-21.) Here, the state excluded all of the venire persons who strongly opposed the death penalty. The trial court erroneously sustained a challenge to a "life-inclined" juror. (see, AOB at 313-20) These joint efforts resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against...capital punishment." (***Adams v. Texas***, *supra*, 448 U.S. at 43) Under these circumstances, no waiver can occur since counsel cannot waive a defendant's right to an unbiased jury without his express consent. (see, ***Hughes v. United States*** (6th Cir. 2001) 258 F.3d 453.)

XIV.

THE CUMULATIVE IMPACT OF CONTINUING PROSECUTORIAL MISCONDUCT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR DETERMINATION OF WHETHER HE SHOULD LIVE OR DIE

A. Introduction: The Prosecutor Intended to Unfairly Prejudice Jury Penalty Phase Deliberations

As noted in Argument IX, a defendant need not demonstrate bad faith to obtain appellate relief because of prosecutorial misconduct. (***People v. Hill*** (1998) 17 Cal.4th 800, 844.) Nevertheless, where it exists, it can be highly relevant as, for example, proof that the prosecutor believed his evidence was so underwhelming that his argument for death needed "a helping hand," so to speak.

A charge of willful misbehavior should never be made lightly. This is especially true since prosecutors are expected to recognize that their actions before a jury "carries with it the imprimatur of the government and may induce jury to trust the government's judgment rather than its own view of the evidence." (***United States v. Young*** (1985) 470 U.S. 1, 18) Sadly, no

other view of the prosecutor's behavior in this case can be reached. Examples abound.

Out of the blue, the prosecutor asked a defense witness, "There is no death penalty in Hawaii, is there?" (R.T. 6030, Lines 8 – 21.) The obvious intent of the prosecutor was to alert the penalty phase jury that their brethren in Hawaii were not empowered to impose the death penalty, no matter how deserving they may have thought Appellant was to receive it. The manifest prejudice of that "question" was discussed in Section XV (D) of the Opening Brief and will not be repeated. Yet, it is noteworthy that Respondent does not argue that the question was in good faith and appears to concede Appellant's point that it was asked strictly to prejudice the jury. (RB 212.) This apparent concession is important as it undercuts Respondent's principle responses to the misconduct claim, which are: (1) that it was waived and (2) that, in any event, it was harmless because of the overwhelming aggravating evidence.

A defendant "will be excused from the necessity of either a timely objection and for a request for an admonition if either would be futile." (***People v. Hill***, *supra*, 17 Cal.4th 820; ***People v. Arias*** (1996) 13 Cal.4th 92.) "In addition, failure to request the jury be admonished is not the issue for

appeal if an admonition would not have cured the cause caused by the misconduct." (***People v. Hill***, *supra*, 17 Cal.4th 800, 821; ***People v. Price*** (1991) 1 Cal.4th 324, 446, *cert. denied*, (1992) 506 U.S. 851.)

Here, the prosecutor's clumsy but deadly effective effort to incite the penalty phase jury to impose death, based upon the unspoken argument that they must "make up" for the jury's inability to do so in Hawaii, typifies the futility of objections to the drumfire of misconduct that continued throughout the guilt and two penalty phase proceedings. Quite simply, the prosecutor was out of the court's control, as well as any internal sense of himself as a representative of the government compelled to seek justice, not convictions. (*see,* ***Berger v. United States*** (1935) 295 U.S. 78, 88.)

B. Appellant Has Not Waived His Right to Raise Each and Every Instance of Prosecutorial Misconduct as Error

Although the court quickly and easily sustained defense counsel's objection to the prosecutions question of a lay witness about Hawaiian capital proceedings, their failure to object to each and every example of misbehavior that continued throughout months of proceedings can be reasonably assigned to a recognition that the court was not able to stop it and admonitions would not cure it. A recitation of all the instances where the

court unsuccessfully attempted to "rein in" the prosecutor is detailed in the Opening Brief; lowlights include the prosecutor's continuing an improper interrogation of Appellant about the honesty and motives of adverse witnesses, despite repeated directions by the court not to do so. (AOB 240 – 243; Argument IX (D) and the prosecution's violation of a ruling by the court that prohibited him from asking Dr. Dietz whether, in his opinion, Appellant was in a "blackout state" during the Deeble homicide. (Argument XV (B)).

With regard to the final example, Respondent acknowledges that "the trial court stated that the prosecutor could only talk about whether Appellant knew what he was doing in the abstract." (RB 206; emphasis supplied.) Yet, Respondent argues that, after an evidentiary hearing and clarifying sidebars, the court's only "focus" was to prohibit the prosecutor from eliciting expert opinion "regarding evidence that Edwards was not in possession of stolen jewelry or that he had no blood on him after the crimes." (RB 206.) This dramatic revision of the court's ruling is not sustained by a common sense reading of the record and could not have been held by the prosecution, in good faith.

The prosecution's elicitation of expert testimony about one of the ultimate questions of the penalty phase (whether Appellant had any long-term memory of the homicide) followed written briefing and an evidentiary hearing. That extensive litigation focused on whether Appellant's "blackout" was the proper subject for rebuttal expert opinion since the defense had changed its tactics after the first penalty phase proceeding and had elected against presenting its own expert opinion on that subject at the second penalty phase. After a defense request for clarification, the trial court made it crystal clear that Dr. Dietz was only allowed to generally opine that in a blackout state a hypothetical individual (and not the Appellant under the circumstances of the homicides and their aftermath) would have "present memory" and thus the capacity to act intentionally:

"The Court	I mean, if you want to put Dr. Dietz on to testify that the individual would have known what the individual was doing during those crimes, that is probably proper to rebut some of the inferences from the blackout testimony. But I assume that Dr. Dietz' testimony would have been just as he testified to about what a blackout really is. It is kind of like after the fact, not during.
Ms. Cemore	And the record, and I believe that Dr. Stalcup has already said that, Your Honor. Mr. Brent asked him about present state memory, and he said yes, you would have that. Yes, you would do intentional acts. It is in the record.

The Court	Well, there are a lot of witnesses who testified on blackout. So I think that is where we are at.
Mr. Brent	O.K. So I can talk to him about that, but not – in the question you just mentioned, but not the sexual sadism.
The Court	And the reacquiring is probably a 352 issue. They may or may not put on experts, I am assuming, to just say the opposite. But the other is proper.
Mr. Brent	O.K.

* * *

Ms. Cemore	Two quick clarifications, Your Honor, just so I am clear, so I don't disturb Mr. Brent with objections. Is the court saying that he can talk about his observing the crime scenes in this case – that he can talk about the specific crime scenes that he viewed in this case and he can render an act that the acts in this case were voluntary and intentional? Or are we talking about in the abstract, that during a blackout state an individual would have present memory and there acts would be conscious, intentional and meaningful in making choices?
The Court	That is how Dr. Dietz testified.
Ms. Cemore	I just want to be sure.
The Court	Generally. The latter parts he was specific, and it was the latter parts I found not to be rebuttal. (R.T. 6326 – Line 10 – R.T. 6327, Line 12.) (*emphasis supplied.*)"

Moments later, the prosecution elicited Dr. Dietz' opinion that Appellant specifically did not suffer a blackout, in open disregard of the court's ruling.

"Q. (Mr. Brent)	Was there evidence that actually indicated to you that the defendant did not suffer a blackout?
A. (Dr. Dietz)	Yes. (R.T. 6344, 20 - 23.)"

The elicitation of expert testimony upon a key point, in open violation of a court ruling that was preceded by briefing, an evidentiary hearing, and lengthy arguments of counsel, is but one example of behavior by the prosecutor that cannot be excused by inadvertence and could not be cured by an admonition; the prosecutor's emotional appeal to the jurors during his closing argument is another.

The impropriety of the prosecutor's efforts to secure a death verdict by any means, fair or foul, is highlighted by this court's recent decision in ***People v. Lopez*** (2008) 42 Cal.4th 960. While the opinion in ***Lopez*** ruled that a prosecutor's closing argument that used the jurors as hypothetical examples did not violate due process, it strongly intimated, by citation and example, that "a prosecutor may not invite the jury to view the case through the victim's eyes because to do so appeals to the jury's sympathy for the

victim (*case cited*)." (*Id.* at 969.) Here, the prosecutor's closing exhortation to the Appellant's jury in this case was an archetypal example of what this court has explicitly and repeatedly held to be improper:

> "She did nothing to deserve what happened to her, nothing. And before he thrust his mousse can deep into her vagina, up into her abdominal cavity – can any of us conceive the unimaginable terror of this? No, we can't. But please don't hold that against the memory of these victims. Do your best to imagine it as you determine this penalty. We can't but give it a show, would you? This terror beyond comprehension. It's unimaginable terror, is it not. (R.T. 6410, Lines 10 – 18; *emphasis supplied.*)"

Because of this and other instances of misconduct, defense counsel found themselves in a dilemma. Objections and favorable rulings by the Court did not restrain the prosecutor. Also, they did not want to seem obstructionist and draw unnecessary attention to the prosecution's prejudicial remarks.. Finally, the prosecutor openly criticized the defense during his closing argument for even making objections. During his final remarks to the jury, the prosecutor complained about the conduct of defense counsel during trial and commented, "I hope he is not trying to deny me a chance to talk to you folks." The court overruled defense counsel's objection to the complaint. (R.T. 3091.) Based upon the foregoing record,

Appellant has not waived his right to raise prosecutorial misconduct; it was relentless, despite objections and the trial court's rulings.

C. The Prosecutor's Misconduct Materially Contributed to the Verdict for Death

The misbehavior of the prosecutor is powerful circumstantial evidence that he did not have the same confidence in his proof that Respondent now professes in its brief. The prejudice that the prosecution's misbehavior had upon a fair determination of penalty, when considered individually, and certainly when considered as a whole, is outlined in the Opening Brief and will not be repeated except to point out that there is concrete and compelling circumstantial evidence that the misconduct at the second penalty phase proceeding unfairly tipped the scales from life to death.

The first penalty phase was deadlocked after each party offered conflicting expert opinion about whether Appellant had any long-term memory of the homicides. This was a key issue at the penalty phase proceedings; it bore upon Appellant's lack of remorse as well as the truthfulness of his testimony to save his life. The only major difference between the first and second penalty phase defense evidence was that Appellant did not introduce expert opinion about whether he had blacked out

his memory of the homicides; nevertheless, notwithstanding the trial court's ruling, the prosecutor introduced expert testimony on that subject, leaving the scales of expert opinion unbalanced. Dr. Dietz testimony was the final evidence that the jury asked to be re-read during its deliberations; its next note announced its verdict of death....throw in a reminder to the jury that Appellant did not receive a death verdict in Hawaii, and extravagantly improper exhortation to the jury to do its best to imagine its victim's "unimaginable terror" as it determined the penalty, and one does not have to look far for the reason that the prosecutor secured a unanimous verdict of death the second time around.

XV.

THE TRIAL COURT'S IMPROPER DECISION TO ADMIT EXPERT OPINION THAT DISPUTED A KEY MITIGATING CIRCUMSTANCE, AS WELL AS TESTIMONY FROM THE VICTIM'S RELATIVES ABOUT THE IMPACT WHICH HER DEATH HAD UPON THEM, VIOLATED MR. EDWARDS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Dr. Dietz' Opinion that Appellant was Not "Blacked Out" During the Crime was Improper Rebuttal and Introduced in Violation of a Court Order

One of Appellant's chief claims of mitigation was that he did not have any present recollection of the offense. The battle was plainly joined on this assertion during closing argument; the prosecution argued to the jury to sentence him to death as "this monster who says that he doesn't remember." (R.T. 6412.)

The trial court recognized that expert testimony is not necessary to argue that Edward was "blacked out during the offense." (R.T. 6309, Lines 11 – 16.) Nevertheless, over timely defense objections, Dr. Dietz gave extensive and detailed "rebuttal" testimony that, (1) Appellant was not in a "blacked out" state when he committed the crimes, and (2) at the time that he committed the crimes he was "behaving intentionally and voluntarily ... he his right there in the present tense in the moment doing as he pleases." (R.T. 6343.)

Respondent asserts that the defense "put the ball in play," so to speak, by Mr. Edwards' testimony that he did not remember the crime and expert testimony that a blackout is not inconsistent with the retention of motor skills. (RB 225 – 226.) As argued in the opening brief, this evidence did not open the flood gates to expert testimony on the ultimate issues of whether Mr. Edwards acted intentionally and voluntarily at the time of the crime and

retained a present memory of it since the defense did not present expert testimony on these matters and since, more importantly, they were not the proper subject of expert testimony. (AOB Argument VXI(B)(2).) There was ample circumstantial evidence for the jury to reach its own informed conclusion about whether the Appellant's acts were intentional and voluntary. As far as whether he retained present memory of his acts, the trial court strictly prohibited Dr. Dietz from expressing an opinion on that subject. (Argument XIV; R.T. 6327.)

Expert testimony that Appellant was "doing as he pleased" at the murders and, in effect, lying to the jury when he explained during his testimony that he could not remember these acts was devastating to the defense evidence of mitigating circumstances. As argued previously, the jury's consideration of these key issues of remorse was hopelessly skewed by the *ex cathedra* pronouncement of the expert, Dr. Dietz.

B. The Admission of Testimony by Victim's Relatives about the Impact which Her Death Had Upon Them Violated Ex Post Facto Principles and Appellant's Right to Due Process and a Reliable Penalty Determination and Requires Reversal of the Death Judgment

In his opening brief, Appellant argued that the admission of the penalty-phase testimony of Marjorie Deeble's daughter and sister violated his constitutional privileges against Ex Post Facto laws and his constitutional rights to due process, a fair jury trial, and a reliable penalty determination. (AOB 360 – 364.) Respondent disagrees, contending that this victim impact evidence was properly admitted by the trial court and did not violate Ex Post Facto principles. (RB 231, 234.) Respondent's contentions do not adequately rebut Appellant's arguments, either legally or factually.

Respondent attempts to treat the Ex Post Facto issue raised by Appellant closed as a matter of law, but it is not. The United States Supreme Court has not decided the constitutional question presented by Appellant. Appellant is well aware that this Court has rejected the argument advanced here. (*see*, e.g., ***People v. Roldan*** (2005) 35 Cal. 4th 646, 73) Appellant respectfully contends that ***Carmell v. Texas*** (2000) 529 U.S. 513, although not involving victim-impact testimony, persuasively supports his position since the interpretation of the Ex Post Facto Clause is a federal question, reserved for determination by the federal courts. (*Id.* at 544, fn, 31)

The high court in ***Carmell*** expressly reaffirmed the principle that changes in evidentiary rules that impact the trial of a criminal defendant can

violate the Ex Post Facto Clause. In discussing the application of the ancient prohibition against Ex Post Facto laws, the ***Carmell*** opinion discussed at length the classic statement in ***Calder v. Bull*** of what constitutes an Ex Post Facto law, including "Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense." (***Carmell***, *supra*, 529 U.S. at 522.)

Although the evidentiary change here involves the penalty phase of a capital trial rather than a determination of guilt, the principles annunciated in ***Carmell*** apply with equal – if not greater – logical force to the instant situation. The ***Carmell*** court explained that "(t)here is plainly a fundamental fairness interest ... in having the government abide by rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." (*Id.* at 533; *emphasis added; see generally,* ***People v. Batman*** (2008) 159 Cal.App.4th 587, 590, civil regulatory schemes can violate the Ex Post Facto Clause if sufficiently punitive in effect).)

The judicial change at issue here certainly did not implicate an "ordinary" rule of evidence which would not violate the Ex Post Facto Clause. (*Id.* at p. 533, fn. 3; *see also*, ***Thompson v. Missouri*** (1889) 171 U.S. 380, 386 – 388: "Rules of that nature are ordinarily even handed, in the

sense that they may benefit either the state or the defendant in any given case.") Rules permitting the introduction of victim impact evidence benefit only the prosecution. They do so by permitting the introduction of a new class of aggravating evidence that is uniquely likely to inflame the passions of the jurors and result in the death verdict, by preventing a rational determination of the appropriate penalty. (*See*, ***People v. Love*** (1960) 53 Cal.2d 843, 856 – 857; Changing the rules "after the fact" to permit victim impact evidence, where such evidence was inadmissible when the crime was committed. must be deemed to constitute an impermissible Ex Post Facto law and the denial of due process. (*See*, ***State v. Odom*** (Tenn. 2004) 137 S.W.3d 572, 582 – 583, and fn. 9; ***State v. Metz*** (Or. 1999) 986 P.2d 714, 721.) Thus, the relevant issue in this case is whether, in May of 1986, California law would have permitted the admission of testimony about third party suffering as aggravating evidence.

Respondent suggests that the admissibility of testimony from relatives of the victim about the impact that the homicide had upon them was foreseeable at the time of the charged offense. Yet, at the time of the murder, there was no authority that permitted the introduction of testimony by relatives of the victim about the impact of the murder upon them, nor does Respondent cite any. In fact, at the time of the homicide, the prevailing

law, as expressed by this court in ***People v. Gordon,*** was that "the effect of the crime on the victim's family is not relevant to any material circumstance ... obviously, evidence on these matters is inadmissible. ((1990) 50 Cal.3d 1223, 1267, cert. denied, (1991) 499 U.S. 913, *citing* ***People v. Boyd*** (1985) 38 Cal.3d 762; *emphasis supplied.*) ***People v. Haskett***, (1982) 30 Cal. 3d 841, *cert. denied*, (1991) 502 U.S. 822, cited by Respondent is not to the contrary.

Haskett did not involve the kind of evidence here which involved the emotional impact of the crime upon a victim's family. The victim impact evidence approved by this court in ***Haskett*** was primarily the suffering of the murder victim, and not of the victim's family. Thus, contrary to Respondent's position, testimony from the victim's family about their suffering was barred in California even before ***Booth v. Maryland*** (1987) 482 U.S. 496 and ***South Carolina v. Gathers*** (1989) 490 U.S. 805. There was no Supreme Court authority before ***Booth*** and ***Gathers*** that remotely suggested that victim impact evidence would be admissible nor does Respondent make any such claim. Indeed, as pointed out in ***Booth,*** the trend of Supreme Court decisions was to restrict the admission of evidence pertaining to the impact of the murder upon the victim's friends and the community. (***Id.*** at 50, citing ***Godfrey v. Georgia*** (1980) 446 U.S. 420, for

the holding that evidence about whether "the victim was a sterling member of the community rather than someone of questionable character" was inadmissible at the penalty phase.) If one would have been called upon to predict the direction of the rule of law of victim impact evidence in California at the time of the Deeble homicide, a projection that it would become *more* restrictive and, indeed, prohibited, would have been correct in light of ***Booth*** and ***Gathers***. It wasn't until 1991, a full five years after the homicide, that the rule of law, for the first time, permitted testimony from the victim's family about the impact that the death had upon them.

Respondent seeks to minimize the prejudice of the improper admission of the testimony by the victim's sister and daughter as "very brief" and inconsequential in comparison to the other evidence in aggravation. (RB 241 – RB 242.) This claim is belied by the record. The prosecutor himself deemed the victim impact testimony of the victim's daughter and sister to be an important element in his argument for a death verdict, or else he would not have called them as witnesses? While the transcript of their testimony may have "consumed no more than eight pages of transcript." (RB 240), those pages were crucial enough to the prosecution's argument for death that they were read to the jury virtually verbatim during his closing argument. (R.T. 6417 – 6423.) No other

testimony in the approximately 200 pages of the prosecution's remaining case in aggravation received this treatment or was featured so prominently in its argument to the jury for death. Indeed, the record shows that the prosecution placed such importance upon the victim impact evidence that he read the transcript of their testimony as the final conclusion for his argument for death, which ended a few moments later. (R.T. 6425.) Thus, its admission was not harmless, however "brief." It was the keystone of the argument for death. Its admission was both prejudicial and constituted an Ex Post Facto violation. The death judgment must therefore be reversed.

XVI.

THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT PREVENTED HIM FROM INTRODUCING RELIABLE EVIDENCE OF REMORSE

The trial court excluded evidence on hearsay grounds that, while waiting execution in Hawaii, Appellant told two correctional officers that he did not join in an escape attempt because he wanted to "do his time." (R.T. 5803; R.T. 5813 – 5814.) Based upon the same grounds, it also excluded Appellant's explanation to Father John McAndrew that he did not remember the commission of the crime. (R.T. 5040.)

As Respondent recognizes, a defendant's right to introduce relevant mitigating evidence trumps a hearsay objection, so long as "substantial reasons exist to assume its reliability." (***People v. Harris*** (1984) 36 Cal.3d 36, *cert. denied*, ***California v. Harris***, 469 U.S. 965.) Respondent does not contend that the proffered testimony was irrelevant; rather, it argues that it was unreliable because it was made after appellant's arrest and "(t)here was possibly an ulterior motive in making these statements of remorse because Edwards knew that they would be helpful in the penalty phase of the trial." (RB 248.) In a related argument, Respondent claims that his circumstantial expressions of remorse are uncorroborated. (RB 248.) These speculative objections are not factually nor legally sound.

To begin with, the record does not present a defendant who seeks to introduce his out-of-court statements to avoid taking the stand and being subject to cross-examination. (*Compare*, ***People v. Harris***, *supra*, where the trial judge excluded a defendant's poetry, offered in mitigation, because he was "troubled by the idea that (he) wrote them with litigation pending and it's a way of testifying, without testifying really." *Id.* at 69.) Mr. Edwards testified at the penalty phase and was thoroughly cross-examined about his inability to remember the crimes. (R.T. 5520 – 5523.) The prosecution was also free to cross-examine him about his failure to join the escape attempts.

The "ulterior motivation" for Mr. Edwards to make these statements is far less apparent then in ***People v. Jurado*** (2006) 38 Cal.4th 72, *cert. denied*, 127 S.Ct. 383. The statements at issue in ***Jurado***, found by this court to be hearsay and untrustworthy, were made during a videotaped interview with the police in which the defendant described his feelings. Such statements, which were made when he had a compelling motive to minimize his culpability for murder and to play upon the sympathies of his interrogators, indicated a lack of trustworthiness. The statements in ***Jurado*** during a post-arrest police interrogation are a far cry from the instant situation where Appellant did not make his statements in direct response to an accusatory interrogation. Those statements were made well before his conviction, after which he then would have an arguable motive to create evidence that would be helpful at the penalty phase of the trial.

Finally, there was substantial evidence at the trial to corroborate the reliability of Appellant's statements. First, Respondent does not contest that the statements were actually made by Appellant or that the escape attempts actually occurred while Appellant was in custody. The record also shows that Appellant had an actual choice between joining the escapes or remaining in custody "to do his time." When Sgt. Morris was asked about the escape attempt in 1993, he replied, "There was an escape, and he wasn't

even involved. He could have gone with them, I guess, but he chose not to." (R.T. 5803, Lines 11 – 13.) Appellant's explanation to Father McAndrew that he could not remember the crimes was likewise well-corroborated. Experts from both sides agreed that "blackout," where long-term memory is erased, is a legitimate medical phenomenon. Appellant introduced circumstantial evidence from Janis Hunt that strongly supported his testimony that substance abuse had erased his memory of events other than the homicide. (R.T. 2646.) Under these circumstances, the excluded evidence was indisputably relevant and there was substantial evidence of reliability, both from testimony introduced by the prosecutor as well as the defense.

Lastly, Respondent contends that Appellant was not prejudiced by the exclusion of his expressions of remorse because they had already been presented to the jury. This is simply untrue. Mr. Edwards decision to "do his time" rather than escape was never admitted into evidence. The ambiguous circumstance that he did not escape, despite an opportunity to do so, cannot be compared with affirmative evidence that he made a conscious decision to remain in custody as a concrete expression of remorse.

Evidence of Appellant's remorsefulness can constitute powerful mitigating evidence and give can a juror reason to spare a defendant's life. (*See, e.g.*, ***Brown v. Payton*** (2005) 544 U.S. 133, 144 – 143 [remorse ... is something commonly thought to lessen or excuse a defendant's culpability]; ***People v. Ghent*** (1987) 43 Cal.3d 739, 771, *cert. denied*, (1988) 485 U.S. 929 ["the concept of remorse for past offenses is sometime warranting less severe punishment or condemnation is universal."]) Furthermore, the prosecutor emphasized Appellant's supposed lack of remorse and his closing argument. Preventing Appellant from forestalling and rebutting that argument with evidence demonstrating or even suggesting that the opposite was true was devastating to his chances of avoiding a death verdict. (***State v. Northcutt*** (S.C. 2007) 641 S.E. 2d 873, 880 [trial court erroneously excluded evidence of a defendant's letter expressing remorse, received nine days following the murder, to correct the false impression the state conveyed to the jury by presenting evidence that defendant never expressed remorse for his action; evidence deemed harmless because there was other evidence of defendant's remorse].)

The jury was able to hear the facts of the crime and the victim impact evidence, but heard nothing of Appellant's concrete action to come to grips with what he had done. This gave the jury an unfairly one-sided view of the

evidence and denied him his right to present critical mitigating evidence at the penalty phase. As noted in the opening brief, the first penalty phase jury heard the excluded evidence and deadlocked; the second did not and returned a death verdict. (AOB 377.) Such an error is reversible per se as to the death sentence. Based upon the entire record in the case, reversal is also required under the ***Chapman*** standard (***Chapman v. California*** (1967) 386 U.S. 18, 24.) Appellant's death verdict must therefore be reversed.

XVII.

THE TRIAL COURT ERRED WHEN IT REFUSED TO DELIVER THE SAME LINGERING DOUBT INSTRUCTION THAT IT GAVE AT THE FIRST PENALTY PHASE PROCEEDING

A. Introduction

Respondent argues that the lingering doubt instruction proposed by the defense was confusing, argumentative and speculative "in that it invited the jury to consider the possibility evidence exists which exculpates Edwards but was, for some reason, not presented." A fair reading of the instruction does not support this interpretation.

The same instruction was delivered to the first penalty phase jury without any adverse repercussions, such as a note from the jury expressing confusion. The instruction does not do anything more than redirect the jury's attention to evidence before them on the evidence of guilt, including evidence of lingering doubt that was introduced by Appellant without objection. This evidence included a number of witnesses who established that the latent fingerprints that were found at the scene, but did not belong to Appellant. (R.T. 5598 – 5631.)

The trial court's ruling was directly contrary to precedent that at penalty phase retrials before a different jury, it is proper for the jury to consider 'lingering doubt.'" (***People v. Gay*** (2008) 42 Cal. 4th 1195, 1125; ***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1219, *cert. denied*, (2003) 537 U.S. 112.) Finally, it is well settled that the ability of defense counsel to argue the concept of lingering doubt is not an adequate substitute for proper instructions by the court. (***People v. Vann*** (1974) 12 Cal.3d 220, 227, n. 6.) This is especially true where, as here, the prosecutor frustrated and undercut the trial court's expectation that the jury would be able to freely and fairly consider defense counsel's attempt to argue lingering doubt as mitigation under CALJIC Nos. 8.85 and 8.88 by branding it a "shameful argument"

during his closing remarks. (R.T. 6359, Lines 6 – 20; C.T. 1647 – 1648; C.T. 1665 – 1680; AOB 380.)

None of the cases cited by Respondent involved facts where a lingering doubt instruction was given at a first penalty trial, leading to a hung jury, and where it was refused at the second penalty trial, leading to a death verdict. This court has noted that there may be some cases where "a lingering doubt instruction of some type might be proper." (***People v. DeSantis*** (1993) 2 Cal.4th 1198, 1239.) The unique facts of Appellant's case require the court to find that the refusal to give a lingering doubt instruction was reversible err.

B. Due Process Required the Lingering Doubt Instruction in this Case

Franklin v. Lynaugh (1980) 467 U.S. 164, has frequently been cited as authority for finding that there is no federal or state law that requires the trial court to instruct on lingering doubt. (*See*, ***People v. Valdez*** (2004) 32 Cal.4th 73, *cert. denied*, (2005) 543 U.S. 1145). In ***Oregon v. Guzek*** (2006) 546 U.S. 517, the United States Supreme Court clarified its earlier plurality opinion in ***Franklin***. The United States Supreme Court in ***Guzek*** clearly stated that its earlier decision in ***Franklin*** did not resolve whether the Eighth Amendment affords capital defendants the right to introduce evidence at

sentencing to cast "residual doubt" on his guilt. The opinion acknowledged that the ***Franklin*** plurality said it was "quite doubtful" that any such right existed. However, the court stated that "***Franklin*** does not resolve whether the Eighth Amendment affords defendants such a right." (***Oregon v. Guzek***, *supra*, 546 U.S. at 525.)

Appellant's argument that this court should reverse the death verdict under the unique circumstances of the case is further supported by United State Supreme Court decisions relating to the constitutional adequacy of jury instructions on mitigation in capital cases. (***Smith v. Texas*** (2007) 127 S.Ct. 1686; ***Brewer v. Quarterman*** (2007) 127 S.Ct. 1706; ***Abdul-Kabir v. Quarterman*** (2007) 127 S.Ct. 1654.) All three cases arise out of Texas state court capital trials. In each case, the defendant argued that the jury instructions giving them the penalty phase trials violated the Eighth and Fourteenth Amendment because the instructions failed to allow the jury to give effect to the mitigating evidence, as required by ***Penry v. Lynaugh*** (1989) 492 U.S. 302, 314 – 319. In each case, the Supreme Court reversed the death verdicts because the jury instructions were constitutionally inadequate because they did not allow the jury to give full consideration to mitigating circumstances in choosing the defendant's appropriate sentence. These three new cases from the United States Supreme Court support

Appellant's argument that the failure to instruct the jury on lingering doubt renders Appellant's death sentence unconstitutional under ***Penry v. Lynaneh*** (1989) 492 U.S. 302. By rejecting Appellant's lingering doubt instruction, the trial court left the jury with no meaningful basis to consider lingering doubt of Appellant's guilt as a mitigating factor upon which the defendant can base a sentence less than death. Thus, Appellant's death sentence was obtained in violation of his Eighth and Fourteenth Amendment Constitutional rights.

C. The Failure to Instruct the Jury that it Could Consider Lingering Doubts about Appellant's Guilt as a Mitigating Factor was Reversible Error

In ***Abdul-Kabir***, the court stated that "the jury must be permitted to consider fully...mitigating evidence and that such consideration would be meaningless unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence. (***Abdul-Kabir v. Quarterman***, *supra*, at 1672.) More recently, this court reversed a death penalty verdict, in material part, because the trial court eviscerated its lingering doubt instruction with other comments to the jury that directed it to assume that defendant's identity as the shooter was conclusively proved by the verdict. (***People v.***

Gay (2008) 42 Cal.4th 1195, 1125.) In its opinion, this court made several observations that are relevant here.

First, the court re-affirmed the right of every penalty phase defendant to argue "lingering doubt" as a mitigating factor:

> " ... that lingering doubt evidence represents an improper attempt to 'retry' the guilt phase as easily rebutted. Because of different standards of proof at the two trial phases, no inconsistency arises ... that the same or a different penalty jury found the defendant guilt beyond a reasonable doubt does not logically preclude the penalty jury from entertaining residual doubt as to the nature or extent of the defendant's guilt. (42 Cal.4th 1195, 1230; *emphasis in the original.*)

Secondly, the Opinion found reversible error even though the defense was not prevented from presenting evidence of lingering doubt as to the identity of shooter, and even though the court delivered a lingering doubt instruction to the jury. Nevertheless, this court found that reversible error occurred because the trial court excluded lingering doubt witnesses and because it gave conflicting instructions as to whether lingering doubt was a mitigating factor. Those circumstances "surely crippled" the defense. (***People v. Gay***, *supra*, 42 Cal.4th 1195, 1224.)

Here, too, lingering doubt was a substantial part of the mitigation defense; indeed, defense counsel's closing argument remarked at length that

there was no direct evidence linking Appellant to the charged murder and detailed the many dissimilarities between the Deeble and Delbecq homicides. (R.T. 64 – 65 – 64.) Even assuming, for the moment, that Appellant was not entitled to a lingering doubt instruction under ***Gay***, surely he was *minimally* entitled to an unfettered opportunity to argue that concept to the jury. The trial court said as much when it denied his request for the instruction. And yet, the prosecutor actively denied Appellant even that minimal opportunity to avoid a death verdict:

> "By Mr. Brent Do I got to worry there is going to be a juror up there, who is going to say could I ever vote for the death penalty? I am not even sure he did it. So <u>if the defense is trying to do that, shame on them</u>. <u>As a matter of law</u>, this defendant was convicted and is guilty of those murders beyond a reasonable doubt, <u>as a matter of law</u>. (R.T. 6359; *emphasis supplied.*)

This record is the functional equivalent of that considered in ***Gay.*** The defense ability to effectively argue lingering doubt as mitigation evidence was "surely crippled" by the combination of the trial court's refusal to plainly instruct the jury that it was a permissible mitigating consideration and the prosecutor's repeated assertion to the jury that, "as a matter of law," Appellant was guilty of those murders and the defense attempt to argue otherwise was "shameful." On this record, Respondent's argument that the

general "factor (k)" instruction to the jury was an adequate substitute for the lingering doubt instruction proposed by the defense and delivered at the first penalty trial proceeding must fail. (RB 379)

As argued elsewhere, this is not a case of overwhelming guilt. It therefore cannot be said that the failure to deliver the instruction did not, beyond a reasonable doubt, effect the jury's verdict. (***Chapman v. California*** (1967) 386 U.S. 18, 24.)

XVIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In his Opening Brief, Appellant argued that even if none of the individual errors identified are deemed prejudicial in themselves, the cumulative effect of such errors requires reversal of the death judgment. (*See*, AOB 389 – 390.) Since Respondent simply reiterates its contentions that "the trial court did not commit any errors, so there were no errors to accumulate," and that Appellant was not denied due process or a fair trial even if any such errors were committed (*see*, RB 260), no reply is warranted.

Because of the cumulative effect of the errors discussed in Appellant's Opening Brief the judgments of conviction and death must be reversed.

XIX.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

In his opening brief, Appellant made a multifaceted attack on the constitutionality of this state's capital-sentencing scheme. (*See*, AOB 391 – 429.) Respondent has answered Appellant's discussion of the faulty California jurisprudence in this area with a pro-forma citation of this Court's rulings disagreeing with many of the Appellant's arguments. Although Appellant acknowledged in his opening brief that this Court has previously rejected similar claims, Respondent merely cites this court's prior cases in contending that these claims are meritless. (*See*, RB 145 – 152.) Thus, Respondent fails to effectively meet Appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow fundamentally-flawed precedents. (*See*, ***Lawrence v. Texas*** (2003) 539 U.S. 558, 577 ["The doctrine of *stare decisis* ... is not ... an inexorable command."]; ***People v. Anderson*** (1987) 43 Cal.3d 1104, 1147, *cert. denied*, (2002) 534 U.S.

1136 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].)

Respondent additionally contends that all of Appellant's claims have been waived because "none of these claims were presented to the trial court." However, the fact that these claims may have been previously decided adversely to Appellant's position establishes that it would have been futile to object because the trial courts are bound to follow the law as declared by courts of superior jurisdiction. (***Auto Equity Sales, Inc. v. Superior Court*** (1962) 57 Cal.2d 450, 455; *see, e.g.*, ***People v. Sandoval*** (2007) 41 Cal.4th 825, 837, fn. 4 ["an objection in the trial court is not required if it would have been futile."]; ***Cedars-Sinai Medical Center v. Superior Court*** (1998) 18 Cal.4th 1, 6 ["here the trial court was bound by prior appellate decisions . . . and it would therefore have been pointless to raise the issue there"]; ***People v. Turner*** (1990) 50 Cal.3d 668, 704, fn. 18 [no waiver for failure to object where "[t]hese challenges had consistently been re buffed"]; ***Moradi-Shalal v. Foreman's Fund Ins. Companies*** (1988) 46 Cal.3d 287, 292, fn. 1 ["clearly it was pointless for defendant to ask either the trial court or appellate court to overrule one of our decisions"]; ***In re Gladys R.*** (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to

anticipate that an appellate court will later interpret [the law] in a manner contrary to the apparently prevalent contemporaneous interpretation"].)

CONCLUSION

For all the foregoing reasons, as well as those stated in Appellant's Opening Brief, the entire judgment must be reversed.

DATED: November 10 2008

Respectfully submitted,

MICHAEL D. ABZUG
Counsel for Appellant

CERTIFICATE OF WORD COUNT

I, Michael D. Abzug, counsel on appeal for Appellant Robert M. Edwards in Automatic Appeal No. S073316, certify that Appellant's Reply Brief consists of 29,447 words, excluding tables, proof of service, and this certificate, according to the word count of the word processing program with which it was produced. (Cal. Rules of Court, Rule 36(b)(1).) Appellant has separately filed an application to file an oversized reply brief. On November 5, 2008, this Court granted permission to file a Reply Brief not to exceed 150 pages.

Dated: November 10 2008

Respectfully submitted,

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Declaration of Service by Mail

Case Name: *People v. Robert M. Edwards*
Case Number: Supreme Court No. S073316
Orange County Superior Court No. 93 WF 1180

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-captioned action. My place of employment and business address is PMB 471, 137 North Larchmont Blvd., Los Angeles, California, 90004

On November 10, 2008, I served the attached reply brief

By placing a true copy thereof in an envelope addressed to the individuals named below at the address shown, and by sealing and depositing said envelope in a United States Postal Service mailbox at Los Angeles, California, with postage thereon fully prepaid.

See attached service list

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2008, at Los Angeles, California.

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