No. S080840
(Los Angeles Co. BA109525)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GLEN ROGERS,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE JACQUELINE A. CONNER, JUDGE, of the Superior Court)

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v.	)	(Los Angeles County Sup. Ct. No. BA109525)
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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to those of respondent's contentions that are adequately addressed in his opening brief. The failure to reply to any particular one of respondent's contentions or allegations, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

In particular, as to appellant's arguments regarding the "[m]any features of California's capital sentencing scheme [that] violate the United States Constitution" (AOB Arg. XI), respondent merely cites this Court's prior cases in contending that those arguments are meritless. (RB 144-151.)

Thus, respondent has not rebutted appellant's arguments, and has offered no basis, aside from *stare decisis*, for continuing to follow fundamentally-flawed precedents. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of *stare decisis* . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [*stare decisis* serves important values, but "should not shield court-created error from correction"].) Accordingly, no further response is provided as to that claim.

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I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT APPELLANT COMMITTED TWO SUBSEQUENT OUT-OF-STATE MURDERS TO PROVE THAT THE CHARGED MURDER WAS PREMEDITATED

Appellant has argued that his convictions and sentence must be reversed because the trial court admitted guilt phase evidence under Evidence Code section 1101(b) ("section 1101(b)") that he killed two *other* women as proof that the charged murder was premeditated. (AOB 30-88.) Appellant has argued that the "other crimes" evidence was inadmissible as proof of premeditation under section 1101(b) for several reasons, including that: (1) other crimes evidence is inadmissible as proof of intent where identity is disputed, as it was here (*id.* at pp. 43-46); (2) appellant's offer to stipulate that the charged crime *was* premeditated made the other crimes evidence unnecessary (*id.* at pp. 47-56); and (3) the charged and uncharged murders were insufficiently similar to support an inference of premeditation under section 1101(b). (*Id.* at pp. 57-69.) Further, appellant has argued that the evidence should have been excluded under Evidence Code section 352 ("section 352") because it was far more prejudicial than probative (*id.* at pp. 70-77), and that admitting the evidence was reversible error under both state law and the federal constitution. (*Id.* at pp. 78-88.)

Respondent disputes all those claims. First, respondent contends that the out-of-state murders were sufficiently similar to the charged crime "to support an inference that appellant harbored the same intent on each occasion." (RB 69-73.) Second, respondent contends that the evidence was properly admitted to prove premeditation, "notwithstanding any dispute concerning identity," because (a) this Court has purportedly approved using other crimes evidence in that way, and (b) the trial court was entitled to "rely on" appellant's pretrial representation that identity would not be

disputed in admitting the evidence to prove premeditation, even though appellant later changed his trial strategy. (*Id.* at pp. 73-76; see 6 RT 104-105.) Third, respondent contends that the trial court properly refused to enforce appellant's proposed stipulation "that the charged murder was premeditated," which would have rendered the other crimes evidence completely irrelevant, because (a) the evidence was "independently admissible to show that appellant engaged in a common plan" and to establish the prior-murder-conviction special circumstance allegation (*id* at p. 77-78), and (b) enforcing the stipulation would have made the prosecution's case less "persuasive[] and forceful[]." (*Id.* at pp. 78-79.) Fourth, respondent contends that the evidence was more probative than prejudicial because it was "tremendous[ly]" relevant to "intent and common plan," and to the special circumstance allegation. (*Id.* at pp. 79-82.) Finally, respondent contends that any error was harmless because (a) there was overwhelming evidence of appellant's guilt even without the other crimes evidence, and (b) the jury was instructed not to consider the evidence except in deciding whether the murder was committed "'with premeditation, and not as a result of rage or provocation or other heat of passion.'" (*Id.* at pp. 82-84.) None of those contentions withstand scrutiny.

A. The Uncharged Crimes Evidence Was Not Admissible *Under Section 1101(b)*

Respondent addresses appellant's arguments concerning the admissibility of the evidence under section 1101(b) in reverse order, contending first that the uncharged murders were sufficiently similar to the charged one to be relevant as evidence of appellant's intent, and then contending that appellant's intent was a material and disputed issue at trial. (RB 69-79.) That approach is both theoretically unsound – since it puts the cart of factual relevance before the horse of materiality – and somewhat

misleading, because it allows respondent to argue that the supposed similarity between the uncharged murders and charged murder made the former relevant to prove that appellant premeditated the latter without first showing why any evidence of premeditation was necessary in light of appellant's offer to *stipulate* to that element of the charge. Nonetheless, appellant has addressed respondent's contentions in the order in which they are set out in its brief.

1. The Charged and Uncharged Murders Were Insufficiently Similar

Respondent's basic contention is that the trial court "acted well within its discretion" in admitting evidence about the uncharged murders because they and the charged murder "shared common features that indicated the existence of a plan." (RB 69.) Thus, respondent asserts that appellant did the following in each of the murders: (1) met an "unaccompanied female" aged between 31 and 37 years at a bar; (2) "engineered for [her] to drive him back either to" his or her "place;" (3) killed her in a "small enclosed area (the cab of a truck, a bathtub, and a waterbed);" (4) took property, "as an afterthought," after killing the victim; and (5) first "took steps to conceal his crimes," then fled. (*Id.* at pp. 69-70.)

Respondent's claim that the crimes were sufficiently similar requires only a brief response, because appellant's opening brief explains in some detail why those crimes were *not* sufficiently similar to pass muster under section 1101(b). (AOB 57-67.) However, one point that should be made regarding that claim is that respondent both exaggerates the similarity between the crimes and downplays their crucial differences. Thus, respondent relies on rather quotidian similarities between the crimes – e.g., that appellant (1) "fled" after each murder, and (2) employed the supposedly distinctive "methodology" of "pick[ing] up" women who "were

unaccompanied" by men. (RB 70-71.) Moreover, while respondent makes too much of those trifling similarities, it completely ignores the most striking dissimilarity between the crimes: that only in the charged murder was the victim was strangled and/or set on fire. (11 RT 1100-1101.) Since, as this Court has recognized, courts are traditionally reluctant to admit other crimes evidence because it is so innately prejudicial (*People v. Hovarter* (2008) 44 Cal.4th 983, 1002), that basic dissimilarity between the charged and uncharged murders should have led the trial court to exclude the evidence.

Respondent's only specific contention that requires a substantive response is the claim that, because the uncharged murders were purportedly offered to prove that they and the charged murder involved a common plan, the crimes did not need to "share unusual or distinctive marks . . . ." (RB 70, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) That contention fails because the crimes were not sufficiently similar to meet the standard this Court has set for other crimes evidence offered to prove the existence of a common plan; i.e., that the charged and uncharged crimes must show "'not merely a similarity in results, but such a concurrence of common features that the various acts are to be naturally explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, quoting 2 Wigmore, Evidence (Chadbourne rev. ed. 1979) §304, p. 249.) That was simply not the case here.

These alleged crimes were far more like random outbursts of rage than the "manifestations" of any kind of plan. Thus, if appellant committed the uncharged murders he must have done the following: (1) arrived in Louisiana on or about November 2, 1995; (2) met and stayed with Ms. Sutton that night; (3) taken the bus to Tampa on the 3rd; (4) met and murdered Ms.

Cribbs there on the 5th; and (5) returned to Louisiana and killed Ms. Sutton on the 9th. To describe those seemingly frenzied actions as the manifestations of a "general plan" is absurd; they are more akin to the random acts of someone in the grip of a feverish psychosis. Moreover, those alleged acts are far different from those of the defendants in *Ewoldt* and the cases upon which *Ewoldt* relied in holding that "evidence of uncharged crimes is admissible to establish a common design or plan." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 401.).

Thus, unlike the crimes at issue here, the charged and uncharged crimes in *Ewoldt* do appear to have been separate manifestations of a common plan, since in each case the defendant molested one of his stepdaughters – both of whom were about the same age and lived with the defendant – in an "almost identical fashion" while they slept. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) Moreover, in each case the defendant offered the same excuse when challenged: that he was only "'straightening up the covers.'" (*Ibid.*) The facts in *Ewoldt* were thus consistent with those of the cases on which the Court relied in holding that other crimes evidence is admissible when crimes are "sufficiently similar to support the inference that they are manifestations of a common plan or design." (*Id.* at pp. 402-403; *People v. Lisenba* (1939) 14 Cal.2d 403 427-428 [in both cases the defendant drowned his wife in a staged accident after obtaining a double-indemnity, accidental death policy, and after previously trying to stage such an accident]; *People v. Peete* (1946) 28 Cal.2d 306, 310-313 [in each case the defendant killed a homeowner, buried him/her, and attempted to take over the house]; *People v. Ing* (1967) 65 Cal.2d 603, 612 [in each case the defendant raped a patient seeking an abortion after rendering her unconscious].)

The *Ewoldt* Court properly held that under the facts of that case, like those in *Lisenba*, *Peete* and *Ing*, the charged and uncharged offenses were

sufficiently similar to establish that the crimes were linked by a common plan. (7 Cal.4th 402-403.) But that standard was not met here. Unlike in *Ewoldt* and the cases it relied on, where the defendants employed pre-designed strategies to accomplish specific criminal purposes – molesting children, defrauding insurers, mulcting property owners, raping patients – the acts appellant allegedly committed can only be called a senseless rampage.

2. The Uncharged Murders Were Inadmissible To Prove Premeditation Because Identity Was Disputed

Respondent offers two responses to appellant's argument that the other crimes evidence was inadmissible as proof of intent because "identity was the primary disputed issue in this case." (AOB 43.) Respondent first contends that appellant's argument fails because the case upon which it largely relies – *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153 – does not apply to criminal cases. (RB 74-75.) Respondent's contention is that because appellant indicated when "the admissibility of the [other crimes] evidence was [first] litigated" that the issue of identity would not be disputed, the trial court was entitled to rely on that representation in admitting the evidence on the issue of intent, despite the fact that appellant later informed the court that he would dispute identity, and asked the court to exclude the other crimes evidence in light of that change in strategy. (*Id.* at p. 76; 6 RT 105.) Those contentions fail.

Respondent first contends that application of the *Hassoldt* rule – "that where the identity of the actor is in dispute . . . uncharged misconduct is not admissible" as proof of intent unless it meets *Ewoldt*'s standard for the admissibility of evidence of identity (*Hassoldt, supra*, 84 Cal.App.4th at pp. 166-167) – in criminal cases would contradict this Court's holding that the degree of similarity between charged and uncharged crimes required under section 1101(b) varies "depending on the element" that evidence is offered to

prove. (RB 74-75.) The gist of respondent's argument is that, since a "not guilty plea places *all* issues in dispute, including identity, intent, and common plan" (*id.* at pp. 74-75, italics original, citing *People v. Roldan* (2005) 35 Cal.4th 646, 705-706), if the *Hassoldt* rule was applied in criminal cases prosecutors would be required to establish that the uncharged crimes meet the "highest level of similarity" every time they offer other crimes evidence, "regardless of the purpose" for which that evidence is offered. (*Id.* at p. 75.) That argument fails because it is one-sided and logically flawed.

The argument completely ignores the unfairness that would result if respondent's view of the law was accepted. Thus, respondent contends in essence that because intent is always disputed when a defendant pleads not guilty – in other words, in every criminal trial – other crimes evidence is always admissible if it meets the *lowest* standard of similarity to the charged crimes, even if identity is disputed, and/or the defendant offers to stipulate to the element of intent. If respondent's analysis is correct, courts deciding whether to admit other crimes evidence are required to apply a uniformly *low* standard of similarity to the charged offense. That would be grossly unfair to defendants because highly prejudicial other crimes evidence would be admitted in almost every case, regardless of the defense offered or the issues in dispute, and would also undermine *Ewoldt*'s carefully-crafted framework for evaluating the admissibility of other crimes evidence. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.)

On the other hand, and despite respondent's suggestion to the contrary (RB 75), it would be completely consistent with *Ewoldt* to apply the *Hassoldt* rule in criminal cases. Moreover, the only "harm" that would result from applying that rule is that in cases where identity is disputed, and the charged and uncharged crimes are not highly similar, prosecutors would be obliged to prove their cases without the aid of evidence that is "so prejudicial that its

admission requires extremely careful analysis." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

Respondent's second contention – that the trial court was "entitled to rely" on appellant's indication that he would not contest identity, even though defense counsel subsequently announced that the contrary was true, and accordingly asked the court to reconsider excluding the other crimes evidence (RB 76) – is even less convincing. That contention rests on the untenable premise that it is appropriate for the trial court to ignore any concessions or alterations in trial strategy made by the defendant in response to the proffer of highly prejudicial evidence, even when they render that evidence completely unnecessary. That premise contradicts the basic rule that other crimes evidence, like any other evidence, "must be relevant to some ultimate fact in issue" to be admissible. (*People v. Thompson* (1980) 27 Cal.3d 303, 315; Evid. Code, §210.)

Moreover, the cases respondent cites in support of that contention actually stand for nothing more than the unremarkable proposition that a reviewing court must "examine the record before the trial court at the time of its ruling to determine whether" the court's ruling was correct. (RB 76; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Welch* (1999) 20 Cal.4th 701, 739.) Thus, in *Welch* this Court held that the appellant could not rely on appeal on evidence of "his considerable mental problems" that was presented at trial, but was not "before" the trial court when it ruled on his *Faretta* motion. (*Ibid.*) Here, of course, the fact that appellant intended to raise an identity defense *was* before the trial court when he renewed his pre-trial objections to the uncharged murders evidence. (AOB 36-37; 6 RT 211.)

3. The Uncharged Murders Should Have Been Excluded Because Appellant Offered to Stipulate *That the Murder Was Premeditated*

Respondent apparently concedes that enforcement of appellant's proposed stipulation "that the charged crime was a premeditated and deliberate first degree murder" (AOB 49; 6 RT 211-212) would have made the evidence of uncharged murders irrelevant, since it does not argue to the contrary. However, respondent contends that the trial court was "unauthorized to enforce" that stipulation, for several reasons: first, because the uncharged murders were "independently admissible to show that appellant engaged in a common plan;" second, because the evidence concerning the Florida murder was "necessary to prove the special circumstance allegation;" and finally, because enforcement of the stipulation would have hampered the prosecution's presentation of its case, and reduced its "force and effect." (*Id.* at pp. 78-79.) However, respondent's cursory analysis of those supposed reasons is unconvincing.

Respondent's contention that the other crimes evidence was "independently admissible" to show that appellant acted in accordance with a common plan fails for two somewhat interrelated reasons. First, as set forth both above and in appellant's opening brief, the charged and uncharged crimes lacked the higher level of similarity required when evidence is offered to establish a common plan. (*Supra*, at pp. 5-6; AOB 67-68, fn. 2; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402 ["[a] greater degree of similarity is required in order to prove the existence of a common design or plan"].)

Second, again as set forth in appellant's opening brief yet nowhere acknowledged in respondent's brief, the alleged fact that the charged and uncharged crimes were parts of a common plan was not "independently" relevant and/or material in this case. (AOB 66, fn. 24; see *People v. Tassell*

(1984) 36 Cal.3d 77, 84, overruled on another ground in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 401-402.) As the *Tassell* Court explained, common plan "is nothing but a 'subordinate objective of proof, whose relevance depends on some other actual issue, such as mistaken identity or innocent intent.'" (36 Cal.3d at p. 84; see *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 393-394, fn. 2 ["[e]vidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged"].) Thus, respondent's contention that the evidence was "independently admissible" to prove the existence of a common plan fails because whether such a plan existed was not "in dispute." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315; *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 409-410, (dis. opn. of Mosk, J.) ["evidence of an uncharged crime showing a common plan [is] not admissible unless it was a material issue in the sense that it was relevant to prove some disputed ultimate fact"].)

Respondent's next contention – that the evidence was relevant to prove the special circumstance allegation – also lacks merit. Thus, while it is true that the evidence that appellant killed Ms. Cribbs also inferentially supported the allegation that he "had been [] convicted" of first degree murder for committing that crime, such evidence was hardly necessary to prove that allegation. The testimony of Detective Massucci of the Tampa Police Department that appellant had been convicted of murder, and the copy of the verdict form from that case she offered in evidence, were completely sufficient to establish the truth of that allegation. (RT 13 1322-1326.) It was completely unnecessary to provide the jury with a complete recitation of the pitiful facts concerning the Florida murder – including testimony describing and photographs depicting the blood-spattered crime scene (12 RT 1334-1337) – to prove that appellant was convicted of the crime. Finally, even assuming arguendo that the prosecution was somehow required to recount the

grisly details of the Florida murder– including, e.g., the nature of Ms. Cribbs' stab wounds (12 RT 1325-1326, 1343, 13 RT 1623) – to prove the special circumstance allegation, there was clearly no need for *any* evidence about the Louisiana murder, since appellant was never convicted of that crime, and no special circumstance was alleged concerning it.

Finally, respondent contends that enforcing the stipulation would have "'hamper[ed] a coherent presentation of the evidence on the remaining issues' and deprived the prosecution of the 'legitimate force and effect of material evidence.'" (RB 78, quoting *People v. Hall* (1986) 28 Cal.3d 143, 152-156.) That contention also fails, and respondent's argument in support of it is both unintentionally revealing and incoherent. That argument – that excluding the uncharged murders would have harmed the prosecution because without that evidence the jury might not have disbelieved appellant's testimony that Istvan Kele, not he, committed the charged murder (RB 78) – betrays the real reason the prosecutor was so insistent on presenting that evidence: he knew it would convince the jury that appellant *committed* the charged murder, not that he *premeditated* it. Moreover, while respondent claims on the one hand that the prosecution was entitled to present this evidence because it "persuasive[ly] and forceful[ly]" undermined "appellant's defense that another person (Kele) killed Gallagher" (*id.* at p. 79, quoting *People v. Sakarias* (2000) 22 Cal.4th 596, 629) – i.e., because it proved appellant's *identity* as the killer– it claims on the other hand that the limiting instruction effectively prevented the jury from considering that evidence on any issue *other* than whether the crime was premeditated. (*Id.* at pp. 83-84.) The incoherence of that argument reveals the falsity of its underlying premises.

Further, while respondent purports to rely on *People v. Hall*, *supra*, as support for its argument that the proposed stipulation was unenforceable, it

fails to recognize that the main holding of *Hall* is that prosecutors normally "must accept" defense offers to "admit the existence of an element of a charged offense," and must "refrain from introducing evidence of other crimes to prove" that element. (28 Cal.4th at p. 152.) The only cases that meet the "narrow exception" to that rule set out in *Hall* are those where (1) the other crimes evidence is relevant to an issue not covered by the stipulation, or (2) the stipulation is ambiguous, "force[s] the prosecution to elect between theories of guilt," or "hampers a coherent presentation of the evidence on the remaining issues." (*Id.* at pp. 152-153.) Respondent only contends that one of those grounds applies here: that enforcing the stipulation would have hampered the prosecution in disproving appellant's defense that he did not commit the murder. (RB 78-79.) Since the uncharged crimes (1) were purportedly not offered for that purpose, because they were not similar enough to the charged crime to be admissible to prove identity, and, (2) according to respondent could not have been considered by the jury for that purpose in light of the limiting instruction, respondent cannot plausibly contend that it was proper to deny enforcement of the proposed stipulation under *Hall* on that basis.

B. The Evidence Should Have Been Excluded Under Section 352

Respondent's basic contention regarding appellant's claim that the trial court erred in refusing to exclude the other crimes evidence under section 352 – that the evidence "was of great probative value to show appellant's intent and a common plan" (RB 80) – does not require any substantial reply. As appellant has argued, that evidence lacked any substantial probative value because (1) the charged and uncharged crimes were insufficiently similar, and (2) the proposed stipulation would have conclusively established the very fact this evidence purportedly supported by

inference. (AOB 42-77.) The latter point is dispositive: because the prosecution could have conclusively established that the charged murder was premeditated without putting on *any* evidence, by accepting the proposed stipulation, any arguable probative value the evidence had on that issue *cannot* have outweighed its highly prejudicial impact.

Respondent's other specific contentions concerning the trial court's refusal to exclude the evidence under section 352 – (1) that the evidence was relevant to show that all three murders were parts of a common plan, and "highly probative of the special-circumstance allegation," (2) that the evidence was only minimally prejudicial given the limiting instruction read to the jury, and (3) that admitting the evidence did not cause any undue consumption of time because evidence about the uncharged murders "would have been admissible during the penalty phase" (RB 80-82) – are equally ill-founded, and require only brief responses.

As to the first claim, as set forth above, it is meaningless to say that the evidence helped prove that appellant acted in accordance with a common plan in committing the murders, because whether he did so was not a material issue. (*Supra*, at pp. 11-12.) The prosecution had no burden to prove that appellant had such a plan, because that alleged fact is not an element of either the charged crimes or the alleged special circumstance. As appellant has argued, whether the crimes involved such a common plan is normally only at issue "'when (1) there is a question whether the charged crime in fact occurred, . . . or (2) evidence of a common plan is used to prove by inference that [the defendant] committed that crime.'" (AOB 67, fn. 24, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406; see also *People v. Tassell*, *supra*, 36 Cal.3d at p. 84 [common plan "is nothing but a 'subordinate objective of proof, whose relevance depends on some other actual issue'"].) This case did not involve either situation, and whether the evidence showed that appellant

had such a plan is thus irrelevant to weighing whether its probative value outweighed the prejudice engendered by its admission.

Respondent's second contention also fails, because it is irrelevant in this context that the evidence was "highly probative"of the allegation that appellant had been "convicted previously of first degree murder" (RB 80; Pen. Code, §190.2(a)(2)), for several reasons. First, as set forth above, the evidence was not admitted to prove the special circumstance allegation, and was largely irrelevant for that purpose. (*Supra*, at pp. 12-13.) That allegation could have been proven solely with evidence of the conviction itself; there was no need for testimony about how appellant allegedly met, wooed and killed Ms. Cribbs, let alone for evidence about his theft of her car, that he left her wallet in a rest stop trash can, etc. And since that evidence was unnecessary, it lacked any substantial probative value. Moreover, as also set forth above, evidence concerning the Louisiana murder was wholly irrelevant and completely improper. (*Supra*, at p. 13.)

In sum, the prosecution could have proven that appellant had suffered a prior conviction for murder without *any* grisly evidence concerning either uncharged murder – either by way of stipulation or by presenting proof of the fact of the conviction alone. Because this evidence went far beyond what was required to prove that appellant had suffered the requisite prior conviction, and because it included completely irrelevant evidence that he committed another murder for which he was not convicted, it was vastly more prejudicial than probative.

Respondent's contention that the "prejudicial impact" of admitting evidence about the two uncharged murders "was necessarily minimized by the limiting instruction" concerning that evidence requires only a brief response. As appellant has argued, that instruction – which told the jury to consider the evidence that appellant committed two other murders in deciding

whether he *premeditated* the charged murder, not whether he *committed* that murder – could not have negated the overwhelmingly prejudicial impact of the evidence because it is so unlikely the jurors were able to follow it. (AOB 76-77.) Few jurors could follow such an instruction in any case, and it must have been particularly difficult in this one, since appellant's testified that he was the innocent victim of an unusually incriminating set of circumstances, and the prosecutor argued that the evidence that appellant committed the uncharged murders also proved that he committed the charged murder as "part of a common scheme or plan" that arose out of his "hatred [] of women. . . ." (*Id.* at p. 77; 15 RT 1827-1828, 1835.) Respondent's contention that the jurors actually did compartmentalize their consideration of the evidence as required by the instruction is naive at best.

Finally, respondent's contention that admitting the evidence of other murders did not extend the overall length of the trial, because that evidence would have come in during the penalty phase anyway, misses the cardinal point: if that evidence had not been admitted at the guilt phase there might never have *been* a penalty phase. If the prosecution had been required to prove that appellant committed the charged murder without the aid of this overwhelmingly prejudicial evidence the jury would have been better able to discern the weakness of the prosecution's evidence, and might not have convicted appellant of a capital crime.

C. The Error Was Not Harmless

Respondent's final contentions are that any error in admitting the evidence of uncharged murders was harmless because there was "overwhelming evidence" of appellant's guilt aside from that evidence, and that any prejudice resulting from admitting that evidence was obviated because the jury was instructed not to consider it for any purpose other than determining whether the charged murder was premeditated. (RB 83-84.)

Those contentions fail, because they disregard the crucial impact of this extraordinarily prejudicial evidence.

Respondent's claim that this case involved overwhelming evidence of guilt does not survive even minimal scrutiny. It is of course a convention for the People to assert on appeal that there was overwhelming evidence in support of the challenged judgment, but that assertion is truly misplaced here. This case did not involve any of the types of evidence normally viewed as having particularly strong weight: there were no eyewitness accounts of the murder; there was no significant incriminating forensic evidence (DNA, bloodstains, fingerprints, etc); appellant did not confess; and there were no jailhouse informants. (AOB 79.)

Moreover, respondent's own review of the evidence shows the insubstantiality of the prosecution's case. That evidence, as summarized by respondent, consisted of the following alleged facts: (1) Mr. Flynn "saw the silhouette of someone making a strangling motion inside [Ms.] Gallagher's truck" the night she was killed; (2) appellant told Ms. Walker that Gallagher was "dead" the next morning; (3) Gallagher's earring was later found in appellant's apartment; (4) Gallagher died from asphyxiation; and (5) someone resembling appellant was seen leaning into Gallagher's truck just before it was set on fire. (RB 83.) That amounts to an extremely weak case, because: (1) Flynn's testimony, upon which respondent places particular emphasis, entirely lacks credibility (Argmt. III, *infra*, at p. 28); (2) appellant's statements to Walker were equally consistent with appellant's testimony that Kele committed the murder; (3) Gallagher was admittedly in appellant's apartment, and the fact that her earring was found there could have been completely non-incriminating; (4) the fact that Gallagher was asphyxiated did not link appellant to her murder, except under respondent's theory that it "corroborated" Flynn's unreliable testimony; and (5) the witness who saw the

man leaning into Gallagher's truck, Ms. Kushan, only saw his elbow and the back of his head, and could only describe him as having light-blond hair that was a "little bit longer than ordinary." (10 RT 1001.)

In apparent recognition of the insubstantiality of that evidence, respondent also asserts that the "defense case was weak and implausible" because it rested on appellant's testimony that Ms. Gallagher left his apartment, alive, with Mr. Kele. (RB 83.) However, there was nothing inherently implausible about that testimony, and it might well have sufficed to create a reasonable doubt as to appellant's guilt if the jurors had not been told that he subsequently committed supposedly similar murders. Because respondent has overstated the strength of the prosecution's evidence, and unfairly denigrated the value of the defense case, its harmlessness argument fails.

Respondent's alternate rationale – that the limiting instruction cured any prejudice caused by admitting the evidence – also fails. As set forth above, it is highly unlikely that the jurors actually followed that instruction, because to do so they would have had to ignore both the obvious import of the uncharged murders evidence – that appellant had a "propensity" to kill women after picking them up in bars, and had therefore done exactly that in this case – and the prosecutor's argument that they *should* view that evidence as proof of appellant's identity as the killer. (*Supra*, at p. 16; AOB 78-83; 9 RT 609, 15 RT 1827-1828.) It was unfair to put the jurors in such an impossible position – to admit evidence they would inevitably view as proof that appellant committed the charged crime, and to then instruct them to ignore that obvious implication.

D. Conclusion

Because respondent has not rebutted any of the main points of appellant's argument – that the evidence of uncharged murders was

improperly admitted under section 1101(b), and vastly more prejudicial than probative under section 352, and that its erroneous admission was devastatingly prejudicial because it led the jury to convict him based on his supposed propensity to commit murders like the charged one – reversal of the guilt and death verdicts is required.

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II

THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S CHALLENGE FOR CAUSE AGAINST JUROR NO. 13

Appellant has argued that the trial court committed reversible error by granting the prosecution's challenge for cause to Juror No. 13, since the juror merely said he would find it "hard," not "impossible," to participate in the penalty determination process. (AOB 89-104.) Respondent contends that the juror was properly excused because his voir dire responses indicated that he was "unwilling to participate and make a determination as to an appropriate sentence." (RB 89.) Respondent is wrong.

The gist of respondent's argument – that Juror No. 13 "unequivocally stated" his "unwilling[ness] to render any penalty decision" and/or to "participate in the deliberative process" (RB 89) – is not supported by the record. Although Juror No. 13 said he "couldn't see himself" voting for life or death, and that it would be find it "hard,"he also said that it would not be "impossible" for him to make the penalty determination. (8 RT 547-549.) Thus, while respondent is correct that jurors are appropriately excused when they "refus[e] to participate in the deliberative process" (RB 89), Juror No. 13 did not indicate directly or by implication that he would or could not participate in deliberations, only that it would be hard. Because that was simply an honest response by a conscientious prospective juror, it was error to exclude him. (See *People v. Stewart* (2004) 33 Cal.4th 425, 466 [that a prospective juror would find it "'very difficult' ever to vote for death" does not establish substantially impairment under *Witt*]; *People v. Avila* (2006) 38 Cal.4th 491, 530, italics original [prospective juror's "mere *difficulty*" in imposing death does not, per se, amount to substantial impairment].)

Brief replies are also required to two related points made by respondent concerning the supposedly "binding" effect of the trial court's assessment of Juror No. 13's state of mind. The first is respondent's contention that this Court must affirm Juror No. 13's excusal because the trial court's "assessment of [his] state of mind" is "binding." (RB 88, citing, inter alia, *People v. Lewis* (2006) 39 Cal.4th 970, and *People v. Abilez* (2007) 41 Cal.4th 472.) However, while this Court has indicated that it will "accept [such trial court assessments] as binding" (see *People v. Heard* (2003) 31 Cal.4th 946, 858), there must still be a basis in the record to support those assessments. As the High Court explained in *Uttecht v. Brown* (2007) __ U.S. __; 127 S.Ct. 2218; 167 L.Ed.2d 1014:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment . . .

(*Id.* at p. 2221.) Here, as set forth in appellant's brief, the record does not disclose such a basis for excusing Juror No. 13.

The other point requiring a response is respondent's apparent contention that *People v. Abilez* (2007) 41 Cal.4th 472, 497, somehow establishes that "the trial court's assessment of [Juror No. 13's] anti death-penalty attitudes sufficiently supported" that court's decision to excuse him. (RB 90.) In fact, the trial court assessment at issue in *Abilez* concerned the prospective juror's "state of mind" – the conclusion that he lacked mental "competency,"and was "evasive" and "slow to answer" because he was "embarrass[ed]" about that deficiency. (*Abilez, supra*, 41 Cal.4th at p. 496-498.) It was that assessment that this Court said it was bound by. (*Id.*) The trial court's assessment here that Juror No. 13 was unqualified was not based on his manner of answering questions, or on a perceived lack of mental

competency, but rather on the conclusion that his answers indicated that he would not vote for either possible penalty. (8 RT 568-569.) And as amply demonstrated in appellant's brief, that conclusion was not supported by either the record below or the relevant case law. (AOB 93-104.) Reversal is therefore required.

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III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD INFER APPELLANT'S CONSCIOUSNESS OF GUILT OF THE CHARGED CRIMES BASED ON HIS FLIGHT FROM THE POLICE AFTER BOTH THE CHARGED CRIMES AND THE TWO MURDERS HE ALLEGEDLY COMMITTED LATER

Appellant has argued that his conviction and sentence must be reversed because the trial court instructed the jurors that they could infer that he was guilty of the charged crimes based on his flight from the police both after the charged crime *and* after allegedly committing two subsequent and unrelated murders. (AOB 105-122; CALJIC No. 2.52.) Appellant argued that it is "almost always error" to instruct that the defendant's consciousness of guilt may be inferred from evidence of his or her flight, because such an instruction (1) improperly duplicates the circumstantial evidence instructions, (2) is unfairly argumentative and partisan, and (3) permits the jury to draw irrational inferences of guilt. (*Id.* at pp. 107-118.) Appellant also argued that it was particularly improper to give that instruction here because the evidence of flight did not support a rational inference either that appellant committed the charged crimes, or that the charged crime was a first degree murder, and that the error was prejudicial because it lowered the prosecutor's burden of proof. (*Id.* at pp. 118-122.)

Respondent rejects all of those claims. Respondent contends that the instruction did not duplicate the circumstantial evidence instructions, was not unfairly partisan and argumentative, and did not invite the jury to draw irrational inferences of guilt (RB 91-96), and was properly given because appellant's "actions demonstrated continued flight from Gallagher's murder and his mounting number of crimes in other states." (*Id.* at pp. 96-99.) Respondent further contends that any error in giving the instruction was

harmless, primarily because there was "strong evidence of guilt. . . ." (*Id.* at pp. 99-100.) All those contentions fail.

No substantive response is required to respondent's arguments that CALJIC No. 2.53 is not duplicative and unfairly partisan, and/or does not allow the jury to draw irrational inferences of guilt, because those arguments rely primarily on prior opinions by this Court rejecting similar claims. (RB 93-96.) Because appellant has acknowledged this Court's previous rejection of those arguments, and has asked the Court to reconsider its position (AOB 110, 115), no further reply is necessary.

Respondent's contention that it was appropriate to give the instruction here, "irrespective of any intervening time period between" the charged murder and appellant's arrest (RB 98), does require a response, because it misses the point of appellant's argument. Contrary to respondent, appellant has not asserted that the "applicability of the flight instruction" was "negate[d]" by the "mere fact that his arrest . . . occurred approximately six weeks after" the charged crime. (*Ibid.*) Rather, appellant has argued that the instruction was inappropriate because the alleged fact that he fled from arrest and prosecution in Florida, Louisiana and Kentucky, if true, is far more likely to reflect his consciousness of guilt as to the uncharged crimes, which allegedly occurred only days before that flight, than as to the charged crimes that occurred six weeks earlier. (AOB 119-120.) That is the same argument defense counsel made at trial, and respondent has not countered either it or appellant's subsidiary claim that this Court has never upheld the propriety of giving CALJIC No. 2.52 under facts like these – where the "purported flight . . . occurred weeks after the commission of [the charged] crime, but shortly after the defendant allegedly committed unrelated crimes." (AOB 120.)

Respondent's argument that any error in giving CALJIC No. 2.52 must have been harmless rests on two assertions: (1) that the instruction

"benefitted appellant" by "protect[ing] him from unwarranted assumptions concerning his flight;" and (2) that "the extremely strong evidence of guilt . . . render[ed] appellant's consciousness of guilt undisputed." (RB 99-100.) Those assertions are unsupported.

First, while reviewing courts have indeed opined that the "purpose" of CALJIC No. 2.52 is to "protect" defendants, by preventing the jury from making "unwarranted assumptions" concerning the significance of evidence of flight (RB 99; *People v. Han* (2000) 78 Cal.App.4th 797, 808), that view is at best naive. It is simply not true that telling jurors they "may" consider evidence that the defendant fled after the commission of a crime as evidence that he/she committed that crime protects the defendant. Instead, it calls the jury's attention to evidence which the prosecutor will then undoubtedly argue constitutes compelling evidence of the defendant's consciousness of guilt. This Court implicitly acknowledged as much when it held that it was harmless *not* to give an analogous instruction – that the jury could infer the defendant's consciousness of guilt from the facts that he made false statements to the police and tried to destroy evidence – because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th 598, 673.)

Respondent's claim that the instructional error was harmless because there was "extremely strong evidence of [appellant's] guilt" (RB 100) also fails. That evidence was sufficient, at best, to support a verdict that appellant killed Ms. Gallagher, but not that the killing was a first degree murder. Thus, because the provision of CALJIC No. 2.52 unfairly lowered the prosecution's burden of proof, reversal is required. (AOB 120-121; *Chapman v. California* (1967) 386 U.S. 18, 24.)

IV

IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY WITH CALJIC NO. 2.15

Appellant has argued that the trial court committed reversible error by instructing the jury, per CALJIC No. 2.15, that it could convict him of "murder or arson" based solely on a finding that he had been in "conscious possession" of Ms. Gallagher's purse and earring, provided there was some "slight" corroborating evidence of guilt. (AOB 123-137; 7 CT 1576; 14 RT 1776-1777.) Respondent concedes the error, but contends that it was necessarily harmless because (1) the evidence of guilt was "overwhelming and unrebutted," and (2) other instructions were given that minimized any prejudice from the error. (RB 103-105.) Respondent is wrong.

As to the first of those claims, respondent contends that this case involved stronger evidence of guilt than either of the cases in which this Court has previously found that it was harmless error to give CALJIC No. 2.15 – *People v. Prieto* (2003) 30 Cal.4th 226, and *People v. Coffman* (2004) 34 Cal.4th 1. Thus, respondent contends that the evidence of guilt here "was at least as strong as" in *Prieto*, and "stronger" than the "predominantly circumstantial" evidence in *Coffman*. (RB 104.) That claim fails, for several reasons.

First, because the instructional error here violated appellant's rights under the federal constitution – by relieving the state of its burden to prove every element of the charged crime – it can only be considered harmless if it did not "'contribute to the verdict obtained.'" (AOB 127-129, quoting *Chapman v. California* (1967) 386 U.S. 18, 24.) Both *Prieto* and *Coffman* apply the less-onerous state law *Watson* test in analyzing the impact of erroneously instructing the jury with CALJIC No. 2.15 (*People v. Prieto*, *supra*, 30 Cal.4th at p. 249; *People v. Coffman*, *supra*, 34 Cal.4th at pp. 101-

102), possibly because the constitutional arguments raised herein were not raised in those cases. (AOB 134-135, fn. 42.) Thus, it is inappropriate to weigh the strength of the evidence in this case directly against that in *Prieto* and *Coffman*, because a higher standard of harmlessness applies here.

Moreover, respondent's comparison of the strength of the guilt case here against that in *Prieto* and *Coffman* both overstates the evidence against appellant and slights the strength of the evidence in those cases. Thus, for example, respondent does not acknowledge that in *Prieto* "[b]oth surviving victims identified defendant on numerous occasions as the man who"committed the charged sexual assault and murder (*People v. Prieto*, *supra*, 30 Cal.4th at p. 249), and that there was no such "unrebutted" eyewitness testimony here.

Respondent has attempted to fill that evidentiary gap by putting heavy emphasis on the worthless "eyewitness" testimony of Michael Flynn, who claimed that on the night of the charged murder he saw "the silhouette of what appeared to be someone strangling something" in Ms. Gallagher's truck. (RB 104.) However, that testimony is almost entirely lacking in credibility, because Flynn also claimed that he told the officer who was arresting him at that time about the "weird" things that were supposedly going on in Gallagher's truck. (9 RT 809.) But that officer testified that Flynn said no such thing, and that he would certainly have investigated if Flynn had said anything like that. (10 RT 872-873.) Moreover, another officer who interviewed Flynn several weeks later also testified that Flynn never said anything about people struggling in Gallagher's pickup. (13 RT 1625-1626.) Accordingly, respondent's heavy reliance on Flynn's testimony is misplaced.

Further, respondent's suggestion that the evidence in *Coffman* was weaker than that here because it was "predominantly circumstantial" is simply misleading. Leaving aside Flynn's worthless testimony, the evidence

of guilt here, including the uncharged murders evidence, was *also* predominantly circumstantial. (See *People v. Karis* (1988) 46 Cal.3d 612, 636 [uncharged crimes evidence is "circumstantial evidence" of defendant's guilt as to the charged crime].)

Moreover, the circumstantial evidence here, aside from the improperly admitted evidence of uncharged murders, was far from strong. As summarized in respondent's brief, that evidence consists primarily of the alleged facts that: (1) appellant was the last person seen with Ms. Gallagher, and said the next morning that he had big problems, and she "was dead;" (2) Walker saw appellant looking through Gallagher's purse that morning, and her earring was later found in his apartment; and (3) a person with long blond hair was near the victim's truck when it was set on fire. (RB 104-105.) That evidence may have been legally sufficient to support a finding that appellant killed Ms. Gallagher, but without the improperly admitted and extremely prejudicial evidence of uncharged murders it certainly did not amount to "overwhelming evidence" that the killing was a premeditated murder.

Respondent's final contention – that other instructions given by the trial court, specifically, CALJIC Nos. 1.00, 1.01, 2.01, 2.20, 2.23, 2.90, 2.92, 3.31, 8.83, 17.31, "properly guided" the jury, and minimized any prejudice from the instructional error – requires only a brief response. Appellant conceded in his opening brief that brief passages in both *Prieto* and *Coffman* suggest that the prejudicial effect of giving CALJIC No. 2.15 in non-theft cases is somehow mitigated when such standard instructions are given on the jury's "duty to weigh evidence." (AOB 135-136; *People v. Prieto*, *supra*, 30 Cal.4th at p.248; *People v. Coffman*, *supra*, 34 Cal.4th at p. 101.) However, appellant has asked the Court to reconsider that view in light of several holdings of the United States Supreme Court that undermine it. (AOB 136, citing *Cool v. United States* (1972) 409 U.S. 100, 104 [instruction lightening

the state's burden of proof required reversal even though a correct instruction on reasonable doubt was given], and *Francis v. Franklin* (1985) 471 U.S. 307, 319-320 [correct instruction does not remedy constitutionally infirm instruction if jury could apply either instruction to arrive at a verdict].) Because respondent has not even addressed appellant's argument considering the invalidity of the Court's view on this point, no further reply is necessary.

The conceded error in giving the instruction was prejudicial, and requires reversal of the guilt and penalty verdicts.

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V

THE TRIAL COURT ERRED IN GIVING INSTRUCTIONS (CALJIC NOS. 2.50 AND 2.51) THAT TOGETHER PERMITTED THE JURY TO FIND APPELLANT GUILTY BASED ON A MERE PREPONDERANCE OF THE EVIDENCE

Appellant has argued that his conviction and sentence must be reversed because the trial court committed structural error, and violated his rights to due process, by giving CALJIC Nos. 2.50 and 2.52, because those instructions, in combination, lessened the prosecution's burden of proof as to his guilt of the charged crimes and special circumstances. (AOB 138-155.)

Respondent contends in response that: (1) any error was "invited' by defense counsel, because he cooperated with the prosecutor and the trial court in modifying the instruction at issue; (2) the instructions were proper, as demonstrated by this Court's prior rejection of similar claims; and (3) any error in giving the instructions was harmless. (RB 106-116.) Those contentions lack merit.

A. Appellant Did Not Invite the Error

Respondent asserts that because "defense counsel undertook affirmative steps to ensure the court instructed with the modified version of CALJIC No. 2.50 as given . . . [appellant] is barred from challenging the instruction on appeal." (RB 109-110, citing *People v. Thornton* (2007) 41 Cal.4th 391, 436, and *People v. Medina* (1995) 11 Cal.4th 694, 763.) Respondent is wrong.

First, as respondent concedes, the invited error doctrine is "designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330; *People v. Coffman* (2004) 34 Cal.4th 1, 49.) The error at issue was not made at appellant's behest. The trial court admitted the evidence of uncharged murders at the prosecutor's request and over defense

counsel's repeated objections, and the admission of that extremely inflammatory evidence made it necessary to instruct the jury how to consider it. CALJIC No. 2.50, the standard instruction on the consideration of other crimes evidence, was the logical choice for that purpose. The mere fact that defense counsel requested a modified version of CALJIC No. 2.50 did not make him responsible for the trial court's error in giving it, because the court's error in admitting the other crimes evidence created the need for a limiting instruction.

Moreover, the invited error doctrine does not apply in this case because defense counsel did not articulate the required "tactical basis" for requesting the modified version of CALJIC No. 2.50. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 332.)

B. The Trial Court Erred in Giving the Instructions

Respondent further contends that the trial court did not err in giving CALJIC Nos. 2.50 and 2.50.1 because (1) this Court has "approved" and/or "sanctioned" giving those instructions, and (2) the federal case upon which appellant's argument largely relies – *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 – is distinguishable, since the instructions at issue there were CALJIC Nos. 2.50.1 and 2.50.01, rather than Nos. 2.50.1 and 2.50. (RB 112-114.) Those contentions require only brief responses.

As to the first contention, none of the cases respondent cites as having "approved" CALJIC Nos. 2.50 (*People v. Wilson* (2005) 36 Cal.4th 309, 328, and *People v. Caitlin* (2001) 26 Cal.4th 81, 147), and 2.50.1 (*People v. Carpenter* (1997) 15 Cal.4th 312, 383, and *People v. Medina* (1995) 11 Cal.4th 694, 763-764), involve the issue appellant raises here – that when those two instruction are given together they "lessen[] the burden of proof required to convict in violation of [] due process." (AOB 138.) Appellant has not argued that it is always improper to give either of those instructions,

but rather that when they are given together the "interplay" between them violates due process.

As to respondent's second contention, appellant's brief acknowledged that *Ortiz* involved the interplay between two different instructions than those at issue here, but asserted that structural error arose here "for essentially the same reasons" as in *Ortiz*. (AOB 144.) Thus, in both cases the instructions fail to provide an "explanation harmonizing the . . . burdens of proof." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 823.)

C. The Error Requires Reversal of the Entire Judgment

Finally, respondent contends that any error in giving the instructions at issue was harmless, primarily because there was "overwhelming evidence" of appellant's guilt of the charged crimes "independent of" the evidence of uncharged murders. (RB 115-116.) Those contentions fail.

First, as appellant has argued, the error involved here was structural because it permitted the jury to convict appellant based on a mere preponderance of the evidence, and accordingly no showing of prejudice is required. (AOB 146, citing *Gibson v. Ortiz*, *supra*, 387 F.3d at p. 820, and *Sullivan v. Louisiana* (2003) 508 U.S. 275, 280-282.)

Moreover, even assuming arguendo that a showing of prejudice was required here, it is simply not true that there was overwhelming evidence of appellant's guilt. As appellant has shown, the evidence of his guilt of first degree murder fell far short of being overwhelming, even if it was legally sufficient to support the jury's verdict. (Arg. I, *supra*, pp. 18-19; Arg. IV, *supra*, p. 28.)

Reversal of the entire judgment is thus required.

VI

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONVICT APPELLANT OF FIRST-DEGREE MURDER WITHOUT UNANIMOUSLY FINDING EVERY ELEMENT OF EITHER MALICE MURDER OR FELONY-MURDER

Appellant has argued that the trial court erred in failing to instruct the jury that, in order to find him guilty of first degree murder, it had to unanimously determine that the charged crime was either a premeditated and deliberate killing or a felony-murder. (AOB 147-155.) Respondent contends that this Court has "properly" rejected this argument previously, based on the distinction between cases in which the prosecution "presents multiple theories (not requiring a unanimity instruction) and multiple acts (requiring a unanimity instruction)." (RB 117, citing *People v. Russo* (2001) 25 Cal.4th 1124.) Because appellant has conceded that the Court has rejected this argument in prior cases, and has asked the Court to reconsider that position (AOB 148), respondent's argument does not require an extended response. However, because respondent relies so particularly on *People v. Russo*, a brief discussion of that case, and its inapplicability here, is necessary.

First, *People v. Russo* is distinguishable because it does not deal with the specific issue at bar, but rather with the separate but related question of whether a jury hearing a conspiracy charge is required to unanimously "find[] beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy." (25 Cal.4th at p. 1128.) Moreover, to the extent that *Russo* does allude to the issue involved here, it merely reiterates this Court's position that felony-murder and premeditated murder are simply different *theories* of first-degree murder, not distinct crimes, and that, accordingly, jurors are not required to unanimously agree on either one. (*Id.* at pp. 1134-1135.)

Finally, while the distinction relied upon by the *Russo* Court between cases involving "multiple theories" and ones involving "multiple acts" might have been meaningful there, where the issue was whether the defendant was guilty of a single "crime" [conspiracy] that arose out of a "'discrete criminal event'" (25 Cal.4th at pp. 1134-1135, quoting *People v. Perez* (1993) 21 Cal.App.4th 214, 223), that distinction is meaningless here. In cases like this one, where the issue at trial was whether the appellant was guilty of one or both of the entirely separate crimes of malice murder and felony-murder (see *People v. Dillon* (1983) 33 Cal.3d 441, 476, fn. 23 [felony murder and malice murder "are not the 'same' crimes"]), the jurors must be instructed that they can only convict the defendant of either offense by unanimously finding each element of the offense beyond a reasonable doubt.

Therefore, the trial court's instructions were erroneous, and the convictions and judgment of death must be reversed.

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VII

IT WAS REVERSAL ERROR TO GIVE CALJIC NO. 17.41.1, BECAUSE IT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY

Appellant has argued that his conviction and sentence must be reversed because the trial court instructed the jury with CALJIC No. 17.41.1, in violation of his Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury. (AOB 156-162.) Respondent's brief raises only one argument that is not adequately addressed in the opening brief – that the error "must be deemed waived" because (1) defense counsel did not object until "after [the instruction] had already been read to the jury," and (2) the "error [did] not affect [appellant's] substantial rights. " (RB 120, fn. 68, citing *People v. Elam* (2001) 91 Cal.App.4th 298, 310-313, and *People v. Demetrulias* (2006) 39 Cal.4th 1, 20.) That argument does not withstand scrutiny.

In the first place, assuming arguendo that a timely objection was required to preserve this claim, counsel evidently objected within minutes after the jury left the courtroom following the reading of the instruction. (14 RT 1818.) That objection was sufficiently timely to preserve the issue for appeal because it would have "'allow[ed] the court to remedy the situation before any prejudice accrue[d].'" (*People v. Boyette* (2002) 29 C4th 381, 418, quoting *People v. Taylor* (1982) 31 Cal.3d 488, 496.)

Moreover, the contention that the error did not affect appellant's substantial rights also fails, because, as set forth in the opening brief, and based on this Court's analysis in *People v. Engelman* (2002) 28 Cal.4th 436, 440, giving CALJIC No. 17.41.1 did affect appellant's substantial rights. Appellant has argued that giving the instruction violated his rights to

due process and trial by a fair and impartial jury under the Sixth and Fourteenth Amendment (AOB 156-162), and this Court held in *Engelman* that the instruction "has the potential to intrude unnecessarily on the deliberative process and affect it adversely . . . ." (*Engelman*, *supra*, 28 Cal.4th at p. 440; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1055.) Because those are substantial rights, the claim is cognizable even if the trial objection was somehow untimely. (Pen. Code § 1259; see *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [rejecting waiver argument where defendant claimed that instruction violated his right to due process, because that is not the type of error "that must be preserved by objection"].)[1]

Instructing the jury with CALJIC No. 17.41.1 violated appellant's Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury, and his Eighth Amendment right to a reliable determination on guilt and punishment, and requires reversal of the judgment.

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[1] *People v. Elam*, *supra*, 91 Cal.App.4th at pp. 312-313, which holds that the provision of CALJIC No. 17.41.1 does not affect a defendant's substantial rights, does not avail respondent. That holding was based on the *Elam* court's conclusion that the instruction "does not impair jurors' ability to question the strength of the People's case," but this Court subsequently concluded to the contrary in *Engelman*, *supra*, 28 Cal.4th at p. 440.

VIII

THE PRIOR-MURDER-CONVICTION SPECIAL CIRCUMSTANCE FOUND TRUE BELOW WAS INVALID

Appellant has argued that his convictions and sentence must be reversed because the only special circumstance that was alleged and found true below – that he had been "convicted previously of first degree murder" under Penal Code section 190.2, subdivision (a)(2) ("section 190.2(a)(2)") – was invalid, since the purported prior conviction was not final when he was tried on the charged crimes, and was based on a murder that allegedly occurred after the charged crimes. (AOB 163-183.) Respondent contends that appellant's claim must be rejected because: (1) it is not cognizable because it was not presented below (RB 123-124); (2) prior murder convictions alleged under section 190.2(a)(2) need not be final on appeal (*id.* at pp. 125-128); (3) this Court has previously held that it does not violate the federal Constitution to base a prior-murder-conviction special circumstance finding on a murder that occurred after the charged murder (*id.* at pp. 128-129); and (4) any possible error was harmless as to guilt, only the penalty verdict must be reversed if the Court finds error. (*Id.* at pp. 129-130.) Those contentions fail.

A. Appellant's Claims Are Cognizable

Respondent asserts in a footnote that "appellant appears to concede that [his claim was] not adequately raised by trial counsel" because "he argues that [it is] cognizable on appeal" for other reasons. (RB 124, fn. 7.) Respondent is wrong; appellant specifically contends that trial counsel's "argument *was* sufficient to preserve [the claim] for appeal," but argues in the alternative that even if the claim was not sufficiently preserved, it is nonetheless cognizable for several reasons. (AOB 178, italics added.) Obviously, it is for this Court to decide whether the record shows that the

claim was adequately preserved below – i.e., that "the trial court understood [the claim] as presented" by trial counsel (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Samuels* (2005) 36 Cal.4th. 96, 120) – but the claim is clearly cognizable in any event.

First, contrary to respondent's suggestion, this Court has not refused to consider "'as applied' challenges to California's death penalty law" that go only to "the validity of a specific special circumstance," rather than to the constitutionality of the entire death penalty scheme. (RB 124, fn. 72.) In fact, the case most prominently cited by both appellant and respondent on this point *involves* an "as applied" challenge to the "financial gain" special circumstance alone, rather than to the entire death penalty scheme. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863; AOB 178-179; RB 124, fn. 72.)

Second, again contrary to respondent's suggestion, appellant's challenge to the validity of the prior-murder-conviction special circumstance found true below is not based solely on "technical arguments." (RB 124, fn. 72.) Appellant has argued that permitting the jury to find that special circumstance true violated "[f]undamental principles of statutory construction," due process principles of fair notice and fundamental fairness, and the Eighth Amendment's proscription against cruel and unusual punishment. (AOB 169- 171.) Those are not merely technical arguments.

Third, respondent's contention that section 1260 "does not permit review of the current claim" (RB 125, fn. 72) is unfounded, and nothing in the only case respondent cites on that point – *People v. Smith* (2001) 24 Cal.4th 849, 852 – suggests otherwise.

Respondent's contention that appellant's claim is not cognizable as a "pure question of law" because it has not been shown to be "pertinent to a

proper disposition of the cause [or to] involve matters of particular public importance" (RB 125, fn. 72) utterly lacks merit. This was the only special circumstance found true below, and if it is found to have been invalid appellant's death sentence will have to be reversed; those are clearly matters "pertinent to a proper disposition" of this case.

Finally, respondent makes the specious contention that appellant cannot claim that it would have been futile to object below on the grounds on which he now relies because appellant "accords" those grounds "sufficient merit to present [them] to this Court." (RB 125, fn. 72.) Obviously, *every* party who argues on appeal that his trial counsel's failure to object on a particular ground should be excused because such an objection would have been futile *necessarily* "accords" the purportedly forfeited issue sufficient merit to warrant presenting it to the appellate court. Otherwise, the question of whether it would have been futile to make the objection would never arise.

B. The Prior-Murder-Conviction Special Circumstance Was Invalid Because the Prior Conviction Was Not Final On Appeal

Respondent contends that the prior-murder-conviction special circumstance in this case was valid even though the process of appealing that conviction was not "exhausted and complete" because: (1) "a plain reading of the statute" does not support appellant's interpretation of it (RB 126); (2) "California decisional law" generally defines conviction as meaning solely an "adjudication of guilt" (*id.* at 126-127); and (3) the Legislature did not intend for the statute to be interpreted as appellant urges. (*Id.* at 127-128.) Those contentions fail.

Respondent contends that a "plain reading of the statute" refutes appellant's claim that any conviction used under section 190.2(a)(2) must be

final on appeal because *another* subsection of Penal Code section 190.2 – subdivision (a)(3), the "multiple murder" special circumstance – "would have no force or application if . . . interpreted to require" appellate finality because the multiple murders required to support finding that special circumstance true "would be appealed at the same time . . ." (RB 126.) However, appellant has not argued that *both* subdivisions (a)(2) and (a)(3) must be interpreted as requiring appellate finality, and respondent does not explain why such a conclusion is either implicit in or required by appellant's argument.

In fact, appellant's main policy argument against using prior murder convictions that are not final on appeal to support a finding under section 190.2(a)(2) – that doing so could give rise to the "absurd consequence" that a defendant could be executed "based solely on a prior conviction that is later invalidated on appeal" (AOB 171) – has no application to subdivision 190.2(a)(3). Under that subdivision, all the murder charges alleged to support the special circumstance would, as respondent notes, be subject to review on appeal together, negating the possibility of such an absurd consequence.

Respondent's second argument – that, in other contexts, California decisional law does not define a "conviction" as a judgment that is final on appeal (RB 126-127) – also fails. Appellant has argued that (1) conviction "'has no fixed meaning and has been interpreted by the courts to have various meaning depending upon the context,'" and (2) the Court should find that in *this* context "appellate finality is required." (AOB 167, quoting *People v. Rhoads* (1990) 221 Cal.App.3d 56, 60.)

Respondent seemingly concedes that it is an open question whether appellate finality is required in this context, and explicitly concedes that "in rare cases [] the term 'conviction' has been construed" to include such a

requirement. (RB 126-127.) Because a true finding on a special circumstance allegation involves the gravest potential consequences for a defendant, in this context "conviction" should be "construed in a way that [guarantees] the highest degree of reliability in death sentences . . ." (AOB 171.)

Finally, respondent contends that because "the Legislature did not enact the [prior-murder-conviction] special circumstance to inure to a defendant's benefit," it must not have intended that "conviction" would be construed as "requir[ing] any finality of judgment." (RB 127-128.) That contention can at best be described as completely unpersuasive. Thus, while the Legislature rarely enacts criminal statutes to benefit criminal defendants, this Court has consistently held that such statutes must be strictly construed in favor of those defendants, and that they must be given the benefit of every reasonable doubt concerning the construction and meaning of those statutes. (*People v. Taylor* (2004) 32 Cal.4th 863, 870; *People v. Simon* (1995) 9 Cal.4th 493, 517-518.) Because respondent's argument concerning the legislative intent behind this statute calls upon the Court to abandon that long-established procedure, it should be rejected.

In sum, respondent has not presented any substantial grounds upon which this Court could reject appellant's claim that the prior-murder-conviction special circumstance found true in this case was invalid because the alleged prior conviction upon which it was based was not final on appeal.

C. The Prior-Murder-Conviction Special Circumstance Was Invalid Because the "Prior" Murder Occurred After the Charged Murder

Respondent's only contention with regard to appellant's argument that the special circumstance is invalid because the charged murder occurred before the alleged "prior murder" is that this Court has previously rejected

that argument. (RB 128-129, citing *People v. Hendricks* (1987) 43 Cal.3d 584, 595-596, et al.) Because appellant has acknowledged that the Court has previously rejected his arguments on this issue, and has stated that those arguments are asserted in this appeal solely "to preserve them for federal habeas corpus review" (AOB 171-172), no further response is required on this point.

D. Both the Guilt and Penalty Verdicts Must Be Reversed

Respondent concedes that reversal of the penalty judgment would be required if this Court finds that the special circumstance at issue was invalid, but points out that both this Court and the High Court have rejected appellant's argument as to why the guilt verdict must also be reversed. (RB 129-130.) Since appellant has acknowledged that the Court has rejected his arguments on this issue, and has urged the Court to reconsider its view (AOB 181-183), no further response is required on this point.

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IX

THE TRIAL COURT ERRED IN EXCLUDING RELEVANT EVIDENCE OFFERED BY THE DEFENSE TO REBUT THE MISLEADING PORTRAYAL OF THE VICTIM BY THE PROSECUTION

Appellant has argued that his sentence must be reversed because the trial court precluded him from presenting evidence that would have "paint[ed] a whole different picture" of Ms. Gallagher – showing that she had "hung out" with biker gangs and had been arrested for possessing a gun "'in a DUI situation'"– to rebut the "false impression" created by the prosecution of her "exemplary life and fine character." (AOB 184-208; 17 RT 2200.)

Respondent contends that the defense evidence was properly excluded because it "had minimal relevance" to the penalty determination, and that at least some of that evidence was properly excluded under section 352 because it was "inflammatory," cumulative and/or unduly prejudicial. (RB 136-138.) Respondent also contends that any error in excluding the evidence was "necessarily harmless," primarily because the aggravating evidence would purportedly have outweighed the mitigating evidence even if the evidence had been admitted. (*Id.* at p. 140.) Those claims require only a brief response.

Respondent's basic contention is that all or most of the excluded evidence about Ms. Gallagher's background – e.g., that she had (1) "hung out" with biker gangs, (2) used cocaine, (3) been hospitalized for "multiple personality disorder," (4) "stalk[ed]" her ex-husband's girlfriend, and (5) been arrested for felonies – was irrelevant, because it concerned matters that were "entirely independent of the charged offense," and thus not circumstances of that crime. (RB 136-138, citing *People v. Edwards* (1991) 54 Cal.3d 787, 883.) In sum, respondent asserts that the evidence "had no

connection, either morally, materially, or logically, to the murder." (RB 138.) That claim cannot withstand scrutiny because it rests on the unsupportable premise that all the *positive* evidence about Ms. Gallagher's life the prosecution presented – e.g., that she achieved "the highest score in Butte County" on an intelligence test (17 RT 2175-2176), and was "very military" and "really good" at her Navy job (17 RT 2177, 2183) – *did* relate to the circumstances of the capital crime, but that the evidence about the negative aspects of her life the defense offered to rebut and/or contradict that positive evidence did not. That one-sided approach to the proper scope of the evidence admissible to counter and confront aggravating victim impact evidence contradicts the constitutional rights of capital defendants, and should be rejected.

As appellant has argued, the High Court itself recognized in *Payne v. Tennessee* (1991) 501 U.S. 808, 825-827, that the admission of penalty phase aggravating evidence about the victim's character and personality would put defendants in the "difficult" position of having to rebut that evidence. (AOB 199.) Here, appellant was put in precisely that position; forced to choose between letting the prosecution present a false impression of the victim and "challeng[ing]" that portrayal by "paint[ing] a whole different picture" of her. (17 RT 2200; 18 RT 2390-2391.) Respondent has not explained, and cannot logically explain, why evidence portraying the victim in a positive light *is* relevant to the jury's assessment of his or her "uniqueness as a human being" (*Payne*, *supra*, 501 U.S. at p. 823) – i.e., why such evidence involves a circumstance of the capital crime – but evidence contradicting that portrayal is irrelevant to the same sentencing factor.

As this Court has acknowledged, capital jurors "'must be allowed to consider on the basis of all relevant evidence not only why a death sentence

should be imposed, but also why it should not be imposed.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015; quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271.) The latter category of evidence includes any facts that tend to "'prove or disprove some fact or circumstance which a fact finder could reasonably deem to have mitigating value. . . .'" (*Frye, supra*, 18 Cal.4th at p.1016, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) Thus, the *Frye* Court held that precluding a capital defendant from "introducing evidence rebutting the prosecution's argument in support of the death penalty" implicates "fundamental notions of due process. . . ." (*Frye, supra*, 18 Cal.4th at p. 1017.) Here, the evidence at issue was admissible both as direct evidence of the circumstances of the crime *and* to rebut the prosecution's victim impact evidence. (See *People v. Harris* (2005) 37 Cal.4th 310, 373-374 (dis. opn. of Kennard, J.) [that the victim "knowing[ly] acquiesce[d]" in defendant's drug dealing was admissible both as a circumstance of the capital crime and to rebut victim impact evidence about her positive qualities]; see also *In re Ross* (1995) 10 Cal.4th 184, 208 [purpose of rebuttal evidence is to present a balanced picture].)

Respondent's argument that the evidence at issue was properly excluded under section 352 because it was cumulative and/or inflammatory does not require any substantive response because those issues are fully discussed in the Opening Brief. (AOB 198-204.) However, one specific contention by respondent does merit a brief response: that the evidence that Ms. Gallagher had been arrested twice for having "a gun in her car and a DUI," and on the second occasion was charged with a felony (17 RT 2212), was "cumulative" to previously admitted evidence that she "drank, went to bars, and was playing around on her husband.'" (RB 137, citing 17 RT 2213.) That assertion is untenable.

For the purposes of section 352, evidence is cumulative when "other evidence on the point in issue has already been introduced," or "something of like effect [has already] been shown." (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1850.) That was clearly not the case here, because the evidence that Ms. Gallagher drank in bars and was unfaithful to her husband was not at all to the same effect as evidence that she had been arrested on a felony charge of possessing a gun. Moreover, even "[e]vidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight. . . ." (*People v. Mattson* (1990) 50 Cal.3d 826, 871.) Thus, even assuming arguendo that the evidence that Ms. Gallagher drank and was unfaithful was essentially identical in nature to the evidence that she had suffered a felony arrest, the latter evidence clearly had greater evidentiary weight for the purpose for which it was offered – to contradict the prosecution's false portrayal of Ms. Gallagher's character and background.

Finally, respondent contends that any error in excluding this evidence was harmless because there is "no reasonable possibility" the jury would otherwise have reached a different penalty verdict. Respondent bases that contention on the following claims: (1) the jury already knew Ms. Gallagher was no "'goody two-shoes;'" (2) the excluded evidence would not have "negated" either the losses suffered by Gallagher's family or her "societal contributions;" and (3) the aggravating evidence would have outweighed the mitigating evidence in any event. (RB 139-140.) Those claims rely on a strained interpretation of both the facts and the law applicable to this issue.

First, respondent's argument underestimates both the significance of victim impact evidence in general and the impact of the excluded evidence in this case. Contrary to respondent's suggestion, victim impact evidence is well known to have a powerful effect on sentencing juries. (AOB 204-205

[citing articles discussing the impact of victim impact evidence]; *People v. Roldan* (2005) 35 Cal.4th 646, 725.) Thus, respondent's implicit assertion – that the jurors would necessarily have reached the same penalty determination even if they had been presented with a "warts and all" picture of Ms. Gallagher – is unfounded.

Moreover, the assertion that the excluded evidence would have simply confirmed what the jury already knew – that Ms. Gallagher was not a goody two-shoes – vastly understates the disparity between the way she was portrayed by the prosecution and how she *would* have been viewed by the jury if the defense evidence had been admitted. It is absurd to assert that the jurors would not have perceived any difference between a victim who went to bars and "play[ed] around" on her husband, on the one hand, and one who partied the night away with bikers, worked at a biker bar, and was arrested for a felony involving drunk driving and possession of a gun, on the other. If victim impact evidence has any proper role to play in capital sentencing, the "glimpse" of the victim's life the jury is given should be an honest one.

Finally, the record does not support respondent's contention that the penalty determination here was such a foregone conclusion that the improper exclusion of this evidence must have been harmless. Even leaving aside the compelling evidence that any crimes appellant committed were the direct products of a childhood deprived of everything except abuse and neglect, and of (1) the complex of mental and emotional disabilities caused by that neglect and (2) his serious head injuries and life-long extreme alcohol abuse (AOB 206-207), the *jury* clearly did not find it easy to sentence appellant to death. That the jury declared itself to be at an "impasse" after four days of penalty deliberations shows that the jurors found the penalty determination a

close question (20 RT 2789-2790), and suggests that the exclusion of this evidence may well have played a decisive role in that determination.

Reversal of the penalty verdict is therefore required.

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THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS BY REFUSING TO INSTRUCT THE JURY ON LINGERING DOUBT

Appellant has argued that reversal of the death judgment is required because the trial court committed constitutional error in refusing to give his requested penalty phase instruction on "lingering doubt." (AOB 209-221.) Respondent contends that the instruction was properly rejected because (1) lingering doubt instructions are neither required nor necessary because CALJIC No. 8.85 "encompasse[s]" the concept of lingering doubt, and (2) lingering doubt was not "remove[d] . . . from the [penalty] jury's consideration," since defense counsel was allowed to argue that issue. (RB 142-144.) Those contentions lack merit.

First of all, the case law supporting respondent's argument that CALJIC No. 8.85 encompasses the concept of lingering doubt is logically flawed. With all due respect, this Court's holding that the instructions on factors (a) and (k) contained in CALJIC No. 8.85 "necessarily encompass the concept of lingering doubt, and thus render any special instruction on the concept unnecessary" (*People v. Earp* (1999) 20 Cal.4th 826, 904; *People v. Sanchez* (1995) 12 Cal.4th 1, 77), does not withstand analysis.

Contrary to this Court's view, the "gravity of the crime" of which the defendant has been convicted is not "extenuate[d]" by the jury's consideration of any doubt that he or she actually committed that crime. (See *People v. Earp*, *supra*; 20 Cal.4th at p. 905) The "circumstances" of a capital crime are exactly the same no matter who committed it, so CALJIC No. 8.88's reference to factor (a) does not encompass the concept of lingering doubt. And, since the "character or record" of the defendant is not altered by the jurors' consideration of any such lingering doubts as to his

guilt, the reference to factor (k) similarly cannot reasonably "convey the notion of residual doubt." (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1273.)

Moreover, the claim that CALJIC No. 8.85 conveys to the jury that it may consider lingering doubt in deciding the appropriate penalty is flatly contradicted by a close reading of the one United States Supreme Court case on lingering doubt cited by both appellant and respondent – *Franklin v. Lynaugh* (1988) 487 U.S. 164. (AOB 217, fn. 61; RB 143.) Thus, in *Franklin* the High Court said that "'residual doubts' over a defendant's guilt" do not relate to "any aspect" of his or her character or record, or to a circumstance of the offense. (487 U.S. at p. 174.)

Moreover, this Court has held that because the trial court must charge the jury "'on any points of law pertinent to the issue[s]," a court may "be *required* to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20, italics added; see also *People v. Musselwhite, supra*, 17 Cal.4th at p. 1273; *People v. Sanchez, supra*, 12 Cal.4th at p. 77.) Lingering-doubt instructions are clearly "pertinent to the issue" facing a penalty phase jury because the issue of "lingering doubt as to guilt" is highly relevant to that determination. (*People v. Cleveland* (2004) 32 Cal.4th 704, 739.) In short, because appellant's requested instruction was both properly formulated and "warranted by the evidence," the trial court was required to give it. (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20.)

Respondent's final contention – that a lingering-doubt instruction was not required because defense counsel was allowed to argue that issue – also fails. As this Court has said, the jury is presumed to treat the trial court's instructions as "determinative [] statement[s] of law," and to view the arguments of counsel "as words spoken by an advocate in an attempt to

persuade." (*People v. Sanchez* (1995)12 Cal.4th 1, 70; see *People v. Morales* (2001) 25 Cal.4th 34, 47.) The mere fact that defense counsel was permitted to argue that lingering doubt should be considered did not cure the harm caused by the trial court's refusal to instruct the jury to that effect.

Reversal of the death judgment is therefore required.

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XI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Appellant has argued that his trial was infected with numerous errors that deprived him of the fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, appellant believes that the cumulative effect of those errors warrants reversal of his convictions and death judgment. (AOB 240-243.)

Respondent asserts that there was no error, and that if there was error appellant has failed to show prejudice. (RB 151-152.) It is axiomatic that if this Court finds no error, the cumulative error doctrine would not come into operation. Consequently, if respondent is correct about the total lack of error, the Court will obviously deny this claim. As to respondent's assertion that appellant has failed to show prejudice, it is a mere assertion based upon no reasoning or argument. As such, it does not merit a response, and appellant merely reiterates what is set forth in his opening brief.

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CONCLUSION

Based on the foregoing reasons, and on all the arguments set forth in appellant's opening brief, both the judgment of conviction and sentence of death must be reversed.

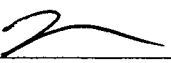
DATED: January 9, 2009

Respectfully submitted,

WILLIAM HASSLER
Attorney for Appellant

Certificate of Counsel (Cal. Rules of Court, rule 36(b)(2))

I, William Hassler, am the Attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using my computer's software. On the basis of that computer-generated word count, I certify that this brief is 13897 words in length.



WILLIAM HASSLER
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Glen Rogers* No. S080840

I, WILLIAM HASSLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O.. Box 2708 Mckinleyville, California 95519. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
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Each said envelope was then, on January 9 ,2009, sealed and deposited in the United States Mail at McKinleyville, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on January 9 ,2009, at San Francisco, California.

DECLARANT