SUPREME COURT COPY

THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

MICHAEL LEON BELL,

Defendant and Appellant.

No. S080056

Stanislaus Co. No. 133269

SUPREME COURT
FILED
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Frank A. McGuire Clerk
Deputy

APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF STANISLAUS COUNTY
THE HONORABLE DAVID G. VANDER WALL, JUDGE PRESIDING

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DEATH PENALTY

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THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	) **No. S080056**
Plaintiff and Respondent,	)
	) **Stanislaus Co.**
vs.	) **No. 133269**
	)
MICHAEL LEON BELL,	)
	)
Defendant and Appellant.	)
	)
	)

APPELLANT'S REPLY BRIEF

CORRECTIONS TO RESPONDENT'S STATEMENT OF FACTS

Respondent's Brief misleadingly states: "The tire patterns from the right rear tire and the front tires were consistent with the tire impressions found at the Quick Stop." (RB 5.) Tire impressions from all four of Travis' mismatched tires were sent to the Department of Justice Crime Laboratory for comparison with photographs of the tire prints found near the Quik Stop Market on January 20, 1997. (X RT 1979-1984.) The comparisons were inconclusive, however, although Travis' car was not ruled out. (XI RT 2141-2154.) The tire imprints for the left rear tire did not match any of the tire treads and did not make the impressions. The right rear tire could not be eliminated, but there was not enough detail for identification. (XI RT 2150-2151.)

The Respondent's Brief recites, "two bullets recovered from underneath and inside Francis' body were consistent with having been fired from the recovered revolver." (RB 7.) Respondent acknowledges that a

third bullet, found on the driveway next to the store, was too damaged to make a determination. (RB 6.)

The criminalist, Sarah Yoshida, testified that she examined two bullets. (XI RT 2158, 2195,2205-2206.) According to Yoshida, People's Exhibit 15, the bullet from the victim's abdomen (X RT 1965) shared rifling characteristics with the bullets test-fired from the recovered gun, could have been fired from the recovered gun; however, Yoshida could not say certainty that it *was* fired from the gun. (XI RT 2163-2166, 2211.) People's Exhibit 7, the bullet found in the middle of the street where shots were fired at Mr. Perry's truck (IX RT 1853), was in such a damaged condition that it's rifling characteristics could not be fully determined. (XI RT 2166-2167.) Yoshida could not say with any degree of probability at all that either of these bullets came from the gun she test-fired. (XI RT 2211.)

Paramedics found a piece of deformed lead underneath the victim when they moved him from the Quik Stop Market. (IX RT 1820, 1825.) Officer Silveira placed the deformed lead, a possible bullet fragment, in an evidence bag and turned it over to a community service officer James Allen. (IX RT 1825, 1827.) Allen believed he sent the fragment to the Department of Justice for testing. (IX RT 1850-1851; People's Exhibit 6.) If Yoshida examined the third bullet fragment identified as People's Exhibit 6, it is not entirely clear from the transcript of the trial that she did so. (XI RT 2163-2166, 2197.)

ARGUMENT SECTION 1

INTERRELATED ARGUMENTS REGARDING THE IMPARTIALITY OF, AND SELECTION OF THE JURY THAT DECIDED GUILT AND PENALTY

Respondent responds to appellant's 75-page discussion of the facts and law supporting a multiplicity of constitutional challenges to the fairness of jury selection in a spare 10 pages. (RB 35-44.)

I

CONTRARY TO RESPONDENT'S ASSERTION, THE TRIAL COURT VIOLATED BELL'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL TRIBUNAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THEIR CALIFORNIA COUNTERPARTS, BY APPLYING AN INCORRECT STANDARD TO FIND STRONGLY PRO-DEATH PENALTY PANELISTS SUBSTANTIALLY UNIMPAIRED PURSUANT TO *WAINWRIGHT V. WITT* (1985) 469 U.S. 412 [83 L.ED.2D 841, 105 S.CT 844] BASED SOLELY ON JURORS' "APPROPRIATE" ANSWERS TO THE JUDGE'S LEADING QUESTIONS THAT THE COURT DEEMED AUTOMATICALLY QUALIFYING ACCORDING TO *WITT*, AND BY EMPLOYING THREATS TO CHILL DEFENSE COUNSEL'S ABILITY TO MEANINGFULLY SCREEN PROSPECTIVE JURORS FOR ACTUAL OR IMPLIED BIAS.

A. Respondent Falsely Suggests Appellant Does Not Challenge The Impartiality Of The Jury.

Respondent asserts that appellant "does not allege any of the empaneled jurors were unduly prone to impose the death penalty." (RB 36.) This is not entirely accurate. It is true, as respondent states, that appellant "did not challenge any of the empaneled jurors for cause." (RB 36.) But it is not true that appellant concedes the impartiality of his jury. Argument I of the Appellant's Opening Brief unambiguously asserts that the trial court

violated appellant's right to an "impartial tribunal." (AOB 76.) In the body of his opening brief, appellant has argued at length that, for a multiplicity of reasons, the jury was not assuredly impartial *notwithstanding the fact that none of the panelists who were challenged for cause ended up on the jury.* (AOB 76-114.)

B. Appellant's Failure To Argue That The Court Erred By Granting The Prosecutor's Challenge's For Cause Is Irrelevant.

To bolster the argument that the jury was fair and impartial, respondent points out that, on appeal, appellant did not argue that the court erred in *granting* any of the prosecution's challenges for cause based on prospective jurors' views about the death penalty. (RB 36.) Appellant fails to see the relevance of arguments he did *not* make in the opening brief to the merits of the arguments he did make.

The trial court granted a total of five of the District Attorney's challenges for cause based on anti-death penalty bias. In each instance of excusal, defense counsel acquiesced, submitted, or voiced token objections for the record without any argument. (See, 5 RT 1011; 8 RT 1722; 6 RT 1117, 1151; 7 RT 1361.) One need only examine the excused panelists' responses to questions to understand that the choice not to challenge the trial court's *granting* of the district attorney's for-cause excusals demonstrates nothing more than reasoned judgment by appellate counsel that the court's rulings – in contrast to the court's rulings denying for-cause challenges of extremely pro-death penalty panelists – would have "no reasonable potential for success" on appeal. (See, *People* v. *Johnson* (1981) 123 Cal.App.3d 106, 109; see also, *People v. McKinnon* (2011) 52 Cal.4th 610, 651; *People v. Thompson* (2010) 49 Cal.4th 79, 103-109.)

One excused panelist, Leona D., said that she could "never under any circumstances impose the death penalty." (5 RT 1009.) Another, Carol A., cried during questioning, and wrote to the court, "I do not believe in the death penalty and could not vote for it under any circumstances." (8 RT 1721-1722.) A third excused panelist, Yamin L., repeatedly wrote, and stated in *voir dire*, that her feelings against capital punishment were so strong that she would "never under any circumstances impose the death penalty. . . ." (6 RT 1107-1114.) A fourth, Chris N., expressed an "abhorrence of the death penalty," opined, "it can never be a just punishment," and emphatically stated that "no set of aggravating factors would lead me to impose the death penalty or vote for it." (6 RT 1146, 1148, 1150.) The fifth excused panelist, Alma F. was a member of the Pentecostal Church. She said she would not impose the death penalty even if she personally felt the circumstances warranted death. (7 RT 1357-1358, 1360.) She said she would refuse to follow the court's instructions if it meant imposing the death penalty. (See, e.g., 7 RT 1359.)

C. Respondent's Forfeiture Argument Should Be Rejected And The Issues Addressed On The Merits.

The Attorney General specifically asserts that claims that the court "misapplied the *Witt* standard and used threats to curtail *voir dire*, were forfeited" by trial counsel's failure to object in the court below. (RB 35, referring to *Wainwright v. Witt* (1985) 469 U.S. 412 [83 L.Ed.2d 841, 105 S.Ct. 844]).)

In order to determine whether trial counsel's objections were adequate to preserve these issues for appeal, it is helpful to examine the rationale for the forfeiture doctrine.

> "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought

> or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . [] Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'" [Citation.] "'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.]

(*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; citations omitted.) Here, if one considers the *order* in which for-cause challenges were asserted, it becomes clear that trial counsel forfeited *neither* issue; he made sufficient objections to preserve the right to challenge the trial judge's threatening statements, and the judge's distortion of the *Witt* standard in aggressively rehabilitating all pro-death penalty panelists.

The *first* challenged panelist was Armendariz, who expressed the belief that the death penalty should be automatic for all first-degree murderers. (4 RT 586-587) Defense counsel objected:

> I think it's clear that the – these are strongly held beliefs . . . .
>
> He's already stated unequivocally that these – that he not only believes the death penalty is appropriate in all cases of first degree murder, but expects the defense to prove – has the burden of proof that Mr. Bell should not be given the death penalty which is totally contrary to the law.
>
> I don't that that he should be rehabilitated. I don't think he can be. I think it's would be [sic] a violation of my client's constitutional rights for him to sit as juror.

(4 RT 588.)

In context, counsel's objection was clear enough to alert the trial court that he was objecting to the trial court's rehabilitation of a clearly pro-death penalty venireman by asking leading questions designed to induce the prospective juror to give lip service – no matter how credible – to setting

aside his views and following the court's instructions. The trial court responded to counsel's objection by attacking counsel – by accusing him of "putting words in [Armendariz's] mouth," and by threatening to *punish* counsel by conducting death qualification with prospective jurors in a group, instead of individually, if counsel continued to object or complain. (4 RT 588.)

After the trial court finished questioning Armendariz, and declared him qualified to serve, defense counsel asked to speak. The trial court *refused* to let him speak. (4 RT 590.) Counsel had no opportunity to do follow up questioning or to elaborate upon the nature of his objections to the court's manner of rehabilitating this prospective juror. The forfeiture doctrine does not apply when "the trial court's actions effectively preclude a meaningful opportunity to object" to errors committed in jury selection. (See, *People v. Mata* (2013) 57 Cal.4th 178, 186; cf. *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

Defense counsel also objected to the trial court's use of threats. After Armendariz returned to the jury room, counsel objected that the court's threat to penalize counsel for asking questions was "disrespectful to the process." (4 RT 591.) The court's response was to threaten counsel again: "I'll change the process. I'm going to bring them all out here and have them all questioned just like I did the last time." (4 RT 591-592.)

Death qualification of Alternate Juror #3 followed almost immediately upon the heels of the questioning of panelist Armendariz. Alternate Juror #3 expressed a strong bias toward the death penalty over life imprisonment without parole, and admitted he was unlikely to be able to vote for a penalty that he "felt was wrong in view of [his] beliefs." (4 RT 600-608.) This panelist admitted he could "probably not" put out of his mind the costs of incarceration in deciding whether or not to impose death. (4 RT 601, 607-608.) Alternate Juror #3 also did not agree "that upbringing

determines the response of the crime committed," or that "because a person was brought up one way, one another; one is prone to a life of crime and one is not." (4 RT 605.)

After denying defense counsel's challenge for cause, the judge announced that from that time forward during jury selection, the attorneys would ask their questions first; the court would ask questions afterward, and there would be *no* opportunity for follow up questioning. (4 RT 614.) Counsel responded, "There won't?" (4 RT 614.) The judge explained that he was not going to have the attorneys come back and "try to subvert [panelists] on the death penalty questions." (4 RT 614.)

Counsel offered no objection at this point, but it was apparent that any objection would have been futile. Counsel had already objected to the judge's method of rehabilitating jurors during the questioning of Armendariz, and had been refused an opportunity to amplify upon those objections. From the trial judge's use of the pejorative word, "subvert" to describe counsel's efforts to ascertain whether panelists were biased, it is quite obvious that the judge intended to impede any good faith effort on defense counsel's part to conduct questioning that might expose the depth of disqualifying biases of prospective jurors. Counsel should not be required repeat a futile objection to preserve the issue for appeal. (See, *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 356.)

Furthermore, as occurred in *In re Khonsavanh* (1998) 67 Cal.App.4th 532, 537, "it appears counsel here was utterly surprised by the court's [declaration that there would be absolutely no follow-up questioning] and had little opportunity to react." Counsel objected to the process when the opportunity next arose, during the questioning of panelist Diep.

Diep was of the belief that, regardless of a person's background, a person who intentionally kills should die. (4 RT 667-668, 669.) After initial

questioning, based on the panelist's answers, defense counsel argued that Diep was "substantially impaired" because he would be unwilling to consider factors in mitigation. (4 RT 670.) The judge then questioned Diep himself, and elicited assurances from this venireman that, if selected as a juror, he would set aside his strong pro-death penalty beliefs. (4 RT 670-673.)

Defense counsel *asked for permission to do follow up questioning*, but the court said no, counsel could *not* ask a follow up question. (4 RT 673.) The court then lectured counsel about his practice of always wanting to question jurors last to "convince" them they were biased. The court restated its previous admonition that the *court* would always be the one to question panelists last. The court explained that if a panelist answered the court's questions "appropriately," that panelist would be deemed "qualified." (4 RT 674.) The judge also repeated his threat to curtail *Hovey voir dire*.[1] (2 RT 674.)

At this stage of the proceedings, defense counsel very *specifically objected* to the way the court was misapplying the *Witt* standard and rehabilitating prospective jurors: "Your Honor, I'm going to object to the court's application of the [*Witt*] standard and the Court's rehabilitation of jurors." (4 RT 675.) This objection was met with another threat by the court to abandon sequestered *voir dire*. (4 RT 675.) Counsel objected to the court's threats again – asserting that he was being "punished for trying to defend my client." (4 RT 675.)

Defense counsel objected at least one more time during the questioning of Diep to the court's misapplication of the *Witt* standard. The judge accused defense counsel of intentionally asking panelists questions with the intent to "put in their mind that just because they're in favor of the

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[1] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

death penalty they can't be fair and impartial in this case." (4 RT 677.) The judge opined that it was "not true at all" that the pro-death penalty jurors could not be fair. (4 RT 677.) The court pointed out that nearly all of the panelists in question had answered "yes" to question #57 of the written jury questionnaire: "Could you set aside any such training and decide this case according to the law as stated to you by the court." (4 RT 677-678.)[2] Defense counsel accurately objected, "That's not the standard." (4 RT 678.)

The next pro-death penalty panelist, Appiano, voiced a very strong preference for capital punishment over life sentencing; regarding life without parole, this panelist frankly admitted he "did not feel he could apply it" for a first degree murder in the course of a robbery. (5 RT 899-901.)

Soon thereafter, another prospective juror, Galvez, not only strongly endorsed the death penalty; he voiced the view that, regardless of whether capital punishment served as a deterrent, killing criminals would result in "one less maggot on this beautifull [sic] planet." (11 JQ 3202; 6 RT 1046-1047.) Among other strong pro-death beliefs, Galvez felt that, regardless of background, anyone who even *attempted* a serious crime should be "toast," meaning he or she should get the death penalty. (11 JQ 3205; 6 RT 1051.) This panelist believed that the death penalty should always be imposed in a

[2] In fact, question #57 of the jury questionnaire was a follow-up to question #56, which asked if panelists "had any religious or moral *training* regarding the death penalty," not whether panelists had a *personally held belief* in favor of, or against, capital punishment. Both Armendariz and Diep answered "no," they had *not received* any moral or religious training, and "yes," they could set aside any religious or moral training in deciding the case. (See, 8 JQ 2307 [Armendariz]; 9 JQ 2424 [Diep].) Alternate Juror #3 responded "no," to the first question and left blank the second question. (17 JQ 5152.) Question #59 queried whether panelists could "set aside your own personal feelings regarding what you think the law should be regarding the death penalty." These three panelists had answered, "yes" to question #59. (See, 8 JQ 2308; 9 JQ 2425; 17 JQ 5153.)

case like appellant's -- "where people go to convenience store and they commit robbery, and for no apparent reason, the night clerk will be shot . . . [or] killed." (6 RT 1053.)

The court denied defense counsel's challenges for cause in both instances, and rehabilitated Appiano and Galvez in much the same way he had rehabilitated the previous pro-death penalty jurors: by questioning the panelists last, after counsel had elicited admissions of pro-death penalty bias, by unequivocally admonishing panelists that the law mandated that they set aside their personal views, and finally, by posing a series of leading questions asking for answers affirming that panelists would follow the court's directive to set aside their own beliefs and follow the law. (5 RT 904-909; 6 RT 1055-1057.)

Counsel did not object again during the questioning of Appiano and Galvez, nor did he ask for a chance to do follow-up questioning; but given the court's prior rulings, admonitions and threats, it would have been futile to object or request an opportunity for follow-up *voir dire*. (*People v. Hill, supra*, 17 Cal.4th at p. 820; *People v. Tuggles, supra,* 179 Cal.App.4th at p. 356.) The court had already declared *there would be no follow up voir dire* by counsel once the judge had successfully induced a panelist to give appropriate qualifying responses. (4 RT 614.)

The next challenged panelist, Ranes, harbored a broad range of viewpoints that were antithetical to giving any criminal defendant a fair trial. In addition to being vehemently pro-death penalty for anyone who "willingly takes the life of another," Ranes had negative attitudes about the costs of life imprisonment, defense attorneys who use "tricks" and "loopholes" to get clients off, and a defendant's reliance on the privilege against self-incrimination. (12 JQ 3602, 3604-3605.) Most importantly, however, Ranes was the sister-in-law of a detective in the Turlock Police

Department who was listed as a witness for the prosecution. (12 JQ 3601-3602, 3615.)

Under questioning by defense counsel, Ranes admitted she might have a problem voting against the death penalty if confronted by her brother-in-law and prosecution witness, David Ranes. (6 RT 1221.) She expressed uncertainty about her ability to set aside her views about the privilege against self-incrimination and the defendant's obligation to tell the jury his story. (6 RT 1223.) The court interrupted defense counsel's questioning, and did not permit Ranes to answer the question,

> Do you think the combination of the fact that you have a brother-in-law who is going to be working for the prosecution and the fact that you expected Mr. Bell or any defendant to testify in his own behalf, do you think putting those things together might have a cumulative effect and you might be – that you would be less than a fair juror in this case?

(6 RT 1224.)

Instead, the court took over questioning. Ranes continued to give somewhat equivocal responses. When the judge court asked if she could be fair and impartial despite her close relationship with a prosecution witness and her negative attitude toward the defendant's privilege not to testify; she thrice responded, not "yes," but "I *think* I could." (6 RT 1225-1226.) Thereafter, the court posed the usual litany of *Witt* questions in a manner that clearly signaled the desired responses; this predictably resulted in a series of "Uh-huh," "Yes," or nods as answers on Ranes' part. These answers were relied upon by the court to declare Ranes unbiased and qualified to serve. (6 RT 1226-1227.)

In keeping with the court's earlier promise, defense counsel's challenge for-cause was denied without any opportunity for follow up questioning. The district attorney offered to have a bench conference for the

purpose of making an offer of proof regarding Ranes' brother-in-law's anticipated role in the trial, but the offer was refused. (6 RT 1225.)

The next challenged panelist, Ewing, was extremely pro-death penalty. Additionally, Ewing – like Ranes – held a number of potentially disqualifying attitudes on subjects likely to be a factor in appellant's trial. For example, Ewing was highly skeptical of mental health evidence; he believed mental health professionals could be paid to mislead for "the right price." (14 JQ 4118.) Ewing felt that a person's background should not have any bearing on penalty. (14 JQ 4101.) Yet appellant's mental health and social history were the focal point of the penalty phase defense.

Someone of the same race as appellant – an African-American – had murdered Ewing's aunt. During questioning by defense counsel, Ewing opined that the prison sentence imposed on the aunt's murderer did not fit the crime; he felt the perpetrator should have received death because "a life was taken." (7 RT 1428-1430.) Ewing admitted it was his "absolute position" that *any* killing other than an *accidental* killing deserved the death penalty. (7 RT 1430.) In Ewing's mind, a defendant would have the burden to prove "extreme mitigating factors" to convince him the defendant did not deserve to die. (7 RT 1431.)

Ewing repeatedly acknowledged that it was his predisposition to impose the death penalty on anyone who commits a premeditated murder. (7 RT 1434, 1436.) Ewing frankly admitted that if he were in defendant's shoes, he would not want someone with his state of mind acting as a juror; he would be a better juror for the prosecution's side. (7 RT 1437-1438.)

Defense counsel challenged Ewing for cause. (7 RT 1438.) Thereafter, the court strongly admonished Ewing that he would "have to" set aside his predispositions and personal feelings and "apply the law." (7 RT 1440, 1441.) The court unequivocally asserted that it was "not relevant to this case" that Ewing had negative experiences with African-Americans,

and Bell was African-American. (7 RT 1441.) The usual *Witt* colloquy occurred and correct answers, as cued by the court, were elicited from Ewing. (7 RT 1440-1441.) Counsel was *not* offered an opportunity for follow up questioning, and the for-cause challenge of Mr. Ewing was denied. (7 RT 1442.)

In the cases of Ranes and Ewing, defense counsel did not repeat his earlier objections to the trial court's manner of rehabilitating all pro-death jurors, but doing so would obviously have been pointless under the circumstances. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Tuggles, supra,* 179 Cal.App.4th at p. 356.)

The last challenged panelist, King, was personally concerned about his ability to be fair, in part due to having friends in the police force. (5 JQ 1250.) He felt life without parole was a "waste of money." (5 JQ 1256.) He strongly believed in the death penalty for "anyone who plans and commits a murder" and "anyone whose has been in prison in the past and kills someone." (5 JQ 1258.) Additionally, King's wife was receiving dialysis treatments, and had been receiving care *from the murder victim's wife* in the dialysis unit of the hospital. (8 RT 1507, 1701.) Defense counsel's for-cause challenge was based on the *latter* circumstance. (8 RT 1704-1709.)

The court conducted very little questioning of King, and denied the for-cause challenge, telling counsel he was "overdramatizing" the potential that King would be influenced by the fact that the victim's wife had given King's wife life-saving care. (8 RT 1707.)

At this point in the proceedings, defense counsel objected that appellant's rights to a fair and impartial jury, due process, and to a reliable penalty determination under the 5th, 6th, 8th and 14th Amendments to the Federal Constitution and Article I of the California Constitution were being denied. (8 RT 1708-1709.) The judge suggested that counsel could preserve his constitutional objections by stating them at the beginning of the case,

and incorporating them by reference every time he challenged a panelist for cause. (8 RT 1709.) The court opined that doing so would "take care of that problem," – the "problem" obviously being the need to repeat the long litany of constitutional objections on the record every time counsel wanted to object to something or challenge a prospective juror for cause. (8 RT 1709.) Thereafter, counsel filed a motion doing just that – incorporating by reference federal and state constitutional objections when made, inter alia, to "jury selection procedures . . . ." (3 CT 858.)

While counsel's formal preservation of federal and state constitutional grounds for objecting to the court's rulings on for-cause challenges came after challenges for-cause had been denied, the trial court tacitly – if not expressly – accepted defense counsel's proffer of a motion as an effective means to preserve state and federal constitutional objections to the court's rulings during all stages of the trial, *including the jury selection phase*. Moreover, the district attorney offered no objection to defense counsel using a written motion to preserve constitutional objections for all objections advanced during the trial. (8 RT 1709.) Under principles of judicial estoppel, the Attorney General should be barred from taking a different position on appeal regarding the sufficiency of defense counsel's state and federal constitutional objections than the District Attorney took below. (*People v. Castillo* (2010) 49 Cal.4th 145, 154-163.)

For all intents and purposes, counsel did what the law demands; he eliminated any potential unfairness to the court or district attorney by calling the grounds for his objections to the attention of the trial court so that any erroneous rulings could be corrected in a timely manner and a fair trial had. (*People v. Saunders, supra,* 5 Cal.4th at pp. 589-590.) Counsel did this in two ways. First, he timely objected to the court's manner of conducting life and death qualification questioning as soon as the court's pattern of inappropriate questioning became obvious. Second, with the

court's blessing and not a word of objection from the prosecuting attorneys, counsel filed a written motion designed to preserve all of the constitutional bases for counsel's objections. Therefore, contrary to respondent's contention, trial counsel did not forfeit the right to assert as issues on appeal the trial court's misapplication of the *Witt* standard and use of threats to curtail counsel's examination of strongly pro-death penalty panelists.

Respondent also argues that any challenge to the fairness of the jury is forfeited because trial counsel did not (1) exhaust peremptory challenges, (2) express dissatisfaction with the jury, or (3) request additional *voir dire*. (RB 35-36, 39.) Appellant respectfully submits that these issues are cognizable on appeal even if counsel's objections in the court below are found lacking. In *People v. Manibusan* (2013) 58 Cal.4th 40, 62, "notwithstanding defendant's failure to exhaust his peremptory challenges or the fact that none of the pro-death-penalty prospective jurors he discusses actually served on his jury," this Court deemed cognizable on appeal the defendant's claims (1) "that the trial court was not 'even-handed' in its treatment of prospective jurors who favored the death penalty and those who had reservations about it"; (2) that "the court 'spen[t] time and effort attempting to rehabilitate' the former, but 'ma[de] no such efforts' with the latter"; and (3) that the trial court "used different standards in applying the governing rules, refusing to excuse 'equivocal' prospective jurors who favored the death penalty while excusing 'equivocal' prospective jurors who had reservations about the death penalty."

Similarly, in *People v. Whalen* (2013) 56 Cal.4th 1, 28, the Attorney General contended that the defendant "forfeited his claim for purposes of appeal by agreeing to the jury without exhausting his peremptory challenges." This Court rejected the forfeiture argument and addressed the merits, explaining:

> Here, however, defendant raises a different argument. He asserts the court's manner of questioning was itself so biased as to be inadequate to root out juror partiality. He claims the court's questioning was not designed to uncover juror bias, but instead was designed to, and did, conceal bias, rendering it impossible for defendant to obtain a fair jury. Defendant thus raises a threshold challenge to the adequacy of the trial court's voir dire that we must address first, because it affects the validity of all of the court's rulings on challenges for cause.

(*Ibid.*)

Here, the fairness of the jury is challenged on the ground that the integrity of the jury selection process was tainted by the trial court's misapplication of the *Witt* standard, and threats, which ultimately chilled trial counsel's performance during the remainder of jury *voir dire*. (See, AOB 102-110.) The issues should therefore be addressed on the merits for same reasons comparable challenges were addressed on the merits in *Manibusan* and *Whalen*. (See, AOB 111-113.)

D. The Trial Court's Threats Were Improper; Counsel Was Not Putting Words In Panelists' Mouths, But Engaging In Proper *Witt* Voir Dire.

Respondent suggests that the trial court was within its rights to threaten curtailment of *Hovey voir dire* to prevent defense counsel from "'putting words in [the prospective juror's] mouth.'" (RB 41.) Respondent characterizes the court's use of threats as tantamount to the proper exercise of judicial discretion to control *voir dire*. (RB 41.) The Attorney General quotes from trial counsel's questioning of Armendariz, and vilifies counsel for "asking follow up questions that interpreted and portrayed Armendariz's general, abstract support for the death penalty to be unyielding and perhaps fanatical support." (RB 42.)

Respondent's argument presupposes that there was something improper about defense counsel's manner of questioning. Nothing could be farther from the truth. Counsel was merely attempting to explore with prospective jurors possible case-specific sources of pro-death penalty bias.

The American Bar Association [ABA] has established rigorous guidelines for counsel conducting *voir dire* in death penalty cases precisely because "the starkest failures of capital *voir dire* are the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty, and the failure to uncover jurors who are unable to consider particular mitigating circumstances." (*American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003); Guideline 10.10.2; Voir Dire and Jury Selection; History of Guideline.)

> Research conducted by the Capital Jury Project -- based upon interviews of more than 1,200 jurors who actually made the life or death sentencing decisions in 350 capital trials in 14 death penalty states -- established that: (1) many pro-death jurors who are constitutionally impaired and subject to defense cause challenges nonetheless have served on capital juries and, furthermore, (2) a large portion of the jurors who do serve fundamentally misunderstand and misapply the constitutional principles that govern the sentencing decision-making process. These misunderstandings significantly increase the likelihood jurors will vote for death.

(Matthew Rubenstein, *Cover Story: Overview of the Colorado Method of Capital Voir Dire*, 34 Champion 18 (November 2010), p. 18.)

Professional techniques have been developed to "strip away extraneous defenses or irrelevant facts in order to gather meaningful, relevant answers and information from the prospective juror regarding her views of the death penalty and life imprisonment," and "confirm that the jurors understand and are willing to make their sentencing decisions in a

constitutionally appropriate and lawful manner." (Matthew Rubenstein, *Cover Story: Overview of the Colorado Method of Capital Voir Dire*, *supra*, at pp. 20, 24.) The use of leading questions is a commonly accepted tool for gleaning the true sentiments of strongly pro-life and pro-death penalty jurors. (*Ibid.*)

The trial court disparaged counsel for "putting words in [Armendariz's] mouth" (4 RT 588), but all counsel was doing was using leading questions. In fact, the trial judge was equally guilty of putting words in jurors' mouths; the court equally resorted to leading questions to extract the biases of prospective jurors expressing anti-death penalty views, and "reeducate" those who appeared strongly death-prone. (See, 5 RT 1010-1011; 4 RT 581-585, 670-673, 610-611; 5 RT 902-908; 6 RT 1049, 1050, 1055-1056, 1225-1227.)

Armendariz had voiced strong support for the death penalty in his written answers to the questionnaire. He opined that "[i]f you do the crime you pay for the crime," "[if] you take a life in the commission of a crime, you should give your life," and "[i]f you take a life for your own personal gain, then you should be willing to give your life." (VIII JQ 2306-2307, 2309.) He responded, "yes," that anyone who attempts to commit a serious crime and kills someone should get the death penalty, and "yes," "[a] person's background does not matter when deciding whether or not he or she should be sentenced to death for murder…." (VIII JQ 2309.) He also responded "anyone who has been in the prison in the past and kills someone should get the death penalty." (VIII JQ 2310) Last but not least, Armendariz acknowledged that the costs of keeping someone in jail for life would be a factor he would consider in deciding between life and death. (VIII JQ 2308.)

The trial court questioned Armendariz first, asking the usual litany of leading life and death qualification questions. The court refrained from

exploring any of Armendariz's specific pro-death penalty responses to the written questionnaire, as did the prosecutor, whose questioning immediately followed. (IV RT 581-583.)

Defense counsel's client – Bell – was accused of committing murder for his own personal gain, and he had been in prison for prior crimes. Moreover, counsel surely knew that it would be necessary to present mitigating evidence of Bell's background in defense of death, should appellant be convicted. Given the absence of meaningful *voir dire* by the court, the duty fell upon defense counsel to sufficiently explore these potential sources of case-specific bias. (*United States v. Shakur* (S.D.N.Y. 1988) 723 Supp. 925, 934.) As the United States Supreme Court has acknowledged,

> a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.

(*Morgan v. Illinois* (1992) 504 U.S. 719, 735-736 [119 L.Ed.2d 492, 112 S.Ct. 2222].) "That certain prospective jurors maintain such inconsistent beliefs—that they can follow the law, but that they will always vote to impose death for conviction of a capital offense—has been demonstrated…." (*Id.* at p. 735, fn. 9.)

Defense counsel called Armendariz's attention to his written responses that suggested bias, and probed what he meant by each response. In response to counsel's questioning, Armendariz admitted, inter alia, that there was "no doubt in [his] mind" and "without question" … "[i]f somebody takes a life, they should give their life." (IV RT 583-584.) Armendariz further reiterated that he "would consider the fact that there was a cost associated with keeping somebody in prison for the rest of their

life," and that fact would have an influence on his decision. (IV RT 583-585.) Armendariz also acknowledged that his opinions were strong and "not subject to change . . . [n]ot in this type of case . . . ." (IV RT 587-588.) Far from being inappropriate or improper, counsel's *voir dire* of Armendariz accomplished precisely what *voir dire* is supposed to accomplish in a capital case: to reveal prospective jurors whose "dogmatic beliefs about the death penalty" would in fact render them substantially impaired, notwithstanding an expressed willingness to obey the judge or abide by the law. (*Morgan v. Illinois, supra,* 504 U.S. at pp. 735-736.)

Respondent's argument also minimizes the importance of the trial court's threat to terminate individual *voir dire* on the basis that the court "could have done what it was 'threatening' to do." (RB 41.) This Court has held that *Hovey voir dire* is not constitutionally compelled. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1315.) But that does not mean that the trial court's multiple threats to curtail sequestered *voir dire* were not intentionally calculated to impede defense counsel's ability to identify and exclude individuals who were substantially impaired.

That which was threatened, the termination of sequestered *voir dire*, would have been extremely disadvantageous to Bell. Studies have shown that repeated exposure to the death-qualification process makes the jurors who are ultimately selected to serve in a capital case more prone to convict and more prone to vote for the death penalty. (John H. Blume, et al, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, 1232, n. 258 (2001); *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, supra,* Guideline 10.10.2; *Voir Dire* and Jury Selection; Commentary, p. 102, n. 260; see also, Samuel L. Gross, *ABA's Proposed Moratorium: Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Prob. 125, 147 (Fall, 1998); *Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 79-80.)

Hence, the court's threats were no less intimidating to counsel merely because sequestered *voir dire* was not *constitutionally* mandated.

E. The Trial Court's Improper Rehabilitation Of Biased Jurors And Threats To Trial Counsel Resulted In Prejudice to Appellant.

Respondent argues that, assuming arguendo the trial court erroneously restricted *voir dire*, appellant cannot show prejudice. (RB 41.)

Appellant has established prejudice. In the Appellant's Opening Brief, appellant pointed to examples of sitting jurors who were not subjected to adequate questioning by trial counsel. Appellant's examples were drawn from the questionnaires and in-court questioning of juror nos. 1, 2, 3, 8 and 9. (AOB 107-110.) Each of these sitting jurors was questioned after the court threatened to discontinue sequestered *voir dire*, and banned follow-up questioning by counsel. (See, 4 RT 614 [Alternate Juror #3; 4 RT 673-677 [Diep]; 5 RT 1019 [Juror no. 1]; 7 RT 1449 [Juror no. 2]; 7 RT 1403-1404 [Juror no. 3]; 8 RT 1522 [Juror no. 8].) Appellant demonstrated that his trial attorney actually "'pulled his punches,'" i.e., failed to represent Bell as vigorously as he would have were it not for the court's erroneous rulings and actions during *voir dire*. (*People v. Easley* (1988) 46 Cal.3d 712, 725; internal citation omitted.)

Respondent accuses appellate counsel of misrepresenting or mischaracterizing the statements of several of the sitting jurors whom counsel did not adequately question. Respondent argues that Juror no. 1 "never said that anyone who has been in prison before and kills someone should get the death penalty." (RB 40.) But appellant never attributed such a statement to Juror no. 1. Rather, appellant pointed out that juror no.1 identified the defendant's prior convictions as something she would want to know about before making a penalty decision. (16 JQ 4646.) Defense

counsel did not even bother to explore the possibility that this juror would be predisposed to impose death if she learned Bell had prior felony convictions. (AOB 107-108.)

Juror no. 1 did not answer a written question about the privilege against self-incrimination. (16 JQ 4658.) This omission should have been of concern to trial counsel, who would have known it was likely that Bell would invoke the Fifth Amendment and not testify in his own defense. Yet defense counsel did not ask why juror no. 1 skipped the question, nor did he attempt to elicit the juror's attitude toward defendants who exercise the privilege against self-incrimination. (5 RT 1019.)

Respondent argues that juror no. 3 "did not say the death penalty should be imposed on defendants found guilty of murder with special circumstances." (RB 40.) It is suggested that this juror expressed support for the death penalty but "noted the possibility that the death penalty may not be warranted." (RB 40.) Respondent omits any discussion of what this juror actually stated. Juror #3 opined that anyone who plans and commits a murder should get the death penalty because "premeditated [sic] must not be allowed." (16 JQ 4725.) Juror #3 further stated "yes," that anyone who has been in prison in the past and kills someone should get the death penalty. (16 JQ 472.) Neither defense counsel – nor any other questioner – asked this juror if she could consider imposing a life sentence, assuming Bell had committed prior felonies and served time in prison. (7 RT 1400-1406.)

Respondent does not even bother to address appellant's claim that trial counsel failed to conduct sufficient *voir dire* of juror nos. 2, 8, and 9. (RB 40-41.) Juror no. 2 was of the opinion that a person's background "does not matter" when deciding whether the person should be sentenced to die. (16 JQ 4686.) This juror was subjected to perfunctory questioning by defense counsel, with no attention paid to the juror's views about the

supposed irrelevancy of mitigating background information. (7 RT 1447-1451.)

Juror no. 8 voiced similar views. He answered, "yes," that anyone who plans and commits a murder should get the death penalty because "the penalty should equal the crime." (17 JQ 4920.) Juror no. 8 also wrote, "a person's background should not matter." (17 JQ 4920.) No questions were asked about this juror's predisposition to impose death regardless of appellant's social, psychological and medical history.

Last but not least, juror no. 9 admitted he would give more weight to a peace officer's testimony than the testimony of a non-peace officer witness. (17 JQ 4976.) This juror's *self-confessed* bias in went unexplored by defense counsel; indeed, counsel asked no questions whatsoever of this juror. (8 RT 1624.)

When a defendant claims that a conflict of interest has led his counsel to refrain from vigorously advocating on his behalf, this Court inquires "whether there may have been tactical reasons other than the conflict that would explain the omission and whether the omitted action is one that likely would have been taken by unconflicted counsel." (*People v. Clark* (2011) 52 Cal.4th 856, 984; see also, *People v. Rundle* (2008) 43 Cal.4th 76, 169; *People v. Doolin* (2009) 45 Cal.4th 390, 393-394.) Here, threats and erroneous rulings by the court, not conflict of interest with trial counsel, chilled counsel's advocacy. It is nonetheless useful to examine whether counsel's lack of questioning of jurors could have been tactical, or whether the questions *not* asked should or would have been asked by a competent capital trial attorney unimpeded by the trial court. (*Ibid.*) The lack of any conceivable tactical reasons for failing to inquire about jurors' admitted biases would tend to support appellant's claim that the trial court's conduct caused counsel to "pull his punches."

The record belies the existence of any tactical reason for counsel to refrain from questioning juror nos. 1, 2, 3, 8 and 9 about their pro-death penalty or pro-prosecution biases, as revealed in written jury questionnaires. Only the court's improper chilling of counsel's *voir dire* could possibly explain why counsel did not inquire of these five panelists whether they could (1) sincerely consider the penalty of life in prison without parole, knowing that appellant had served a prior prison term [juror nos. 1 and 3]; (2) consider mitigating evidence of appellant's social, psychological and medical history despite the belief that background information should *not* be considered in the determination of penalty [juror nos. 2 and 8]; (3) refrain from assuming appellant was guilty if he did not testify at his trial [juror no. 1]; and/or (4) weigh the testimony of all witnesses equally, and not give greater weight to the testimony of peace officer witnesses [juror no. 9].

Miller v. Webb (6th Cir. 2004) 385 F.3d 666, though not a case involving judicial error, is exemplary. There, the issue was whether the defendant was deprived of the effective assistance of counsel for failing to challenge a biased juror during *voir dire*. The juror, Bell, was a minister who had known the victim for two or three years through Bible study. During *voir dire*, Pastor Bell admitted feeling she "would kind of be partial to [the victim]…." (*Id.*, at p. 668.) In follow-up questioning by the judge, she said, "I believe I could be fair about it all. But I do have some feelings about [the victim]." (*Ibid.*) The juror never unequivocally stated she could set aside her sympathies for the victim. The defendant's counsel did not ask follow-up questions on this subject, or challenge Pastor Bell for cause; nor did he use a peremptory challenge to excuse her. (*Ibid.*)

The federal court held that the defendant had been deprived of the effective assistance of counsel during jury selection. The court stated:

> [W]hen a juror makes a statement that she thinks she can be fair, but immediately qualifies it with a statement of partiality, actual bias is presumed when proper juror rehabilitation and juror assurances of impartiality are absent . . . . Accordingly, when the trial court is ultimately left with a statement of partiality, as in this case, that is coupled with a lack of juror rehabilitation or juror assurances of impartiality, we are left to find actual bias . . . . Because the trial court failed to respond to Juror Bell's statement of bias on *voir dire*, we find that...counsel's failure to respond in turn was objectively unreasonable pursuant to *Strickland*. "When a venireperson expressly admits bias on *voir dire*, without a court response or follow-up, for counsel not to respond [to the statement of partiality] in turn is simply a failure 'to exercise the customary skill and diligence that a reasonably competent attorney would provide.'" *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001).

(*Miller v. Webb, supra*, 385 F.3d at pp. 675; internal citation omitted.)

Appellant has not asserted ineffective assistance of counsel during *voir dire* on direct appeal because issues concerning the competency of trial counsel will more appropriately addressed in the context of state habeas corpus proceedings. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) The ruling in *Miller v. Webb, supra,* is still relevant to rebut respondent's argument that appellant cannot show he suffered *prejudice* as the result of the trial judge's imposition of impediments to counsel's conduct of effective *voir dire*.

As the record shows, in the beginning, defense counsel made *bona fide* efforts to screen potential jurors for pro-prosecution, case-specific, and pro-death penalty biases revealed in juror questionnaires. Counsel's vigorous conduct of *voir dire* changed tangibly after the judge repeatedly disparaged trial counsel's efforts, threatened to cease individual *voir dire* entirely, and made it clear through words and actions that the court would systematically and aggressively "rehabilitate" any juror who admitted bias in response to written or verbal questions.

Thereafter, a number of panelists who had made statements of partiality in juror questionnaires, including juror nos. 1, 2, 3, 8, and 9, were *not* asked relevant follow up questions. This left among Bell's twelve jurors at least five jurors either strongly partial to imposing the death penalty on any defendant with a prior criminal record, strongly inclined to give peace officer testimony undue weight, strongly disinclined to give any weight to mitigating social history evidence, and/or at risk of holding it against Bell if he did not testify in his own defense. Given that the presence of biased jurors would be certain to taint the entire trial (see, *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [145 L.Ed.2d 792, 120 S.Ct. 774]), "there [was] no sound trial strategy that could support what [was] essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." (*Miller v. Webb, supra*, at p. 676.)

Respondent argues that in order to demonstrate prejudice, appellant must explain what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of the responses to questions the court did permit. (RB 41.) The case and page cited, *People v. Ramos* (1997) 15 Cal.4th 1133, 1158, discusses restrictions on the questioning of jurors "regarding, for example, a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird . . . ." *Ramos* stands for the fairly well accepted general proposition that a trial court retains considerable discretion to contain *voir dire* within reasonable limits. (*Ibid.*) Ramos does not address, and does not govern, a challenge to a trial court's systematic use of threats, and deliberate distortion of the *Witt* standard, to dissuade counsel from exploring the depth of biases admitted by jurors in written questionnaires.

Respondent also asserts that no prejudice is shown because appellant has not identified any question he sought to ask of prospective jurors that was refused by the trial court. (RB 41.) The case relied upon for this

principle, *People v. Vierra* (2005) 35 Cal.4th 264, 286-287, is inapt. In *Vierra*, the trial court refused to include a requested question on multiple-murder in a jury questionnaire. The court did not rule that the question could not be asked during oral *voir dire*. The judge conducted most of the *voir dire* and, for the most part, did not allow counsel to directly question prospective jurors. But the judge did make it clear that he would ask supplemental questions of panelists at the request of counsel. Counsel made no request for supplemental questions. Moreover, the court presented the questions he planned to ask prospective jurors regarding the death penalty and the defendant's attorney offered "'no legal objections.'" (*Id.*, at p. 286.)

Judge's behavior in *Vierra* sharply contrasts with appellant's trial judge's aggressive rehabilitation of strongly biased jurors, refusal to let counsel do appropriate follow-up questioning, and use of threats to curtail counsel's questioning. In this case, it is clear from the record that counsel wanted to question jurors to explore whether jurors sincerely believed they could set aside strongly held beliefs that were clearly disqualifying for service on a capital case. Counsel was not allowed to pursue such questioning once the trial court completed purportedly life-qualifying *voir dire*.

F. The Trial Court Misapplied The Law And Erred In Finding Challenged Panelists Qualified.

On the merits, respondent argues that the record does not support appellant's contention that the trial court misapplied the law in evaluating the qualifications of the prospective jurors. (RB 38.) As support for this proposition, respondent points to the 39-page jury questionnaire that was filled out by each juror, and asserts that trial counsel was able to ask questions where any prospective juror gave an "ambiguous response." (RB 38.) Respondent also argues that the court "was satisfied" that each of the

prospective jurors indicated that they would not automatically impose the death penalty, that they were able and willing to put aside their personal feelings, keep an open mind, and consider and weigh the mitigating and aggravating circumstances in deciding the appropriate penalty," and "impliedly found [all panelists] to be credible." (RB 38.)

It is true that counsel was allowed to ask questions of each panelist and in some instances, the questions posed by counsel clarified ambiguous responses. It does not necessarily follow that the trial court was applying the correct legal standard in its assessment of pro-death penalty bias.

Respondent ignores completely, for example, the fact that the trial judge, after denying defense counsel's first and second for-cause challenges (Armendariz and Alternate Juror #3), ruled that the court would thereafter *always* get to ask questions last, and counsel would not be allowed to ask any follow-up questions once the court elicited from a strongly pro-death penalty panelist "appropriate" qualifying answers. (See, 4 RT 674, 678.) Moreover, respondent ignores that the trial court declared in advance that any panelist who answered the court's rote questions in a certain manner – apparently without regard to demeanor – would be considered qualified to serve. (4 RT 678.) Nor does respondent address the fact that the life-qualifying questions posed by the court were frequently preceded by admonitions signaling the challenged panelist that it would be a violation of the law, or the court's instructions for a panelist to give the *wrong* answer. In some instances, panelists were even scolded after giving wrong, i.e., disqualifying, answers.[3] In fact, respondent appears to have missed or

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[3] The court admonished Armendariz, for example:

"*you understand* that not all murder cases the Defendant automatically gets the death penalty...." (4 RT 585; emphasis added);

"it's up to you folks to decide whether he should get the death penalty or not [but] you *have to* hear all the evidence before you make up your mind (4 RT 486; emphasis added);

ignored appellant's point: that the trial court was not applying the "substantial impairment" standard of *Witt*. Rather, the court did precisely that which *Witt* prohibits; the court reduced its determination of juror bias "to question-and-answer sessions which obtain results in the matter of a catechism." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) The court did not consider the entirety of the challenged panelists' responses, and instead

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"*I told you* that the burden of proof is on the People...." (4 RT 587; emphasis added);

"you *have to* listen to all the evidence...." (4 RT 590; emphasis added);

"*if you're going to sit on the case, you have to* set aside your own personal feelings about the subject and judge the case and apply the law based on what the law is in California" (4 RT 590; emphasis added).

The court cautioned alternate juror #3:

"You felt it was not cost effective to housing in prison for life without the possibility of parole, but *you have to understand* that, if you're going to sit in a trial, that's not a consideration . . . . That may be your personal feeling coming in here, but you're going *to have to* set that aside." (4 RT 610; emphasis added);

"And particularly on this issue of the death penalty, once you hear all the evidence, you can make up your mind, but *it has to* be based on the evidence in this case, not your personal feelings . . . ." (4 RT 611; emphasis added).

The court rebuked panelist Diep:

"*the law requires that you* weigh certain what we call aggravating factors and mitigating factors. You understand that? I tried to explain that to you earlier." (4 RT 667; emphasis added);

"that's one of the things that *you do have to* take into consideration, the defendant's background." (4 RT 670; emphasis added.)

The court similarly scolded or admonished Appiano:

"you said you didn't think you could give them life without the possibility of parole, whereas, before you said . . . you would wait and hear all the circumstances first. *I told you*, you don't just put someone to death because they committed first degree murder." (5 RT 902; emphasis added);

"You *have to* consider all those things [evidence of aggravating and mitigating factors]." (5 RT 905; emphasis added);

"I'm going to tell you that you *have* to set aside your personal feelings." (5 RT 906).

gave undue weight to "later *voir dire* answers" that favored retention. (See, *People v. Tate* (2010) 49 Cal.4th 635, 674, fn. 22.)

Respondent concludes by arguing, "the manner in which the trial court conducts *voir dire* does not provide a basis for reversal unless it renders appellant's trial fundamentally unfair." (RB 44.) Appellant disagrees. By applying an incorrect standard to find strongly pro-death penalty panelists substantially unimpaired pursuant to *Wainwright v. Witt, supra*, 469 U.S. 412, based solely on jurors' "appropriate" answers to leading questions that the court deemed automatically qualifying, by prohibiting follow-up questioning, and by employing threats, which actually chilled defense counsel's screening of seated jurors for actual or implied bias, the trial court violated appellant's constitutional right to trial by an impartial jury, and rendered the trial fundamentally unfair.

II

CONTRARY TO RESPONDENT'S ASSERTION, BELL WAS DENIED DUE PROCESS, A FAIR TRIAL, EQUAL PROTECTION AND A RELIABLE DETERMINATION OF PENALTY BY THE TRIAL COURT'S UNREASONABLE REFUSAL TO ALLOW SECTION 987.9 FUNDS TO BE SPENT ON AN INVESTIGATOR WHO WAS ALSO A JURY SELECTION CONSULTANT, RATHER THAN ON AN INVESTIGATOR WITHOUT ANY JURY SELECTION EXPERTISE OR A SECOND ATTORNEY.

A. The Record:

Respondent's statement of the facts omits or understates salient circumstances bearing on the trial court's exercise of discretion to deny appellant the services of qualified jury consultant. Defense counsel's first request for funding for jury expert Eda Gordon sought a total of $5,510. (I § 987.9 RT 119-124.) The trial court eventually denied the defense request for funds to hire Ms. Gordon without prejudice to apply for funds for "private investigator assistance" to review up to 75 juror questionnaires. (II § 987.9 RT 202.) Eda Gordon, who is based in New Mexico, was, and continues to be, a licensed private investigator as well as a jury consultant.[4] Defense counsel therefore requested $4,500 in funding to pay to Eda

[4] The current website for a prominent New Mexico criminal defense lawyer, describing members of the firm's "team," describes Ms. Gordon in the following manner. "Eda Gordon is a licensed private investigator and jury consultant who works on a contract basis with the Twohig Law Firm on many cases. Originally working on the Wounded Knee cases in the 70's, in which Mr. Twohig was also counsel, she later moved to New Mexico and has worked on many high profile and death penalty cases. Those which featured representation by the Twohig Law Firm have included Gordon House, Roy Buchner and the currently pending habeas corpus for Tim Allen, one of two prisoners who remain on New Mexico's Death Row. All of these are described in the Major Cases section of the web site. More recently, she conducted the detailed mental health investigation, which led to the dismissal of the Diane Willis case. Her work is referred to in the Nolle Prosequi and the reports of both experts which are also described in the Major Cases portion of this web site." (See, twohiglawfirm.com.)

Gordon *the investigator* at a rate of $50.00 per hour for her assistance in reviewing juror questionnaires. (II § 987.9 RT 215-217.)

The court granted $2,750 in investigative funding, to be paid at $50 per hour, but specified that the work had to be done by two investigators previously approved to do work on the Bell case: Joe Maxwell or Richard Wood. The order also specified that the sum to be paid *would not cover payment for meals, lodging or transportation.* (II § 987.9 RT 218-223.) Obviously, this would have precluded use of anyone but a local investigator.

The court eventually removed the restriction requiring the use of Joe Maxwell or Richard Wood after both investigators declined the job of assisting in jury selection due to their lack of qualifications. (II § 987.9 RT 255-256; 12/29/98 SRT 112-114.) But the court denied counsel's request for increased funding, and did *not* modify its order that investigative funding not be used for meals, lodging or transportation.

At a hearing held on December 29, 1998, defense counsel told the court he could not find another investigator with the skills he desired. The court accused counsel of trying to circumvent the court's denial of the motion to hire New Mexico jury consultant Eda Gordon. Once again, the court refused to provide more than $2,750 for an investigator to assist with jury selection. (12/29/98 SRT 116-117; II 987.9 295.) Subsequently, the court granted a request for $6,750 to be paid at a rate of $75 per hour for second counsel Karen Kelly "to assist in selecting jury." (II 987.9 296-300.) Karen Kelly's qualifications did not include specific experience or expertise in capital case jury selection. (§ 987.9 RT 168-174.)

B. Discussion:

Respondent argues that a "jury selection expert is not reasonably necessary for the preparation or presentation of the defense." (RB 57.) Respondent cites *People v. Box* (2000) 23 Cal.4th 1153 [*Box*] and *People v. Mattson* (1990) 50 Cal.3d 826 [*Mattson*], as support for this proposition.

In *Box*, a case involving a 1989 multi-defendant triple murder, the defense requested $4,200 for a jury selection expert. The request was denied, in part based on costs of "giving everybody in this case and every case an expert for jury selection," and in part based on the court's conclusion that the defense attorneys had the skills necessary to select the jury. (*Id*., at pp. 1183-1184.) In *Mattson*, a case involving a 1978 murder, the defense sought funding for a jury consultant, premised on counsel's lack of experience in selecting juries under the death qualification process established by *Hovey v. Superior Court*, supra, 28 Cal. 3d 1, and the fact that the inflammatory nature of the charges increased the difficulty of selecting impartial jurors. (*Id*., at p. 847.) This Court found no abuse of discretion because the defendant "did not demonstrate how lack of experience in conducting voir dire under the *Hovey* procedure was relevant to his ability to identify prospective jurors who were qualified or were subject to excuse for cause."

Here, in contrast, defense counsel's request for the expert assistance was predicated on the following factors. Counsel argued that the District Attorney's office had greater resources, including but not limited to: access to all criminal history information concerning prospective jurors; access to other sources of information regarding prospective jurors; the ability and funds to deploy more manpower for investigation and preparation; and the absolute discretion to have any expert it wishes without court supervision over selection and funding. (I 987.9 RT 120.) Counsel further asserted that,

because counsel for the parties would be participating in sequestered *voir dire*, panelists would be filling out lengthy juror questionnaires, which would have to be evaluated and graded by trial counsel prior to *voir dire*. (9/27/12 Aug. Appendix.) Counsel argued that, if the court conducted *voir dire*, the need for a jury consultant would be even greater because of the increased speed of the jury selection process and the smaller amount of information elicited upon which to base a decision. (9/27/12 Aug. Appendix.)

Counsel also claimed he needed the assistance of an expert to help him address the attitudes formed by prospective jurors in response to advertising and media, and the extreme sensitivity in the community to violence. (7/23/98 SRT 19-21.)

Counsel expressed certainty that there would be a penalty phase; he argued that Bell's case was different from other capital cases he had tried due to the significant amount of mental health evidence that would be presented at the penalty phase. (7/23/98 SRT 19.) Counsel described his anticipated mitigation case in some detail, explaining the importance of having a jury receptive to considering such evidence. (12/29/98 SRT 98-99.) He indicated that he lacked the expertise to select jurors receptive to this type of mitigation evidence.

Last but not least, counsel explained that the process of selecting a capital jury required two sets of eyes. He asserted he would be deluged with information from questionnaires and trying to watch the prospective jurors and make eye contact. Counsel argued that he could not competently read all of the questionnaires and evaluate all the jurors alone. (12/29/98 SRT 101-102.)

The trial court found that counsel did not need the assistance of a jury selection "expert." However, the trial court acknowledged that counsel did "need private investigator assistance in study and review of the jury

questionnaires." (II 987.9 RT 202.) Accordingly, the court did not merely exercise discretion to deny appellant *funding* to hire *a jury selection consultant*, as the courts did in *Box* and *Mattson*. The court actually authorized funds – the sum of $6,750 – for assistance during jury selection, but prohibited counsel from *spending* the funds on anyone with jury selection experience and expertise.

No "fiscal or administrative burden" (see, *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 96 S.Ct. 893, 903]) would have resulted had Ms. Gordon, rather than second counsel, assisted counsel with jury *voir dire*. Second counsel was engaged to perform the same function that trial counsel had wanted Eda Gordon to perform. Moreover, the trial court authorized *more* money to pay second counsel to assist with jury selection than it would have been cost to pay Eda Gordon even though Ms. Gordon had superior task-specific qualifications for the job.

Nor can it fairly be said that the court's exercise of discretion was properly motivated by Ms. Gordon's lack of *qualifications* to serve as a *jury consultant*. Ms. Gordon was the editor of a legal treatise on jury selection and other publications, and she had worked as a jury consultant in numerous high profile cases for the prior eighteen years. (I § 987.9 RT 122.) Months earlier, she had served as a jury consultant in the California case of Rhett Lamar Moore, a young African-American man charged with murder of an Assyrian man during a convenience store robbery. The crime was captured on videotape, and not surprisingly, Moore was convicted and special circumstance allegations found true. (7/23/98 SRT 8, 9, 18.) Like Bell, Moore suffered from limited cognitive functioning, mental problems, and a difficult family history. In Moore's case, counsel employed Ms. Gordon's assistance and the jury returned a verdict of life without parole. (7/23/98 SRT 9.)

Furthermore, the court also refused to allow *authorized* funds to be used to hire Ms. Gordon *as an investigator* notwithstanding the fact that she was licensed as an investigator, and had experience doing what the "investigator" was being hired to do – review and analyze juror questionnaires. (I § 987.9 RT 122-123.) It also bears noting that the court tried to force counsel to employ investigators Joe Maxwell and Richard Wood to assist with jury selection without voicing any concern that these investigators might not be qualified for the task.

Additionally, after the trial court questioned Eda Gordon's qualifications to serve as a jury consultant, counsel requested funding to hire Dr. Karen Fleming, a jury consultant from Oakland with extensive experience selecting juries in capital trials. (II 987.9 RT 219-220, 225.) Despite Dr. Fleming's vast experience, which included work on the Timothy McVeigh case, the trial court refused to approve funding to hire her. Moreover, the sum authorized for purposes of hiring second counsel, who had no expertise, was a mere $250 less than it would have cost to retain Dr. Karen Fleming, one of the most preeminent jury selection consultants in the state.

Based on the record, one can only conclude that the trial judge was antagonistic toward the use of jury selection consultants as a matter of policy, and framed its section 987.9 orders to prevent Bell's counsel from using money to hire anyone with jury selection expertise. The trial court's actions bespeak a policy to deny funding to for expert assistance during jury selection regardless of the costs, the circumstances of the case, or the showing made by trial counsel. The court's denial of funding for Ms. Gordon was arbitrary and capricious, and not the product of a reasoned determination that funding was not reasonably necessary for the preparation of the defense. (See, *Johnny S. v. Superior Court* (1979) 90 Cal.App.3d 826, 828.)

In this case, defense counsel made a strong showing of case-specific need for assistance with jury selection. His request was reasonable and supported by both American Bar Association and National Legal Aid & Defender Association Capital Case Guidelines. (See, 1989 *ABA Guidelines for the Appt. and Performance of Counsel in Death Penalty Cases*, Guideline 11.5.1, B, 9; *National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation*, Guideline 7.2(a)(7) (1995 ed.).) Had the Stanislaus County Public Defender not declared a conflict in Bell's case, it is almost certain that Bell, like Mr. Moore, would enjoyed the benefits of Ms. Gordon's services as a jury consultant.

Respondent argues that appellant was not denied equal protection by virtue of court's refusal to allow Bell's counsel to hire Eda Gordon because indigence, standing alone, is not a suspect classification. (RB 58-59.) Appellant did not argue that poverty, standing alone, is a suspect classification. (See, AOB 147.) Appellant's point is that once a state chooses to confer certain rights and benefits upon all persons charged with crimes, "a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois* (1956) 351 U.S. 12, 18 [100 L.Ed. 891, 76 S.Ct. 585].) Because California has chosen to authorize the use of section 987.9 monies for the purpose of retaining jury selection consultants in capital cases, the state may not administer its own laws in a way that discriminates based on poverty or any other invidious classification. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320; see also, *People v. Blair* (2005) 36 Cal.4th 686, 729-734.) Respondent does not apparently dispute that Bell was, and still is, poor – too poor in fact to pay for a lawyer much less for ancillary defense services.

Respondent also argues, "the assistance of a jury selection expert is not a fundamental right, nor is it necessary to the meaningful exercise of

any fundamental right." (B 58.) This is a point upon which appellant and respondent fundamentally disagree. Bell was a member of the class of defendants upon which the prosecution was seeking to impose *death*, not just life without parole. The right to life is regarded as fundamental. (See, *Skinner v. Oklahoma* (1942) 316 U.S. 535 [86 L.Ed.1655, 62 S.Ct. 1110] (fundamental right to procreate).) The death penalty is strictly scrutinized because death is qualitatively different from, and much more severe than, any other form of punishment; it is irrevocable. (*California v. Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 103 S. Ct. 3446]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 [101 L.Ed.2d 702, 108 S. Ct. 2687]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 262 [100 L.Ed.2d 284, 108 S. Ct. 1792].) The denial of the assistance of a jury selection expert, or even a qualified investigator, impinged upon Bell's fundamental rights, including the right to life, and the right to the effective assistance of counsel at a capital trial. (*Ake v. Oklahoma* (1985) 479 U.S. 68, 78 [84 L.Ed.2d 53, 105 S.Ct. 1087] ["interest in the accuracy of a criminal proceeding that places [his] life ... at risk is almost uniquely compelling.]; see also, 1989 *ABA Guidelines for the Appt. and Performance of Counsel in Death Penalty Cases, supra*, Guideline 11.5.1, B, 9; *National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation, supra*, Guideline 7.2(a)(7); *Powell v. Alabama* (1932) 287 U.S. 45, 73 [77 L.Ed. 158, 53 S.Ct. 55].)

When disparate treatment of similarly situated groups of people impinges upon "fundamental interests," the courts will apply strict scrutiny. If strict scrutiny applies, the state bears the burden of proving that disparate treatment is necessary to further a compelling governmental interest. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832.)

Respondent argues against "strict scrutiny, then merely assumes that the disparate treatment of appellant, who was represented by court-

appointed counsel, would survive the rational relationship test, assuming that test applied. (RB 58-59.) The rational relationship test requires that the distinctions in treatment of similarly situated groups bear a rational relationship to a conceivable state purpose. (*In re Marriage Cases, supra,* 43 Cal.4th at p. 832; see also *Harris v. McRae* (1980) 448 U.S. 297 [65 L.Ed.2d 784, 100 S.Ct. 2671].) The Attorney General does not bother to explain what "conceivable state purpose" (*id.*) is advanced by according less liberal access to ancillary resources to capital case defendants represented by court-appointed counsel versus those represented by a public defender.

Respondent instead asserts, "it is purely speculative to assert that a public defender has a greater chance of obtaining reimbursement than appointed counsel does of securing funds in the first instance . . . ." (RB 59.) Equal protection is violated even if the Stanislaus County Public Defender's chances of being reimbursed are "speculative."

Section 987.9 was added to the Penal Code in recognition of the financial burdens on counties that would come with reinstatement of the death penalty. (California Commission on the Fair Administration of Justice [CCFAJ], *Report and Recommendations on the Administration of the Death Penalty in California* [death penalty report]; June 30, 2008, pp. 34-35.) Section 987.9 includes a provision allowing counties to "reimburse extraordinary costs in unusual cases if the County provides sufficient documentation of the need for those expenditures." Section 987.9 costs "incurred pursuant to a court order must be supported by sufficient documentation for the Controller to determine whether the costs are directly related to the trial, and whether they are reasonable and necessary." "The costs of investigators are reimbursable at a rate not to exceed the prevailing rate paid investigators performing similar services in capital cases." (2 CCR 1025.1.) "Any cost claimed for reimbursement must

supported by adequate documentation and be readily traceable through county records and books of accounts." (2 CCR 1023.1.)

Counties do not apply for reimbursement for investigative and expert costs under section 987.9 "until confidentiality is no longer an issue." (2 CCR 1022.1.) In other words, attorneys from public defender agencies select their investigators and experts unimpeded by the courts, and apply for reimbursement of section 987.9 costs later, subject to the approval of the Controller. Court-appointed attorneys, on the other hand, must seek approval to hire an expert or investigator from a judge in advance of the trial.[5]

More importantly, as of June 30, 2008, when the CCFAJ death penalty report was published, no reimbursements had been made to counties under section 987.9 for *fifteen years*, leaving counties to foot the bill for their death penalty cases. (*Id.*, at p. 36.) This period of non-reimbursement covers the time during which Bell was charged and tried. During this period, the essential difference between Bell, who was represented by court-appointed counsel, and indigent capital defendants represented by the Stanislaus County Public Defender, was the authority of the trial court to refuse funding for jury selection assistance and/or to grant

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[5] Government Code sections 15200-15204 provide another device for the state to reimburse counties for the costs incurred in connection with *homicide* trials. Counties can seek reimbursement for costs incurred by district attorneys, sheriffs, public defenders and court-appointed attorneys, excluding normal salaries and expenses, "if such costs will seriously impair the finances of the county." (Gov. Code, §§ 15201, 15202, subd. (a).) Reimbursement is limited to costs "in excess of the amount of money derived by the county from a tax of 0.0125 of 1 percent of the full value of property assessed for purposes of taxation within the county." (Gov. Code, § 15202(b).) This provision does not appear to be subject to case-specific findings of need.

funding for jury selection assistance, but place unlimited restrictions upon *whom* defense counsel could hire.

Regardless of whether a county eventually receives reimbursement for extraordinary expenses incurred to defend death penalty cases, public defenders may utilize investigators of their own choosing, or engage jury selection consultants of their own choosing, without seeking advance permission to do so from the trial court. The trial court has no apparent authority in advance of trial to pass upon the *qualifications* of the investigators employed by a public defender, nor can a trial judge authorize funds, but prevent a public defender from engaging an expert or investigator with a particular skill set, merely because the *judge* is unpersuaded that the individual's skills will be of value to the defense.

The state cannot establish a compelling interest justifying the disparate treatment of indigent defendants represented by court-appointed counsel and those represented by the public defender. No compelling reason exists to deny court-appointed counsel similar leeway to hire experts that he or she deems reasonably necessary for a proper defense. Equal protection demands that a request for funding be granted when a court-appointed attorney makes a reasonable request for services of a type that would ordinarily be available to the death-eligible clients of the public defender – or privately retained counsel – in a capital case, and the sums requested to pay for such services do not exceed the prevailing rates or customary fees paid for such services.

Even if, however this Court were to apply the "rational relationship" test, the disparate treatment of Bell, merely because his lawyer was court-appointed, does not bear a rational relationship to any conceivable state purpose. The trial court *not only* denied Bell the services of a *jury consultant*; additionally, the court made it clear *investigative* funding that *was* awarded could *not* be spent on counsel's preferred investigator, Eda

Gordon, even though she was a licensed investigator as well as a jury consultant. Furthermore, the court eventually awarded more funding than counsel requested be spent for jury selection assistance to hire second counsel *in lieu of someone with jury selection expertise.* (I § 987.9 RT 168-174.) To the extent the statutory scheme would condone the exercise of judicial discretion to deny an indigent defendant's court-appointed attorney the right to use authorized funds to hire the qualified expert or investigator of his or her own choosing, when public defender-represented defendants would not be constrained by similar limitations on the use of authorized funding, a violation of equal protection results.

Under the circumstances, it was an abuse of discretion for the court to arbitrarily prevent counsel from using available section 987.9 funds for an investigator with jury selection expertise, effectively forcing him to expend the same resources on second counsel without such expertise. (See, *Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 545-547.) The trial court's ruling violated the Sixth Amendment right to counsel, as well as the Due Process and Equal Protection Clauses. As in *Ake v. Oklahoma, supra*, 470 U.S., at p. 87, the judgment should be reversed.

Additionally, the central purpose of *voir dire* is ensuring an impartial tribunal by "exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment, Inc., v. Greenwood* (1984) 464 U.S. 458, 554 [78 L.Ed.2d 663, 104 S.Ct. 845].) The risks inherent in denying adequate *voir dire* are "most grave when the issue is of life or death." (*Aldridge v. United States* (1931) 283 U.S. 308, 314 [75 L.Ed.1054, 51 S.Ct. 470]; *California v. Ramos, supra,* 463 U.S. at pp. 998-999 [77 L.Ed.2d 1171, 103 S.Ct. 3446].) Especially in a death penalty case, the Eighth Amendment demands *reliability* in the process by which a person's life is taken. (*Gregg.* v. *Georgia* (1976) 428 U.S. 153, 196-203 [49 L.Ed.2d 859, 96 S.Ct. 2909].) Accordingly, the court's refusal

to allow counsel to expend authorized funds to hire Eda Gordon to provide assistance during jury selection also compromised the reliability of the process by which Bell was convicted and sentenced to die, which violated the Eighth Amendment. The judgment should be reversed.

ARGUMENT SECTION 2

INTERRELATED ARGUMENTS STEMMING FROM THE TRIAL COURT'S DENIAL OF BELL'S MOTION FOR DISCOVERY OF TORY'S STATEMENTS MADE TO DEPUTY DISTRICT ATTORNEY CASSIDY WHILE CASSIDY WAS TRAVIS' DEFENSE ATTORNEY, AND MOTION TO RECUSE THE STANISLAUS COUNTY DISTRICT ATTORNEY'S OFFICE OR, ALTERNATIVELY, PRECLUDE TORY FROM TESTIFYING AGAINST BELL AT HIS TRIAL.

III

CONTRARY TO RESPONDENT'S ARGUMENT, BELL'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION AND COMPULSORY PROCESS WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF BELL'S MOTION FOR DISCOVERY OF TORY'S STATEMENTS TO DEFENSE COUNSEL AT A TIME WHEN COUNSEL WAS IN THE PROCESS OF APPLYING FOR, OR HAD ALREADY ACCEPTED A JOB IN THE OFFICE OF THE STANISLAUS COUNTY DISTRICT ATTORNEY, AND WAS AT THE SAME TIME NEGOTIATING A PLEA BARGAIN WITH THE DISTRICT ATTORNEY NOTWITHSTANDING THAT THE STATEMENTS WERE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

A. The Record:

Respondent says there is no dispute in the record "that Tory's trial counsel, Mr. Cassidy, negotiated a plea agreement on Tory's behalf and thereafter accepted employment with the district attorney's office." (RB 64.) Respondent further avers, ". . . appellant does not dispute [] that Cassidy was Tory's attorney at all stages up through Tory's acceptance of the plea bargain." (RB 65, fn. 16.)

Respondent's characterization of appellant's position is not completely accurate. Tory – an admitted aider and abettor – had numerous discussions with Cassidy regarding his own involvement in the alleged capital murder, as well as concerning what Bell purportedly did. The

discussions occurred during a period when Cassidy was *applying for, being interviewed for, and awaiting the start of a job as a prosecutor in the office whose job it was to prosecute both Tory's and Bell's cases*. Cassidy was, for all intents and purposes, playing multiple roles simultaneously – that of defense attorney, that of job applicant seeking to enhance the prospects of employment in the same district attorney's office that was prosecuting appellant's case, and that of soon-to-be Stanislaus County deputy district attorney. Depending on what Tory knew of his lawyers' impending employment, the conversations with Cassidy may have been more akin to discussing the facts of the case and the possibility of a plea bargain with, or in the presence of, someone employed by the District Attorney's office. Such a conversation would not be protected by attorney client-privilege. (See, *People v. Johnson* (1989) 47 Cal.3d 1194, 1228.)

B. Discussion:

Respondent cites a plethora of California cases that generally hold that one defendant's right to due process can never trump the attorney-client privilege of another. (RB 64.) Respondent also briefly discusses *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 416 [141 L.Ed.2d 379, 118 S.Ct. 2081] (hereafter *Swidler*), and cites the case for the proposition that the attorney-client privilege survives death and therefore is, for all intents and purposes, impenetrable. (RB 65.)

But respondent fails entirely to address the important policy considerations that underpinned the concerns voiced by Justice O'Connor (joined by Justice Scalia and Justice Thomas) in her dissenting opinion. Justice O'Connor agreed that the attorney-client privilege "ordinarily will survive the death of a client," but she also opined that a "criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other

sources, override a client's posthumous interest in confidentiality." (*Id.* at p. 411.) Justice O'Connor felt that "the attorney-client privilege should not go unexamined 'when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise . . . .'" (*Id.* at 412; internal citation omitted.)

Justice O'Connor pointed out the obvious: that prosecutors have the power to grant immunity and compel *living* witnesses to disclose privileged information when disclosure is necessary to help law enforcement, or to exonerate an accused. (*Swidler* at pp. 412-413.) In Justice O'Connor's opinion, "the costs of recognizing an absolute *posthumous* privilege" could potentially be "inordinately high." (*Id.* at p. 413; italics added.) Extreme injustice might occur, for example, "where a criminal defendant seeks disclosure of a deceased client's confession to the offense . . . ." (*Ibid.*)

Appellant agrees with Justice O'Connor's view that, "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences." (*Ibid.*) Justice O'Connor suggested, and appellant concurs, that exceptions to any absolute application of attorney-client privilege should be made where "the constitutional rights of a criminal defendant are at stake," or "in the face of a compelling law enforcement need for the information." (*Ibid.*) When the attorney-client privilege is asserted in the criminal context, and "a showing is made that the communications at issue contain relevant factual information not otherwise available," (*id.* at p. 413), courts should be permitted to balance competing considerations and decide, "whether the privilege should be trumped in the particular circumstances of [the] case." (*Swidler* at p. 416.)

In *Morales v. Portuondo* (S.D.N.Y. 2001) 164 F.Supp.2d 706, a federal district court judge did just that. Faced with inculpatory statements made by someone other than the defendant under the cloak of attorney-

client privilege (*id.* at p. 730), the federal district court held that "the attorney-client privilege must not stand in the way of the truth." (*Id.* at p. 731.) Citing the Supreme Court's decision in *Chambers v. Mississippi* (1973) 410 U.S. 284, the court concluded, even where the technical requirements for a state's attorney-client privilege rule are satisfied, the privilege will yield if strong public policy requires disclosure. (*Id.* at p. 730, concurring with the holding in *Priest v. Hennessy* (1980) 51 N.Y.2d 62; see, Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: a Systemic Approach*, 17 Tex. Wesleyan L. Rev. 499, 523-528 (Symposium Edition 2011) [discussing the story of Jose Morales].)

Recent developments, including the belated exoneration of so many unjustly convicted and /or condemned prisoners (see, Death Penalty Information Center, The Innocence List: List of Those Freed From Death Row, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110. (visited on February 12, 2015)) have led some lawyers, judges and scholars to question the application of attorney-client privilege rules to prevent disclosure by attorneys of truthful statements by a client that may exonerate an innocent person. (Louis M. Natali, Jr., *Should We Amend or Interpret the Attorney-Client Privilege to Allow for an Innocence Exception?* 37 Am. J. Trial Advoc. 93 (Summer 2013); Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: a Systemic Approach, supra.*)

Specific examples of the injustices wrought by the strict application of attorney-client privilege in the criminal context can be found in law reviews. For example, in Illinois, Alton Logan was sentenced to life in prison for the 1982 murder of a security guard at a McDonald's in Chicago. The person who actually killed the guard was a man by the name of Andrew Wilson. Wilson confessed to his attorneys, who did not come forward because it would have violated attorney-client privilege and put

their own client in danger of an execution. Twenty-six years later, after Wilson's death, the lawyers came forward and Logan was exonerated and released from prison. (Louis M. Natali, Jr., *supra*, 37 Am. J. Trial Advoc. at pp. 95-97; Crime & Courts on NBCNEWS.com, A killer's 26-year-old secret may set inmate free (April 12, 2008) http://www.nbcnews.com/id/24083675/ns/us_news-crime_and_courts/t/killers--year-old-secret-may-set-inmate-free/#.VBG1OEiWSCc (visited on February 12, 2015).)

Lee Wayne Hunt was convicted in North Carolina for the 1986 murders of Roland and Lisa Matthews. There was no physical evidence connecting Hunt to the murders, only the testimony of immunized associates and prison informants. Hunt was connected to the crime scene by the testimony of an FBI expert who said the bullets in Hunt's possession matched bullets used to shoot the victims. The convicted codefendant, Jerry Cashwell, admitted to an appellate public defender named Hughes that he was the lone killer of Matthews, and Hunt was not even there.

Hughes did not reveal this information until after Cashwell's death; but Hughes, unlike Wilson's attorneys, had not obtained his client's permission to disclose. The courts denied Hunt's motion for a new trial and excluded the Cashwell's statements to Hughes as hearsay. Cashwell's lawyer was referred to the state bar for discipline for violating the attorney-client privilege. Hughes was not disciplined, but Hunt remains incarcerated today. (Louis M. Natali, Jr., supra, 37 Am. J. Trial Advoc. at pp. 97-99; see also, The New York Times, Week in Review When Law Prevents Righting a Wrong (May 4, 2008), < http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html?pagewanted=2&fta=y&_r=0> (visited on February 12, 2015).)

Where the possible exoneration of an innocent criminal defendant is at stake, the harm of precluding critical evidence that is unavailable without

violating a declarant's attorney-client privilege should outweigh any potential disincentive to forthright communication between attorney and client. In other contexts, the attorney-client privilege is not absolute. California's Business and Professions Code section 6068 and the American Bar Association's Model Rules of Professional Conduct (Rule 1.6: Confidentiality of Information) contain exceptions to confidentiality rules, which balance interests that "pale by comparison to the need to prevent the execution or incarceration of an innocent person." (Louis M. Natali, Jr., *supra*, 37 Am. J. Trial Advoc. at p. 112; < http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html> (visited on February 12, 2015).) Attorneys may make disclosures, for example, "to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (Bus. & Prof. Code, § 6068, subd. (e)(2).) Additionally, lawyers may reveal client confidences to the extent necessary to defend against allegations of malpractice, ineffectiveness, or other breach of duty arising out of the lawyer-client relationship. (Evid. Code, § 958; *People v. Ledesma* (2006) 39 Cal.4th 641, 693.) To protect the client's interests, the court, in effect, provides a kind of use immunity; "'client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges.'" (*Ibid.*, quoting *Com. v. Chmiel* (1999) 558 Pa. 478 [738 A.2d 406, 424].)

Appellant is not asking this Court to annihilate Tory's attorney-client privilege altogether, but rather, to provide a mechanism by which it can be insured that Bell will not serve decades on death row before a court will scrutinize whether Tory shared confidences with his former attorney-turned-prosecutor that might undermine the reliability of his trial testimony,

and thus the convictions and death judgment in Bell's case. Tory admitted he was present and physically available to commit the crime, and at least one witness claimed Tory admitted that he was the shooter. Tory testified at trial, and was available for cross-examination; but state rules that preclude defendants from access to information before trial often hinder the defendant's opportunity for effective cross-examination. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 738, fn. 9 [96 L.Ed.2d 631, 107 S.Ct. 2658].)

In such circumstances, this Court should adopt the approach suggested by Justice O'Connor's dissenting opinion in *Swidler*, which is based on the American Law Institute's recommendations that courts should "balance the interest in confidentiality against any exceptional need for the communication," whenever the confidential communication "bears on a litigated issue of pivotal significance." (*Swidler, supra*, 524 U.S. at p. 415.)

Respondent devotes one paragraph to arguing harmless error. (RB 66.) Rather than offering any *facts* to support the assertion that "there is no reasonable probability that would have obtained a more favorable result but for the trial court's ruling denying discovery of Tory's confidential communications with Cassidy" (RB 66), respondent instead argues waiver. Ergo, respondent argues appellant *failed to object* that he was denied discovery regarding Tory's testimony. (RB 66.) This is obviously not true. Appellant filed a motion for disclosure, an evidentiary hearing was held, and the trial court unequivocally denied the motion. Respondent cites no authority for the proposition that additional objections were required to preserve the issue, once appellant's motion for discovery was litigated at an evidentiary hearing and finally denied.

Respondent also argues that appellant "identifies no material information about Tory or his involvement in the crimes that appellant was denied." (RB 66.) Manifestly, appellant cannot point to particular statements Tory made to Cassidy about his involvement in the crimes; he

was denied discovery of all of Tory's statements to Cassidy without any *in camera* review to determine whether Tory's statements had exculpatory or mitigating value to Bell. (See, *Morales v. Portuondo, supra,* 154 F.Supp.2d at p. 730.)

Appellant's written motion clearly sought potentially exculpatory or mitigating statements made by Tory to his former attorney (and soon-to-be district attorney) during more than twenty meetings that led up to Tory's extraordinarily lenient plea agreement. (*Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194]; 2 CT 461-484.) At the time of trial counsel's motion for discovery of Tory's statements to his former attorney, Bell was on trial for his life. As trial counsel aptly argued in his motion, Tory, a self-admitted accomplice, was only witness to put Bell at the scene of the murder and positively him as the actual killer. (2 CT 471.) Undermining Tory's credibility was of paramount importance and the key to Bell's defense.

Tory's statements to Cassidy had great potential for impeachment in two respects. Tory might have made statements to Cassidy, which were either inconsistent with his trial testimony, describing Bell's role in the robbery and murder, or consistent with the testimony of Kenneth Alsup that Tory had bragged about being the shooter. (XII RT 2275, 2278; *United States v. Bagley* (1985) 473 U.S. 667, 677 [87 L.Ed.2d 481, 105 S.Ct. 3375].) Tory's conversations with Cassidy might also have provided a more detailed and nuanced portrait of Tory's motives for "favoring the District Attorney with his testimony." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 673, 106 S.Ct. 1431].) Either type of evidence had the potential to tip the scales in favor of something less than conviction of all charges and the ultimate punishment of death.

Accordingly, for the reasons set forth above, as well as the reasons more fully amplified in the Appellant's Opening Brief, appellant asks this

Court to remand for an evidentiary hearing at which the trial court would "balance … competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case." (*Swidler*, *supra*, at p. 416.)

IV

CONTRARY TO RESPONDENT'S CONTENTION, THE TRIAL COURT ERRONEOUSLY REFUSED TO RECUSE THE DISTRICT ATTORNEY, AND/OR ALTERNATIVELY, TO PRECLUDE TESTIMONY BY TORY, ON THE GROUND THAT DEPUTY DISTRICT ATTORNEY CASSIDY, PRIOR TO JOINING THE DISTRICT ATTORNEY'S OFFICE, WAS THE DEFENSE ATTORNEY FOR TORY AND HELPED NEGOTIATE A PLEA BARGAIN FOR A LENIENT SENTENCE IN EXCHANGE FOR TESTIMONY AGAINST BELL.

Respondent answers appellant's twenty-eight-page argument, in which he urges reversal based on the trial court's denial of the motion to recuse the Stanislaus County District Attorney's office (AOB 170-197), in little over four pages of the Respondent's Brief. (RB 66-70.)

There is little for appellant to quarrel with in respondent's one-page discussion of cases interpreting section 1424, which states in relevant part that a motion to disqualify a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." Appellant does not dispute that *People v. Connor* (1983) 34 Cal.3d 141, 147-148, *People v. Eubanks* (1996) 14 Cal.4th 580, *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, and *People v. Vasquez* (2006) 39 Cal.4th 47, articulate this Court's two-pronged approach to analyzing recusal cases arising under section 1424. Recusal is appropriate if (1) the circumstances of a conflict evince a reasonable possibility that a prosecutor's office "may not exercise its discretionary function in an evenhanded manner," and (2) the conflict is sufficiently acute "as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*People v. Connor, supra,* at pp. 147-148; AOB 175-176 [citing *Eubanks* and *Haraguchi*].)

Respondent perfunctorily argues that the trial court's decision to deny the motion to recuse was not "arbitrary, capricious or outside the bounds of reason" because Cassidy did not participate in or assist in the prosecution of Bell's case, there is no evidence Cassidy divulged any of Tory's confidences to prosecuting attorneys, Cassidy was not in a supervisory position, and the District Attorney took steps to protect Tory from disclosure of privileged information arising from Cassidy's prior representation. (RB 68.) Appellant disagrees with respondent's benign characterization of the facts.

Cassidy accepted employment with the District Attorney *before* the final terms of the plea bargain were memorialized, on January 20, 1998. Consequently, Cassidy was seeking employment, and negotiating the terms of his employment, while simultaneously negotiating the terms of Tory's credit-for-time-served deal. (2 RT 45-52; 2 CT 462, 485-493.) The appearance of a conflict of interest was sufficient to require scrutiny of whether Bell could receive fair treatment from the district attorney's office during all stages of his trial.

Respondent claims the District Attorney took "protective measures" to guard Tory's attorney-client privilege. (RB 68.) In fact, there was no evidence of any real effort on the District Attorney's part to build an ethical screen for purposes of protecting the rights of Tory or Bell. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 116, fn. 6.) Evidence is lacking of any physical, geographic, and departmental separation of attorneys. Cassidy's personal office was on the same floor as the office of prosecuting attorney Birget Fladager, 40 to 50 feet away, separated by a "couple of partitions." (2 RT 44.)

Additionally, the Stanislaus County District Attorney's office was relatively small, comprised of a few dozen lawyers. There was no written policy against, or sanctions provided in the event Cassidy discussed

confidential communications with other deputy district attorneys, nor rules preventing access to confidential information and files. The District Attorney had neither procedures nor policies to prevent Cassidy from profiting from his prior representation of Tory, who had turned state's evidence in a high profile criminal case being prosecuted by the Stanislaus County District Attorney. (2 RT 44.) Under such circumstances, the risk was high that the all attorneys involved would consciously or unconsciously be adversely affected by their colleagues' interests in the case to a degree rendering it unlikely Bell would receive a fair trial. (*People v. Connor, supra,* 34 Cal.3d at p. 149.)

Respondent asserts that, assuming *arguendo*, the trial court erred by denying the motion to disqualify the district attorney, any error was harmless because there was no evidence Cassidy revealed client confidences, or that Bell was treated unfairly as the result of Cassidy's employment with the District Attorney. (RB 68.) Respondent fails entirely to address the factual predicate for appellant's argument that prejudice occurred. To wit, the District Attorney and Cassidy interacted simultaneously over a sustained period of time (1) to secure a job for Cassidy and (2) to strike a deal for the codefendant Cassidy represented. When a lawyer for an accused codefendant is negotiating to be hired the prosecuting attorney's office at the same time he is negotiating for a plea bargain, which would benefit his own client and disadvantage the other codefendants, all parties participating in the negotiations, including the prosecuting attorneys, labor under special interests that compete with the obligation to seek justice for all defendants in an impartial manner. (*People v. Eubanks, supra,* 14 Cal.4th at p. 588.) In the case at bench, the District Attorney and Cassidy, as a new member of the office, would have been highly motivated to immunize Tory against impeachment that could result

from examining any express or implied promises made by Cassidy in pursuit of settlement of Tory's case and a job.

Regarding appellant's assertion that section 1424 violates equal protection, respondent first asserts that the issue is forfeited by the failure to raise the issue in the trial court. (RB 69; citing *People* v. *Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) Reviewing courts will frequently examine constitutional issues raised for the first time on appeal, "especially when the enforcement of a penal statute is involved (e.g., *People* v. *Allen* (1974) 41 Cal.App.3d 196, 201 []), the asserted error fundamentally affects the validity of the judgment (e.g., *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153 []), or important issues of public policy are at issue (e.g., *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 4-5 [])." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *D.M. v. Department of Justice* (2012) 209 Cal.App.4th 1439, 1447.) Whether section 1424 violates equal protection because a private attorney's conflict is imputed to his private law firm but an individual prosecutor's conflict is not imputed to the public prosecutor's office is an important issue of public policy worthy of consideration on the merits.

Respondent also disagrees on the merits that section 1424 violates the equal protection clause. (RB 69.) Respondent first asserts that criminal defendants are not "similarly situated" with civil litigants with respect to the purposes of the law. (RB 69.) The case cited by respondent for this proposition, *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53 (RB 69), does not involve a law discriminating between civil and criminal litigants, but rather a law discriminating between two different classes of prisoners. In *Rajanayagam*, the court found that (1) those defendants who were in jail on and/or after October 1, 2011, who committed an offense on or after October 1, 2011, and (2) those defendants who were in jail on and/or after October 1, 2011, who committed the same offense before

October 1, 2011, were "similarly situated" with respect to the purposes of a law increasing conduct credit for time spent in custody. (*Ibid.*) This case does not aid respondent.

Respondent presumes that the primary purpose of section 1424 is to "prevent due process violations." (RB 69.) Assuming it is true for purposes of equal protection analysis that the purpose of the statute is to "'prevent potential constitutional [due process] violations from occurring'" (*People v. Gamache* (2010) 48 Cal.4th 347, 366, quoting *People v. Vasquez, supra*, 39 Cal.4th at p. 56), defendants in state criminal proceedings are in no different position with respect to the need for due process than other individuals who are engaged in civil litigation against state agents or agencies. "Public perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office." (*City and County of San Francisco v. Cobra Solutions, Inc.*, (2006) 38 Cal.4th 839, 854.)

As appellant previously pointed out in his opening brief, the Attorney General also provides representation in civil litigation when a state agency, commissioner, or officer is a party to, or has an interest in litigation, as a result of his or her office or official duties. (AOB 191; Gov. Code, § 11042.) If a private attorney for a party with an interest adverse to the government were to join the Attorney General's office while litigation was pending, the same potential for a conflict of interest, and the same risk of a due process violation, would exist. Yet the more stringent standards of section 1424 would *not* apply.

Furthermore, respondent's discussion of the equal protection issue ignores the fact that the real legislative purpose of section 1424 was to overrule *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255. *Greer* had

authorized judicial disqualification of prosecuting attorneys based on the "appearance of impropriety," with the legitimate and important goal of maintaining public confidence in the integrity and impartiality of our system of justice. (*People v. Eubanks, supra*, 14 Cal.4th at pp. 591-592.) Section 1424 was the California Attorney General's solution to the problem of increased caseloads caused by the disqualification of local prosecuting agencies based on the "appearance of conflict" test enunciated in *Greer*. (*Id.* at p. 591, fn. 3.) The objective of the law was to reduce the number of disqualifications in order to save money. Therefore, to the extent fewer disqualifications of local government lawyers helps the Attorney General's office save resources, criminal defendants are similarly situated with other litigants insofar as the purpose of section 1424 is concerned.

Respondent asserts that section 1424 does not involve a suspect classification or interfere with a fundamental constitutional right. (RB 69.) Respondent sites *People v. Ramos* (2004) 34 Cal.4th 494, 511-512, for the proposition that civil litigants may be afforded greater protections than criminal defendants without violating the equal protection clauses. (RB 69.) Appellant discussed the *Ramos* decision in his opening brief. (AOB 193.) That case upheld against a due process challenge to former Code of Civil Procedure section 223, which provided for court conducted *voir dire* in criminal cases, including death penalty cases. Appellant refers the Court to that discussion, rather than reiterating the entire argument here. It suffices to say that section 1424 regulates the conduct of judges in criminal cases, not the conduct of defendants, whereas Code of Civil Procedure section 223 prevents abuse of jury selection practices by defense attorneys. Furthermore, the right to exercise peremptory challenges is a creature of statute, not a fundamental right. (*People v. Ramos, supra*, at p. 512.) The right to an impartial prosecuting official is an essential component of a

defendant's fundamental right to a fair trial. Section 1424 infringes on that right.

Respondent finally argues that no due process violation results from eliminating the "appearance of impropriety" as a ground for recusal of a prosecuting official. (RB 70.) Appellant disagrees for reasons previously set forth in the Appellant's Opening Brief. (AOB 196-197.) Applying obstacles to the disqualification of a prosecutor with an apparent conflict of interest increases the risk that a death eligible defendant will not receive a completely fair trial. Death penalty cases are supposed to be subject to heightened standards of reliability, not reduced standards of reliability. Application of section 1424 in the capital setting unreasonably impedes the ability of the courts to insure the integrity and reliability of proceedings leading to a death judgment. In a death penalty case, denial of disqualification where there is an appearance of impropriety violates the cruel and unusual punishment and due process clauses of the state and federal constitutions. (U.S. Const., Amendments VIII and XIV; Cal. Const., Art. I, § 17.)

ARGUMENT SECTION 3

ERRORS IN THE ADMISSION OF EVIDENCE DURING THE GUILT PHASE, OR GUILT AND PENALTY PHASES

V

CONTRARY TO RESPONDENT'S ASSERTION, THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED BELL'S RIGHTS GUARANTEED BY THE STATE AND FEDERAL CONFRONTATION CLAUSE BY ADMITTING THE TESTIMONY OF DETECTIVE OLSON REGARDING THE STATEMENTS OF DECEASED CODEFENDANT ROSEADA TRAVIS.

A. The Record:

Both appellant and respondent have set forth facts surrounding Detective Olson's guilt phase testimony that deceased codefendant Rosie Travis told him that that the interior and exterior of her car were washed after the robbery. (AOB 198-200; RB 71-74.) Those facts are incorporated by reference herein.

B. Discussion.

1. Forfeiture:

Respondent argues that appellant's argument that the admission of Rosie Travis' statement violated the Confrontation Clause is forfeited because counsel failed to make a timely, contemporaneous objection in the trial court. Respondent cites *People v. Livingston* (2012) 53 Cal.4th 1145, as authority for finding the issue forfeited. *Livingston* is inapt. There, the defendant's counsel did not object to the testimony at trial. (*Id.*, at p. 1161.) Here, trial counsel objected.

Respondent nevertheless argues that the issue was forfeited because defense counsel waited two hours to object, and then failed to object on the

grounds of hearsay and denial of the right of confrontation. Respondent acknowledges that counsel objected on *Aranda-Bruton* grounds, but asserts that this particular objection had no application because Travis and Bell were not jointly tried. (RB 75.)

Bell's case was tried in 1999, several years before *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354] [hereafter, *Crawford*] was decided. In pre-*Crawford* cases, this Court has declined to apply the forfeiture doctrine, noting that, "because *Crawford* was 'a dramatic departure from prior confrontation clause case law,' a defendant's failure to object is excusable in cases like this one where the trial occurred long before *Crawford* was decided 'because defense counsel could not reasonably have been expected to anticipate this change in the law.'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 872, citing *People v. Harris* (2013) 57 Cal.4th 804, 839–840; internal citations omitted.)

The fact that Bell's counsel characterized the objection as brought under authority of *Aranda-Bruton* furnishes an additional reason *not* to find the issue forfeited. To preserve an evidentiary objection on appeal, a party must make a timely objection in the trial court "so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) The purpose of this rule is to give the trial court a concrete legal proposition to pass on, to give the opponent an opportunity to cure the defect, and to prevent abuse. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

In *Bruton*, the United States high court held that the introduction of a codefendant's confession implicating the defendant in a joint trial violates the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the confession only against the codefendant. (*Bruton v. United States* (1968) 391 U.S. 123, 137 [20 L. Ed. 2d 476, 88 S.Ct. 1620] [*Bruton*]; see also, *People v. Aranda*

(1965) 63 Cal.2d 518 [*Aranda*].) Decades later, the United States Supreme Court decided *Crawford, supra*, and *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224, 126 S.Ct. 2266] [hereafter, *Davis*]. Since then, the admissibility of testimonial hearsay by a codefendant in a joint trial, as well as any other hearsay declarant, is viewed "through the lens of *Crawford* and *Davis* . . . ." (*United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85.) Therefore, even if counsel's *Aranda-Bruton* objection was technically incorrect—because Travis died prior to trial (XII RT 2253), and therefore she and Bell were not being jointly tried—the objection more than sufficed to inform the court and the district attorney that the defense objection was premised on the Confrontation Clause. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809.)

Respondent argues that defense counsel's objection and motion for mistrial were properly denied as untimely because counsel waited until the next recess to object. (RB 75.) Defense counsel stated a tactical reason for not objecting in front of the jury. Counsel would have no reason to assume his motion for mistrial would inexorably be granted; he did not wish to give undue emphasis to the issue of whether Bell's codefendant had washed blood from the car in the event the motion were denied. (XII RT 2432.) Criminal defense attorneys will frequently decide not to make contemporaneous objections in front of a jury if doing so will focus the jury's attention on evidence in a way "that would not be helpful to the defense." (*People v. Harris* (2008) 43 Cal.4th 1269, 1290.)

The purpose of the contemporaneous objection requirement is to allow court's to remedy the situation before any prejudice accrues. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Here, counsel opined that it would have caused even more prejudice, not less, had he objected and moved for mistrial in front of the jury. (XII RT 2432-2433.) Additionally, it is apparent from the record that a specific, contemporaneous objection on

confrontation grounds would have been unavailing. It is clear that the trial court would have ruled against appellant for several other reasons, i.e., because the court believed the evidence was not inculpatory, and that counsel had "opened it up" for the prosecutor to elicit Travis' statements about washing the car by asking about the prosecution's failure to test suspected blood stain evidence. (XII RT 2434.)

2. The Merits:

In Argument V, D of the Appellant's Opening Brief, appellant has already explained why, contrary to the trial court's finding, counsel's cross-examination did *not* invite the admission of the codefendant's hearsay statement in violation of his confrontation rights. (AOB 205-209.) Since respondent failed to address those arguments or any of the cases cited therein, there is no need for appellant to elaborate on this particular point in reply.

Respondent perfunctorily argues as one ground for finding no violation of appellant's confrontation rights that the "statement that [Roseada] washed the car did not incriminate appellant." (RB 75.) Under *Crawford* analysis, a Confrontation Clause violation occurs regardless of whether the declarant's testimonial hearsay statement directly incriminates the defendant who is on trial. (*Crawford v. Washington, supra*, 541 U.S. at pp. 68-69; *United States v Nguyen* (9th Cir. 2009) 565 F.3d 668, 674.)

Under *Crawford*, the relevant inquiry is whether the out-of-court declarant's statement constitutes testimonial hearsay. If so, its admission is error unless (1) the declarant is unavailable to testify at the trial, and (2) the defendant has had a prior opportunity for cross-examination. (*Crawford v. Washington, supra*, 547 U.S. at pp. 53-54.) Hearsay is testimonial if the declarant's statement was "given and taken primarily … to establish or prove some past fact for possible use in a criminal trial . . . ." (*People v. Cage* (2007) 40 Cal.4th 965, 984) "[S]tatements elicited by law enforcement

officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Ibid.*)

There can be no dispute that Roseada Travis' statement was testimonial hearsay. There was no contemporaneous emergency, and the statements were made during a police interrogation of a suspect in a homicide case for the express purpose of proving past facts for possible use in a criminal trial. (I CT 4-8, 14.)

Respondent argues that there was no Confrontation Clause violation because Travis' hearsay statements were not offered for the truth of the matter asserted, but rather for the nonhearsay purpose of showing why Detective Olson failed to pursue testing of the possible bloodstain on the car's doorframe. (RB 76.) The prosecutor may have intended to proffer the statement for a nonhearsay purpose, but the jury was never instructed to limit its consideration of the evidence to explaining Detective Olson's state of mind. (See, XII RT 2436 [MR. RAYNAUD: "...It wasn't offered for the truth of the matter any way."].) The trial court opined that "the time had passed ... to give [the jury] any ... limiting instruction," and further, that there was no basis for a limiting instruction in any event because defense counsel had failed to contemporaneously object. (XII RT 2435, 2436.)

The trial court left open the possibility that trial counsel could convince the court to reconsider the possibility of a limiting instruction at the end of trial. (XII RT 2435, 2436.) In the end, however, that did not happen; the jury was left free to consider the statement as proof of the matter asserted, i.e., that Travis washed the interior and exterior of the car for purposes of destroying any evidence of the crime.

It is not surprising the record is devoid of a later request for a limiting instruction. The court was obviously negatively disposed to give one. Moreover, counsel had already made it clear that he viewed the error

as so prejudicial that it warranted a mistrial. (XII 2432-2433.) This Court, too, has recognized that in some instances limiting instructions are not enough to prevent the kind of prejudice that results from introducing testimonial hearsay to a jury. (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)

Although this Court has in the past imposed on defense counsel the obligation to request limiting instructions (see, *People v. Cowan* (2010) 50 Cal.4th 401, 479), in the wake of recent decisions of the United States Supreme Court interpreting the Confrontation Clause under *Crawford*, that burden should no longer be imposed on counsel. Rather, when trial is by jury, and otherwise inadmissible testimonial hearsay is received for a nonhearsay purpose, it is the trial court's duty to give a limiting instruction safeguarding the defendant's confrontation rights. (See, *Williams v. Illinois* (2011) 132 S.Ct. 2221, 2241 [183 L.Ed.2d 89] [stating, in the context of expert opinion testimony revealing otherwise inadmissible hearsay to a jury as the basis for the expert's opinion, that "the trial judge may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth…."].)

3. Prejudice:

Respondent also argues that the error, if any, was harmless because Travis' statement that she washed the car did not implicate Bell. (RB 76.) To the contrary, the jury would necessarily have understood from Detective Olson's testimony that Travis had confessed, and had admitted washing the car to destroy any evidence. This furnished critical evidence to corroborate Tory's testimony, identifying the participants in the robbery as Bell, and Tory and Travis. Prejudice caused by the inculpatory statement of a codefendant that also implicates other defendants cannot be dispelled by cross-examination if the hearsay declarant never takes the stand. (*Bruton v. United States, supra,* 391 U.S. at p. 133.) It matters not that the declarant is dead, and therefore not being tried jointly.

Moreover, respondent argues no prejudice, but omits any discussion of a plethora of similar cases in which prejudice has been found. (AOB 207-208.) Accordingly, the absence of cases to support respondent's position should be presumed.

VI

CONTRARY TO RESPONDENT'S ASSERTION, THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED BELL'S STATE AND FEDERAL CONFRONTATION RIGHTS BY ADMITTING DETECTIVE OLSON'S TESTIMONY ABOUT HIS DISCUSSIONS WITH PROBATION OFFICER MICHAEL MOORE, FROM WHICH THE JURY WOULD NECESSARILY HAVE INFERRED THAT MOORE IDENTIFIED BELL AS THE ROBBER AND MURDERER FROM THE VIDEOTAPE OF THE INCIDENT.

A. The Record:

Appellant adopts and incorporates by reference the summary of the facts set forth in the Appellant's Opening Brief. (AOB 215-220; see also, RB 77-87.)

B. Discussion:

Respondent argues that the issue of whether it violated Bell's confrontation rights to admit the testimony about Detective Olson's conversation with Michael Moore was forfeited, citing *People v. Livingston, supra*, 53 Cal.4th at pp. 1160-1161, and *People v. Cage, supra*, 40 Cal.4th at p. 970, as authority. (RB 88.) *Livingston* does not support respondent's forfeiture argument. In *Livingston*, the defendant did not object to the admission of hearsay in the trial court. (*Ibid.*) Bell's counsel did object; in fact, before the evidence was elicited, counsel made a motion to exclude evidence that Moore, who was Bell's probation officer, identified Bell as the robber and shooter in the surveillance videotape.

The cited page of *Cage* does not discuss forfeiture at all.

On the merits, respondent argues that testimony (1) that Olson met with a citizen informant who personally knew appellant the day after the robbery; (2) that he showed the citizen informant the store surveillance video; and (3) that he later set up a meeting with Bell did not qualify as "testimonial hearsay" because the testimony was not received to prove the

truth of the matters asserted. (RB 88.) Respondent is ignoring the record. The prosecutor argued that the evidence was admissible for the nonhearsay purpose of explaining the reasons for the detective's conduct. The trial court ruled that the detective's *reasons* for acting were irrelevant. (XII RT 2430.) Therefore, it cannot be said that the testimony was received for the nonhearsay purpose of explaining the detective's conduct. It was not.

Respondent also argues that no actual out-of-court statement was offered for the purpose of establishing that Bell was the person in the surveillance video. (RB 89.) In essence, respondent asserts that the Confrontation Clause is not implicated merely because of the unspoken inference that Olson set up the meeting with Bell because of Moore's identification of Bell as the robber and shooter. (RB 89.)

Detective Olson did not answer the ultimate question—what did Moore say to Olson after viewing the store surveillance videotape. Olson did testify, however, that he met with a citizen informant on the day after the robbery; that the citizen informant had met with Bell on at least five prior occasions, had talked to him, had seen him move, had seen him walk, and knew him on a personal basis; that Olson played the videotape and audiotape for the citizen informant; that Olson showed the citizen informant a photograph of the killer leaving the store; and immediately afterward, Olson set up a meeting with Bell. The only conceivable inference from Olson's testimony was that the citizen informant, who knew Bell personally and well, identified him as the shooter in the store surveillance videotape.

Before *Crawford*, the United States Supreme Court treated in-court descriptions of out-of-court statements, as well as verbatim accounts, as statements for purposes of the Confrontation Clause. (See, e.g., *Idaho v. Wright* (1990) 497 U.S. 805 [111 L.Ed.2d 638, 110 S.Ct. 3139].) Numerous federal circuit courts have held that testimony that communicates the substance of an unavailable declarant's statements violates the

Confrontation Clause, even when there is no verbatim account of the declarant's statement presented to the jury.

In the Appellant's Opening Brief, appellant cited a number of Circuit Court decisions in which the federal courts have held that testimony communicating the substance of an absent declarant's statements runs afoul of the Confrontation Clause, even when there is no verbatim account of the declarant's testimonial hearsay. (AOB 226-227; see, *Ocampo v. Vail* (9th Cir. 649 F.3d 1098, 1110; *Ryan v. Miller* (2nd Cir. 2002) 303 F.3d 231, 250; *Favre v. Henderson* (5th Cir. 1972) 464 F.2d 359, 364; *Taylor v. Cain* (5th Cir. 2008) 545 F.3d 327, 335; *United States v. Silva* (7th Cir. 2004) 380 F.3d 1018, 1020; *Hutchins v. Wainwright* (11th Cir. 1983) 715 F.2d 512, 516; see also, *United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161, ¶ 10; *Wheeler v. State* (Del. 2012) 36 A.3d 310, 318.) Respondent simply ignores all of appellant's citations of authority, and makes no effort to discuss or distinguish the cases on either factual or legal grounds.

A respondent's failure to address an argument raised by an appellant may, under some circumstances, be interpreted as a concession. (See, *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [stating that the People "apparently concede" a point made by the defendant to which they did not respond, either in briefing or in oral argument].) This Court should find that respondent's failure to address appellant's legal arguments constitutes a concession that extrajudicial statements need not be repeated verbatim to trigger the protections of the Confrontation Clause.

Respondent also argues that, even if the admission of Olson's testimony was error, it was harmless under either the *Chapman* or *Watson* standard. (RB 89.) Constitutional errors, including *Crawford* error, are subject to harmless error analysis under the rule of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*People v. Loy* (2011) 52 Cal.4th 46, 69.) Respondent bears the burden of proving that the error

was harmless beyond a reasonable doubt. (*United States v. Nguyen, supra*, 565 F.3d at p. 675.)

Respondent argues that the jury was focused on the surveillance video; therefore, the challenged testimony "had no effect on the jury's verdict." (RB 90.) In the portions of the record cited by respondent (XIII RT 2649-2667), the parties discuss the jury's request to play the whole videotape of the robbery during deliberations. Respondent assumes, without any basis in fact, that the jurors, upon viewing the videotape, felt confident based on what they personally could see, that the perpetrator, who was wearing gloves and a mask, was Bell. (X RT 1929-1953.)

One cannot reasonably conclude from the jury's *request* to watch the surveillance videotape that hearing Olson's testimony had no effect on the jury's verdict. To the contrary, the jurors' interest in viewing the videotape again may well have been prompted by the knowledge that someone who was well acquainted with Bell at or about the time of the robberies had identified him from the surveillance videotapes. Perhaps the jurors wanted to assess the likelihood that the citizen-informant accurately identified Bell as the perpetrator from the surveillance videotape. Alternatively, perhaps, after seeing the hooded, masked and gloved perpetrator on the grainy and poor quality video, jurors felt incapable of making a positive identification themselves. If so, hearsay evidence that a "citizen informant" who was "not up for any charges" (XII RT 2420) had identified Bell from the store videotape as the person who shot and killed the victim may have tipped the scales in favor of conviction. This critically important evidence would have corroborated the self-serving testimony of Tory, which pinned most of the blame for the killing on Bell, and deflected blame from his mother and himself. (See, e.g., *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1444 [Confrontation Clause error not harmless where the one of two witnesses was untrustworthy and testified under a grant of immunity].)

Furthermore, as appellant previously argued (AOB 227-230), inasmuch as the trial court acknowledged that Moore's statements to Olson were hearsay and inadmissible under California's evidence rules, the trial court's ruling amounted to the arbitrary refusal to apply a state rule of evidence to a clearly inadmissible extrajudicial identification. As such, Bell was denied a liberty interested protected by the federal Due Process Clause, pursuant to the United States Supreme Court's ruling in *Hicks v. Oklahoma* (1980) 455 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227].

As appellant has previously pointed out (AOB 229-230), the United States Supreme Court and this Court regard the death penalty as substantially different, i.e., much more severe and irreversible than all other penalties provided by law. (See, *Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona* (2002) 536 U.S. 584, 606 [54 L.Ed.2d 717, 98 S.Ct. 824]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [115 L.Ed.2d 836, 111 S.Ct. 2680]; *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [97 S.Ct. 1197, 51 L.Ed.2d 393]; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728.) The greater need for reliability in this type of case means that the trial must be policed at all stages for procedural fairness and accuracy of fact finding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.) As the result of the admission of damaging testimonial hearsay establishing an unidentified informant's identification of Bell as the perpetrator, the reliability of the jury's death determination was severely compromised, resulting in a violation of the federal Eighth Amendment.

VII

CONTRARY TO WHAT RESPONDENT ARGUES, BELL'S SIXTH AMENDMENT RIGHT TO EFFECTIVE CROSS-EXAMINATION WAS VIOLATED BY ALLOWING DEBRA OCHOA TO TESTIFY, THEN INVOKE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS A BAR TO CROSS-EXAMINATION ABOUT HER DISPOSITION OF THE GUN.

A. The Record:

Appellant adopts and incorporates by reference the facts set forth in support of this argument at pages 231-233 of the Appellant's Opening Brief. (See also, RB 90-92.)

B. Discussion:

Respondent argues that appellant has forfeited the issue of whether appellant's right to effective-cross examine was violated by allowing Debra Ochoa to testify, and then invoke the Fifth Amendment privilege against self-incrimination. (RB 92.) The issue is forfeited, according to respondent, because defense counsel failed to cross-examine Ochoa at all, and did not object that allowing her to testify violated his right to confrontation. Respondent cites one case in support of the forfeiture argument: *People v. Williams* (2008) 43 Cal.4th 584, 629. (RB 92.)

In *Williams, supra*, defense counsel withdrew his request that the witness be forced to invoke the privilege against self-incrimination in front of the jury. On that basis, the forfeiture doctrine was invoked on appeal. (*Id.*, at p. 629.) Appellant fails to see how the *Williams* decision supports respondent's forfeiture argument.

In this case, counsel did not refer to the Confrontation Clause, but he specifically objected that he was being denied the ability to effectively cross-examine Ochoa. (XI RT 2181, 2183-2184.) The Confrontation Clause's "'commands, not that evidence be reliable, but that reliability be

assessed in a particular manner: by testing in the crucible of cross-examination.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 343, quoting *Crawford v. Washington, supra*, 541 U.S. at p. 61.) Counsel's objection clearly sufficed to invoke the Confrontation Clause. Unlike the situation presented in *Williams, supra*, 43 Cal.4th 584, Bell's counsel never withdrew his objection. Furthermore, defense counsel did not cross-examine Ochoa because doing so would have violated the trial court's order not to ask Ochoa questions in front of the jury that would cause her to invoke the Fifth Amendment. (XI RT 2185.) Counsel did not forfeit the issue merely by complying with the trial court's order. Counsel knew Ochoa would invoke the Fifth Amendment if he tried to cross-examine her about what she did with the gun. Bell's attorney was not required to engage in meaningless cross-examination about Ochoa's relationship with Bell in order to preserve his objection to the denial of cross-examination about what Ochoa did with the gun.

On the merits, respondent argues that appellant has "identified no error arising from the trial court's ruling." (RB 93.) The gist of respondent's argument is that appellant had no right under California law to exercise the privilege against self-incrimination in front of the jury. (RB 93.) Respondent misses the point. The defense was not only objecting about the prohibition against Ochoa invoking the Fifth Amendment in front of the jury. Defense counsel was objecting to the totality of the circumstances that was preventing him from effectively cross-examining Ochoa about whether or not she furnished the gun to Bell.

At the time of the trial court's ruling, Nick Feder had already testified that he sold the alleged murder weapon to Ochoa. (XI RT 2127-2128, 2132.) Over defense counsel's objections, the prosecutor was allowed to call Ochoa to the stand to testify regarding her longstanding relationship with Bell. But defense counsel was completely precluded by the court's

rulings from cross-examining Ochoa on the precise point for which her testimony was being offered—to connect Bell with the gun. In fact, in closing arguments, the prosecutor explicitly pointed to Ochoa's longstanding ties to Bell as proof that Ochoa must have furnished him the gun. (XIII RT 2575-2576 [guilt phase]; XVIII RT 3737 [penalty phase].)

In Arguments VII, B and C of the Appellant's Opening Brief (AOB 233-240), appellant cited numerous state and federal cases for the proposition that Bell's Sixth Amendment right to effective cross-examination was thwarted by the trial court's rulings. (AOB 233-239; see, e.g., *Davis v. Alaska, supra,* 415 U.S. at p. 315, 317-318; *People v. Harris* (1989) 47 Cal.3d 1047, 1091; *People v. Hathcock* (1973) 8 Cal.3d 599, 616; citing with approval *People v. Barthel* (1965) 231 Cal.App.2d 827, 834; *People v. Robinson* (1961) 196 Cal.App.2d 384, 390-391; *People v. McGowan* (1922) 56 Cal.App.587, 589-590; *People v. Sanders* (2010) 189 Cal.App.4th 543, 554, citing 1 McCormick, *Evidence* (6th ed. 2006); *United States v. Cardillo* (2nd Cir. 1963) 316 F.2d 606; *United States v. Wilmore* (9th Cir. 2004) 381 F.3d 868.) Appellant discussed several cases with similar facts, including the federal circuit courts' decisions in *Cardillo* and *Wilmore*. Parallels were drawn between these cases and appellant's case, so as to explain why the decisions supported appellant's claim of Sixth Amendment error. (AOB 234-235, 238-239.)

Respondent does not cite, much less discuss, any of the authorities cited by appellant. As appellant has previously pointed out, a respondent's failure to address an argument raised by an appellant may, under some circumstances, be interpreted as a concession. (See, *People v. Bouzas, supra,* 53 Cal.3d at p. 480.) In the case at bench, this Court should find that respondent's failure to address appellant's citations of authority constitutes, at the very least, a concession that the federal case law is supportive of

appellant's assertion that the trial court's rulings violated Bell's Sixth Amendment right to confront and cross-examine the witnesses against him.

Respondent predictably argues that, even if the trial court erred, the error was harmless, regardless of whether measured against the *Chapman* or *Watson* standard. (RB 94.) The harmless beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. 18, not the *Watson* standard, applies to Confrontation Clause violations. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 414-415.) Respondent bears the burden of proving that the error was harmless beyond a reasonable doubt. (*United States v. Nguyen, supra*, 565 F.3d at p. 675.)

The error was *not* harmless beyond a reasonable doubt. As appellant previously pointed out (AOB 237-241), proof of the exact source of the gun was of considerable import to Bell's theory of defense. The defense sought to prove, or at least raise a reasonable doubt, regarding whether it was Bell, and not Tory or another boyfriend of Tory's mother, who entered the Quik Stop Market and did the actual shooting. The murder weapon was found *not* in Bell's possession, but buried. Tory received a substantial *quid pro quo* to testify that Bell was the one who used the gun to commit the murder.

Additionally, the area in which defense counsel's cross-examination was precluded was vital to the issues of planning and identity – i.e., whether Bell traveled to Los Angeles for the purpose of procuring a gun from Debra Ochoa, or whether Ochoa sold the gun to someone else. For reasons previously noted, the error is not harmless beyond a reasonable doubt. The jury may well have reached a more favorable judgment at either the guilt or penalty phases of Bell's trial had Ochoa's testimony been completely precluded. (*United States v. Wilmore, supra*, at p. 873.) Moreover, even if the error, standing alone, is deemed harmless, the cumulative prejudicial effect of the assaults on Bell's Sixth Amendment

right to effective cross-examination cannot be ignored. (*People v. Hill, supra*, 17 Cal.4th at p. 847; see, Arguments V & VI, *ante*.)

As Bell has previously pointed out, the death penalty is different in its final nature from all other penalties provided by law. (See, *Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Hollywood v. Superior Court, supra,* 43 Cal.4th at p. 728.) The greater need for reliability in capital cases means that the trial must be policed at all stages for procedural fairness and accuracy of fact finding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.) For reasons previously articulated in Appellant's Opening Brief (AOB 241), the reliability of the jury's death determination was severely compromised by the denial of any meaningful opportunity to cross-examine Ochoa, resulting in a violation of the federal Eighth Amendment.

VIII

CONTRARY TO RESPONDENT'S ARGUMENT, ALLOWING THE REPEATED PLAYING OF A VIDEOTAPE AND AUDIOTAPE OF THE ROBBERY, INCLUDING BONE-CHILLING AUDIO OF THE VICTIM DYING, WAS AN ABUSE OF JUDICIAL DISCRETION, EVISCERATED BELL'S RIGHT TO FUNDAMENTALLY FAIR GUILT AND PENALTY PHASE TRIALS, AND VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF RELIABILITY AND ACCURACY IN CAPITAL SENTENCING.

A. The Record:

Regarding the repeated playing of the robbery surveillance video and audiotapes during the guilt and penalty phase trials, appellant adopts and incorporates by reference the facts set forth in the Appellant's Opening Brief. (AOB 242-247; see also, RB 95-99.)

B. Discussion:

1. Forfeiture:

Respondent first asserts that appellant forfeited any claim of error relating to the playing of the video and audiotape during the guilt phase of the trial. (RB 100.) It is asserted that defense counsel moved to exclude the evidence before trial, but failed to press for a ruling and did not object when the evidence was introduced at the trial. (RB 100.) According to respondent, when the videotape was played for the third time, defense counsel asked for a bench conference but did not object or seek a ruling on his motion to exclude. (RB 101.)

The issue should not be deemed forfeited for purposes of the appeal. The record shows that defense counsel made numerous objections to this extremely inflammatory evidence. Furthermore, to the extent counsel failed to ask the court to reconsider its "tentative" finding that the evidence was more probative than prejudicial, the issue should not be forfeited because it

is so clear from the record that the court would have overruled the objection even if counsel had argued for exclusion again.

It is not disputed that defense counsel made timely objections to playing the audiotape of the noises made by the victim, and couched his objections in the language of Evidence Code section 352. Counsel argued that the sounds were "extremely prejudicial," and expressed doubt that the sounds of the victim dying had any probative value. (II RT 136, 141.) Counsel characterized the audiotape as "bone chilling, blood curdling." (II RT 141.) He argued that the portions of the tape with the victim dying was "not necessary for any purpose, at least during the guilt phase." (II RT 144.) He further argued that listening to the victim die "wouldn't have anything to do with whether the jury is going to convict or not convict. There were shots fired, a man is dead from gunshot wounds." (II RT 145.)

The court explicitly found that the potential prejudice hearing the victim's agonized cries was "outweighed by the relevancy and probativeness of the evidence to the charges in the case." (II RT 144.) The court initially ruled that the evidence was more probative than prejudicial, and would be admitted. Subsequently, after a brief discussion about gruesome autopsy photographs, the court took the matter "under submission." (II RT 146.) Before doing so, however, the court reiterated that the evidence seemed

> relevant and probative and outweigh[ed] any probable prejudice in this case because this is a tape of the actual crime occurring. Part of the crime is the person in the throws of dying after wards, right? It's a murder case.

(II RT 145.)

During trial, when the prosecutor was about to play the entire video and audiotape for the third time, Mr. Faulkner asked to approach the bench, and there was a conference. (IX RT 1892.) He questioned whether the

prosecutor really wanted to "put these people through this" for a third time. (II RT 1892.) The district attorney insisted on playing the video and audiotape for the third time. (IX RT 1893.)

When the prosecutor made clear her intention to play the video and audiotape for the fourth time, defense counsel repeated his earlier objection that the videotape was "very inflammatory," and commented family members in the courtroom had strongly reacted when the evidence was presented earlier." (XIII RT 2542.) The court ruled that the sound on the videotape was relevant to voice identification. (XIII RT 2543.) Defense Counsel then asked that the audio be turned down after the suspect finished talking on the videotape so that the jury would not hear dying sounds for the fourth time. (XIII RT 2543.) The judge ruled that he could not "restrict the People from commenting on the evidence and showing the evidence to the jurors . . . ." (XIII RT 2543.) The trial court's refusal to limit the jury's *fourth* exposure to the excruciating noises of the victim dying belies any suggestion that the court would have ruled differently had counsel asked for reconsideration of the court's "tentative" ruling on the first, second, or third occasions that the video and audiotape was played for the jury. (*People v. Panah* (20505) 35 Cal.4th 395, 462; *People v. Burnett* (1999) 71 Cal.App. 4th 151, 182.)

2. The Merits:

a. Guilt phase error:

Respondent argues that, in the guilt phase, the evidence was not unduly prejudicial because the portion of the surveillance videotape that was played for the jury was edited to exclude two minutes of moaning sounds coming from the victim as he lay on the floor dying. (RB 102, citing XIII RT 2638; XVII RT 3511; IV CT 1024-1025.) Just because two minutes of moaning noises were edited from the videotape does not necessarily render the portions of the tape that *were* played nonprejudicial.

In fact, appellant finds respondent's argument somewhat disingenuous, given repeated indications in the record that the edited audio feed of the victim's moaning was still highly disturbing. The trial judge, after listening to the sounds of the victim dying, remarked that he had "never heard anything like that, . . . [o]ther than in fictional accounts like old radio shows . . . ." (II RT 142.) The prosecutor, during *opening* argument, warned the jury that they would "experience a killing," and "hear a man dying." (IX RT 1783.) Defense counsel was obviously appalled that the prosecutor wanted to expose the victim's family members to the emotionally wrenching sounds of their loved one dying over and over again, and suggested warning family members that they might wish to leave the courtroom before the tape was played for the third time. (IX RT 1892.) The trial judge admitted he did not want to have to eject family members from the courtroom due to their "outbursts," and suggested that the district attorney inform them that they might want to remain outside the courtroom. (IX RT 1892.) When the videotape was played for the last time, during the prosecutor's guilt phase closing argument, in order to avoid further emotional outbursts, the court warned members of the audience to leave the courtroom if they felt the videotape would bother them. (XIII RT 2569.)

Pertinent to the court's assessment of the videotape's probative value, respondent argues that the videotape was relevant to establish the perpetrator's identity. (RB 102-103.) Respondent argues that seeing the videotape from four camera angles gave the jury "different perspectives of the robbery and shooting, and of the shooter." (RB 102.) But respondent fails to explain how repeatedly *listening* to the audio feed of the victim's moaning noises could possibly have helped the jury to ascertain the shooter's identity.

As appellant previously pointed out (AOB 248-249), repeatedly playing the sounds of the victim dying was, for all intents and purposes, the

same as asking jurors to personally experience the suffering of the victim, as well as his family members who were in the courtroom. Yet during the *guilt* phase of a capital trial, a prosecutor's appeal to jurors to experience the suffering of the victim – or the suffering of the victim's family members – is misconduct. (*People v. Jackson* (2010) 45 Cal.4th 662, 691.) Respondent neither responds to this point, nor argues otherwise. (RB 100-104.)

People v. Love (1960) 53 Cal.2d 843, is a case on point. In *Love*, on the issue of penalty, the trial court allowed the playing of a tape recording that included the victim's groaning noises in the emergency room of a hospital, shortly before death. The sole purpose of playing the recording was to let the jury hear the "failing voice and the groans of the deceased as she was dying." (*Id.*, at pp. 854-855.) In *Love*, this Court held that it was *penalty* phase error to admit this evidence. Furthermore, this Court found that the prejudicial effect of the error was "aggravated by the district attorney's argument," in which he "referred several times to the pain suffered by Mrs. Love and closed with an appeal for the death penalty, based primarily on the contents of the tape recording." (*Id.*, at p. 857.)

If playing a tape recording of a victim's dying noises constitutes prejudicial error in the *penalty* phase of a capital trial, surely it constitutes prejudicial error to repeatedly expose the jury to the victim's dying noises in the *guilt* phase of the trial, where the measure of harm caused by the defendant's crime plays no legitimate role in the jury's assessment of guilt. (Cf. *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [115 L.Ed.2d 720, 111 S.Ct. 2597].)

People v. Love, *supra*, was decided prior to the United States Supreme Court's decision in *Payne v. Tennessee, supra*. *Payne*, however, addressed the admissibility of victim impact evidence at the *penalty* phase of a capital trial, not the repetitious admission of inflammatory victim

impact evidence during a capital jury's adjudication of guilt. Here, the audiotape of the victim's dying noises was played repeatedly during the *guilt* phase trial. Hence, nothing in *Payne v. Tennessee* would negate this Court's holding in *Love*, insofar as it is relied upon for the proposition that repeatedly exposing the jury to the victim's audible expressions of pain during the guilt phase was completely improper and highly prejudicial.

Respondent argues that the repeated playing of the videotape at the *guilt* phase was harmless because the videotape showed the shooting happen, and there was overwhelming evidence that Bell was the person in the videotape. (RB 104.) Appellant disagrees. The visual quality of the videotape was extremely poor. Identification of Bell as the shooter would not have been possible without the testimony of Tory, self-interested accomplice who received an extremely favorable plea bargain as a *quid pro quo* for testifying. If any juror entertained a reasonable doubt about Tory's veracity, or Bell's precise role in the robbery-murder, the prosecutor's blatant and repetitious use of the videotape to inflame the passions of the jury would have tipped the scales in favor of conviction, and rendered the trial fundamentally unfair.

b. Penalty phase error:

Respondent argues, also, that it was not error to allow the video and audiotape to be replayed during the *penalty* phase of the trial. (RB 103-104.) The components of respondent's argument are: that courts have narrower discretion to exclude evidence pursuant to Evidence Code section 352; that there was no abuse of discretion here; that the error, if any, was harmless under the *Watson* standard of review; and finally, that the playing of the videotape during the penalty phase could not have caused penalty phase prejudice since the jury had already heard the videotape several times during the guilt phase. (RB 103-104.)

Contrary to respondent's assertion, allowing the videotape and audiotape of the victim's groans to be replayed during the prosecutor's penalty phase closing argument constituted a gross abuse of discretion. Not only was the jury exposed to the "bone chilling" and "blood curdling" (II RT 141) sounds of the victim dying *again*; additionally, the prosecutor, in very graphic and detailed terms, encouraged the jury to imagine how the victim felt, and what he was thinking, while dying. (XVIII RT 3736-3737.) *People v. Love, supra*, 53 Cal.2d 843, the case discussed in the paragraphs above, should be considered dispositive. In *Love*, a similar tape recording of the victim's dying noises was played for the jury. This Court reversed the death judgment and remanded the matter for a retrial. (*Love*, at p. 858.)

Even though *People v. Love, supra*, was decided prior to the United States Supreme Court's decision in *Payne v. Tennessee, supra*, 501 U.S. 808, the case survives as authority to support appellant's argument that replaying the audio of the victim's dying noises was prejudicial penalty phase error. In *Payne, supra,* the Supreme Court reconsidered and overruled its prior holding in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], in which it had earlier held that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial. *Payne*, however, involved a much less inflammatory type of victim impact evidence than is involved here, i.e., brief testimony by the murder victim's mother describing how the victim's son—the witness' grandson—had been affected by the murders of his mother and sister. (*Id.*, at pp. 814-815.) The Supreme Court held that there was no *per se* Eighth Amendment bar the admission of such evidence showing the impact of the murder on the victim's family. (*Payne, supra*, at p. 827.) The high court also cautioned, however, that if "in a particular case, a witness' testimony or a prosecutor's remark infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek

relief under the Due Process Clause of the Fourteenth Amendment." (*Payne*, at p. 831.)

Since *Payne* was decided, this Court has never overruled *People v. Love, supra*, 53 Cal.2d 843. In fact, the case is oft cited as an example of the type of victim impact evidence that crosses constitutional lines, and is frequently *distinguished* from cases in which appropriate victim impact evidence has been received. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 575 [distinguishing the testimony of two officers regarding their reactions to learning that a killed police officer was their friend, and the effect of his death on their lives]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172 [distinguishing testimony by family members explaining the ways they were adversely affected by their loss of the victim's care and companionship]; *People v. Sanchez* (1995) 12 Cal.4th 1, 64-65 [distinguishing the autopsy photographs of the victim's scalp wounds].) This case involves precisely the type of penalty phase victim impact evidence found extraordinarily prejudicial in *People v. Love, supra*. Here, the prosecutor repeatedly filled the courtroom with the victim's audible expressions of agony, which had no conceivable purpose but to "inflame the passions of the jurors." (*Love, supra*, at p. 857.)

On the topic of penalty phase prejudice, respondent mistakenly assumes that the repetitive playing of audio of the victim's dying noises should be assessed for prejudice under the *Watson* standard of review. Appellant's argument on appeal is that the error violated Bell's constitutional right to due process and a fair trial, guaranteed by the federal Fifth and Fourteenth Amendments, and his constitutional right to a reliable determination of the death penalty, guaranteed by the federal Eighth Amendment. (AOB 253.) This Court applies the *Chapman* "harmless beyond a reasonable doubt" standard in assessing such constitutional errors. (See, *People v. Russell* (2010) 50 Cal.4th 1228, 1265.)

Furthermore, it strains credulity to argue that the playing of the video and audio recording was not prejudicial at the penalty phase trial merely because it had been played at the guilt phase so many times before. To the contrary, erroneously playing the videotape and audiotape multiple times at the guilt phase, and then again at the penalty phase, would have compounded, not lessened, the prejudice. The videotape "shifted the jury's attention from the evidence to the all too natural response of empathizing with the victim's suffering and his family's resulting torment." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1206.) Playing the videotape repeatedly "'created a negative synergistic effect, rendering the degree of overall unfairness to the defendant more than that flowing from the sum of the individual errors.'" (*People v. Vance, supra*, quoting *People v. Hill, supra*, 17 Cal.4th at p. 847.)

During the penalty phase of a capital trial, the jury is supposed to face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. (*Gardner v. Florida, supra,* 430 U.S. at p. 358; *People v. Haskett* (1982) 30 Cal.3d 841, 864.) While victim impact evidence is admissible at the penalty phase of a capital trial, its use is not without limits. (*People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) "[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Haskett, supra*, at p. 864.) In this case, the cumulative effect of repeatedly exposing the jury to the victim's dying noises, and the prosecutor's prolonged argument focusing on the victim's subjective experience, diverted the jury from its proper role and invited an irrational, purely subjective response. (*Ibid.*)

Additionally, because death is "profoundly different from all other penalties." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed. 1, 8, 102 S.Ct. 869]; *Hollywood v. Superior Court, supra*, 43 Cal.4th at p. 728),

the Eighth Amendment imposes a heighted need for reliability in the determination that death is the appropriate punishment in a specific case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [86 L.Ed.2d 23, 105 S.Ct. 2633].) As appellant has previously explained, repeatedly and gratuitously exposing the jury the horrific sounds of the victim dying compromised the accuracy of the jury's fact finding and the reliability of the verdict of death in violation of the Eighth and Fourteenth Amendments. (AOB 253-256.)

IX

CONTRARY TO WHAT RESPONDENT ASSERTS, BELL SUFFERED PREJUDICE AS A RESULT OF THE TRIAL COURT'S ERROR ADMITTING THE TESTIMONY OF REGINA FAY ALSIP REGARDING HER OPINION OF KENNETH ALSIP'S TRUTHFULNESS, AND HIS REPUTATION IN THE COMMUNITY FOR UNTRUTHFULNESS.

A. The Record:

After Kenneth Alsip was called as a witness on Bell's behalf, his mother, who admitted having little contact with her son since he was thirteen, was allowed to render an opinion concerning Alsip's character for dishonesty. (XII RT 2274-2477.) In other respects, appellant incorporates by reference the facts set forth previously in the Appellant's Opening Brief. (AOB 257-258; see also, RB 105-108.)

B. Discussion:

Respondent argues that the trial court did not abuse its discretion by allowing Regina Alsip to render an opinion about Kenneth's reputation for untruthfulness among those who knew him. (RB 108-109.) It is asserted that the witness knew her son well enough and for a sufficient length of time to render an opinion, and that she also knew family members who knew him. (RB 109.)

Respondent relies on *People v. McAlpin* (1991) 52 Cal.3d 1289, 1305-1306, for the proposition that a "witness who has known a person for a reasonable length of time may be qualified to render an opinion if it is based on personal observation and knowledge." (RB 108.) At the referenced pages of the *McAlpin* case, this Court discusses the admissibility of testimony by three defense witnesses, opining that the defendant was not a "'sexual deviant.'" (*Id.*, at p. 1305.) This Court concluded that "sexual

deviance" was a character trait subject to proof by opinion testimony, and that lay opinion testimony concerning a defendant's lack of sexual deviance was admissible providing it was rationally based on the perception of the witness, and helpful to a clear understanding of his testimony. (*Id.*, at p. 1305-1306.) In *McAlpin*, this Court held that the opinions of two female character witnesses regarding the defendant's lack of sexual deviancy, based on their personal observations of the defendant's conduct with their daughters during the time the women had relationships with the defendant, should have been admitted. (*Id.*, at p. 1309.) The two women had dated defendant for approximately six months, had been sexually intimate with him during that period, and thereafter had continued their friendship with him. They also had daughters of their own, with whom they had seen the defendant interact. (*Id.* at p. 1304.) The case does not address the admissibility of lay opinion testimony under Evidence Code section 780, subdivision (e), regarding a witness' veracity.

Respondent cites *People v. Sergill* (1982) 138 Cal.App.3d 34, 39, for the general rule that an individual who has known a person for a reasonable length of time may be qualified to render an opinion the person's veracity based on personal observation and knowledge. (RB 108.) In *Sergill*, however, the Court of Appeal held that it was error to admit the expert opinion testimony of police officers that the child victim was telling the truth, when the officers did not know the child victim personally and were unfamiliar with her reputation for honesty and veracity. (*Id.*, at pp. 39-41.)

In *People v. Cobb* (1955) 45 Cal.2d 158, 164, cited but not discussed by respondent (RB 109), the issue was whether prejudicial error was committed by not allowing the *defendant* to call a character witness to testify to the defendant's reputation for truth and veracity. (*Id.*, at p. 163.) The foundational evidence established that the defendant had worked for the character witness off and on for approximately four years. The witness

knew of the defendant's reputation for honesty, integrity and truthfulness, based on his association with the defendant at his place of business, and his discussions with other employees who worked with the defendant. The testimony was erroneously excluded because the witness "did not know anyone in Cobb's neighborhood," and the witness' knowledge of the defendant's reputation "was limited to contacts with a restricted group of . . . fellow employees . . . ." (*Id.* at p. 163.) Exclusion of the evidence was held to be error, although not prejudicial.

In *People v. Workman* (1955) 136 Cal.App.2d 898, 902-903, also cited by respondent (RB 109), the defendant's brother testified against him at trial. The issue on appeal was whether the defendant's mother's testimony regarding the defendant's brother's veracity was properly excluded. The mother testified that she was familiar with the brother's reputation for truth and veracity because she had heard his reputation discussed by his fellow workers. The trial court excluded the mother's opinion because she had not shown familiarity with the son's "general reputation in the community." (*Id.*, at p. 903.) The defense was precluded from asking the mother whether she had discussed the brother's reputation with "his circle of friends and the people who came to visit her home." (*Ibid.*)

The Court of Appeal held that it was error to exclude the mother's testimony about her son's reputation for honesty and veracity in accordance with the "latest expression" (*id.*, at p. 902) of the evidence rules, which recognized that "'business men may acquire no reputation one way or the other in the community in which they actually reside, and bear an excellent reputation miles distant where they follow their daily vocations and come in contact with many associates.'" (*Id.*, at p. 903; internal citation omitted.)

The foundational evidence in this case was far weaker than the foundational showing in the *Cobb* and *Workman* cases. The sole

foundational evidence was that Regina Alsip had only *infrequent* contact with her son during the six years preceding the Bell's trial. She testified that she did not know him "real well," but just "well." (XII RT 2474.) She knew her son when he was younger, but did not know whether he had changed or not, because she hardly ever saw him. (XII RT 2474.) She knew an unspecified number of people who knew him, primarily family members, but not many of her son's friends. (II RT 2474.)

Kenneth had been in and out custodial facilities for years. There was certainly no proffer of evidence that Alsip knew any of the people with whom Kenneth was incarcerated, or that she was familiar with his reputation for truthfulness among other prisoners or custodial staff. There was no foundational showing that Kenneth's *other* family members maintained any more contact with during his years of incarceration than did his mother. There was absolutely no proffer as to how many family members Alsip was referring to, or how much contact Alsip had with such family members. A person's conversations "with no more than one or two persons on the subject are not enough" to establish a foundation for that person to render an opinion about another person's veracity. (*People v. Paisley* (1963) 214 Cal.App.2d 225, 233.) On such tenuous foundational evidence, defense counsel's objections were erroneously overruled.

Respondent argues that the error, if any, was nonprejudicial. (RB 109.) Respondent echoes earlier arguments, in which the videotape of the robbery is held out as overwhelming evidence that Bell, not Travis or some other person shorter than Bell, was the shooter. (RB 109-110.) As appellant has previously pointed out, the quality of the videotape was extremely poor—so poor that the prosecutor had to have selected frames of the videotape enhanced enlarged to improve brightness, contrast and color. (X RT 1929-1953.) Positive identification of the masked, hooded robber would not have been possible from the video alone.

There was testimony by a detective, based on his viewing of the surveillance videotape of the robbery, estimating that the shooter was between six feet, three inches and six feet, five inches tall. (X RT 2026.) Another witness, a deputy sheriff, estimated Bell to be six feet, seven inches tall. (XVII RT 3473.) There was testimony that a Turlock police sergeant "took down a fair and accurate" description of Tory Travis on March 21, 1997, when Tory was cited for possession marijuana on school grounds. (XII RT 2463.) The police sergeant filled out a form indicating that Tory was five feet, ten inches tall. (XII RT 2464.)

Kenneth Alsip's testimony that Tory intended to let Bell "take the fall" was a key component of Bell's defense. It is not a foregone conclusion that the jury would have rejected Kenneth's testimony as untruthful merely because there was some evidence, including but not limited to a grainy videotape of a masked, hooded robber and testimony regarding the estimated heights of the robber, that arguably undermined Tory's assertion that he did the shooting. It was the province of the jury to decide what weight to give Kenneth Alsip's testimony. Unfounded testimony by Kenneth's own mother that family members took a dim view of his propensity to tell the truth significantly undermined Bell's entire guilt phase defense, and deprived him of a fundamentally fair trial.

Furthermore, as appellant previously pointed out (AOB 260), trial court's arbitrary and unwarranted interpretation of the state's evidentiary rules not just a violation of state procedural law. The court's misapplication of California's evidentiary rules also violated Bell's liberty interest, which is protected by the federal Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

Last but not least, the improper impeachment of a key defense witness would have skewed the jury's guilt phase deliberations, and during the penalty phase, weighed heavily on death's side of the scale. Under these

circumstances, the reliability of the jury's death determination was severely compromised by the unfounded testimony of Regina Faye Alsip, culminating in a violation of the federal Eighth Amendment. (See, *Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Hollywood v. Superior Court, supra,* 43 Cal.4th at p. 728.)

ARGUMENT SECTION 4

ERRORS IN INSTRUCTION DURING THE GUILT PHASE

X

CONTRARY TO RESPONDENT'S ASSERTION, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE ADJUDICATION OF GUILT AND PENALTY, BY REFUSING A DEFENSE INSTRUCTION ON THE CREDIBILITY OF A DRUG ADDICT AS A WITNESS.

A. The Record:

The trial court refused a request by the defense to give an instruction cautioning the jury to examine the testimony of drug addict witnesses with greater care. (IV CT 1040; XII RT 2337.) The instruction was requested because several key prosecution witnesses in the case had admitted addiction and/or heavily using alcohol and contraband drugs. Appellant incorporates by reference additional facts, as set forth in the Appellant's Opening Brief. (AOB 262-263; see also, RB 110-111.)

B. Discussion:

Respondent argues that the trial court did not err in refusing a cautionary instruction on the testimony of a drug addict. (RB 112.) It is asserted that drug addiction is a "medical fact," and involves more than just repeated use of drugs. (RB 112.) The cited case, *People v. Victor* (1965) 62 Cal.2d 280, 301-302, includes the following quote, from which the "medical fact" language is taken.

> In creating a distinct category of persons who "by reason of repeated use" of narcotics are in imminent danger of "becoming" addicted, the Legislature has in effect recognized the fundamental medical fact that narcotics addiction is not so much an event as a process. Judicial recognition is likewise

> shown in *People v. Jaurequi* (1956) 142 Cal.App.2d 555 . . . . where it was said that "The court will take judicial notice of the fact that the inordinate use of a narcotic drug tends to create an irresistible craving and forms a habit for its continued use *until one becomes an addict*" (italics added). Certainly mere sampling or experimentation does not make an addict; but it could be a step in the process.

The *Victor* case lends no support to respondent's position. If anything, the decision's discussion of the "process" of becoming addicted supports the notion that the "inordinate use" of drugs causes "irresistible craving[s]" that lead to addition. This is precisely why testimony by people who are already addicted to drugs, or who are using drugs regularly and have begun to suffer the type of "irresistible craving" (*id.*) that leads to addition, should be viewed as inherently suspect and weighed with great caution. (*United States v. Kinnard* (D.C. Cir. 1972) 465 F.2d 566; *United States v. Collins* (5th Cir. 1972) 472 F.2d 1017.) There is always a risk that such witnesses will color their testimony to make the defendant look guilty in order to derive some benefit. (*United States v. Kinnard, supra*, at p. 572.)

Like other types of police informants, drug-using and drug-addicted informants

> frequently have criminal records and a history of contact with the police. Often they are free only on probation or parole or are themselves the focus of pending criminal charges or investigations. All familiar with law enforcement know that the tips they provide may reflect their vulnerability to police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation . . . .

(*People v. Kurland* (1980) 28 Cal.3d 376, 393.)

This Court has yet to explicitly consider the rule followed by some federal courts, which have spoken approvingly of instructions requiring stricter scrutiny of testimony by addict-informers. (*Ibid.*; AOB 264-265.)) Appellant respectfully submits that the time is ripe to address the issue.

This Court should find that such instructions do not intrude on the jury's fact-finding function, and should be given on request whenever there is evidence that a witness either addicted to, or engages in the type of inordinate use of drugs that may lead to addiction.

Assuming the refusal of the proposed cautionary instruction was error, respondent argues that the error was harmless. (RB 109.) Appellant disagrees. Robert Dircks described the preparations for the robbery allegedly undertaken by Bell and others up until the time they left in Rose's car. (XI RT 2108-2115.) Daniel Herrera's testimony furnished an important link in the chain of proof regarding Bell's possession of the murder weapon. (XI RT 2118-2120.) Gary Wolford testified during the guilt phase of the trial that Bell made statements of a self-incriminatory nature regarding his belief that Tory and Roseada Travis were going to "talk." (XII RT 2467-2469.) Wolford testified again at the penalty phase trial, claiming that Bell had imprisoned and assaulted him, and forced him to use drugs. (XV RT 3028-3033.) Lawrence Smith, witness to the alleged assault of Patrick Carver, was a regular user of methamphetamine. (XV RT 2983.)

Accordingly, several of the drug-using witnesses played an essential role either corroborating Tory's version of events. Under the circumstances, it is reasonably probable that the jury would have given less credence to Tory's testimony, and possibly reached a more favorable outcome at either guilt or penalty phase, had it not been for the denial of a cautionary instruction. (*United States v. Kinnard, supra*, at p. 576.)

Furthermore, as Bell has previously pointed out (AOB 266), the greater need for reliability in death penalty cases means that the trial must be policed at all stages for procedural fairness and accuracy of fact finding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.) Several of the drug-using witnesses were crucial in proving that Bell had committed prior

criminal acts involving force or violence that were used by the jury as reasons to impose the death judgment. The trial court's denial of an instruction that would have properly empowered the jury to discredit a witness's testimony on the basis of addition or abuse of drugs violated Bell's right to a fair trial, and undermined the reliability of the verdicts in violation of the Eighth Amendment.

XI

THE TRIAL COURT'S VIOLATION OF ITS SUA SPONTE DUTY TO GIVE AN INSTRUCTION ON THE OFFENSE OF DISCHARGING A FIREARM IN A GROSSLY NEGLIGENT MANNER, AS A LESSER-INCLUDED OFFENSE OF DISCHARGING A FIREARM AT AN OCCUPIED VEHICLE WAS PREJUDICIAL ERROR, AND VIOLATED BELL'S RIGHT TO A RELIABLE DETERMINATION OF PENALTY.

Respondent argues that there was no evidence to support instructions on the lesser-included offense of discharging a firearm at an occupied vehicle. (RB 116.) As was previously explained in the Appellant's Opening Brief, based on account of the only neutral and detached witness, Mr. Perry, the jury could have determined that Bell discharged a gun in a grossly negligent manner, with the intent to scare, but with no intent to strike the truck. If so, Bell was guilty of the lesser offense. (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 540.) Therefore, the court had a duty, without request, to instruct on the lesser-included offense of discharging a firearm in a grossly negligent manner. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990.)

Respondent argues that the doctrine of "invited error" should be invoked because Bell's trial attorney agreed with the prosecutor that the trial court did not need to instruct on any lesser offenses. (RB 115-116.) The relevant passage in the record occurred after a brief recess. The trial court inquired, "And both sides agree there are no lesser offenses in this case, right?" Defense counsel answered, "Right." (XII RT 2480.)

Defense counsel agreed with the trial court, but did not express a deliberate tactical purpose for not giving instructions on discharging a firearm in a grossly negligent manner. The record does not even show that this particular necessarily lesser-included offense instruction was mentioned or discussed during the ten-minute recess that preceded counsel's one word response. (XII RT 2480.) Under such circumstances,

the doctrine of invited error does not apply. (*People v. Wilson* (2008) 43 Cal.4th 1, 16; *People v. Valdez* (2004) 32 Cal.4th 73, 115.)

Respondent also argues that the error could not have been prejudicial because the jury necessarily adversely decided the question of Bell's intent to shoot the vehicle under other properly given instructions. (RB 116.) The general rule is that the failure to instruct on a necessarily lesser-included offense is harmless if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Sedeno* (1974) 10 Cal.3d 703, 715-716.) Respondent misconstrues the rule. A trial court's failure to give necessarily lesser-included offense instructions is not harmless merely because the jury has *convicted* the defendant of the greater offense on properly given instructions.

An example of the correct application of the "harmless error" rule can be found in *People v. Bolden* (1996) 44 Cal.App.4th 707, where, in an arson case, the jury was not given an instruction on the lesser-included offense of recklessly causing a structure to be burned. The error was ruled harmless because the jury had found the defendant guilty of another offense—exploding a destructive device with specific intent to injure or destroy property. The conviction of that *other* offense, for which proper instructions were given, necessarily adversely resolved the issue of recklessness against the defendant. (*Id.*, at p. 715.)

In this case, the factual question posed by the omitted instruction—whether Bell was grossly negligent, or intentionally aimed at Perry's vehicle—was not resolved adversely to Bell under other, properly given instructions. Respondent fails to articulate how the jury's other verdicts, finding Bell guilty of the first degree murder of Simon Francis, the robbery of Simon Francis, and possession of a firearm by an ex-felon, and/or the

jury's finding that Bell personally used a firearm in the commission of these offenses, adversely resolved against Bell the question of whether he intended to shoot at Perry's car, or whether he merely fired his gun in a grossly negligent manner with the intent to frighten the witness away. In accordance with the settled decisional law of this Court, the error cannot be regarded as harmless. (*People v. Breverman, supra*; *People v. Sedeno, supra.*)

Furthermore merely weighing the evidence and finding it not reasonably probable that a correctly instructed jury would have convicted the defendant of the lesser offense rather than the greater offense does not cure the error. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352.) This would defeat the purpose of the *sua sponte* instructional rule, which is to prevent the "'strategy, ignorance, or mistakes' of either party from presenting the jury with an 'unwarranted all-or-nothing choice,'" and to encourage "'a verdict . . . no harsher or more lenient than the evidence merits.'" (*People v. Breverman, supra,* at p. 155; internal citations omitted.) Here, the jury had an all or nothing choice: to convict of the greater offense of shooting at an occupied vehicle or convict of no offense at all.

With respect to the remainder of appellant's arguments relating to prejudice, the alleged violation of Bell's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments, and the effect of the instructional error on the death judgment (AOB 270-271), to which respondent offers no response, appellant merely adopts and incorporates those arguments as though they were set forth at this point herein.

ARGUMENT SECTION 5

PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE

XII

THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION OF THE PENALTY BY TRIVIALIZING THE REASONABLE DOUBT STANDARD DURING CLOSING ARGUMENT.

A. The Record:

During guilt phase closing argument, the prosecutor made the following argument, which promptly drew an objection from defense counsel that it incorrectly characterized reasonable doubt. (XIII RT 2617-2618.)

> If I take this quarter and flip it up in the air over a hard surface, it's possible it could land on heads or it's possible it could land on tails. It's reasonable either way. It's reasonable because it's based on physics, logic and reason. But if I flip this coin up in the air and expect it to land smack dab on its side and stay standing still, is it possible? Sure it's possible. Anything is possible, but is it reasonable?

(XIII RT 2617.)

B. Discussion:

Respondent argues that the prosecutor did not trivialize the reasonable doubt standard, and therefore did not commit misconduct. Even if so, respondent argues that evidence of guilt was so strong that any error was harmless beyond a reasonable doubt. (RB 118-120.)

The Respondent's Brief cites a number of this Court's decisions, but all stand for general propositions. (See, RB 118-119, citing *People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Brown* (2003) 31 Cal.4th

518, 553; *People v. Mendoza* (2007) 42 Cal.4th 686, 703; *People v. Osband* (1996) 13 Cal.4th 622, 717.) None of the cited cases address specific instances in which a prosecutor trivializes the reasonable doubt standard to a jury.

In contrast, the Appellant's Opening Brief cites and discusses a number of cases in which trivializing descriptions of the reasonable doubt standard were found to be prosecutorial misconduct. (AOB 274-276; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1265-1266; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172; *People v. Wilds* (N.Y. App. Div. 1988) 141 A.D.2d 395, 297-398.) Despite the fact that these cases support appellant's prosecutorial misconduct claim, respondent does not bother to discuss them. As appellant has previously pointed out, a respondent's failure to address an argument raised by an appellant may be interpreted as a concession. (*People v. Bouzas, supra,* 53 Cal.3d at p. 480.) The absence of cases to support respondent's position should be presumed.

Respondent argues that the error, if any, was harmless beyond a reasonable doubt under the *Chapman* standard. (RB 119.) Respondent applies the correct legal standard but reaches the wrong result.

Proof of Bell's role as shooter depended on testimony by Tory, who received an extremely lenient sentence as a *quid pro quo* for testifying at Bell's trial. Corroborating evidence on the identity issue, such as who procured the gun and who borrowed the black jacket, came from equally suspect sources. Inviting the jury to apply a burden of proof lower than the reasonable doubt standard may have contributed to the jury's finding that Bell was the shooter. (*People v. Nguyen, supra,* 40 Cal.App.4th at pp. 35-36; *People v. Katzenberger, supra,* 178 Cal.App.4th at pp.1265-1266; *People v. Johnson, supra,* 115 Cal.App.4th at pp. 1171-1172; *People v. Wilds, supra,* 141 A.D.2d at pp. 297-398.)

Additionally, many other guilt phase errors occurred. Hence, even if prosecutorial misconduct alone was not sufficient to require reversal of the judgment, the cumulative effect of guilt phase errors resulted in fundamentally unfair trial. (*People v. Hill, supra*, 17 Cal.4th at p. 847.) Accordingly, the judgment should be reversed.

APPELLANT'S ARGUMENT SECTION 6

PENALTY PHASE ERRORS STEMMING FROM DEPUTIES' SCUFFLE WITH BELL WITHIN THE EARSHOT OF THE JURY DURING THE PENALTY PHASE OF THE TRIAL

Introduction

It is relevant to point out at this juncture that appellant, under the heading "Argument Section 6," made six interrelated arguments, all stemming from Bell's outburst on April 8, 1999, and the events that ensued thereafter. (AOB 279-358; Arguments XIII-XVIII.) Respondent has addressed each individual argument piecemeal, without reference to the broader context in which each alleged error occurred.

The overall thrust of appellant's interrelated arguments has been forgotten or ignored by respondent, but should not be overlooked by this Court. Bell was denied any semblance of a fair trial, impartial jury or reliable death judgment by the cumulative effect of the errors that followed upon his outburst in the courtroom: Argument XIII, addressing Bell's wrongful exclusion from portions of the penalty phase trial; Argument XIV, addressing the trial court's erroneous denial of Bell's motion for mistrial; Argument XV, addressing the trial court's failure to conduct adequate questioning to ferret out biased jurors; Argument XVI, addressing the court's failure to instruct the jury not to consider their personal experiences of Bell's outburst in determining the incident qualified for treatment as an aggravating factor; Argument XVII, addressing the multiplicity of errors pertaining to court's decision to use visible chains and a stun gun on Bell following the outburst; and XVIII, addressing the ineffectiveness of trial counsel in handling the issues arising from Bell's outburst in the courtroom. (*People v. Hill, supra*, 17 Cal.4th at p. 847.)

XIII

CONTRARY TO WHAT RESPONDENT ARGUES, THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WILFULLY VIOLATED BELL'S STATUTORY, AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PERSONALLY PRESENT AT ALL CRITICAL PHASES OF THE PROCEEDINGS IN A PROSECUTION FOR A CAPITAL OFFENSE; BELL DID NOT VOLUNTARILY WAIVE HIS RIGHT TO BE PRESENT.

A. The Record:

The Appellant's Opening Brief includes a lengthy description of the events and proceedings that led up the exclusion of Bell from various proceedings, including penalty phase trial proceedings at which several defense penalty phase witnesses testified. Rather than restate those facts again here, appellant incorporates by reference the facts supporting Argument XIII, which can be found on pages 279-295 of the Appellant's Opening Brief. (See also, RB 120-134.)

B. Discussion:

Respondent agrees that a criminal defendant has constitutional and statutory rights to be present at every critical stage of a trial. (RB 134.) Respondent nevertheless argues that there was no error because Bell voluntarily waived his constitutional and statutory rights to be present during the testimony of two penalty phase defense witnesses. (RB 135.)

Respondent's position on appeal starkly contrasts with the position advanced by the district attorney in the trial court. Before the trial court, the district attorney objected to proceeding in Bell's absence and argued that it would be unlawful to do so. (XVI 3108.) Ms. Fladager, citing case law and sections 977 and 1043, argued, "a capital defendant basically needs to be present during the proceedings and really can't waive that right to be present." (XVI RT 3108.)

The district attorney was correct. California law allows a *capital* defendant to be absent from the courtroom in only one circumstance: after the defendant has been warned by the judge that he or she will be removed for disrupting the proceedings, and nevertheless insists on engaging in a manner so disorderly, disruptive and disrespectful of the court that the trial cannot be carried in with the defendant in the courtroom. (§ 1043, subds. (b(1) & (b)(2).) A defendant may *not* voluntarily absent himself during the taking of evidence before a jury if he is on trial for a capital crime. (§ 977, subd. (b)(2)); *People v. Young* (2005) 34 Cal.4th 1149, 1214.) Under the doctrine of judicial estoppel, a prosecutor will sometimes be precluded from abusing the judicial process by "advocating one position, and later, if it becomes beneficial to do so, asserting the opposite." (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262; *Thompson v. Calderon* (9th Cir. 1996) 109 F.3d 1358, 1371.) Given that the district attorney argued that it would unlawful to proceed with the penalty trial in Bell's absence, the Attorney General should be estopped from arguing the absence of error on appeal.

Respondent vainly attempts to portray the facts in a way that supports a finding that Bell was ejected from the trial for being disruptive. Respondent argues that appellant was "disruptive" on Thursday, April 8th, and had to be removed by nine deputies. (RB 137.) Respondent ignores that the melee in the courtroom was precipitated when Bell stood up and began pounding on the counsel statement because his mother was on the stand crying, and sheriff's deputies jumped him. (XVII RT 3452, 3470.) Respondent further ignores that after things calmed down, the proceedings resumed in Bell's absence without any effort on the court's part to ascertain Bell's status, or his willingness to remain in the courtroom without any further disruption. Bell did not waive his right to be present, and was not given an opportunity to reclaim his right to be present once the initial

disturbance had passed. (§ 1043, subd. (c).) It was not error to remove Bell, but it was error to resume the proceedings indefinitely without bothering to determine whether he was willing to conduct himself consistently with courtroom decorum. (§ 1043, subd. (b)(2).)

Respondent argues that Bell effectively waived his right to be present on Friday, April 9th, the day after the flare-up in the courtroom, by giving the court permission to hear the testimony of two defense witnesses in his absence. (RB 135.) Respondent futilely attempts to portray Bell's exclusion from the proceedings as justified by disruptive behavior.

Respondent characterizes Bell's behavior on the day after the outburst as "uncooperative," because Bell wore jail clothes instead of a suit, was seated in a wheelchair and complained of severe pain. (RB 137.) Bell was injured *and* his suit was "messed up" during the scuffle with deputies on Thursday. (XVI RT 3103.) That is why he was in jail attire and wheelchair bound on Friday.

The trial court initially implied that Bell's refusal to wear a suit might be "one indication of uncooperativeness" (XVI RT 3103); but the court seemed to accept counsel's assertion that Bell's suit had become disheveled in the scuffle, and would be capable of replacement by the following Monday. (XVI RT 3103-3104.) Furthermore, a few minutes later, when defense counsel suggested that Bell's disruptive behavior on *Thursday* probably justified his ejection from the courtroom, the court retorted that "today," unlike the day before, Bell was present had not "disrupted anything." (XVI RT 3108.) Plainly, Bell's lack of cooperativeness was not the reason for proceeding in his absence; hence, this factor furnishes no basis upon which to sustain the trial court's decision to proceed in Bell's absence on appeal.

To the extent respondent argues that Bell's waiver of personal presence was voluntary, knowing and intelligent, the facts tell a different

story. Bell did not want to sit in court on Friday because he was in "a lot of pain," and for no other reason. When the court solicited Bell's input regarding his ability to tolerate sitting in court on Friday, he agreed with the court that it would be better for the court to put the proceedings off until the following Monday. (XVI RT 3111.) The trial would have been delayed until Monday, when Bell could have participated, but a key defense witness, neuropsychologist Riley, who was present in court, interjected that she had patients scheduled for Monday. (XVI RT 3111.) The judge responded that he would not delay the proceedings until Tuesday. (XVI RT 3112.) Defense counsel complained that the court's unwillingness to delay the testimony until Tuesday was putting him in an untenable position. (XVI RT 3112.)

After the court unreasonably refused to allow the matter to be delayed until Tuesday, just one more day, to accommodate both Bell and Dr. Riley, counsel averred that Bell was upset and would probably make noise because of his pain, which would be disruptive to the proceedings and his attorney. (XVI RT 3113-3114.) Based on counsel's representations, the court made a finding of a "strong possibility that proceedings could be disrupted" and exercised discretion to have Bell removed from the courtroom. (XVI 3114-3115.)

Bell's agreement to have the proceedings held in his absence was not voluntary. "Voluntary choice presupposes meaningful alternatives. Put another way, a voluntary waiver of the right to be present requires true freedom of choice." (*State v. Garcia-Contreras* (Ariz. 1998) 953 P.2d 536, 539; cf. *Shahinian v. McCormick* (1963) 59 Cal.2d 554, 566, fn. 2 [a civil case involving the doctrine of assumption of risk, defining "voluntary" as "freedom of choice" coming from "circumstances that provide [plaintiff] a reasonable opportunity, without violating any legal or moral duty, to safety refuse to expose himself to the danger in question."].) Bell was without

meaningful alternatives. He could either endure the neck, back and leg pain caused by sitting in the courtroom chained to a wheelchair, or escape the pain by relinquishing his right to participate in the trial. In effect, Bell surrendered his constitutional right to be personally present with counsel at a critical stage of a death penalty trial in order not to impair the effectiveness of his attorney, who claimed he might be distracted if Bell was noisy due to his severe pain. (*Simmons v. United States* (1968) 390 U.S. 377, 394 [19 L.Ed.2d 1247, 88 S.Ct. 967]: see, AOB 305-306.)

Respondent cites a handful of cases for the proposition that Bell's waiver of the right to be personally present was voluntary. (RB 134-138.) None of the cases serves as persuasive authority.

In *People v. Frye* (1998) 18 Cal.4th 894 (RB 134), the issue was whether the trial court erred by *refusing* the defendant's request to be absent during penalty phase of the trial. The defendant was having difficulty maintaining control and was afraid he would have a "flare-up in front of the jury that would have a deleterious effect on their opinion of him." (*Id.*, at p. 1009.) The defendant suffered an "angry outburst and display of resentment" during his allocution before the jury. In essence, on appeal, he blamed the court for forcing him to stay in the courtroom. (*Id.*, at p. 1010.) Here, the issue is whether the trial court erred by allowing penalty phase witnesses to testify in Bell's absence, rather than postponing the trial for an extra day so that Bell could participate in his trial without pain.

In *People v. Romero* (2008) 44 Cal.4th 386 (RB 134), the defendant, and subsequently his counsel, verbally waived the defendant's right to be personally present while the court answered a jury question during deliberations. This Court found statutory violation inasmuch as the defendant had not executed a written waiver as required by section 977, subdivision (b)(1). (*Id.*, at p. 418.) Furthermore, the error was found harmless because the trial court's unauthorized communication with the

jury—which strayed beyond providing the answer sanctioned by defense counsel—was limited to advising the jury to put any additional questions in writing. (*Id.*, at p. 419.) Bell's waiver of the right to be present was not "voluntary" in any true sense of the word, and his absence occurred during a critical evidentiary stage of the trial.

In *People v. Price* (1991) 1 Cal.4th 324, 405 (RB 134), the defendant had been engaging in a pattern of threatening and assaultive behavior toward correctional officers at the jail, and while being transported to court. (*Id.*, at p. 404.) The court became concerned about courtroom safety, and ordered the defendant chained. The defendant declared he would rather be absent from the trial than appear before the jury in chains. The defendant was informed that if he left the courtroom, it would be construed as a waiver of his presence. The defendant left. The court reconsidered, and ordered the defendant back to the courtroom, but the defendant refused to dress in civilian clothing for his appearance. The court found a waiver of personal presence and proceeded with the trial in the defendant's absence. (*Id.*, at p. 405.)

In *Price*, this Court held that the defendant's right of presence during the guilt phase of a capital trial is not of such fundamental importance that, as a matter of state or federal constitutional law, it can never be waived. (*Id.*, at p. 405.) Moreover, this Court found that the record amply supported the trial court's finding of a waiver based on the defendant's ongoing disruption of the proceedings in the trial court. (*Id.*, at pp. 405-406.) Here the trial court did not exclude Bell from the courtroom for being disruptive on Friday, April 9th; nor does the record support a finding that Bell's disruptive conduct justified proceeding in his absence on that date.

In *People v. Moon* (2005) 37 Cal.4th 1 (RB 135), the defendant was allowed to be absent during the jury's visit to the crime scene, at his explicit request. (*Id.*, at p. 20.) In the *Moon* case, none of the coercive

elements were present that are present here. Bell articulated a preference to have the proceedings delayed. There is nothing in the record to suggest that Bell did not wish to be present during the testimony of defense witnesses. Bell waived his right to be personally present, only because he was given the Hobson's choice of remaining in the courtroom while suffering severe pain, or absenting himself from the proceedings. A "Hobson's choice" is no choice at all. (Webster's Encyclopedic Unabridged Dictionary of the English Language (New Deluxe Ed. 1996), p. 909.)

Taylor v. United States (1973) 414 U.S. 17, 20 [38 L.Ed.2d 174, 94 S.Ct. 194] (RB 135), is not a capital case, but a federal prosecution for selling cocaine. The out-of-custody defendant disappeared in the middle of trial and the court allowed the trial to continue in his absence. The Supreme Court affirmed the judgment under the "prevailing rule."

> "Where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."

(*Id.*, at p. 19; internal citation omitted.) Needless to say, the "prevailing rule" has no application to this case, a capital trial in which the judge arbitrarily refused to continue the trial one additional day so that Bell, who was injured when he emotionally reacted to his mother's testimony and had to be restrained, could participate in his trial without suffering acute pain.

In *People v. Weaver* (2001) 26 Cal.4th 876 (RB 138), the defendant became distraught, and asked to be excused from the courtroom during the sanity phase of his trial, while a portion of a videotape showing the defendant answering questions posed by a doctor administering the Vietnam Era Stress Inventory [VESI]. This Court found the error

nonprejudicial, but relied on the fact that "no live witnesses testified in defendant's absence, reducing the potential value of any assistance defendant could have given to defense counsel." (*Id.*, at p. 968.) During Bell's absence, which occurred during the penalty phase of the trial, two live defense witnesses testified.

Respondent argues that there is no reasonable probability that Bell would have obtained a more favorable outcome had he been "forced to remain in the courtroom in a wheelchair and jail clothes against his wishes." (RB 138.) Respondent misses the point, and ignores Argument XIII (C) of the Appellant's Opening Brief, in which appellant argues that the trial court violated Bell's constitutional right to be present by refusing a continuance sufficient to permit Dr. Riley to testify on Tuesday in Bell's presence. (AOB 306-309.) Respondent's complete failure to address this issue should be viewed as a concession that the trial court's arbitrary refusal to delay the proceedings until Tuesday, when Dr. Riley *and* Bell could be present, was error of constitutional dimension. (*People v. Bouzas, supra,* 53 Cal.3d at p. 480.) A court's "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [11 L.Ed.2d 921, 84 S.Ct. 841].)

In arguing that no prejudice resulted (RB 138), respondent does not address any of the factors—discussed in the Appellant's Opening Brief (AOB 307-309)—that weigh in favor of finding the error prejudicial. First, had proceedings been delayed merely one additional day, Bell could have been present and pain free, and actively assisted counsel during the examination of important defense witnesses. (*Riggins v. Nevada* (1992) 504 U.S. 127, 144 [118 L.Ed.2d 479, 112 S.Ct. 1810]; *United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 998.) Second, under the unique circumstances of this case, the jury was almost certain to have drawn

damaging inferences from Bell's unexplained absence at a trial. (*Blackwell v. Brewer* (8th Cir. 1977) 562 F.2d 596, 600; *Commonwealth v. Kane* (Mass. App. 1984) 472 N.E.2d 1343, 1348; *State v. Garcia-Contreras, supra,* 953 P.2d at p. 541.) Bell's unexplained absence occurred the day after the jury's frightening exposure to "screaming and yelling" coming from the courtroom. (XVI RT 3123.) The jury was not told that Bell had been "voluntarily excused for good cause." (Cf. *People v. Jackson* (1996) 13 Cal.4th 1164, 1212.) Therefore, jurors most likely assumed that Bell was not present because he was continuing to engage in behavior that posed a physical threat to persons in the courtroom.

It is almost impossible under the circumstances to "quantify the resulting harm." (*State v. Garcia-Contreras, supra,* at p. 541.) For this reason, as well as the reasons set forth at length in the Appellant's Opening Brief, the error should be regarded as structural, and immune from harmless error review. (AOB 310-312; *Yarborough v. Keane* (2nd Cir. 1996) 101 F.3d 894, 897; *Arizona v. Fulminante* (1991) 499 U.S. 279, 294 [113 L.Ed.2d 302, 111 S.Ct. 1246].)

Even if not structural, however, the error was prejudicial. Bell's absences violated the federal constitution as well as state statute. When a defendant's exclusion from trial implicates the Sixth Amendment and Fourteenth Amendment rights, the more stringent *Chapman* test applies. (*Chapman v. California, supra*, 386 U.S. 18.) Respondent cannot meet this burden.

Bell's absence at critical phases of the trial, including but not limited to proceedings where two penalty phase witnesses testified, effectively denied him any opportunity to consult with counsel, or to be consulted, on issues having great potential to influence the outcome of the penalty phase trial. Additionally, his unexplained absence would have given jurors the false impression that Bell, if present, would dangerously act out, and

therefore his exclusion was necessary for the safety and security of persons the courtroom. (See, AOB 312-315; *Riggins v. Nevada, supra*, 504 U.S. 127; *Blackwell v. Brewer, supra*, at p. 600.) Last but not least, the trial court's intentional disregard of state laws governing Bell's right to be personally present and/or regarding the granting of continuances also violated his state-created liberty interest, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Hewett v. Helms* (1983) 459 U.S. 460, 466 [74 L.Ed.2d 675, 103 S.Ct. 864]; *Ford v. Wainwright, supra*, 447 U.S. at p. 428 [Concurring op., O'Connor, J.].)

XIV

CONTRARY TO RESPONDENT'S CONTENTION, BELL WAS DENIED THE RIGHT TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM, AND A RELIABLE ADJUDICATION OF PENALTY BY THE TRIAL COURT'S DENIAL OF THE MOTION FOR MISTRIAL; THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL.

A. The Record:

The Appellant's Opening Brief includes a lengthy description of the events and proceedings that led up the denial of appellant's motion for mistrial. The motion came on the heels of a note from the jury expressing concern about walking past Bell when he was not restrained. (XVI RT 3116; AT 1340.) Rather than restate those facts again here, appellant incorporates by reference the facts supporting Argument XIII, which can be found on pages 286-288 of the Appellant's Opening Brief. (See also, RB 139-144.)

B. Discussion:

Respondent responds to appellant's nine-page legal argument, which includes numerous citations of authority (AOB 316-324), in three conclusory paragraphs. (RB 144-145.) The sum total of respondent's argument is that "[t]here is nothing in the record to suggest that the jury was unduly prejudiced against appellant," (RB 144) the trial court "instructed the jury not to speculate about the event [referring to the melee in the courtroom]," (RB 145) and appellant has failed "to show that the court's denial of his motion for a mistrial was arbitrary, capricious, or wholly outside the bounds of reason." (RB 145.)

Respondent cites, but does not discuss, several cases to support the People's position. In *People v. Lewis* (2008) 43 Cal.4th 415, 501 (RB 144),

this Court upheld a trial court's denial of a motion for mistrial based on the testimony of sheriff's deputies that they had information there were "ex-cons" in an apartment when they served a search warrant. On its facts, this case bears little similarity to Bell's case.

In *People v. Elliot* (2012) 53 Cal.4th 535, 575 (RB 144), this Court affirmed a trial court's denial of a mistrial motion after the prosecutor carelessly left a box with a written label on it in a position where jurors could have seen it. The defendant asserted that the label of the box implied that the defendant was suspected of committing another supermarket robbery, in addition for the two for which he was being tried. (*Id.*, at pp. 575-576.) The error was raised as prosecutorial misconduct, and rejected on the basis that a jury admonition would have cured any conceivable harm, yet the defendant had failed to request one. (*Ibid.*)

In *People v. Williams* (1988) 44 Cal.3d 1127, 1156, the issue before the court was alleged *juror misconduct*. There was no motion for mistrial. A juror notified the court that a juror other than himself had overheard a remark by the defendant during the taking of the guilt phase verdicts; the juror understood the remark, probably mistakenly, as a threat "get" the jurors.[6] (*Id.*, at p. 1155.) The trial court took steps to ascertain that the perceived remark played no role in the jury's penalty phase deliberations. This Court found that any presumption of prejudice caused by alleged juror misconduct had been thereby been rebutted. (*Id.*, at pp. 1156-1157.) Here, of course, the issue was whether a mistrial should have been granted after jurors admitted to the trial court that, due to the ruckus they heard, they were afraid to walk past Bell "while he [was] not restrained." (XVI RT 3116; ACT 1340.)

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[6] Defense counsel explained to the court that the defendant had asked him, referring to the jurors, "Are those the son-of-bitches who are going to decide what happens to me?" (*Williams, supra*, at p. 1155, fn. 14.)

In *People v. Hendricks* (1988) 44 Cal.3d 635, 643, the defendant contended that the trial court erred in denying a mistrial after an outburst in open court in which the defendant admitted he was guilty of six murders. This Court declared, "a defendant may not be heard to complain when, as here, such prejudice as he may have suffered resulted from his own voluntary act." (*Id.*, at p. 643.) The *Hendricks* decision contains no discussion of the "outburst," and it is impossible to know what the trial court did, if anything, to ameliorate the potential prejudice caused by the incident. Moreover, in *Hendricks*, the defendant was a male prostitute, charged with the robbery-murders of two male customers. At the penalty phase, the prosecution presented evidence that the defendant had committed two more murders of homosexual men. (*Id.*, at pp. 640-641.) In that situation, the trial court, as well as this Court, could reasonably have concluded that defendant's leak that he had committed six murders was no more prejudicial than the *admissible evidence* that the defendant had murdered four men.

People v. Pride (1992) 3 Cal.4th 195, 260 (RB 145), is another jury misconduct case. In that case, one juror was allegedly by seen by a defense investigator, glaring, shaking his head, and muttering "son-of-a-bitch" during the prosecutor's penalty phase opening argument. (*Id.*, at p. 259.) Under questioning by the court, the juror apologized for any inappropriate conduct, assured the court he had not prejudged the penalty phase, and promised to avoid any recurrence. The trial court found that the defense investigator had mischaracterized the juror's conduct in the courtroom, and that no misconduct had actually occurred. (*Id.*, at p. 260.) The *Pride* case does not demand that in all circumstances this Court must defer to the trial court's evaluation of a juror's state of mind in denying a motion for mistrial.

Respondent simply ignores the figurative "elephant in the room." To wit, the jurors bore witness to the commotion in the courtroom. They may not have *seen* what occurred, but they *heard* the ruckus, and felt *personally threatened* enough to push and shove at one another while trying to escape into the jury room. The jurors were so frightened, in fact, that, when the court went to excuse the jurors for the day, they demanded his identification before unlocking the jury room door. (XVI RT 3120.)

Bell's outburst was then used as aggravating evidence at the penalty phase trial—even though the jurors were witnesses to the incident. They should have been disqualified from judging the evidence proffered to prove that the incident occurred in the manner described by prosecution witnesses. (AOB 321-322.)

As the Appellant's Opening Brief points out, the circumstances were akin to allowing the juror to sit in judgment after receiving material information about a party or the case that was not received at trial.

> Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias . . . . "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury . . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." . . . As the United States Supreme Court has explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ."

(*People v. Nesler* (1997) 16 Cal.4th 561, 582; internal citations omitted.)

Here, the jurors' assessment of the eyewitness accounts of Deputies

Bentley and Ridenour, who testified at the penalty trial, would have been colored by each individual juror's personal, frightening experience of the incident. Hence, the entire jury lacked "the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 982 [hereafter, *Dyer*].) Respondent fails to answer this argument at all.

As the Appellant's Opening Brief further explains (AOB 319-324), denying the mistrial, and thereafter allowing jurors who were percipient witnesses to hear the penalty trial evidence about the outburst in the courtroom, denied Bell a fair penalty trial before an impartial trier of fact, in violation of the Fourteenth Amendment and Article I, sections 7, 14 and 15. (*Dyer v. Calderon, supra*, 151 F.3d at p. 982.) The circumstances also violated Bell's right to confront and cross-examine the jurors about their perceptions, which violated his rights guaranteed by the Sixth Amendment and Article I, section 15 of the California Constitution. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [13 L.Ed.2d 424, 85 S.Ct. 546]; *People v. Nesler, supra*, 16 Cal.4th at p. 578.) Furthermore, allowing Bell's fate to "turn on the vagaries of particular jurors' emotional sensitivities" violated the Eighth Amendment and Article I, section 17 of the California Constitution because it deprived the death judgment of any reliability at all. (*Saffle v. Parks* (1990) 494 U.S. 484, 493 [108 L.Ed.2d 415, 110 S.Ct. 1257].)

XV

CONTRARY TO RESPONDENT'S ASSERTION, THE COURT'S FAILURE TO CONDUCT ADEQUATE QUESTIONING OF THE JURY TO RULE OUT PREJUDICIAL EFFECTS OF THE INCIDENT IN THE COURTROOM VIOLATED BELL'S RIGHT TO AN IMPARTIAL JURY, AND A RELIABLE DETERMINATION OF THE DEATH PENALTY BASED SOLELY ON EVIDENCE PRESENTED IN COURT; THE ISSUE WAS NOT FORFEITED.

A. Forfeiture:

Respondent asserts that appellant's challenge to the trial court's inadequate inquiry of jurors to assess the prejudicial effect of the outburst in the courtroom was forfeited. (RB 145.) Respondent's forfeiture claim should be rejected. "The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (*People v. Cowan, supra,* 50 Cal.4th at p. 506.)

Cases cited by respondent in support of invoking forfeiture include *People v. Holloway* (2004) 33 Cal.4th 96, 126-127; *People v. Taylor* (2010) 48 Cal.4th 574, 638; and *Turner v. Murray* (1986) 476 U.S. 28, 37 [90 L.Ed.2d 27, 106 S.Ct. 1683]. In *Turner v. Murray,* a trial court refused a defense request to *voir dire* the jury on racial bias in a case involving a black defendant and Caucasian victim. Forfeiture was not even an issue. The United States Supreme Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. (*Id.*, at pp. 36-37.) For future cases, the high court indicated, "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." (*Id.*, at p. 37.)

In *Holloway*, this Court paid lip service to the forfeiture doctrine in an appeal challenging a trial court's inadequate questioning of a single juror who, during trial, asked the bailiff if the juror could see photographs of the two victims while they were alive. (*Id.*, at p. 127.) The Court held that the issue was forfeited, but addressed the merits. (*Ibid.*)

In the *Taylor* case, the defendant contended on appeal that the trial court had conducted inadequate voir dire of four jurors regarding possible racial bias. (*Id.*, at p. 638.) This Court invoked forfeiture, but also addressed the merits. (*Id.*, at pp. 638-639.)

Even assuming the forfeiture doctrine would apply to a trial court's failure to adequately investigate whether grounds exist to remove a sitting juror for bias (cf. *People v. Cowan*, *supra*, at p. 506), appellate courts have inherent authority to consider claims on appeal, even if they are not adequately preserved in the court below. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Courts will frequently address unpreserved issues on the merits if the forfeited claim involves an important issue of constitutional law or a substantial right. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7.) This is a death penalty case, in which the defendant's life is at stake. Respondent is asking this Court to refrain from considering of an issue of possible jury bias bearing on the fundamental fairness and reliability of the penalty phase trial. This Court should address the merits, just as it did in the cases cited by respondent. (*People v. Holloway, supra*, 33 Cal.4th at pp. 127-128 and *People v. Taylor, supra*, 48 Cal.4th at p. 638.)

B. The Merits:

On the merits, respondent argues that the trial court's inquiry was adequate to find that the raucous skirmish in the courtroom "did not affect the jurors' ability and willingness to follow the court's instructions, to decide the appropriate penalty based solely on the evidence presented at

trial, and to be fair and impartial." (RB 147.) Respondent first quotes from this Court's decision in *People v. Maury* (2003) 30 Cal.4th 342, 434. (RB 146.) In *Maury*, on the day after the jury returned its guilt phase verdict, the jury foreman (Jimmie K.) reported having a conversation with a female bartender who claimed she knew the defendant, and that he had choked and attempted to rape her. A second juror, Annette S., was present during part of the conversation, and overheard the bartender say she had a "run-in" with the defendant that involved choking. Both of these jurors were questioned, excused and replaced with alternate jurors prior to the commencement of the penalty phase trial. (*Id.*, at p. 435.) Prior to excusal, Jimmie K. assured the court that he had not discussed the incident with any other jurors, including Annette S. (*Id.*, at p. 434.)

At issue in *Maury* was whether the trial court conducted an adequate inquiry to rule out the possibility that the excused jurors, Jimmie K. and Annette S., had spoken with other jurors about the bartender's statements. From the chronology of events, which were undisputed by defendant's appeal counsel, it was clear that the excused jurors had no opportunity to communicate the bartender's statements to other jurors in the courthouse. (*Id.*, at p. pp. 435-436.) The defendant nevertheless argued that the trial court erred by not questioning the ten remaining original jurors because of the possibility that excused jurors may have socialized with, and spoken to, other jurors outside of court. This Court rejected the possibility as "speculative" "in light of the record." (*Id.*, at p. 436.)

There are striking differences between what happened in *Maury* and what happened in Bell's case. First, in *Maury*, the purported assault of the bartender was not going to be used as aggravating evidence at the penalty phase trial. There was no danger that any of Maury's jurors would be asked to adjudicate the truth of the allegation that the defendant had choked or attempted to rape the bartender. Second, the trial court excused both jurors

who had any contact with the bartender, albeit Annette S. was not excused until the parties rested and penalty phase deliberations were about to begin. Here, not a single juror was excused. Fourth, in *Maury*, there was no apparent need to question *other* jurors about the bartender's statement because Jimmie K. and Annette S. were both questioned about the incident—and presumably admonished not to talk to other jurors—during the adjournment between the guilt and penalty phase trials, *before* other jurors reported back to duty.

Here, all of the jurors were exposed to, and frightened by, the noise emanating from the ruckus in the courtroom. No juror publicly confessed to "feeling biased or prejudiced" as a result of the incident. (XVI 3118-3119.) But a juror's own opinion of his or her impartiality is not controlling. (*United States v. Williams* (5th Cir. 1978) 568 F.2d 464, 471.) Under the circumstances, the trial court's superficial inquiry was patently inadequate flush out jurors who might be incapable of setting aside their personal feelings in determining the appropriate penalty. (See, AOB 325-328; *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 637-638; *Williams v. Griswald* (11th Cir. 1984) 743 F.2d 1533, 1539, fn. 12; *United States v. Thompson* (10th Cir. 1990) 908 F.2d 648, 650; *People v. Burgener* (1986) 41 Cal.3d 505, 517-521, overruled on unrelated grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) Moreover, the trial court made no inquiry at all to determine whether jurors would be able to disregard their own personal experience of the incident, and their fear of Bell, when it came time to evaluate penalty phase witnesses who would be describing the very same incident that caused the jurors' fright.

Respondent sites *People v. Burgener, supra*, 41 Cal.3d 505, for the proposition that a court has a duty to make whatever inquiry is "reasonably necessary" to determine whether a juror should be discharged. (RB 146.) Appellant also cited the *Burgener* case in the Appellant's Opening Brief.

(AOB 327.) The case provides an excellent example of deficient questioning by a trial court, very much like the superficial questioning that was done in this case.

Respondent also cites *People v. Cowan, supra*, 50 Cal.4th 401, as an example of a case in which the trial court's superficial inquiry was deemed adequate. (RB 146.) In *Cowan*, this Court affirmed the trial court's decision not to inquire further regarding a report by one juror that another juror had been sitting in the hallway next to some of the victim's family members. The reporting juror was not sure if the seated juror was talking to family members, or just sitting near them, because all he could see was the back of the seated juror's head. (*Id.*, at p. 504.) The court asked counsel for suggestions, and the defendant's attorney suggested they just "play it out and see what happens." (*Ibid.*)

The circumstances in *Cowan* are nothing like the circumstances here. In *Cowan*, the reporting juror's observations were at best ambiguous. There was no reason to assume that the juror seen seated near the victim's family members had engaged in any conversation at all, much less any potentially biasing communication relating to the trial.

In this case, the foreman complained to the court that jurors could have been injured when they rushed into the jury room during Bell's outburst the previous day. He indicated that jurors no longer wanted to have to walk by Bell "while he is not restrained." (XVI RT 3116.) During the brief inquiry that ensued, the court learned that jurors, frightened by the noise, had pushed and shoved their way into the jury room, and shut the door and locked it. (XVI RT 3119-3120.) Afterward, the jurors even refused to open the door for the judge until he produced identification. (XVI RT 3120.) Under the circumstances, good cause existed to suspect that one or more of the jurors would no longer be capable of performing the duties of a juror with appropriate dispassion. Furthermore, in this case,

unlike any case sited by respondent, the jurors were not only exposed to a frightening event; they were asked to judge the credibility of the People's witnesses who later testified about the event at the penalty phase trial.

In the last case cited by respondent (RB 147), *People v. Farnam* (2002) 28 Cal.4th 107, four female jurors were returning to the courthouse from lunch when four men stopped to ask them for the time. One of the men knocked one of the females to the ground and snatched her purse. Police officers apprehended the man, who was armed with a knife. (*Id.*, at p. 139.) The jurors were examined by the court, and gave assurances that the purse-snatching incident would not spill over and adversely affect their ability to decide the defendant's case. (*Ibid.*) After a second hearing, the defendant's motion for mistrial or to replace the jurors with alternates was denied. (*Id.*, at pp. 139-140.)

On appeal, this Court rejected the defendant's assertion that the trial court's inquiry was inadequate, explaining:

> The court held two separate hearings on the matter, and ascertained the details of the purse-snatching incident. In both hearings, the trial court queried whether the four jurors understood the absence of any relation between the incident and the crimes allegedly involving defendant. The court was obviously aware that the purse snatching might interfere with the jurors' ability to sit in judgment of defendant, and the questions put to the jurors reflected that awareness. And although the court was not obligated to do so, it allowed each side to question Violet J. directly. Upon hearing the four jurors' responses regarding their state of mind and observing their demeanor, the court had ample basis for determining whether they could fulfill their obligations as jurors. No more was required.

(*Id.*, at p. 141.)

In contrast, appellant's judge merely asked the jury collectively whether any of them were "feeling biased or prejudiced in the case." (XVI RT 3118-3119.) The depth of the court's inquiry in this case pales by

comparison to the inquiry conducted by the trial judge in *Farnam*, a case in which the defendant's life was not even at stake.

In this case, no specific questioning was done to determine whether jurors, as the result of their exposure to the incident in the courtroom, would be predisposed to impose a death sentence, "the [trial court's] finding of impartiality does not meet constitutional standards." (*Irvin v. Dowd* (1961) 366 U.S. 717, 727-728 [6 L.Ed.2d 751, 81 S.Ct. 1639].) The penalty phase verdict must be reversed because it cannot be said with any certainty that the court's inadequate inquiry did not result in a biased jury, with a predilection to impose a death sentence.

XVI

CONTRARY TO WHAT RESPONDENT ARGUES, THE LACK OF A CLEAR ADMONITION OR INSTRUCTION DIRECTING JURORS NOT TO CONSIDER THEIR PERSONAL EXPERIENCES OF THE INCIDENT IN THE COURTROOM IN ADJUDICATING WHETHER BELL COMMITTED VIOLENT CRIMINAL CONDUCT USABLE AS AGGRAVATING EVIDENCE VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, TO CONFRONTATION, AND A RELIABLE DEATH PENALTY DETERMINATION; THIS COURT SHOULD NOT INVOKE FORFEITURE.

A. Forfeiture:

Respondent argues that, by failing to request such an instruction, appellant forfeited the claim of error based on the trial court's failure to instruct jurors not to consider their personal experiences of the incident in the courtroom in adjudicating whether Bell committed violent criminal conduct usable as aggravating evidence. (RB 147-149.) Forfeiture should not be invoked.

The claim here is analogous to one where a defendant is wearing physical restraints that are visible to a jury at the penalty phase of a capital trial. In that circumstance, a trial judge has a *sua sponte* duty to admonish the jury not to consider the fact that the defendant is shackled. (*People v. Duran* (1976) 16 Cal.3d 282, 291-291; *People v. Jacla* (1978) 77 Cal.App.3d 878, 889; *Deck v. Missouri* (2005) 544 U.S. 622, 633 [161 L.Ed.2d 953, 125 S.Ct. 2007]; *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1452; *People v. Virgil* (2011) 51 Cal.4th 1210, 1271.) Here, jurors panicked upon hearing the commotion in the courtroom, and then, to assuage their own persistent fears, more or less *asked* for Bell to be shackled in their presence. In such circumstances, there is an equally compelling reason to impose a *sua sponte* duty on the trial court to caution jurors to disregard their personal perceptions of the event in question, and

the personal fears produced thereby, in weighing the evidence for and against the penalty of death. This argument was thoroughly articulated in the Appellant's Opening Brief, but was apparently deemed not worthy of a single sentence from respondent in riposte. (AOB 329-330.)

Respondent argues in support of invoking the forfeiture doctrine that the defense ignored the trial court's suggestion to design a "jury instruction to tell them that they can't consider this incident." (XVI RT 3122.) This argument borders on specious. At the time the court made its remark, the parties already knew that the prosecution intended to use the incident in the courtroom as aggravating evidence. (XV RT 3097; XVI RT 3117.) It would have been purposeless to fashion an instruction telling the jury not to "consider this incident." (XVI RT 3122.) The jury was going to be asked to consider the incident.

Respondent additionally argues for forfeiture on the theory that the defense failed to ask for a limiting instruction when the defense expert, Dr. Riley, "disclosed the specifics of what happened and used it as part of the basis for her expert opinion regarding appellant's mental deficits and character for violence." (RB 148.) Respondent apparently analogizes the situation to a defendant's obligation to *request* an instruction telling a jury that hearsay considered by an expert in forming his or her expert opinion may not be considered for the truth of the matter asserted. (RB 147-148, citing *People v. Ledesma, supra,* 39 Cal.4th at pp. 697-698, and *People v. Clark, supra*, 52 Cal.4th at p. 942.)

In reality, Dr. Riley discussed few "specifics of what happened" during her courtroom testimony. Riley testified that she was out in the hallway and heard a "very loud wailing noise," which she later learned had come from Bell's mother. (XVI RT 3168.) Riley characterized the mother's wailing and crying as an "extremely emotional event" for Bell, and opined that he was incapable of preventing himself from reacting in an

"uncontrollable physical way." (XVI RT 3169.) Riley's testimony was based on her limited, first-hand experience of the incident. She relied on hearsay only to the extent necessary to establish that the source of the wailing and crying in the courtroom was Bell's mother. Defense counsel would have had no tactical reason to have the jury instructed that the expert's assumed fact, i.e., that the wailing came from Bell's mother, could not be considered as proof that the wailing came from Bell's mother.

Furthermore, Riley testified *after* defense counsel moved for a mistrial, asserting that jurors would not be able to set aside their personal experiences of the fracas, and *after* it was a foregone conclusion that the prosecution would introduce testimony about the incident, and urge the jurors to find that Bell's outburst was an aggravating act of violence. (XVI RT 3121.) Bell's attorney did not have to refrain from having Dr. Riley explain the neuropsychological reasons for Bell's courtroom behavior in order to preserve Bell's right to appeal the court's other rulings. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1056; cf. *People v. Lawley* (2002) 27 Cal.4th 102, 165 [defendant elicited the facts of an incident where prosecution had neither charged nor argued the incident in its case in aggravation].)

B. The Merits:

Respondent argues that the jury was properly instructed that the "penalty determination had to be based on evidence in the record and considered in light of statutory factors." (RB 148.) As appellant previously pointed out (AOB 331), at the penalty phase, the jury was directed to decide whether to impose life or death based on its consideration of "all of the *evidence* which has been received during any part of the trial of this case." (IV CT 1146; emphasis added; XVIII RT 3690.) The word "evidence" was broadly defined for the jury to include " . . . anything

presented to the senses and offered to prove the existence or nonexistence of a fact." (IV CT 1127; XVIII RT 3683.) From the totality of instructions given, jurors would logically have inferred that the conduct of Bell during the trial – *including conduct jurors had personally heard or perceived* – could properly be considered in determining whether Bell's conduct in the courtroom constituted an act of violence that ought to be weighed as an aggravating factor.

Furthermore, respondent ignores the other problem identified by appellant in briefing: that the net effect of the instructions as a whole was to *misinstruct* the jury. (AOB 331-332.) To wit, during the *guilt* phase of the trial, the jury was instructed:

> The nontestimonial conduct of the defendant during the trial is not evidence that may be considered by you in determining guilt or innocence. You are to disregard the defendant's conduct in the courtroom, as it has no tendency in logic or reason to prove or disprove a material issue at trial.

(IV CT 977.) But in the penalty phase, jurors were instructed to ignore the instructions given during the guilt phase of the trial. (4 CT 1120; XVIII RT 3679, 3689.) The failure to instruct the jury that the "nontestimonial conduct of the defendant during trial is not evidence," would have left the jury with the impression that they could properly consider Bell's nontestimonial conduct in the courtroom during the penalty phase trial. Furthermore, the prosecuting attorney invited the jurors to consider their own personal experiences of the incident, rather than just relying on the account provided by witnesses. (XVIII RT 3745-3746.) It is an "oft-stated presumption that the jury does as it is instructed to do." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.)

Respondent argues that, when a defendant has placed his character in issue, "the parties may comment favorably or unfavorably on his demeanor and courtroom behavior." (RB 148.) The issue before this Court, however,

is not whether the prosecutor or defense counsel should have been allowed to *comment* on Bell's demeanor in the courtroom. (Cf. *People v. Valencia* (2008) 43 Cal.4th 268, 307 [error to preclude defense counsel from commenting on defendants demeanor while testifying], cited at RB 148.) The much more complex issue, rather, is whether the court, the prosecution, and/or Bell's counsel committed cumulatively prejudicial error (1) by allowing the prosecutor to present aggravating evidence of Bell's outburst in the courtroom pursuant to section 190.3, subdivision (b); (2) by allowing jurors, who were percipient witnesses to, and frightened by, the outburst, to determine whether the prosecutor had proven beyond a reasonable doubt that Bell's conduct included the express or implied threat to use force or violence within the meaning of section 190.3, subdivision (b); and (3) by failing to give any instruction telling jurors that they must base their adjudication of the facts of the Bell's outburst on evidence received from witnesses in the courtroom. (See, AOB, Argument XVIII, addressing a related ineffective assistance of counsel claim.)

Respondent does not bother to argue prejudice, or the lack thereof, choosing instead to advocate rejection of appellant's argument on the merits. (RB 149.) Accordingly, appellant does not reiterate the reasons why the instructional error was prejudicial here, but rather incorporates by reference the argument previously made in the Appellant's Opening Brief (AOB 332-333.) It suffices to say that, because there was no admonition telling the jurors to disregard their own personal perceptions and fears stemming from the incident in the courtroom, jurors' personal feelings of near-victimization by Bell would have become a "'thumb [on] death's side of the scale.'" (*Deck v. Missouri, supra*, 544 U.S. at p. 633; internal citation omitted.) The death judgment should therefore be reversed.

XVII

THE TRIAL COURT VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION OF THE DEATH PENALTY, AND INTERFERED WITH BELL'S RIGHT TO THE ASSISTANCE OF COUNSEL, BY DEFERRING TO COURTROOM SECURITY PERSONNEL THE DECISION TO USE CHAINS AND A STUN BELT TO RESTRAIN BELL DURING THE PENALTY TRIAL, AND BY FAILING TO INSTRUCT JURORS NOT TO CONSIDER BELL'S PHYSICAL RESTRAINTS FOR ANY PURPOSE; THE ISSUE WAS NOT FORFEITED.

A. The Record:

The Appellant's Opening Brief includes a lengthy description of the events and proceedings that led up to the decision to use chains and a stun belt to restrain Bell during the penalty phase trial. (AOB 291-295.) Rather than restate those facts again here, appellant incorporates by reference the facts supporting the argument in the opening brief. (See also, RB 149-154.)

B. Discussion:

1. Delegation of Decisionmaking and Decision re Types of Restraints:

a. Forfeiture:

Respondent argues that, because defense counsel did not object at trial to the type of physical restraints used, Bell has forfeited any claim that the court improperly deferred to security personnel the decision as to what types of physical restraints to use. (RB 153.) In anticipation that respondent would assert forfeiture, the Appellant's Opening Brief already includes a discussion of the reasons why the forfeiture doctrine should not be invoked to bar consideration of the merits. (AOB 342-344.) This discussion is incorporated by reference herein.

The forfeiture doctrine will not be applied "when the pertinent law changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner* (1990) 50 Cal.3d 668, 703.) *People v. Mar* (2002) 28 Cal.4th 1201, was decided several years after Bell's case was tried. Defense counsel could not have anticipated that in *Mar*, this Court would identify problems unique to stun guns, and impose greater burdens on trial courts to justify their use. To the extent appellant challenges the court's deference to security personnel's choice of a stun belt to restrain Bell, the forfeiture doctrine should not be applied because counsel could not have anticipated the holding in *Mar*.

Respondent argues that the issues relating to Bell's restraint were waived by counsel's failure to object to the use of physical restraints, and failure to object to the specific type of restraints used. (RB 153.) Given Bell's outburst, however, objecting to the use of *any restraints at all* would have been pointless. Courtroom security personnel were requesting restraints; the trial judge made it abundantly clear he would defer to deputies' expertise in security matters. (XV RT 3078-3079.) Bell's counsel was not required to make a futile objection to preserve the issue for appeal. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Moreover, objections are deemed sufficient to preserve an issue if there is fair notice to the trial court of the issue it is being called upon to decide. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Counsel's statements as a whole, including the questions he posed to deputies, conveyed his overriding concern that, whatever restraints were used, they must not be visible to the jury. (XVI RT 3080-3083.) Counsel likewise conveyed his belief that the specific security measures being proposed by courtroom security personnel, including a Taser and "full chains," were unnecessary since Bell's outburst had been precipitated by his mother's emotional breakdown, which was "not going to happen again." (XV RT 3080.)

Accordingly, the court had fair notice of the nature of counsel's objections and there is no possibility that fewer restraints, different restraints, or less visible restraints would have been used had defense counsel more vocally and specifically objected.

Moreover, the fact that the restraints turned out to be visible was contrary to the earlier assurances given by deputies regarding their ability to conceal the proposed restraints. Deputies had assured the parties that the chains could be made invisible, and that the Tasers would be kept concealed. (XVI 3081-3083.) It would have been futile to object to the use of the combination of devices chosen by courtroom security personnel once it became apparent the restraints could not in fact be completely concealed. The trial court had made it clear security personnel could use whatever restraints they deemed necessary to restrain Bell, and even discounted the importance of counsel's concerns about the visibility of restraints, remarking, "They know he is in custody anyway." (XV RT 3081) Simply put, there was no forfeiture.

In any event, even if this Court finds that Bell's counsel forfeited or waived issues relating to the use of visible restraints, including the stun belt and chains, this Court will eventually have to address the issue on the merits. In Argument XVIII, *post*, appellant asserts that defense counsel's overall handling of issues consequent to Bell's emotional outburst, including but not limited to his failure to adequately challenge the use of physical restraints, denied Bell the effective assistance of counsel. (AOB 350-358.)

b. The Merits:

On the merits, respondent argues the trial court did not in fact yield its authority to court personnel, and properly found manifest necessity for the restraints. (RB 153.) The record speaks for itself and paints a contrary

picture. The trial court made numerous statements indicating it would be up to the bailiffs in the courtroom to decide what to do.

" . . . I mean, I have got to follow the advice of, you know, the people in charge of security." (XV RT 3079.)

"Well, based on what I saw today, whatever the bailiffs feel is appropriate, I think, is what I am going to order because I am not a security person . . . ." (XV RT 3081.)

"If you think he should be chained, that's probably what I am going to do tomorrow." (XV RT 3083.)

"So Jerry [bailiff] recommends chains. He has been dealing with Bell from a security standpoint now for a few weeks and has a good sense of what's happening." (XV RT 3084.)

"So we will see what the options are tomorrow, but whatever the bailiffs feel is going to protect them, under these circumstances – normally I am not the kind of judge that wants people chained in the courtroom." (XV RT 3085.)

"I'm not going to give them orders to use it [a stun belt]." (XV 3097.)

Among other cases, respondent relies on *People v. Medina* (1995) 11 Cal.4th 694, 730. (RB 153.) On its facts, *Medina* lends little support to respondent's position in this case. First, it was not asserted that the trial judge in *Medina* unlawfully left the shacking decision up to courtroom personnel. Second, *Medina* involved a defendant whose competency, not guilt, was being tried. Medina had, in prior proceedings, picked up a table and thrown it at the judge's bench, attempted and succeeded in escaping several times, and acted out in a violent fashion on a number of occasions, resulting in the destruction of several jail and prison cells. Based on the defendant's past violent and disruptive conduct, the trial court ordered that the defendant remain shackled during his competency trial. (*Id.*, at p. 730.)

Medina's counsel did not dispute the facts on which the court's decision was based, but argued that less intrusive alternatives, i.e., "'strategically placed guards'" should be used. (*Ibid.*) This Court found that the trial court did not err by using shackles, or by failing to give a cautionary instruction about the shackles. This Court doubted that a jury would be more likely to find the defendant *competent* merely because it had viewed the defendant's restraints. (*Id.* at p. 732.) The restraints could possibly contribute to the impression that the defendant was incompetent.

Respondent likewise cites this Court's decision in *People v. Combs* (2004) 34 Cal.4th 821, 837, as exemplary (RB 154), but that case does not address a claim that the trial judge improperly deferred its decisionmaking to bailiffs. In *Combs*, the issue was whether the court abused its discretion by keeping the defendant in invisible leg restraints for the duration of the trial. Here, of course, partially visible restraints, including chains, handcuffs, Tasers and a stun belt were used, solely at the discretion of the bailiffs in the courtroom.

The Respondent's Brief also includes a citation to *People v. Stevens* (2009) 47 Cal.4th 625, 642 (RB 153-153), to support the proposition that the trial court did not defer to security personnel. *Stevens* is inapt. In *Stevens*, this Court extended the rule ordinarily applied in shackling cases, and ruled that a trial court may not defer to sheriff's department policy in deciding whether to post a deputy at the witness stand. (*Id.*, at p. 642.) This Court also ruled, however, that a "heightened showing of manifest need is not required to justify the stationing of a security officer near the witness stand." (*Ibid.*)

In *Stevens, supra*, the trial court mentioned the sheriff department's policy of having a deputy at the stand with an in-custody defendant for safety purposes, but did not blindly adhere to the department's policy. The trial court not only made an independent finding that the precaution of

posting a deputy near the stand was reasonable, it also found that the presence at the deputy would actually benefit the defendant by allaying the jury's fears. (*Id.*, at p. 643.)

In this case, in contrast to the *Stevens* case, it was incumbent upon the court to find "manifest need" for the simultaneous use of handcuffs, chains, Tasers and a stun belt—particularly since complete concealment was not possible. (*People v. Duran, supra,* 16 Cal.3d at pp. 290-291; *People v. Hill, supra*, 17 Cal.4th at p. 841.) The trial court, far from finding that all of these measures were manifestly necessary, acknowledged that Bell had remained stoic throughout the trial, until his mother broke down on the stand. (XV 3080.) The court voiced no disagreement with counsel's assessment that the outburst was circumstantial and not likely to happen again. (XV 3080.) Furthermore, as occurred in the cases cited by appellant previously (AOB 339-340), the judge repeatedly stated he would defer to courtroom security personnel no matter what restraints they decided to use. (See, e.g., *People v. Hill, supra*, at p. 842 ["I don't interfere in [the sheriff's department's] business."]; *People v. Jacla, supra*, 77 Cal.App.3d at pp. 885 ["You [the bailiff] may use your discretion to keep a certain amount of security. Whatever you are satisfied you are safe with, all right."]; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825 ["Even if we accept the trial court's later statement that it did not abdicate its responsibility, it erred in imposing shackles without a prior on-the-record determination of the need for shackles."].)

In *People v. Virgil, supra*, 51 Cal.4th at p. 1271 (cited at RB 155), a case decided years before *People v. Mar, supra*, 28 Cal.4th 1201, the issue was whether the trial court abused its discretion by ordering the defendant to wear a stun belt during the penalty phase, after he had been caught trying to manipulate another inmate's handcuffs with a heavy duty staple. (*Id.*, at p. 1269.) The trial court found that restraints were needed because Virgil

was attempting to help another inmate escape, and possibly intended to escape. (*Id.*, at pp. 1270-1271.) It was *not* alleged that anyone other than the judge was responsible for the decision to use a stun belt.

In *Virgil*, the stun belt was brought into the courtroom for examination and a bailiff explained to the parties how the device worked, the physical effects of its activation, and the protocols for treating someone who had been shocked. In *Virgil*, the courtroom deputies had developed written guidelines, which counsel were given an opportunity to study. After a hearing, the court concluded that the stun belt was the least intrusive means available of providing security. (*Ibid.*) This Court found no abuse of discretion, rejecting the defendant's argument that the trial court should have anticipated the *Mar* decision, and considered the psychological consequences to the defendant of wearing the stun belt. (*Id.*, at p. 1271.)

Here, the record clearly shows that courtroom deputies, not the judge, were making security decisions in Bell's case. The judge was unaware until the scuffle in the courtroom that deputies had previously "beefed up" security to include four deputies in the courtroom for the penalty phase trial. (XV RT 3084.) The judge made a finding of "ample grounds" to impose restraints of some kind on Bell, but left to courthouse bailiffs the discretion to decide what restraints to use. (XV RT 3079-3083.) Courtroom deputies, not the judge, made the decision to restrain Bell using handcuffs, chains, Tasers and the stun belt. The court violated the cardinal rule against deferring to law enforcement decisions regarding the decision to use multiple visible physical restraints, and made no finding of manifest need. (*People v. Hill, supra,* 17 Cal.4th at p. 842.)

2. Failure to Instruct:

a. Forfeiture:

Respondent argues that appellant's claim that the trial judge should have instructed the jury on the use of restraints was forfeited because the

trial court offered to provide an instruction, which defense counsel expressly declined. (RB 153, 155.) *People v. Duran, supra*, 16 Cal.3d at pp. 289-291, is cited as support for this proposition. (RB 153.) The rule, as stated in *Duran*, provides:

> In those instances when visible restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided.

(*Id.*, at pp. 291-292.)

Respondent argues that the instructional issue is forfeited because "there was no evidence that the jurors saw the restraints, and appellant expressly declined to have the jury told about the restraints." (RB 153.) Appellant disagrees with respondent's characterization of the facts. In direct response to the jury's earlier note, expressing fear of Bell "while he is not restrained," the court in so many words promised to "work it out logistically" to take care of any fears the jury might have. (XVI RT 3120.) The obvious import of the court's words was that something would be done to restrain Bell in the event he returned to court. When Bell did return to court, the apprehensive jurors would have been looking to see that he was restrained.

Furthermore, the record shows that the court could see the handcuffs and stun belt. (XVI 3294.) Defense counsel could see the handcuffs and stun belt, and opined that he "didn't see how" they could keep jurors from seeing the stun belt. (XVI RT 3294.) Neither the court nor the prosecuting attorney disagreed with counsel's statement that there was no way to keep the jury from seeing Bell's restraints. This evidence is more than sufficient to show that the restraints were at least partially visible to the jury.

Under the *Duran* rule, an instruction was therefore required *sua sponte*. The fact that Bell's attorney declined an offer of an instruction in the midst of trial did not relieve the trial court of its obligation to instruct the jury at *the end of the penalty trial* that the restraints should have no bearing on the jury's determination of penalty. Respondent does not argue for application of the doctrine of "invited error," nor does the record support a finding that the error was invited. (See, AOB 346-347.) Trial counsel did not articulate a tactical reason for *omitting from the penalty phase instructions* an instruction directing the jury not to consider increased courtroom security, or Bell's physical restraints, in deciding penalty. (XIV RT 2871; XVIII RT 3641.) Hence, the error was not invited. (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 675-679; *People v. Graham* (1969) 71 Cal.2d 303, 321.)

Furthermore, respondent completely ignores appellant's second argument—that the trial court affirmatively misinstructed the jury. As appellant previously argued (AOB 346-347), the court read the instructions that jurors were to apply to determine penalty, and advised them to "disregard the instructions that I have previously given to you in the first phase of the trial..." unless repeated. (XVIII RT 3689, 3691.) At the guilt phase, the jury was instructed that increased security measures in the courtroom were normal and should have no bearing on the jury's determination of guilt or innocence. (XIII RT 2560.) In effect, the trial court affirmatively misled jurors into believing that increased courtroom security – which would obviously have included the fact that Bell was chained and wearing a stun belt – was a factor that could be weighed in the determination of penalty.

b. The Merits:

Respondent implies that an instruction on restraints is not required *sua sponte* when a defendant is physically restrained during the penalty

phase of the trial. (RB 156.) Respondent quotes dicta in *People v. Lopez* (2013) 56 Cal.4th 1028, 1081, which suggests that the rationale for requiring an instruction when a defendant is restrained does not apply when the "defendant has been convicted of a special circumstances murder." (RB 156.) In *Lopez*, however, the restraints were *invisible* to the jury. A witness fleetingly referred to the possibility that the defendant was restrained with handcuffs and a chain. (*Id.*, at p. 1080.) The defendant argued that the trial court should have given an instruction to disregard the fact that the defendant was wearing restraints. This Court held that that the instruction was unnecessary, because the restraints were invisible to the jury, and further that "an instruction may have achieved the opposite result than was intended by Duran by calling attention to the defendant's restraints when, otherwise, the jury would have been unaware of them." (*Ibid.*) Here the restraints were visible.

Respondent also cites dicta in *People v. Medina* (1990) 51 Cal.3d 870, 898. In *Medina*, this Court presumed, based on the record, that the shackles were visible to the jury when the defendant testified at the *sanity* phase of the trial, but were invisible to the jury that determined guilt. (*Id.*, at p. 987.) The Court held that, assuming error in failing to frame an instruction on shackling, the error was not prejudicial. (*Id.*, at p. 898.)

This Court has yet to hold that the rule that an instruction admonishing the jury not to consider a defendant's shackles is unnecessary at the sentencing phase of a capital trial. Such a holding would conflict with the pronouncements of our federal high court. As the United States Supreme Court stated in *Deck v. Missouri, supra,* 544 U.S. 622,

> The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining

> dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant's conviction means that the presumption of innocence no longer applies. Hence shackles do not undermine the jury's effort to apply that presumption.
>
> Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. [Citations.]
>
> Neither is accuracy in making that decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. [Citations.] The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point . . . . It also almost inevitably affects adversely the jury's perception of the character of the defendant. [Citations.] And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations -- considerations that are often unquantifiable and elusive -- when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." [Citations.]
>
> Given the presence of similarly weighty considerations, we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.

(*Deck*, at pp. 632-633.)

Respondent perfunctorily argues that the errors, if any, caused Bell no prejudice. (RB 156-157.) Respondent again argues the absence of evidence the jurors saw the restraints. (RB 157.) This assertion should be rejected for the reasons previously stated; the court and counsel could see the restraints and there was no disagreement when Bell's attorney stated

that the stun belt and chains would be impossible to completely conceal from the jury.

Respondent repeats as a basis for finding no prejudice that counsel declined the offer of an instruction telling the jury not to consider the restraints. (RB 157.) As appellant has previously pointed out, the court had a *sua sponte* duty to so instruct the jury. Furthermore, the trial court affirmatively misled jurors into believing that increased courtroom security—which would include the presence of restraints—was a factor that *could* be weighed in the determination of penalty. Moreover, appellant fails to see how counsel's decision to forego the instruction in the middle of trial bears on the calculation of prejudice.

Last but not least, respondent argues, because Bell had already been convicted of a special circumstances murder, "there is no reasonable probability that the absence of a jury instruction affected the jury's verdict." (RB 157.) Respondent invites this Court to apply the less stringent *Watson* standard for evaluating prejudice, rather than the "harmless beyond a reasonable doubt" standard of *Chapman v. California, supra*, 386 U.S. 18. In fact, it is respondent that bears the burden of proving beyond a reasonable doubt that the shackling errors did not contribute to the death judgment. (*Deck v. Missouri, supra*, 544 U.S. at p. 635.)

Additionally, just because Bell had already been adjudicated guilty of a capital offense does not mean he suffered no prejudice. (*Deck v. Missouri, supra*, 544 U.S. at pp. 632-633.) Absent an instruction telling jurors that the restraints should not be weighed on death's side of the scale, the presence of chains and stun belt would inevitably have undermined the jury's ability to weigh accurately all relevant considerations, including Bell's low intellectual functioning, developmental and learning disabilities, dyslexia, attention deficit disorder, impaired executive and social

functioning, hyperactivity, and a constellation of other problems identified by experts at the penalty phase trial. (XVI RT 3124-3145, 3157- 3169.)

Accordingly, for foregoing reasons, and reasons previously set forth in the Appellant's Opening Brief (AOB 348-349), the instructional errors were not harmless beyond a reasonable doubt.

XVIII

BELL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S HANDLING OF ISSUES ARISING CONSEQUENT TO THE OUTBURST IN THE COURTROOM.

Respondent asserts that appellant has failed to establish either deficient performance or prejudice as the result of trial counsel's failures: (1) to object to the use of physical restraints; and (2) request an admonition explaining that Bell was excused from the trial for good cause. (RB 157.)

Regarding counsel's failure to object to the particular restraints used, respondent argues that counsel was present during Bell's outburst, and the court's finding of the "manifest necessity for restraints." (RB 158.) It is argued that counsel must have reasonably believed that restraints were necessary, and that there was no basis for objecting to the use of the stun belt. (RB 158.) First, the court did not make a finding of "manifest necessity" for the particular restraints that were used; the court delegated that judgment to courtroom security personnel. (AOB, Argument XVII; ARB XVII.) Second, trial counsel's on-the-record statements bespeak his belief that the bailiffs were employing more onerous methods of restraint than were necessary under the circumstances. (XV RT 3080; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 728; *People v. Duran, supra*, 16 Cal.3d at p. 291, fn. 9.) Under the circumstances, vigorous advocacy demanded an objection. An attorney may not refrain from objecting to the use of a particular restraining device, such as a stun belt, merely because he or she concludes, "that the trial court was going to require restraints no matter what." (*Wrinkles v. Buss* (7th Cir. 2006) 537 F.3d 804, 814.)

Respondent suggests that counsel was not ineffective for failing to make "'frivolous or futile motions.'" (RB 158; citation omitted.) The record does not support a finding that it would have been futile or frivolous for

counsel to object to the use of excessively onerous restraint devices that could not be concealed from the jurors. Had counsel pointed out to the court the impropriety of deferring to the judgment of courtroom deputies, and advocated for less onerous methods of restraint, it is reasonably probable that less arduous and visible alternatives would have been employed.

In fact, courtroom security personnel did not request the contemporaneous use of handcuffs, chains, Taser and a stun belt. Rather, one bailiff initially presented three discrete alternatives that included "full chains," a Taser, or a stun belt, not all three. (XV RT 2079.) The bailiff expressed a preference for full chains, or full chains with a Taser. (XV RT 3079.) The possibility of using the stun belt was fleetingly discussed, with the reservation that the deputies qualified to use the device were on vacation. (XV RT 3 079.) Another member of the security staff expressed a preference for using a stun belt. (XV RT 3085.) Ultimately, the court left the selection of restraint devices to the bailiffs, and specifically refrained from making a specific order to use a stun belt. (XV 3081, 3083, 3084, 3085, 3097.)

Counsel was concerned about the visibility of the restraints to the jury, and clearly did not agree that extreme security measures were really necessary, given the transient nature of Bell's emotional outburst in the face of his mother's distress. Under the circumstances, counsel's failure to object to the trial court's abdication of responsibility for the choice of restraints, and near total lack of advocacy in favor of using the least onerous type of restraint, was strategically inexplicable and fell below professional norms. (*Wrinkles v. Buss, supra,* 537 F.3d at p. 814.)

Regarding counsel's failure to request an instruction admonishing the jury that Bell's absence was for good cause, respondent argues that the instruction would have been "erroneous and contrary to the instructions

actually given directing the jury not to speculate on appellant's absence." (RB 159.) Respondent does not explain in what manner such an instruction would have been "erroneous." The record unambiguously shows that on April 9, 1999, Bell was not excluded from the courtroom for being disruptive, or for threatening to be disruptive. (*People v. Jackson, supra*, 13 Cal.4th at p. 1211 [defendant appeared in court with a black eye, and did not want to make a negative impression].) The court excused Bell from the proceedings because he had been injured in the prior day's melee, and did not feel he could tolerate the pain and discomfort of being chained to a wheelchair in the courtroom.

Black's Law Dictionary defines "good cause" as a "legally sufficient reason." (Black's Law Dict. (9th ed. 2009) p. 251, col. 1.) The injury or illness of a defendant is generally regarded as good cause to justify granting a motion for mistrial or a request to continue the trial. (*People v. Avila* (2004) 117 Cal.App.4th 771, 777; see also, *People v. Wilcox* (1960) 53 Cal.2d 651, 655 [defendant's absence from court caused by serious illness as good cause to vacate the forfeiture of bail].) Merely because the trial court chose to excuse Bell from being present, rather than to grant a mistrial, or a continuance sufficient to allow Bell to recover, does not mean that Bell's absence due to injury was not justified by "good cause."

In order to prevent the obvious prejudice that would result if jurors made the natural assumption that Bell's absence was attributable to ongoing dangerous or disruptive behavior, counsel should have requested an admonition to disabuse the jury of such a notion. (*Blackwell v. Brewer*, supra, 562 F.2d at p. 600; *State v. Garcia-Contreras, supra*, 953 P.2d at p. 541.) There is no reason to assume the trial court would have refused to give such an instruction if requested. (*People v. Jackson, supra*, 13 Cal.4th at p. 1212 ["the court properly informed the jury that defendant had been

voluntarily excused for good cause and that the jury was not to consider his absence in any respect."].)

Respondent argues, in essence, that it would have done more harm than good to inform jurors that Bell was absent for "good cause," because jurors would have assumed that "good cause" meant that appellant posed a danger and had to be kept out of the courtroom. (RB 160.) Had counsel requested an instruction explaining the reasons for Bell's absence, it is unlikely he would have crafted an instruction that jurors would take to mean that Bell's dangerousness was the "good cause" justifying his absence from the courtroom. An admonition as simple as, "Mr. Bell has been excused from the proceedings today at his request, and his lawyers' request, for health-related reasons," would have sufficed. Additionally, the court could have instructed jurors not to speculate about the nature of the defendant's health problem, and not to consider his absence from the trial for any reason.

Last but not least, without any discussion, respondent asserts the lack of any reasonable probability that Bell would have obtained a more favorable result but for counsel's failure to request instructions explaining that Bell's absence was justified by good cause. (RB 160.) Respondent offers no substantive argument on the prejudice issue that has not been thoroughly debunked in appellant's previous arguments. (See, AOB, Argument, XVIII (E).)

Appellant asserted a third ground for finding the denial of effective assistance of counsel: that counsel failed to object to the use of Bell's outburst in the courtroom as aggravating evidence at the penalty phase trial. (AOB 356.) Respondent fails to offer any argument at all in response to this argument. (RB 157-160.) This Court should interpret respondent's omission as a concession that Bell was deprived of the effective assistance of counsel by virtue of counsel's failure to object to the use of the outburst in the

courtroom as aggravating evidence, despite the fact that all twelve jurors were percipient witnesses to—and even perceived themselves to be near victims of—this alleged act of "violent" criminal conduct. (*People v. Bouzas*, *supra*, 53 Cal.3d at p. 480.)

Furthermore, for the reasons set forth in Argument XVIII (E) of the Appellant's Opening Brief (AOB 357-358), counsel's trifecta of omissions should be found individually and cumulatively prejudicial, and sufficient to undermine any confidence in the outcome of the penalty phase trial.

ARGUMENT SECTION 7

ERRORS RELATING TO THE ADMISSION OF EVIDENCE DURING THE PENALTY PHASE

XIX

CONTRARY TO RESPONDENT'S ASSERTION, THE TRIAL COURT ABUSED ITS DISCRETION AND EVISCERATED BELL'S RIGHT TO A FAIR PENALTY TRIAL AND A RELIABLE DEATH DETERMINATION BY ALLOWING THE PROSECUTOR TO PLAY A VIDEOTAPE OF THE VICTIM'S WEDDING CEREMONY AND CELEBRATION.

A. The Record:

At the penalty phase trial, the trial court allowed the prosecution to play for the jury a four-minute excerpt of the victim's wedding videotape. (XVI RT 2755-2761.) The objections and rulings leading up to the presentation of this evidence are set forth in full in the Appellant's Opening Brief. (AOB 359-361.) Rather than re-summarizing the procedural facts again here, appellant incorporates by reference the factual summary contained in his opening brief. (See also, RB 160-167, in which respondent quotes at length from the record.)

B. Discussion:

Respondent argues that trial court's ruling, allowing the playing of a videotape of the victim's wedding, was well within the court's discretion, and did not render Bell's penalty trial fundamentally unfair. (RB 168-170.) Respondent reasonably relies on this Court's prior decisions, which have held that multi-media presentations, or videotapes depicting the victim in life, may properly be received to show the full extent of the harm caused by the defendant's conduct. (RB 168-170.) It is true that this Court has generally rejected defendants' constitutional challenges to the use of these

types of victim impact evidence. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 882-883; *People v. Vines* (2011) 51 Cal.4th 830, 887; *People v. Prince* (2007) 40 Cal.4th 1179, 1289.)

This case presents unique circumstances, which are neither discussed nor addressed by respondent in Argument XIX of the Respondent's Brief. The prosecution showed two videotapes, not just one. In short temporal proximity during the penalty phase of the trial, the prosecutor showed the videotape of the victim getting married, and videotape and audiotape of the victim groaning in agony as he lay dying. A multiplicity of errors "though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error...." (*People v. Hill, supra*, 17 Cal.4th at p. 844) Accordingly, even if the showing of the wedding videotape, standing alone, was not an abuse of discretion, the combination of the two videotapes invited a purely irrational response from the jury that would have made it impossible for the jury refrain from imposing "the ultimate sanction as a result of an irrational purely subjective response to emotional evidence." (XVIII RT 3694.) This put a "heavy thumb on the prosecutor's side of the scale" in the determination of penalty (*Kelly v. California* and *Zamudio v. California* (2008) 555 U.S. 1020, 1026 [172 L.Ed.2d 445, 129 S.Ct. 564]), and completely undermined Bell's interest in due process and a reliable determination of penalty.

In *Kelly v. California, supra,* 555 U.S. 1020, in which the United States Supreme Court denied certiorari in *People v. Kelly* (2007) 42 Cal.4th 763, Justices Stevens and Souter wrote separate opinions discussing the reasons why they would have granted the certiorari petitions. These judges opined that certiorari should be granted to revisit the need to "elucidate constitutional guidelines" governing the scope of permissible victim impact evidence. (555 U.S., at p. 1027.) In earlier briefing, appellant suggested that this Court heed the advice of Justices Souter and Breyer, and for the

guidance of California's trial courts, place clear limits on the use of victim impact evidence that vastly exceeds the "'quick glimpse'" of the victim's life contemplated by the United States Supreme Court when it decided *Payne v. Tennessee, supra.* (AOB 364-366.)

For the foregoing reasons, and the reasons previously set forth in the Appellant's Opening Brief, this Court should find that the playing of the victim's wedding videotape, juxtaposed with the videotape of the victim dying, was "'so unduly prejudicial'" as to render the trial "'fundamentally unfair.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

XX

THE TRIAL COURT ABUSED ITS DISCRETION PURSUANT TO EVIDENCE CODE SECTION 352, AND VIOLATED BELL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND RELIABLE DEATH DETERMINATION BY ADMITTING EVIDENCE THAT BELL REQUESTED THE PLAYING OF "GANGSTA RAP" MUSIC DURING THE BEATING OF PATRICK CARVER.

A. The Record:

The Appellant's Opening Brief includes a lengthy description of the events and proceedings that led up the introduction, over defense objection, of testimony that Bell requested the playing of "gangsta rap" music during the beating of Patrick Carver. (AOB 369-371.) Rather than restate those facts again here, appellant incorporates by reference the facts set forth in support of the claim in the opening brief. (See also, RB 170-174.)

B. Discussion:

Respondent argues that court has much narrower discretion to exclude evidence at the penalty phase of a capital trial. (RB 174.) Respondent's argument ignores federal decisional law, which holds that inflammatory evidence of a defendant's association with a gang is inadmissible at the sentencing phase of a capital trial unless relevant prove some material fact in issue. (See, *Dawson v. Delaware* (1992) 503 U.S. 159 [117 L.Ed2d 309, 112 S.Ct. 1093] [hereafter, *Dawson*].) In *Dawson*, the United States Supreme Court held that it was a violation of the First Amendment and the Fourteenth Amendment's Due Process Clause to admit evidence at the penalty phase of a capital case that the defendant belonged to the notorious white supremacist prison gang, the Aryan Brotherhood. The court opined that, inasmuch as the defendant's gang membership was

not related to the capital murder, not relevant to prove any of the aggravating circumstances, and not relevant to rebut evidence of mitigating circumstances, the Aryan Brotherhood evidence had no purpose but to convince the jury that the defendant deserved to die because he harbored "morally reprehensible" beliefs. (*Id.*, at p. 167.)

Respondent cites *People v. Bonilla* (2007) 41 Cal.4th 313, 353-354 (RB174), which holds that a court's discretion to exclude photographs "is much narrower at the penalty phase than at the guilt phase.... because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences." (*Id.*, at p. 353; accord: *People v. Anderson, supra,* 25 Cal.4th at p. 591, quoted at RB 175.) The issue here is not whether the trial court erred by admitting photographs at the penalty phase to prove the murder's "gruesome consequences." The issue is whether the court abused its discretion by allowing a lay witness to characterize the music being played during the assault as "gangsta rap." This evidence added nothing to the proof that a violent assault was committed, but merely injected a highly inflammatory yet irrelevant inference—that Bell was a member of or associated with a gang, or was acting pursuant to the dictates of violent gang culture—without any reliable, admissible evidence that this was the case.

Respondent also cites *People v. Jablonski* (2006) 37 Cal.4th 774, 834, as an example of the court's limited discretion to exclude evidence at the penalty phase of a capital trial. (RB 174.) In *Jablonski*, the defendant was charged with the capital murders of two women, allegedly committed while the defendant was engaged in the commission of rape and sodomy. During the penalty phase, the People presented evidence of numerous violent sexual crimes committed by the defendant against myriad women other than the murder victims. In one such incident, the defendant brandished a gun at a female victim while he was stopped at a rest stop. The

woman was able to escape when the defendant lost his grip on the gun and dropped it. (*Id.*, at p. 795.)

On appeal, the defendant argued that the trial court erroneously admitted his tape-recorded description of his desire to sexually assault and murder the woman he saw at the rest stop. The evidence was received pursuant to Evidence Code section 1101, subdivision (a), to prove the defendant's intent when he brandished his gun at the woman at the rest stop. (*Id.*, at pp. 833-834.) This Court found no error, inasmuch as the evidence was received for a proper purpose, to prove sexual intent, and the jury was given an instruction limiting the jury's consideration of the evidence for that purpose. (*Id.*, at p. 934.) In this case, perpetrator's intent was not the issue and no limiting instruction was given.

Here, as in *Dawson v. Delaware*, *supra*, the "gangsta rap" evidence was irrelevant to any contested issue in the case. Lawrence Smith testified first, and offered one account of the assault. According to Smith, the motive for the assault was that the participants in the assault believed Carver was a child molester. (XV RT 2969-2970.) The defense then called Joseph Black, who disputed Smith's account of the Carver assault. Black testified that the motive for the beating was Carver's nonpayment of rent to someone named Carla Wallace. (XVI RT 3370-3375, 3384.) The People called Patrick Carver, the assault victim, as a rebuttal witness. Carver denied that he was a child molester, and concurred with Black that the beating was inflicted because he owed Carla Wallace rent money. (XVIII RT 3576-3578, 3582-3584.) Carver also testified that "Mike Brown" was the person who assaulted him, and that Bell, the person in court, was not the person who had beaten him up. (XVIII RT 3556-3607.) Smith's testimony that Bell ordered Black to put on Dr. Dre's "gangsta rap," and then stated, "You know how I get when I hear my Dre," was completely tangential to the jury's task of determining whether Bell participated in the assault on

Carver, and whether his amounted to criminal activity involving the "use or attempted use of force or violence or the express or implied threat to use force or violence." (§190.3, subd. (b).)

Respondent also cites *People v. Virgil*, *supra*, 51 Cal.4th at p. 1276, as support for the trial court's exercise of discretion to admit the "gangsta rap" evidence in Bell's case. (RB 175.) At issue in *Virgil* was the admissibility of "victim impact" evidence that pertained to a victim of one of the defendant's alleged section 190.3, subdivision (b) prior violent crimes. The victim testified at the penalty phase that the defendant had violently assaulted her, kicking her, trying to suffocate her, and stabbing her 20 times in the face, arm, stomach and leg. (*Id.*, at p. 1232.) For the first time on appeal, the defendant argued that it was improper to admit testimony regarding the effects of the defendant's violent assault on one of the female assault victims. (*Id.*, at p. 1276.)

In *Virgil*, in contrast to this case, the defense attorney did not object to the evidence in the trial court; this Court therefore declared that the issue was forfeited for purposes of the appeal. On the merits, this Court additionally held that the "admission of evidence about the impacts of a capital defendant's other violent criminal activity does not violate the state or federal Constitutions." (*Ibid.*)

In this case, unlike the situation presented in *Virgil*, the "gangsta rap" evidence had no probative value to show the *impacts* of Bell's assaultive conduct on the alleged victim, Patrick Carver. Testimony by Smith that Bell requested the playing of Dr. Dre's "gangsta rap" music during the assault on Carver had no conceivable purpose except to bias the jury. Bell did not write the music or the lyrics. It was not a theory of the People's case that Bell's actions toward Carver mirrored the lyrics of whatever "gangsta rap" titles were playing. Indeed, the prosecutor admitted she had no idea what songs were playing. (XV RT 2919, 2921-2922; cf.

Holmes v. State (Nev. 2013) 306 P.3d 415, 418 [finding no abuse of discretion to admit evidence of "gangsta rap," where the defendant-authored lyrics described details mirroring the charged crimes].)

As appellant previously explained, the term "gangster" has many commonly understood meanings, none of them positive. (AOB 373.) So-called "gangsta rap" music is commonly associated with gangs, drugs and violence. (*Tucker v. Fischbein* (3rd Cir. 2001) 237 F.3d 275, 280 fn. 1 [internal citation omitted].) Injecting the subject of "gangsta rap" music into the mix was just another way to portray Bell as a person of bad character with a predisposition to have acted in the vicious manner described by prosecution witnesses, all of whom were of dubious character.

Respondent argues that, even if erroneous, the admission of testimony that Bell requested the playing of "gangsta rap" during the assault of Carver was harmless beyond a reasonable doubt. (RB 175.) Respondent argues that the jury, having been exposed to "the surveillance video showing the callous and brutal manner appellant fired two bullets killing Francis," testimony regarding Bell's possession of a "shank" in jail, and testimony concerning Bell's "dangerous attempt to evade police while intoxicated," would not have been influenced by something as trivial as his request to hear "gangsta rap." (RB 175-176.)

First, the repeated playing of the surveillance video, including the audio of the victim's agonized dying sounds was also penalty phase error, as was juxtaposing the video of the victim dying with the video of his wedding ceremony. (See, AOB, Arguments VIII & XIX.) The playing of the surveillance video—repeatedly—would have compounded the prejudicial effect of the inflammatory "gangsta rap" references, rather than rendering the evidence harmless. (*People v. Hill, supra*, 17 Cal.4th at p. 844.) Furthermore, appellant respectfully suggests that evidence of a defendant's possession of a "shank" in jail, and his attempt to evade an

arrest for intoxicated driving are significantly more "trivial," and furnish less substantial reasons to impose death, than a defendant's request to play violence-glorifying "gangsta rap" music as the musical accompaniment to an alleged brutal assault.

Additionally, respondent's assertion that the "gangsta rap" references could not have tipped the scales in favor of death ignores the vast amount of mitigating mental health evidence that was presented in support of imposing a life sentence. Jurors may have been convinced that, because Bell listened to "gangsta rap" music, he had a proclivity to engage in the kind of gratuitous violence that is romanticized in it. (See, e.g., *People v. Memory* (2010) 182 Cal.App.4th 835, 848-864 [reversible error to admit evidence of defendant's membership in an outlaw motorcycle club]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 191-195 [reversible error to admit evidence of gang graffiti in the defendant's bedroom].) The evidence additionally created a danger that the jury would improperly weigh Bell's perceived "morally reprehensible" gang values in its life-or-death determination. (*Dawson v. Delaware, supra*, 503 U.S. at p.167.) "Where, as here, the trial is infused with gang evidence, it is simply not possible to assess the fairness of the trial in its absence . . . ." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn. 15.)

ARGUMENT SECTION 8

ARGUMENTS RELATING TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL.

XXI

APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

Respondent's argument that there is no reason for this Court to reconsider its prior holdings that section 190.2 is not impermissibly broad is unsound. This Court should reconsider its prior rulings for the following reasons.

Under California's 1977 death penalty law one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death eligible. (1977 Cal. Stats. 1255-66.) In addition, the 1977 law explicitly limited the death penalty to intentional murders, with the sole exception of multiple or prior murder. (1977 Cal. Stat. 316, § 9 (a)-(d).) Under the 1977 statute, death-eligibility was the exception rather than the rule. (*People v. Green* (1980) 27 Cal.3d 1, 30.)

The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." The clear intent of the voters, as expressed explicitly in the ballot proposition arguments, was to make the death penalty applicable to "every murderer." (1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7.") The Briggs Initiative sought to achieve this result in two ways. First, it expanded the scope of Penal Code section 190.2 to more than double the number of special circumstances compared to the prior law. Second, it substantially broadened the definitions of the prior law's special circumstances, most significantly by eliminating the across-the-board intent-to-kill requirement

of the 1977 law. The Briggs Initiative established 27 separately enumerated special circumstances making a first-degree murderer eligible for the death penalty. Section 190.2, subdivision (a) listed 19 special circumstances, one of which (felony-murder) had 9 enumerated subparts.

In 1990, Proposition 115 added two new felony-murders (mayhem and rape) to the list of special circumstances, eliminated the intent-to-kill requirement for death-eligibility by felony-murder accomplices, and instead required only that the accomplice have acted with "reckless indifference to human life and as a major participant" in the special-circumstance felony. (State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115, § 10 (approved June 5, 1990, and codified as Pen. Code, § 190.2(d)).)

Bell was convicted of a murder committed in 1997, and thus prosecuted under the 1978 death penalty law as amended and expanded in 1990. When the crimes for which Bell was charged were committed, the death penalty law contained 28 special circumstances encompassing nearly all murders.[7] In Appellant's Opening Brief, appellant argued that the death-eligible class created by the California death penalty scheme at the time of the homicide in this case was too broad to comply with the constitutional narrowing requirement set forth in *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726], because of the broad legislative definition of first degree murder, the number of special circumstances, and judicial rulings on both the scope of first degree murder and the special circumstances.

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[7] Another special circumstance – the "heinous, atrocious, or cruel" special circumstance, Penal Code section 190.2, subdivision (a)(14) – had been invalidated by this Court (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 801 and *People v. Sanders* (1990) 51 Cal.3d 471, 520), but remained in section 190.2.

Respondent answers appellant's failure-to-narrow argument by citing one of many cases in which this Court has rejected this challenge to California's death penalty law: *People v. Elliot, supra*, 53 Cal.4th at p. 593. (RB 176.) Following the *Elliot* case back to the authority on which it rests leads to cases like *People v. Stanley* (1995) 10 Cal.4th 764 and *People v. Arias* (1996) 13 Cal.4th 92, 187, in which this Court rejected the claim that California's 1978 death penalty law fails to perform the narrowing function required by the Eighth Amendment. In *Arias*, this Court relied on the United States Supreme Court's decision in *Tuilaepa v. California* (1994) 512 U.S. 967 [129 L.Ed.2d 750, 114 S.Ct. 2630].

In *Stanley*, *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871], was the precedent cited by this Court for the proposition that the failure-to-narrow claim had been rejected by the federal high court. In *People v. Bacigalupo* (1993) 6 Cal.4th 457, this Court wrote, "California's 1978 death penalty statute is essentially identical to California's 1977 death penalty law the United States Supreme Court upheld in *Pulley v. Harris* [citations omitted], in that it 'require[es] the jury to find at least one special circumstance beyond a reasonable doubt,' thereby 'limit[ing] the death sentence to a small subclass' of murders." (*Id.*, 6 Cal.4th at p. 467.)

This Court's assertion that the United States Supreme Court resolved the constitutionality of California's current death penalty sentencing scheme in *Pulley v. Harris, supra*, represents a fundamental misunderstanding of that decision. First and foremost, the defendant, Harris, was prosecuted under California's 1977 death penalty law, which had only twelve enumerated special circumstances. The whole purpose of the Briggs Initiative, which changed the law in 1978, was to substantially expand the reach of the death penalty to include "every murderer." (1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7.")

Additionally, in *Harris*, the issue was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris, supra*, at pp. 43-44.) The issue was not whether the *1978 version* of California's death penalty law sufficiently narrows the pool of death-eligible murderers to comply with the mandate of *Furman v. Georgia, supra*. The Supreme Court's statement in *Harris*, that "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt the statute limits the death sentence to a small subclass of capital-eligible cases" was in reference to a statutory scheme that made a much smaller subclass of murderers eligible for the death penalty than were eligible at the time of Bell's crime.

Under the 1977 law, the statutory special circumstances were limited to: (1) murder was profit; (2) murder perpetrated by an explosive; (3) murder of a police officer killed in the line of duty; (4) witness murder; (5) murder committed during five enumerated felonies, including robbery, kidnaping, rape, performance of a lewd or lascivious act on someone under 14, or burglary; (6) murder involving torture; and (7) multiple or prior murder. (*Pulley v. Harris, supra*, 465 U.S. 53, fn. 13; citing § 190.2 (West Supp. 1978).) The *Harris* opinion expressly acknowledged that the number of special circumstances had been "greatly expanded in the current statute." (*Ibid.*) *Harris* did not discuss, let alone resolve, the issue of whether the "current statute," encompassing 1978 and 1990 increases in the number of death-eligibility factors, meets the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow the class of offenders eligible for a death sentence.

This Court has also erroneously interpreted *Tuilaepa v. California, supra,* 512 U.S. 967, in rejecting California defendants' failure-to-narrow

claims. In *People v. Sanchez, supra,* 12 Cal.4th 1, this Court rejected the claim that "the 1978 law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on the mistaken belief that the United States Supreme Court in *Tuilaepa* had resolved this claim. (*Id.*, at pp. 60-61; accord: *People v. Arias, supra,* 13 Cal.4th at p. 187; *People v. Beames* (2007) 40 Cal.4th 907, 933-934.)

The issue decided in *Tuilaepa* was whether the three of the aggravating factors in section 190.3, which pertained to the *death selection determination*, and *not the death eligibility determination*, were constitutional. (*Tuilaepa v. California, supra,* 512 U.S. at p. 969.) The Supreme Court explicitly declined to address any issue concerning the statutory special circumstances, i.e., California's death-eligibility factors, "save to describe its relation to the selection phase." (*Id.*, at p. 975.)

The narrow scope of the *Tuilaepa* holding is evinced in the concurring and dissenting opinions of Justices Stevens, Ginsburg and Blackman. Justices Stevens, joined by Justice Ginsburg, concurring, stated,

> Accordingly, given the assumption (unchallenged by these petitioners) that California has a statutory "scheme" that complies with the narrowing requirement . . . . I conclude that the sentencing factors at issue in these cases are consistent with the defendant's constitutional entitlement to an individualized "determination that death is the appropriate punishment in a specific case."

(*Tuilaepa*, at p. 984; internal citation omitted.)

Justice Blackman, dissenting, was critical of the absence of any discussion regarding the constitutional adequacy of the eligibility process, and the petitioners' failure to mount a narrowing challenge.

> Additionally, the Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is

> convicted of first-degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.

(*Id.*, at p. 994.)

The United States Supreme Court has yet to consider, let alone sanction, the method of determining who is eligible for a death sentence in California. In rejecting claims that California's statutory scheme does not adequately narrow the pool of murderers eligible for death, this Court has relied upon two cases from the United States Supreme Court that either explicitly declined to rule on the question, or explicitly stated that their holding was limited to the 1977 death penalty law, not the "greatly expanded" 1978 statute. This Court should recognize that the United States Supreme Court has never addressed whether California's expansive list of death-eligibility factors meaningfully narrows the class of offenders eligible for the death penalty to those most deserving of death. (*Furman v. Georgia, supra*, 428 U.S. at pp. 877-878; *Gregg v. Georgia, supra,* 428 U.S. at p. 222.) The issue should, accordingly, be revisited.

XXII

BELL'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Argument XXII of the Appellant's Opening Brief, appellant raised (pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-305) the above contention that this Court has previously rejected. (AOB 386-388.) The People predictably agree that the contentions have previously been rejected, but disagree that the issues should be revisited. (RB 177.) No further argument is likely to assist the court. Accordingly, the issue is submitted on previous briefing.

XXIII

CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Argument XXIII of the Appellant's Opening Brief, appellant raised (pursuant to *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-305) a multiplicity of constitutional challenges to the death penalty that this Court has previously rejected. (AOB 389-416.) The People predictably agree that the contentions have previously been rejected, but disagree that the issues should be revisited. (RB 177-179.) No further argument is likely to assist the court. Accordingly, the issues encompassed in Argument XXIII of the Appellant's Opening Brief are submitted on previous briefing.

XXIV

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

In Argument XXIV of the Appellant's Opening Brief, appellant raised (pursuant to *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-305) an equal protection challenge to California's death penalty statute that this Court has previously rejected. (AOB 417-420.) The People predictably agree that the contention has previously been rejected, but disagree that the issue should be revisited. (RB 180.) No further argument is likely to assist the court. Accordingly, the issue is submitted on previous briefing.

XXV

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Argument XXV of the Appellant's Opening Brief, appellant raised (pursuant to *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-305) a claim that California's use of the death penalty violates international norms, as well as the Eighth and Fourteenth Amendments. This Court has consistently rejected these arguments in prior cases. (AOB 421-425.) The People agree that the contentions have previously been rejected, and disagree that the issues should be revisited. (RB 180-181.) No further

argument is likely to assist the court. Accordingly, the issues are submitted on previous briefing.

XXVI

THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS DEPRIVED THE GUILT AND PENALTY PHASE JUDGMENTS OF FAIRNESS OR RELIABILITY.

The Appellant's Opening Brief summarizes the main errors in the case, of which there were a substantial number at both the guilt and penalty phases of the trial. (AOB 426-428.) Respondent asserts that there were no errors committed by the trial court in Bell's case. (RB 181.) Respondent alternatively argues that, assuming there was any error, "any adverse effect attributable to such an assumed error did not tend to aggregate with adverse effects from any other assumed error, and there was no possible accumulation of harms amounting to prejudice." (RB 181.)

Respondent's argument implicitly, if not expressly, acknowledges state law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill, supra*, 17 Cal.4th at 844-845.)

Bell was not entitled to a "perfect trial," but he was entitled to a trial in which guilt and penalty were "fairly adjudicated." (*Hill*, at P. 844.) Neither guilt nor punishment was fairly adjudicated in this case. (See, AOB426-428.) As appellant has previously argued, even if no single error was sufficiently prejudicial to require reversal, the cumulative effect of so many errors deprived the guilt and penalty phase judgments of any semblance of reliability. Clearly, "if ever there were a case for application of cumulative error principles, this is it." (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Hill*, at pp. 844-848; *In re Jones* (1996) 13 Cal.4th

552, 587.)

CONCLUSION

For the foregoing reasons, and the reasons previously set forth in the Appellant's Opening Brief, the judgment should be reversed. Additionally, Mr. Bell should be afforded any further relief supported by the law and evidence including, in the alternative, reversal of the death judgment, and/or remand the matter for an *in camera* review of Tory's confidential conversations with his counsel to determine whether Bell was denied critical impeachment evidence stemming from what was said by the parties during plea bargaining discussions.

Dated: March 4, 2015

Respectfully submitted,

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WORD COUNT CERTIFICATE
PEOPLE V. MICHAEL BELL, S080056

I certify, pursuant to California Rules of Court, rule 8.630, as follows:

Microsoft Word for Mac 14.2.5 (2011) was used to create this document.

The Microsoft Word for Mac properties program indicates that the attached Appellant's Reply Brief, exclusive of certificates, tables and indices, and proof of service, has a typeface of Times New Roman 13 points, and contains 47,028 words.

Dated: March 6, 2015

Respectfully submitted,

Melissa Hill
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Michael Leon Bell

PROOF OF SERVICE

I reside in the State of New Mexico, Sandoval County. I am over the age of 18 years and a duly-licensed California attorney. I represent Michael Leon Bell, the appellant in this action. My business address is PO Box 2758, Corrales, New Mexico, 87048.

On March 7, 2015, I served the attached Appellant's Reply Brief on the following interested parties by placing true copies thereof, enclosed in a sealed envelope with postage prepaid, in the United States mail in Corrales, New Mexico, addressed as follows:

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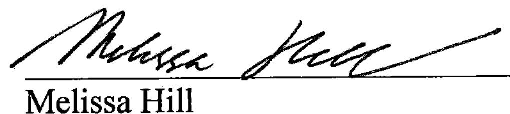
I declare under penalty of perjury the laws of the State of California that this statement is true.

Executed this 7th day of March, 2015, at Corrales, New Mexico.



Melissa Hill