IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. ANTHONY GILBERT DELGADO Defendant and Appellant	Case No. S089609 Kings County Superior Court No. 99CM733

APPELLANT'S REPLY BRIEF

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

HONORABLE JUDGE PETER M. SCHULTZ

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. ANTHONY GILBERT DELGADO *Defendant and Appellant.*	No. S089609 Kings County Superior Court No. 99CM7335

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant went to trial for two capital murders and an assault, all of which occurred on prison grounds, without the opportunity to consult with counsel in private before or during trial. Trial preparation, investigative leads and every defense strategy had to be discussed with prison guards present and within earshot, or not discussed at all. The entire structure of appellant's trial was built on this fatally weak foundation, for without confidential consultation, the right to counsel is but a hollow beam that cannot withstand constitutional scrutiny. Ignoring this gross infringement of the right to counsel and to a fair trial, respondent relies on unsupported inferences, misstatements of the facts, and tenuous legal arguments in an attempt to support appellant's convictions and death sentences.

In addition to this fundamental structural error, as shown in the opening brief, the proceedings against appellant also were marred by trial errors and constitutional defects in California's death penalty scheme. In addressing respondent's arguments to these claims, appellant does not reply to contentions which already are adequately addressed in appellant's

opening brief.[1] The lack of a response to any particular contention or allegation made by respondent, 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 appellant's view that the issue has been adequately presented and the positions of the parties fully joined.[2]

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1. For this reason, appellant does not present any reply to Argument VI of the opening brief.

2. The following abbreviations are used throughout this brief: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief. Although respondent, for reasons that are entirely unclear, has substituted its own abbreviations for the transcripts, appellant continues to use the abbreviations described and utilized in his AOB in order to maintain consistency and avoid confusion. Accordingly, "CCT" refers to the Kings County Consolidated Courts Clerk's Transcript on appeal; "CT" refers to the Clerk's Transcript on appeal; "SCT" refers to the Supplemental Clerk's Transcript on appeal, and "RT" refers to the Reporter's Transcript on appeal.

I.

THE JUDICIAL "EXTENSION" OF THE ATTORNEY-CLIENT PRIVILEGE TO INCLUDE STATE CORRECTIONAL OFFICERS PRIOR TO THE APPOINTMENT OF COUNSEL, OUTSIDE APPELLANT'S PRESENCE AND WITHOUT HIS CONSENT, VIOLATED APPELLANT'S RIGHT TO COUNSEL, HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS AND AT TRIAL, AND REQUIRES REVERSAL

A. Introduction

All criminal defendants, even those charged with capital crimes, have the right to consult privately, and in confidence, with counsel in order to effectuate their state and federal constitutional rights to a fair trial, to the assistance of counsel and to due process. Despite this, during a cursory in camera proceeding, held in appellant's absence just prior to arraignment and prior to the appointment of counsel, the court authorized the close presence of prison guards at every meeting between appellant and his future attorney.

At the request of the prosecutor, and with prospective counsel's agreement, the court ordered that the attorney-client privilege be "extended" to include prison guards employed at Corcoran Prison, where the alleged crimes had occurred and where appellant remained housed for the duration of the trial. In complete disregard of the personal nature of the attorney-client privilege and the importance of the confidentiality of attorney-client communications in our adversary system, the court made this order in appellant's absence and without his knowledge or consent. Because counsel was not yet appointed, and appellant was not present, appellant had no representation and no one to protect his interests when the court made its order. Nonetheless, the court took no steps of its own to safeguard appellant's rights. It did not notify appellant that the attorney-client privilege had been extended or that specific prison guards had been ordered to keep what they heard confidential, nor did it require counsel to so notify her future client. It did not inform appellant of his prospective attorney's stipulation, nor did it ascertain whether appellant consented to the

stipulation, or to the inclusion of his own jailors on the "defense team."[3] After the case was transferred to the superior court, another judicial officer extended the previous stipulation for the duration of the trial, without any inquiry into its inception, necessity, or the procedure under which it was initially obtained, and again without appellant's consent or awareness of its origins.

Representation by counsel would be severely impeded for any defendant facing a criminal trial for any crime if unwelcome and unnecessary third parties were authorized to listen in and to observe all his pretrial meetings and trial consultations with his attorney. But the trial in this case was not just any criminal trial, it was a capital trial. The defendant was charged with the most serious of offenses, and he faced not just a trial to determine his guilt or innocence, but also faced a penalty trial at which his character and personal history were at issue, and his very life at stake. The defendant here was not just any defendant. He stood accused of crimes at Corcoran State Prison, including charged and uncharged crimes against Corcoran correctional officers. Corcoran Prison was not just any prison; it was a prison which had been the subject of extensive press coverage and investigation into allegations that its guards set up prisoners to fight each other, and then, together with their supervisors, engaged in a cover-up to protect their fellow guards from punishment for their misconduct. (See AOB at 2-4.) And, the unwelcome and unnecessary individuals who were present during all of appellant's attorney-client conferences before and during trial were not just uninvolved, neutral law enforcement or security personnel, but were themselves correctional guards at Corcoran Prison.

It is not only realistically possible but extremely likely that appellant was harmed by this novel and unconstitutional arrangement among the prosecutor, prospective defense counsel and the court. The crimes charged all occurred at Corcoran State Prison, and involved or implicated the

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3. Respondent concedes that the effect of the stipulation was to make prison guards "part of the defense team . . . ." (RB at 41.)

behavior of correctional officers. One of the victims, Eric Mares, was himself a Corcoran correctional employee. Even more troubling is that 16 of the 19 guilt phase witnesses were employed at Corcoran,[4] and all 16 of the witnesses the prosecution called in its case in chief at the penalty phase were correctional officers, 12 of whom were officers at Corcoran.[5] The remaining prosecution penalty phase witnesses were correctional officers and sergeants at other California state prisons.[6]

The close presence of correctional officers who worked under or with the prosecution witnesses, and who were governed by the same chain of command, was as chilling to appellant's exercise of his right to counsel as if an actual wall of ice had been placed between attorney and client. Under these unique circumstances, the court's endorsement and enforcement of this ongoing intrusion into the attorney-client relationship, without appellant's knowledge or consent, turned the criminal proceedings into a non-adversarial travesty of justice.

Respondent raises multiple arguments in an attempt to uphold

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4. Fifteen guilt phase witness worked at Corcoran as correctional officers, (Williams, 3RT 511; Carmona, 3RT 526; Montgomery, 3RT 561; Carrell, 3RT 602; Hernandez, 3RT 615; Sexton, 3RT 690; Uyeg, 4RT 735; Vasquez, 4RT 736; Castaneda, 4RT 758; Kee, 4RT 769; Mares, 4RT 782, Alaniz, 4RT 823; Phillips, 4RT 857; Ortega, 4RT 868, Todd, 4RT 876), and another witness (Lemos, RT 915-917) was employed there as a medical technician but had also been trained as a correctional officer. At least three of the Corcoran officers who testified were sergeants (Montgomery, 3RT 561; Sexton, 3RT 690; Phillips, 4RT 857), and thus held a higher rank than the officers who monitored appellant's meetings with his attorney.

5. (Tovar, 6RT 1292; Espinoza, 6RT 1316; Ny, 6RT 1335; White, 6RT 1339; Boyer, 6RT 1364; Henderson, 6RT 1382, Butts, 7RT 1390; Pearson, 7RT 1414; Mascarenas, 7RT 1437; McClaren, 7RT 1452; Gatto, 7RT 1458; Ortega, 7RT 1488.) Two of the Corcoran penalty phase witnesses held the rank of lieutenant (Pearson, 7RT 1414; Gatto, 7RT 1458), and three were sergeants. (White, 6RT 1339; Boyer, 6RT 1364, McClaren, 7RT 1452.)

6. (Dewall, 6RT 1216; Valko, 6RT 1261; Schmidt, 6RT 1268; Baires, 6RT 1284.)

appellant's convictions and sentences, each of which will be addressed and refuted in detail below. But there is one point that respondent completely overlooks – the duty of the court to protect the rights of the accused by assuring that his interests are adequately represented at every step of the criminal proceedings. As the United States Supreme Court established nearly 80 years ago in *Powell v. Alabama*, it is the court's obligation to see that criminal defendants "are denied no necessary incident of a fair trial." (*Powell v. Alabama* (1932) 287 U.S. 45, 52.) The right to communicate freely and in confidence with a competent legal representative is a basic, and possibly the most important, aspect of the right to counsel and thus is "a necessary incident" of a fair trial and due process. Nonetheless, the court deprived appellant of this right without any notice, process, or an opportunity to be heard. The court made its order in appellant's absence and without the presence of a legal representative loyal to appellant's interests.

The court did not require any showing that appellant actually posed a threat to his attorney and no such showing was put on the record. But even assuming appellant did pose such a threat, the court did not consider any of the obvious, less onerous ways of assuring counsel's safety.[7] It did not consider the impact of the presence of Corcoran guards on appellant's relationship with counsel or on his ability to speak candidly about the offenses with which he was charged or about his life and prison history. The court did not advise or inform appellant that the guards were ordered not to disclose what they heard, nor did it require anyone else to do so, and even sealed the transcript of the in camera proceeding. There is nothing on

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7. Some less chilling arrangements that could have protected counsel, if necessary, included handcuffing or shackling appellant, arranging for conferences to be conducted behind glass or in a room where security personnel could visibly observe appellant but not hear attorney-client communications, requiring the guards to wear earplugs, and/or using personnel unconnected to Corcoran State Prison. These alternatives could have protected counsel from any possible harm, without eliminating appellant's right to communicate confidentially with his attorney.

the record to show that the court attempted to safeguard, balance or protect appellant's state and federal rights to counsel or his right to be present at critical proceedings.

Under these circumstances, respondent's contention that there was no state interference with the right to counsel is unavailing. Similarly, respondent's contentions that appellant "waived" his right to confidential communications with his attorney because he failed to object or voice displeasure with counsel's stipulation or the court's order have no basis in law or in principles of due process. A rule that a defendant must voice objections to the outcome of a proceeding of which he was unaware, to the stipulation of an attorney who was never required to discuss it with him, and/or to an order of the court of which he was not informed, cannot withstand the mandates of fairness and justice.

B. The Record Does Not Establish that Prospective Counsel Requested or Desired the Presence of Corcoran Correctional Officers During Attorney-client Conferences

Virtually all of respondent's arguments are constructed on a faulty legal premise – that the right to counsel cannot be violated where the attorney in question "requested" the conditions leading to the constitutional violation herself. However, whether it was prospective counsel or the prosecutor who requested the presence of prison guards during counsel's meetings with appellant, it was the court that authorized the arrangement and purported to sanction an extension of the attorney-client privilege without appellant's presence, knowledge or consent. It was the court that sealed the proceedings to keep them secret. Following this, the court appointed counsel without assuring appellant was aware of the arrangement it had previously authorized, let alone that appellant consented to it. Thus, whether or not it was prospective appointed counsel Donna Tarter's desire to be accompanied by Corcoran guards, the record does not show that appellant was aware of that desire, that he shared or acquiesced in it, nor that he was informed of the court's order. It was the court that had the ultimate duty to protect appellant's right to counsel, and the court that

allowed the evisceration of that right.

Ignoring these principles entirely, throughout its arguments respondent insists, in contradiction to the record, that attorney Tarter initiated, desired, and/or requested herself that correctional officers be present at all attorney-client meetings.[8] It then relies on this misleading characterization of the record in each of its arguments to appellant's claims and subclaims, in an attempt to divert from the serious constitutional violations that undermined the entire framework of the trial.[9]

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8. See, e.g., RB at 27 ["Tarter indicated her desire," the court accepted "her request," appellant did not object to "Tarter's desire"]; RB at 28 ["Tarter wanted the officers present for her protection"]; RB at 29 ["Tarter requested the officers' presence"]; RB at 30 ["Tarter desired the officers' presence for her protection"]; RB at 31["Tarter's desire to have the officers accompany her"]; RB at 38 ["Tarter requested the officers' presence for her protection"; "the court, accepting Tarter's desire"]; RB at 39 ["Tarter requested the officers' presence"]; RB at 41 ["Tarter requested the officers' presence"]; RB at 45 ["Tarter requested that the officers accompany her to meetings with appellant"]; RB at 46 ["Tarter requested that the officers accompany her to her conferences with appellant"]; RB at 47 ["the hearing where Tarter indicated her desire to have officers accompany her to conferences with appellant"]; RB at 48 ["Tarter's desire to have the officers present"]; RB at 50 [appellant knew that "Tarter desired officers to accompany her while in appellant's presence"]; RB at 51 ["Tarter's desire to have officers accompany her"]; and RB at 53 ["the court's acceptance of Tarter's request"; "Tarter desired to have officers accompany her"; "appellant had knowledge of Tarter's request"].

9. See e.g., RB at 28, 38, 51 [arguing that appellant waived his right to challenge the violation of his rights on appeal because he never objected to counsel's "desire," that because the court merely accepted "Tarter's desire" for the officers' presence, there was no "government interference" with the right to counsel, and that because appellant accepted Tarter's appointment, the record does not show that he did not agree with Tarter's "desire"]; RB at 29 [arguing that because Tarter requested the officers' presence, this Court can infer from the silent record that she explained to her future client why the officers were with her]; RB at 30 [arguing that the extension of the attorney-client privilege without appellant's knowledge or informed and express consent was valid because "Tarter desired the officers' presence for her protection" and that that desire alone "made the officers, in essence, a part of the defense team"]; RB at 41 [arguing that there was no harm to appellant or benefit to the prosecution because, in part, Tarter requested the officers' presence]; RB at 45, 46 [arguing that (continued...)

Appellant was denied the right to counsel, to be present, and to due process when the court, at a proceeding from which appellant was absent and at which he had no legal representative, authorized prison guards from the prison where the crimes occurred to be present at pretrial and trial attorney-client meetings. Nonetheless, because respondent apparently considers Tarter's asserted "desire" and "request" critical to so many of its arguments, appellant is compelled to set the record straight and to dispel any harm from respondent's inclusion and repetition of misleading factual statements into the record.

Appellant therefore sets forth the entirety of the transcript of the critical in camera court hearing:

> THE COURT: On the record. What case are we talking about?
>
> MR. GULARTE: People versus Anthony Delgado, Judge.
>
> THE COURT: What's the Case Number? It's in court, see, I'm in chambers at this point in time. We'll put the court number on whatever it is.
>
> MR. GULARTE: Okay.
>
> THE COURT: Will you, please.
>
> MR. GULARTE: Present in chambers, representing the People, Chris Gularte, Shane Burns; and for the defendant, who we anticipate to be appointed, Donna Tarter. Also present is Correctional Officers Martinez and Correctional Officer Kaszap from Corcoran State Prison.
>
> THE COURT: And there's -- okay.
>
> MR. BURNS: Investigator Rick Bellar from the D.A.'s office.
> THE COURT: I knew we were missing someone.
>
> MR. GULARTE: Given the nature of the case and the person we're dealing with, Mr. Delgado is, in our belief, very, very,

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9. (...continued)
appellant cannot show there was an intrusion into the attorney-client relationship because any intrusion was at Tarter's request and that there was no structural error because Tarter's "desire" did not amount to the denial of counsel]; RB at 52 [arguing that because appellant must have had knowledge of Tarter's "request" and didn't complain about it, he is now "estopped" from challenging the court's jurisdiction].

very dangerous. He's already killed two individuals and we believe he's going to kill another person. In order to protect his attorney, we are willing to stipulate that the attorney/client privilege will extend to the transport officers who are present with Donna Tarter. In the future we're going to have two specific officers assigned to the case from then on. They're not present today, but for today's purposes I would like to have Officer Kaszap and Officer Martinez admonished as to what the attorney/client privilege is. I've already spoken to them in private, so has Donna, we've told them not to disclose any of the communications they hear while they're in the room with Miss Tarter and her client, and that to do so would be a violation of a court order if the Court were to so order that. That's what we're seeking.

MS. TARTER: And I'm in agreement with that order.

THE COURT: You are in agreement with that order?

MS. TARTER: Yes.

THE COURT: All right. Mr. Martinez and Mr. Kaszap?

OFFICER MARTINEZ: Yes, sir?

THE COURT: You are ordered anything that you might casually overhear -- hopefully you won't, but if you do overhear anything, communications between the attorney, Miss Tarter, and her client, it's absolutely confidential and the attorney/client privilege will -- based on stipulation, will apply to that and cannot be used for any purposes whatsoever.

OFFICER MARTINEZ: Yes, sir.

OFFICER KASZAP: Yes, sir.

THE COURT: Not even an impeachment purpose or anything else.

MR. BURNS: Can't even be disclosed.

THE COURT: It cannot be disclosed to anyone.

OFFICER MARTINEZ: Yes, sir.

THE COURT: You just forget it, don't even put a report down.

OFFICER MARTINEZ: Yes, sir.

MR. GULARTE: Your Honor, just to clarify, it won't be a casual overhearing, they're going to be present in the room at all times.

THE COURT: Well, I'm extending it all the way to casual.

MR. GULARTE: Okay.

MS. TARTER: My other request is that this transcript be sealed so that the press does not, or the public, have access to it.

THE COURT: Any objection?

MR. GULARTE: No objection.

THE COURT: So ordered. Opened only under court order.

MS. TARTER: Now I need to go speak with Mr. Delgado.

(8/6/99 CCT 15-21.)

As the above transcript shows, the in camera proceeding was initiated and conducted by the prosecutors, not Tarter. Tarter never said she was requesting the officers' presence nor, significantly, that she felt any need for protection from her future client. Indeed, the record reflects that it was not Tarter, but Deputy District Attorney Gularte who asserted that Tarter needed "protection," based solely on the prosecution's belief that appellant was "very, very, very dangerous." The court made no inquiry into the basis for the prosecutor's assertions, or into Tarter's own concerns, if any, for her personal safety.

The timing of the conference, as well as the presence and the role of the prosecutors belies respondent's contentions regarding Tarter's desire for protection. The conference occurred prior to Tarter's appointment as appellant's trial counsel, i.e. at a time when Tarter would have had no access to any information about the case other than what the prosecutor chose to tell her.[10] She had not yet met appellant and therefore had no independent knowledge of him. Even assuming, without conceding, that Tarter felt the need for protection from her future client, it was a matter between her and the court, and not between the court and the prosecutor, or even between Tarter and the prosecutor. The prosecutor's presence was not necessary to "extend" the attorney-client privilege, nor did the prosecutor need to be present to request that the transport officers be admonished. And

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10. During record settlement proceedings, the parties stipulated that there were no unreported or untranscribed proceedings prior to the in camera conference on August 6, 1999. (2nd SCT 2.)

yet it was the prosecutor who claimed Tarter needed protection, and who initiated and led the entire proceeding.

Further, although Tarter stated her agreement with the prosecutor's request, that request was that the court approve a stipulation that the attorney-client privilege be extended to the officers who transported appellant to court, and that the court specifically admonish the two officers who happened to be present that day that they would violate the court's order if they revealed what they heard to anyone. As Gularte stated: ". . . for today's purposes I would like to have Officer Kaszap and Officer Martinez admonished as to what the attorney/client privilege is. I've already spoken to them in private, so has Donna, we've told them not to disclose any of the communications they hear while they're in the room with Miss Tarter and her client, and that to do so would be a violation of a court order if the Court were to so order that. *That's what we're seeking.*" (*Id.* Italics added.)

As the transcript shows, Tarter requested only one thing herself – that the transcript of the hearing be sealed. (*Id.*) Thus, respondent's contention that Tarter requested or even desired the presence of correctional officers for her own protection is contrary to the record. It was the prosecution who proffered the arrangement to the court, the prosecution who gratuitously extended a privilege it had no right to waive or extend, and the prosecution who requested that the officers be admonished.

The subsequent hearing in the trial court at which two additional officers were admonished to keep confidential anything they heard between appellant and his attorney also cannot be attributed to any request by attorney Tarter. (1RT14-15.) The record makes clear that it was the government, through the California Department of Corrections, that requested that the court admonish two different correctional officers, Masters and Close, that they too were covered by the attorney-client privilege and that they were not to disclose attorney-client discussions to anyone in the CDC or the District Attorney's office. The prosecutor explained that the request to admonish the officers came from Masters and

Close's supervisors at the CDC and not attorney Tarter. (1RT14-15.) In fact, Tarter said nothing during this hearing.

To the extent that respondent's legal arguments depend on the factual representation that Tarter requested or desired the presence of prison guards for her own protection, these arguments must be rejected. But regardless of the desires or requests of his future attorney, the court authorized the arrangement that stripped appellant of an essential component of the right to counsel, resulting in the denial of appellant's state and federal rights.

C. Appellant Did Not Waive or Forfeit His Claim that His State or Federal Constitutional Right to Counsel Was Violated by the Presence of Correctional Officers During Attorney-client Conferences

Respondent argues that appellant "waived" any claim regarding the officers' presence because he failed to object and he accepted Tarter's appointment, "knowing that officers would accompany Tarter to all conferences." (RB at 27.) As this Court has repeatedly acknowledged, "waiver" is frequently used to describe two related, but distinct concepts: forfeiture or the loss of a right by failing to assert it; and waiver or the intentional relinquishment of a known right. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Forfeiture is the failure to make the timely assertion of a right, while waiver is the intentional abandonment of a known right. (*Id.*, citing *United States v. Olano* (1993) 507 U.S. 725, 733; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) Respondent throughout its brief argues that appellant "waived" his rights, without distinguishing between the two concepts of waiver and forfeiture. Nonetheless, whether respondent's argument is construed as one of the intentional relinquishment of a known right, or as the simple forfeiture of a claim of trial error, the record does not demonstrate that appellant either waived or forfeited the claims at issue here.

1. This Court Cannot Infer from a Silent Record that Appellant Was Informed of and Agreed to the Presence of Prison Guards at His Meetings with Counsel or the Purported Extension of the Attorney-client Privilege, nor that He Waived His Right to Confidential Communications with Counsel

To establish waiver here, the burden is on respondent to establish that appellant knowingly relinquished a crucial aspect of his right to counsel, the right to consult in private. The party claiming the existence of a waiver must prove it by evidence that does not leave the matter to speculation, and doubtful cases must be resolved *against* a waiver. (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108.) The valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. (*People v. Vargas* (1993) 13 Cal.App.4th 1653, citing *Jones v. Brown* (1970) 13 Cal.App.3d 513.) In the context of the right to counsel, the United States Supreme Court has mandated, and this Court has duly acknowledged, that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and must "not presume acquiescence in the loss of fundamental rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; accord, *In re Johnson* (1965) 62 Cal.2d 325, 334.) "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (*Carnley v. Cochran* (1962) 369 U.S. 506, 515-516.)

Respondent does not even attempt to meet its burden here and it could not prevail if it did. There is nothing on the record that shows that appellant was informed of his right to communicate confidentially with counsel, or that by accepting counsel's appointment, he had waived the right to challenge anything that had happened prior to that appointment, whether or not he knew about it. No judge informed appellant that his prospective attorney had stipulated away a crucial aspect of the attorney-client relationship, and no judge sought his agreement in that stipulation.

Critically, there is nothing on the record that establishes appellant was ever asked for his waiver or consent. Respondent has not proven that appellant waived any of his Sixth Amendment or state constitutional rights.

2. Appellant Did Not Forfeit His Right to Appellate Review of his Claims

a. Respondent's Argument Relies on Unreasonable and Illogical Inferences

Respondent, while couching its argument solely in the language of waiver, does not point to any facts that show an actual, knowing waiver on the record, but instead essentially argues that appellant has forfeited appellate review of his claims by failing to object or voice his displeasure in the trial court. In the absence of a record to prove that appellant knowingly waived his rights, respondent is forced to base its argument entirely on inferences, presumptions, and assumptions of what might have occurred when counsel met with her future client for the first time.

Specifically, respondent asserts that the first time Tarter met appellant she "presumably" was accompanied by officers Martinez and Kazsap. From that presumed fact and "the fact that the in camera hearing had just commenced [sic],"[11] respondent urges that "it is a reasonable inference that Tarter explained to appellant why the officers were accompanying her." (RB at 27.) While appellant does not dispute that the prison guards were present when Tarter met with appellant prior to arraignment, and at every meeting thereafter, there is no basis on which this Court may infer anything that may or may not have been said by counsel or appellant prior to arraignment, or at any other meeting between them.

An inference under California law is defined as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code § 600, subdiv. (b).) It is not reasonable or logical to infer merely from the presence of the officers at Tarter's first meeting with appellant that she explained *why* the officers were there or that she informed appellant that

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11. The in camera hearing had just concluded. (8/6/99 CCT 21.)

they would be present at every subsequent meeting, and respondent does not further describe the logic of its reasoning or explain how it draws such a specific inference from a silent record.[12] The only thing that reasonably can be drawn from the record is that prospective counsel met "briefly" with appellant prior to arraignment, that she attempted some form of communication with him, and that two prison guards were present with her at the time.

But even assuming, without conceding, that future counsel provided some sort of "explanation" to her client, the record contains no indication of what that explanation might have been. It would be unwarranted to assume that Tarter told appellant she had "requested" the arrangement when the record does not reflect that she made such a request. Further, the record does not indicate that Tarter was afraid of appellant or concerned for her own protection, and when later asked about the need for courtroom security, she affirmatively stated that appellant was "not going to be a problem." (1RT 54.) It is extremely unlikely, and therefore *unreasonable* to infer that she would have told her future client that "she wanted the officers present for her protection" (RB at 28), when she never even made such a representation to the court, not even in the privacy of an in camera and sealed proceeding. Further, it is not reasonable or logical to assume that she would have undercut her imminent appointment as counsel by informing appellant that she had requested, "desired" or stipulated to this arrangement. The record does not show, nor is it logical to infer any specific details of her wholly imagined "explanation."

Nonetheless, from the unreasonable inference that Tarter provided some kind of unknown explanation to appellant in her brief pre-arraignment meeting with him, respondent concludes that (1) appellant waived his right to challenge the denial of his right to counsel by failing to object; (2) that he is estopped from challenging the court's jurisdiction; and (3) that he accepted Tarter's appointment "knowing" that she had agreed to the

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12. The record indicates only that Tarter "tried to talk with [appellant] briefly" prior to arraignment. (CCT 31-32.)

presence of the officers for her own protection. (See e.g., RB at 28, 38, 51, 52.) Basing such conclusions on unsupported inferences or presumptions is improper, especially where the right to counsel is involved, and any inferences that may be drawn from the silent record should not be construed against appellant.

b. Appellant's Right to Counsel Was Not Forfeited by His Failure to Object

In light of the lack of any record to support respondent's asserted inferences, this Court cannot properly find that appellant knowingly waived or forfeited his right to counsel. But even if appellant did know that his prospective attorney had stipulated to the presence of the correctional officers, respondent's contention that none of appellant's arguments regarding the denial of counsel are preserved for appeal, i.e. that they are forfeited, flies in the face of the state constitution, the Sixth and Fourteenth Amendments, and the rights included therein.

Respondent cites one case only for the principle that claims concerning of the denial of counsel can be forfeited by the defendant's failure to object, *People v. Towler* (1982) 31 Cal.3d 105, 121-122. (RB at 27-28.) That case, however, did not address the denial of counsel but instead, addressed the propriety of reversal and dismissal of a criminal case because the district attorney had entered the defendant's jail cell without a warrant and without defense counsel's consent and had seized a number of documents, including a "synopsis" of the defense which Towler had prepared at counsel's request. Defense counsel raised the matter in the trial court by moving that the court either hold the district attorney in contempt, or seize the intercepted documents. The court granted the defense motion and seized the documents, which were never introduced at trial. Thus, defense counsel did not seek suppression of the documents or dismissal as a remedy in the trial court. This Court found the claim of "prosecutorial interference with the attorney-client relationship" was waived because the defendant received the relief requested in the court below in the form of judicial seizure of the documents, and had sought no further remedy in the

trial court. (*Ibid.*)

The present case is set apart from *Towler* for multiple reasons. First, the error here is one of structure, a structure that was established before appellant was even arraigned and when he had no legal representation. Unlike Towler, appellant does not argue that the prosecutor seized a specific piece of privileged evidence and sought to use it against him at trial, or even that appellant's conviction was or may have been based on the introduction of such privileged information at his trial,[13] but rather that his right to communicate with his attorney in confidence was completely eliminated, thereby impairing the very basis of the attorney-client relationship. Unlike appellant, Towler did not assert that he was denied the assistance of counsel. Further, counsel in *Towler* did object to the prosecutor's actions and succeeded by winning the relief requested in the trial court. What was forfeited in *Towler* was the appellant's right to seek a remedy that had not been sought below. Respondent points to no other cases where this Court has refused to hear a denial of the right to counsel claim because of the lack of any objection in the trial court.

If, as respondent repeatedly insists, the deprivation of the right to confidential communications was based on counsel's own "desire" and accomplished at her own "request," its waiver arguments are even more specious. Appellant's claims cannot be waived by counsel's failure to raise an objection to a process designed only to serve her own interests, and not appellant's. An appellate waiver or forfeiture cannot properly rest on the failure of a trial attorney to challenge an order or process that was made at her request, and solely to protect her own interests. (Cf. *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215 [finding that appellant's failure to object to an order concerning trial attorney fees did not forfeit appellate claims regarding the order because it involved the assessment of fees for the

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13. Appellant does not concede that there were no specific violations of the attorney-client privilege by the prosecutor in this case, but to the extent that there were, such issues are not apparent from the appellate record and thus cannot be raised on direct appeal.

attorney's own office and employer].) Similarly, the proceedings and orders "as to which appellant's attorney stood mute" here, like the issue of fees to be paid to counsel by a client, were solely for counsel's benefit and went directly against her client's rights and interests. Counsel had a financial interest in gaining appointment in a capital case, and her failure to object to an arrangement that furthered such an appointment cannot be held against her client. And of course, counsel would not, and indeed, could not later object to something she herself had agreed to prior to accepting appointment as appellant's counsel.

If respondent's argument is that appellant himself had to raise an objection or express displeasure with counsel prior to her appointment regarding the court authorized stipulation or the presence of prison guards at his meetings with counsel, it has not cited any authority for those arguments. Indeed, if appellant's personal failure to object bars consideration of the claims raised herein, then all claims of the denial of counsel would be barred on appeal if not raised in some manner in the trial court. This Court has never held that an unrepresented individual, such as appellant was prior to Tarter's appointment, has to take any steps to protect his right to counsel or effective representation, nor that an individual who *is* represented by counsel has a personal duty to raise an objection to counsel's performance in the trial court, or risk losing all judicial review of his claims. Application of such principles, if ever appropriate, would be particularly unfair where, as here, the record is devoid of any suggestion that appellant was informed of the challenged stipulation and court order.

D. Appellant's Right to Counsel Was Violated When the Court Authorized a Stipulation Between the Prosecutor and Prospective Counsel Eliminating Confidential Attorney-client Communications Without Appellant's Knowledge or Consent, Whether or Not There Was Intentional Governmental Interference

Respondent argues that appellant has not established a claim of "governmental interference" with the attorney-client relationship because the court's order authorizing the presence of prison guards at attorney-client conferences was not made "unilaterally" and thus, was "not at the

government's hands." (RB at 28.) Respondent misconstrues both the facts and the bases of appellant's claims.

Initially, respondent relies on another misstatement of the facts, this time claiming that "the prosecutor explained to the court that . . . Tarter wanted the officers present for her protection." (RB at 28.) As the transcript of the August 6, 1999, hearing shows, the prosecutor did not "explain" to the court that *Tarter* wanted prison guards at her meetings with appellant for her protection, but only that *the prosecutor* believed generally that appellant was dangerous and that counsel needed protection. (8/6/99 CCT 15-21.) But whether or not it was future appointed counsel, the prosecutor, the court or a combination of all three who were responsible, through no fault of his own appellant was tried, convicted and sentenced to death without the ability to consult in private with his attorney, and thus, was effectively without counsel.

Respondent ignores the gravamen of appellant's claim. Because of the court's actions and inactions, appellant was denied the right to counsel entirely, whether or not there was an intentional prosecutorial interference with his relationship with counsel. Under both the state and federal constitutions, the right to counsel is absolute in the absence of an informed, voluntary waiver. Violations of the right to counsel can occur even when there was no intentional interference by the prosecutor and even where appellant's "representative" agreed to the violation. Thus, this Court has found a reversible violation of the state constitutional guarantee to the assistance of counsel where the defendant was represented at a felony trial by an attorney who had been suspended from the practice of law and had submitted his resignation to the state bar while disciplinary charges were pending. (*In re Johnson* (1992) 1 Cal.4th 689.) The right to counsel and all subsidiary rights can be violated even where purported counsel is privately retained, rather than appointed by the state court.

The United States Supreme Court has made this point abundantly clear by extending the Sixth Amendment right to counsel and effective assistance to cases where the defendant has retained counsel and thus,

where neither the prosecutor nor the court had any role in selecting or appointing the chosen attorney. "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 345.) The Court reasoned that, in the state trial court, it is "the State," i.e, the government, that is responsible for the conduct of the trial.

> Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance. . . . [T]he State's conduct of a criminal trial itself implicates the State in the defendant's conviction.

(*Id.*) To the extent respondent's arguments depend on the asserted lack of "governmental" interference, they ignore these long-established principles and have no merit.

Appellant's legal representation in this case was at all times under the control of the court. Tarter was appointed by a judge who had just authorized the violation of appellant's right to counsel at a proceeding orchestrated by the prosecutor, and which was kept secret by judicial order. Under these circumstances, the deprivation of the right to confidential communication with counsel was entirely at the hands of the "government," which included not just the prosecution, but the judicial officer overseeing the proceedings as well.

The United States Supreme Court has conferred upon trial courts the final authority for ensuring that a criminal defendant receives a fair trial. (*Powell v. Alabama, supra,* 287 U.S. at p. 52 ["However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial"]; *Geders v. United States* (1976) 425 U.S. 80, 87 ["If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings"].)

Indeed, in *Geders*, the Court found structural error based on a trial court order prohibiting one meeting between counsel and client during a lengthy trial. There was no discussion in *Geders* of the lack of "governmental interference." Instead, the Court acknowledged that the trial judge had the authority to control the proceedings, and thus, the authority to order and oversee the sequestration of witnesses during trial. It found that the trial court's application of a sequestration order to a testifying defendant that prohibited him from meeting with counsel on one occasion during trial violated the defendant's constitutional rights. (*Id.* at p. 91.) Although it recognized that there is a legitimate purpose to be served by a court order to sequester witnesses, the *Geders* court noted that the trial court had a variety of ways to further that purpose without placing a sustained barrier to communication between the defendant and his lawyer. It held that "a judge faced with a conflict between the defendant's right to consult with his attorney and other legitimate concerns must, under the Sixth Amendment, resolve such conflicts in favor of the right to the assistance and guidance of counsel. (*Ibid.*, citing *Brooks v. Tennessee* (1972) 406 U.S. 605.) The court here did not do so.

In this case, the court did not acknowledge that appellant had any rights whatsoever vis-a-vis the attorney-client privilege, let alone make any attempt to resolve the conflict between those rights and any "other legitimate concerns" in a manner that would favor appellant's right to the assistance of counsel. Notably, assuming, arguendo, that there was a legitimate concern for counsel's safety, as in *Geders*, there were a variety of ways to accommodate that concern without placing a sustained barrier to communication between appellant and his lawyer. The court could have considered more traditional methods of security, such as handcuffing or shackling appellant when he met with counsel. It could have arranged for conferences to be conducted with appellant behind glass or a partition, or in a room where security personnel could visibly observe, but not hear, attorney-client communications. It could even have directed the guards to wear earplugs. Any of these arrangements would have served any need to

protect counsel, without impeding appellant's right to communicate confidentially with his attorney.[14]

The trial judge is not simply an observer of the trial process, but rather has the responsibility "for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice." (*People v. Shelley* (1984) 156 Cal.App.3d 521, 530.) Even when a defendant has counsel, the trial court retains "the obligation to supervise the performance of defense counsel to ensure that adequate representation is provided." (*Id.* at pp. 531-532.)

> The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.

(*People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, quoting ABA Standards for Criminal Justice – Special Functions of the Trial Judge, std. 6-1.1.)

As this Court has recognized:

> "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. [Citations.]" *"It is no mere peripheral evidentiary rule, but is held vital to the effective administration of justice.* [Citations.]"

(*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715, italics added.) By failing to protect appellant's right to confidential communications with his attorney, neither the court that initially authorized and enforced the prosecutor's stipulation, nor the trial court that further "extended" the attorney-client privilege, safeguarded appellant's right to counsel or the

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14. Although the presence of any unwanted third parties would have infringed on appellant's right to counsel, the court also failed to consider minimizing the possibility of harm by using personnel unconnected to Corcoran State Prison, such as marshals, bailiffs or local law enforcement.

effective administration of justice in this case.

Appellant recognizes that the issues raised here do not fit squarely into any cases previously decided by this or any other court. The absence of cases directly on point, however, does not mean that appellant's rights were not violated, but only that a situation such as the one presented by this case has not previously reached the courts. Indeed, their *sui generis* nature further underscores the unreasonableness of the circumstances which were forced upon appellant. Because the acceptance of a stipulation purporting to make prison guards part of the defense team in a prison murder case, without appellant's presence, knowledge or informed consent is so completely counter to the guarantees of the state constitution, the Sixth and 14th Amendments, and the duties of the court, these facts have not arisen in the past and are extremely unlikely to arise again.

E. The Presence of Prison Guards at All Attorney-client Conferences Violated Appellant's Right to Counsel Whether or Not the Guards Actually Disclosed Appellant's Communications to the Prosecution

Respondent argues that, regardless of appellant's failure to object, or whether or not there was government interference, there was no error. Respondent relies entirely on a footnote in *People v. Rich* (1988) 45 Cal.3d 1036, 1100, fn. 16, for this argument. In the footnote, this Court summarily discounted an argument that counsel's failure to object to the presence of one police officer at an interview between the defendant and a court-appointed mental health professional amounted to ineffective assistance of counsel. Respondent points to the fact that counsel in *Rich* did not object and stated on the record that they would not object because the officer had assured them he would not discuss the conference with anyone.

This Court's footnote in *Rich* does not control the present case for several reasons. Appellant's claim here is not based on counsel's failure to raise an objection, but rather on a stipulation authorized by the court which undermined the entire framework of appellant's right to counsel and his trial. Appellant does not base his present claim on the interception or use of a specific privileged communication, or on his prospective counsel's failure

to object, but on the far more insidious invasion of the attorney-client relationship that was caused by the presence of prison guards during all his meetings with counsel. Even assuming, arguendo, that, as in *Rich,* the accompanying officers did not disclose what they heard, and/or that the prosecution gained no specific benefit from any such disclosure, the violation of appellant's rights here stems not from a breach of the privilege, but from its absence altogether, an absence which deprived him of a basic and fundamental component of his right to counsel, the right of the accused to confer privately with his attorney.

Moreover, unlike the court-appointed expert in *Rich*, there is no indication that Tarter expressly requested the presence of Corcoran prison guards, or even more importantly, that their presence was necessary to her representation of appellant. In *Rich,* this Court found it significant that the expert himself had refused to interview the defendant unless his request for protection was granted. (*People v. Rich*, *supra*, 45 Cal.3d at p. 1100, fn. 16.) The attorney-client privilege does not extend to third parties unless their presence is "reasonably necessary" for counsel to accomplish his or her goals. (Cal. Evid. Code. § 952.) In *Rich*, the expert's insistence on this specific form of protection before meeting with the client rendered that protection "reasonably necessary," and thus there was no incursion on the right to confidential communications.

Respondent's reliance on *Rich* only highlights the egregiousness of the violation of appellant's right to confidential communications with counsel in this case. At issue in *Rich* was one conference with one expert, not every conference between attorney and client. Unlike in *Rich*, appellant here was never allowed to speak in confidence with counsel. Further, there was no showing here that counsel, like the expert in *Rich*, would not or could not communicate with her client absent the presence of Corcoran prison guards, and thus the record does not demonstrate any necessity for the arrangement.[15]

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15. Even assuming Donna Tarter would not accept appointment in (continued...)

F. The Record Does Not Show that the Presence of Prison Guards at All Attorney-client Conferences Was Reasonably Necessary for the Transmission of Information to Trial Counsel, nor that Appellant Was Aware that Their Presence Was Reasonably Necessary

Respondent urges this Court to find that appellant was not denied the right to consult with counsel confidentially because, by virtue of Evidence Code section 952, the guards were included within the attorney-client privilege and thus were, effectively, members of the defense team. As set forth in the AOB, at pages 48-51, the requirements of section 952 were not met because the presence of Corcoran guards was not necessary to transmit information between appellant and his attorney nor to accomplish appellant's representation and, in fact, their presence only impeded, rather than promoted appellant's right to counsel.

Respondent again is forced to rely on a series of illogical and unreasonable inferences to counter appellant's arguments. Respondent again asserts that Tarter "desired the officers' presence for her protection," and adds that "*presumably*, she was aware of the facts underlying appellant's charges." (RB at 31, italics added.) Based on Tarter's purported "desire" and a presumption that she was familiar with the facts of a case to which she had not yet been appointed, respondent asks this Court to conclude that the presence of prison guards employed at the prison where the crimes occurred and where appellant was housed was "reasonably necessary for the transmission of the information from appellant to Tarter." This Court cannot reasonably draw any such conclusion.

Appellant has already shown that respondent's underlying premise that prospective counsel "desired" the presence of prison guards at attorney-client conferences is not supported by the record. He has also shown that there is nothing in the record to support the conclusion that counsel herself felt that she needed protection. But even assuming that Tarter did want

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15. (...continued)
the absence of extraordinary security measures, as discussed above, there were multiple ways to accommodate any legitimate concerns short of stripping away appellant's right to confidential communications.

protection, that desire alone does not support an inference that her protection was "reasonably necessary" to represent her client. And perhaps most significantly, there is nothing on the record from which any court could reasonably infer that it was necessary to place two Corcoran prison guards within earshot of every conversation between appellant and his counsel in order to provide counsel with such protection as was actually warranted.

Further, the Evidence Code only protects communications transmitted by a means which, "so far as the client is aware," discloses the information to no third parties other than those present to further his own interests or that are reasonably necessary to transmit information to counsel. (Evid. Code § 952.) Respondent contends that there is "nothing in the record" to show appellant did not understand "why" the officers were there, but the problem is that there is nothing to show that he was aware of the reasons either. Whether or not appellant was present when the court told two particular guards they could not repeat what they heard, the Evidence Code and relevant authority makes clear that statements made in the presence of unnecessary third parties are not privileged unless *the client is aware* they are reasonably necessary for his representation. Because the presence of the officers was not reasonably necessary, it is impossible for this Court to infer that appellant was aware that they were. Further, contrary to respondent's contention (RB at 31), the court's belated admonishment of two of the officers, Masters and Close, in appellant's presence some four months into trial preparation, does not support an inference he was aware they were reasonably necessary to assist counsel, and certainly cannot support any inference that appellant was aware of anything regarding any *other* guards who were present at the meetings that occurred prior to that admonishment.

Regardless, appellant is not contending here that section 952 of the Evidence Code was violated, and is not seeking relief for any such violation. Instead, he points to the Evidence Code only to show that, despite its broad interpretation of the attorney-client privilege, the mere

judicial acceptance of the "extension" of the privilege, without a showing of reasonable necessity and without appellant's awareness of any such necessity, could not effectively render any communications between appellant and his attorney "confidential."

G. Appellant's Sixth Amendment Rights Were Violated and Structural Error Occurred When the Court Authorized the Presence of Prison Guards at All Attorney-client Conferences

In Section D of its brief, respondent again argues that the lack of "government action" is determinative of appellant's right to reversal. (RB at 38.) It begins its argument with a footnote in which it claims to refute an argument not made by appellant, that the guards were "sitting" at counsel table. (RB at 32, fn. 9.) Appellant did not make any representations as to whether the guards were sitting or standing and such a detail is irrelevant to his argument. However, respondent also claims the record does not show that the guards were positioned in between appellant and his counsel while in open court. On that point, it clearly is mistaken. The officer in charge of security assured the court that there would be one officer to the left of appellant, one to the right and one directly behind him at all times. (1RT 114.) While respondent now claims that actually was not the case,[16] the record shows otherwise.

District Attorney investigator Ebner was asked twice during his testimony to identify appellant. On the first occasion, he testified that appellant was situated "*between* three correctional officers and to the right of defense attorney, Donna Tarter." (3RT 702.) Had appellant actually been positioned between his attorney and the correctional officers, as respondent now asserts, Ebner's description would have been incorrect, yet the prosecutor himself confirmed the description by responding "Good identification." (*Id.*) On the second occasion, Ebner described appellant's

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16. Respondent knows, or should know, the precise security arrangements enforced at appellant's trial. Its attempt to rely on a minor inconsistency in the record to falsely suggest that those arrangements were not actually followed is reprehensible.

position as "to the left of Defense Attorney Tarter, and three correctional officers to his rear." (5RT 996.) This time, the prosecutor corrected the witness' imprecise description, a correction which the court itself confirmed:

> [District Attorney] Burns: May the record reflect that the witness has pointed in the general direction of Mr. Delgado, who is sitting to– from the witness' perspective– the left of Ms. Tarter, is wearing a white shirt, button-up shirt, and has *three correctional officers in green circling around him?*
>
> Court: Yes

(5RT 996, italics added.) The record thus shows that officers were circling between appellant and his attorney when they were in open court.

After discussing the opinions of the United States Supreme Court that have addressed, inter alia, the circumstances under which the denial of counsel or related Sixth Amendment rights have been found to be structural, respondent asserts such error can only be established in cases where there is "government action." Relying again on the unsupported inference that Tarter requested the presence of prison guards to protect her from her future client, respondent insists there was no "governmental interference" with the right to counsel. As appellant argued above, the prosecutor's proffered stipulation to extend the attorney-client privilege made no mention of Tarter's desire or request for the presence of the officers.

The State cannot seek judicial approval and acceptance of its plan, and then claim, as it does here, that the court bore no responsibility for the resulting constitutional violation. But even if the arrangement was made at prospective counsel's request, it was the court that was asked to accept the unconstitutional stipulation and the court that purported to extend the attorney-client privilege. Further, it was the court that appointed Tarter to defend appellant against charges of two prison murders and the assault of a prison guard, knowing that Tarter had just agreed to allow prison guards employed at the very same prison to hear all communications between her and her future client. As the United States Supreme Court has observed:

> When an indigent defendant is unable to retain his own lawyer, the trial judge's appointment of counsel is itself a

> critical stage of a criminal trial. At that point in the proceeding, by definition, the defendant has no lawyer to protect his interests and must rely entirely on the judge. For that reason it is "the solemn duty of a ... judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings.

(*Von Moltke v. Gillie* (1948) 332 U.S. 708, 722.)

Further, the law is clear that the Sixth Amendment right to counsel exists unless it is affirmatively and knowingly waived, and Sixth Amendment violations can and do occur even in the absence of a court order or prosecutorial interference. As discussed above, "the State's conduct of a criminal trial itself implicates the State in the defendant's conviction." (*Cuyler v. Sullivan*, *supra*, 446 U.S. 335, at p. 345.) No further state action or interference is required to plead a Sixth Amendment violation.

Respondent's attempt to draw a distinction between Sixth Amendment structural error and regular trial error based on whether or not the error was caused by "government action" is thus misplaced. In *People v. Hernandez*, this Court recognized there are several different categories of Sixth Amendment violations in which a conviction may be reversed without a specific showing of prejudice because "the cost of litigating their effect in a particular case is unjustified." (*People v. Hernandez* (2012) 53 Cal.4th 1095, 1104-05.) In describing these errors, this Court explained that no prejudice need be shown where the accused "was denied counsel," or where "counsel was totally absent" or was "prevented" from assisting the accused during a critical stage of the proceedings." (*Ibid.*) Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable. None of these categories require any state action beyond the action of bringing the accused to trial.

To the extent that this Court has also described examples of instances where the United Supreme Court found that "*the government's*

interference with counsel's ability to render effective assistance" justified a presumption of prejudice, that language appears to be shorthand for action or inaction by the court, or for the application of state statutes or court rules, and does not require any overt or intentional governmental "interference" or misconduct. (*People v. Hernandez, supra*, 53 Cal.4th at 1104-05.) After discussing the different types of cases deemed reversible for structural error, this Court also acknowledged that "[c]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (*Ibid.*, citing *United States v. Cronic* (1984) 466 U.S 468, 659-660.) Again, this circumstance does not depend on the presence or absence of governmental action.[17]

Respondent identifies no rationale for a rule that would limit a finding of structural error to cases where there was some additional "government action" beyond that which attaches to every criminal trial. While the Supreme Court has listed certain circumstances where it has found structural error, it has clearly stated that other "circumstances of that magnitude" might also justify such a finding. In discussing *why* certain errors are considered "structural" the Supreme Court generally does not place any significance on *who caused* the error, and for good reason. The deprivation of the right to counsel is no more [or less] egregious in situations where the deprivation is caused by prosecutorial misconduct or a direct order by the trial court, than where it is caused by oversight or even counsel's own actions. Accordingly, as this Court has recognized, the proper focus for purposes of determining whether an error is "structural" is on the nature and scope of the restrictions on the right to counsel and

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17. Obviously, where the claimed Sixth Amendment violation is itself based on prosecutorial misconduct, i.e. the unlawful seizure or interception of privileged communications without the knowledge of the defendant or counsel, then such misconduct or interference must be shown on the record. Appellant is not raising such a claim in this proceeding.

whether it is possible to demonstrate prejudice. (*People v. Hernandez*, *supra*, 53 Cal. 4th at pp.1104-05.) The presumption of prejudice redresses situations where *Strickland's* prejudice requirement is inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. (*Ibid.*, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 176.) Thus, to protect the defendant's Sixth Amendment rights, the presumption of prejudice must be applied where "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel." (*People v. Rundle* (2008) 43 Cal.4th 76, 173.)

The circumstances in the present case fall squarely into the class of cases where prejudice has been presumed. Both the possibility of prejudice and the difficulty of demonstrating it are far greater in this case than in cases involving counsel's specific acts or omissions before or during trial. Given the importance of confidential attorney-client communications to the right to counsel itself, the denial of the ability to speak with counsel in private and outside the hearing of third parties closely aligned with the prosecution, the witnesses, and one of the victims, operated in the same way as a complete denial of counsel. Whether considered as a constructive denial of counsel, or as circumstances under which no lawyer, even a fully competent one, could provide effective assistance, the existence of prejudice cannot be determined using the "more customary assessments of the detrimental effects of deficient performance by defense counsel," i.e. by assessing whether, in the absence of the error, there is a reasonable probability the result of appellant's trial would have been different.

Respondent argues that the presence of Corcoran prison guards at every meeting between appellant and Tarter before and during trial did not amount to a complete denial of counsel because the record does not affirmatively show that appellant was prevented from effectively communicating with his attorney. (RB at 39.) Appellant disagrees. The first time appellant was asked by the court for his input into a decision by

counsel, he told the judge he had "no intentions to discuss anything with her." (CCT 34.) That exchange demonstrates that there was no effective communication between appellant and Tarter. But even without appellant's expression of distrust and his lack of communication with his attorney, in this case, the uninvited inclusion of prison guards during all conferences with counsel created a situation where no similarly situated defendant would or could speak freely and in confidence about matters directly related to his defense.

In *Geders v. United States*, *supra,* 425 U.S. 80, the Court found structural error when the defendant was not allowed to speak to his attorney during just one overnight recess in the course of a lengthy trial. The Court there based its ruling on general concepts and "common practice" regarding the importance of a defendant's right to consult with counsel during a trial, rather than on any case specific factors articulated by counsel or Geders himself. As the Court explained:

> The recess at issue was only one of many called during a trial that continued over 10 calendar days. But it was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

(*Id.,* at p. 88.) Appellant's need to discuss matters with his counsel at recesses and breaks during preliminary proceedings and at trial here was no less important than the defendant's in *Geders*. Meetings with counsel at recesses during court proceedings, just as in *Geders*, were crucial for him to receive the benefit of counsel's assistance and guidance, and to make tactical decisions and review strategies with counsel. Here, however, appellant never had the opportunity for any private, confidential

conferences with counsel, as prison guards were present at all such conferences, from the time the complaint was filed until the judge imposed a sentence of death. The denial of counsel here lasted not just a matter of hours, but a period of months.

Nowhere in respondent's brief does it mention the fundamental nature of the right to private consultation with counsel or the reasons it is considered to be fundamental. These reasons are every bit as compelling and possibly more so, than the reasons identified by the Court in *Geders* to support per se reversal where the defendant was not allowed to meet with his attorney on only one occasion during trial. A defendant cannot enjoy the effective aid of counsel if he is denied the right of private consultation with him or her. "The purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions." (*In re Jordan* (1972) 7 Cal.3d 930, 940.)

> [Counsel's] duty to investigate requires that counsel gather as much information as possible about the case, including facts concerning the acts charged, possible defenses, and the accused's background and prior record. A primary source of such information is the accused himself. Often, whether guilty or innocent of the offense charged, the accused knows facts pertinent to his defense which may tend to incriminate or embarrass him.

(*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751.) A client who knows that damaging information could more readily be obtained following disclosure to his attorney than it could be obtained in the absence of such disclosure will be reluctant to confide in his lawyer and it will be difficult to obtain fully informed legal advice. (*Id.*) If an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney.

While this assurance likely could not be fulfilled in any case where the defendant's meetings with counsel were held in the presence of *any* unwanted and unnecessary third parties, it is significantly greater here, where the third parties were directly connected to the prosecution team, i.e.,

to the prison officers who investigated the charged crimes, and to a vast majority of the witnesses, as well as to one of the victims. As set forth in Section A of this argument, *ante,* 16 of the 19 guilt phase witnesses and 12 of the prosecution's 16 penalty phase witnesses were employed at Corcoran State Prison, and a number of them held higher ranks than the transport officers present during appellant's meetings with his attorney.

Any defendant would be hesitant to disclose names and information relevant to the attorney's investigation and necessary for the formulation of trial strategy and defenses in the presence of people who were possibly friends, coworkers or subordinates of the people the defendant might implicate, not to mention one of the victims. But a defendant charged with killing two prisoners and assaulting a prison guard would, with justification, be especially hesitant to do so in front of other prison guards from the same institution. Particularly in a case such as this, where the CDC, the Warden and Corcoran correctional officers were facing investigation and possible criminal and/or civil proceedings for their negligence in one of the charged murders, and thus had a significant stake in the facts developed at appellant's trial (see AOB at 4-5), the defendant would necessarily feel constrained in discussing his case freely in the presence of Corcoran employees.

Even assuming the four guards who were admonished not to divulge what they heard in this case upheld that admonition, appellant had more to fear than that they would divulge confidential communications to the prosecutor, to prison staff or to other guards, because these men also were appellant's jailors. As such, they did not need to share or disclose what they learned with anyone in order to "use" privileged information to appellant's detriment. The guards, by virtue of their position, had the power and authority to make appellant's daily life much more difficult by using the information they learned about him to taunt or provoke him, to impose special punishments or restrictions in their encounters with him, and/or to take advantage of any specific vulnerabilities he revealed to counsel.

Discussions between client and counsel in a capital case necessarily touch on many things that a defendant may not want to reveal to strangers, particularly not to individuals with control over virtually every aspect of his life. During preparation for the guilt phase of the trial in this case, effective counsel would need to investigate, inter alia, appellant's mental state, physical condition and relationship with other prison guards and prisoners. In preparation for the penalty phase, counsel had a duty to investigate, inter alia, appellant's life history, his relationship with his family and others, his institutional history, his mental health and medical problems, and his history of physical or sexual abuse. There are myriad reasons why a prisoner would not be comfortable disclosing such information in front of his jailors, including but not limited to fear of retaliation for implicating the guard's co-workers and friends, fear of appearing weak or vulnerable, a desire not to reveal family or other sensitive matters to strangers, and embarrassment or shame about events in his life or his background.[18] Based on his own experience, appellant here would have had a legitimate and not unwarranted fear that his personal information might be used to harm his interests.

Respondent urges this Court to apply *Weatherford v. Bursey* (1977) 429 U.S. 545, 553, and *People v. Alexander* (2010) 49 Cal.4th 846, both of which rejected a structural error analysis for claims involving specific, discrete, and identifiable intrusions into the attorney-client relationship. Applying this line of cases, respondent argues that appellant must show "the realistic possibility of injury to the defendant or benefit to the state" to prevail. Appellant disagrees that this case is governed by *Weatherford* or its progeny to the extent that they require more than demonstrating that the facts here give rise to a presumption of prejudice. The nature of the injury claimed here is categorically different from that presented in the cited cases, and that difference itself makes both "the possibility of prejudice and the

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18. Indeed, before appellant was ever charged in this case, investigators, for no apparent reason, had notified his foster parents that he was accused of killing his cellmate. When he learned that the investigators had disclosed this information, appellant was distraught because he had wanted to break the news to his foster parents himself. (9CT 2428.)

corresponding difficulty in demonstrating such prejudice . . . sufficiently great" (*People v. Rundle, supra*, 43 Cal.4th at p.173), to warrant reversal without any additional showing of prejudice.

In *Weatherford*, the defendant filed a civil rights suit seeking redress for the violation of his Sixth Amendment rights. The issue there was whether the presence of an undercover police informant, who also was pretending to be a co-defendant, at just two pretrial meetings with the defendant and his attorney, violated the Sixth Amendment right to counsel when the record unequivocally established that no privileged communications were passed on to the prosecution or were used at trial. As the Supreme Court found, to prevail on a claim based on the government's *surreptitious* interception of privileged communications, there must be some showing that the intercepted communications were used for the prosecution's benefit or that there was a "realistic possibility" of harm to the defendant. The Court rejected a presumption that "federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case." (*Id.* at p. 57.) In light of the trial court's express findings that nothing privileged had been divulged or used at trial, the Court in that case found no benefit to the prosecution and no possibility of harm to the defendant.

In *Alexander*, *supra*, 49 Cal.4th 846, this Court applied the same principles and the rationale of *Weatherford* in a criminal appeal. As in *Weatherford*, the defendant there claimed that specific privileged communications were intercepted, in that instance through the surreptitious wire tap of one specific phone call between the defendant, his mother, and a defense investigator. As in *Weatherford*, the trial court had made express findings that the privileged information revealed during the intercepted call was not used in any way against the defendant and that the government's conduct was not egregious. (*Id.* at 886-887.)

In *People v. Ervine* (2009) 47 Cal.4th 745, another case in which this Court found *Weatherford* to be dispositive, a defendant's notes about his case and strategy were improperly seized from his jail cell during one search. The defense learned of the seizure prior to trial and moved to dismiss all charges. The prosecutors represented that they had not directed, authorized, or received any information from the search of defendant's cell, a showing the defense did not attempt to rebut. The trial court made a factual finding that Sacramento County jail personnel had read defendant's privileged legal materials, but declined to dismiss in the absence of any evidence that jail personnel had communicated the confidential defense information to members of the Lassen County prosecution team. This Court agreed, and held that it is the duty of the defense to establish, as part of its prima facie case, that "confidential information was actually communicated to the prosecution team." (*Id.* at 768.)[19]

Respondent misses the point when it argues that *Weatherford* rejected any assumption that law enforcement agents always communicate the contents of "intercepted communications" to the prosecutors because appellant's claim does not depend on whether or not the guards actually communicated information to the prosecutors handling his case. Appellant's claims are *sui generis*, and thus cannot be resolved by looking to cases like *Weatherford, Ervine* or *Alexander* which only address the surreptitious interception or unauthorized seizure of identifiable, privileged materials. Unlike a situation where, *unbeknownst to defendant or his attorney,* a government agent is present and surreptitiously "overhears," tapes, or seizes privileged communications, appellant was faced with an inherently chilling situation – either knowingly disclose strategic, personal

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19. As appellant demonstrated in his AOB at pages 58-59, under the authorities cited and rationale set forth in *Ervine*, the prison guards in appellant's case, unlike the Sacramento Sheriff's Department in *Ervine*, were members of the prosecution team. As employees of the CDC, and of Corcoran State Prison where the crime occurred, the prison guards worked directly for, and were under the supervision of, agencies indisputably connected to the investigation and prosecution of the criminal charges against the defendant.

and sensitive information to third parties who were not only directly connected with the prosecution and many witnesses, but were in a position of power, authority and control over him, or forgo free and open communications with counsel. This "Hobson's choice" does not arise when a defendant learns, after the fact, that the government overheard something he meant to be confidential. In the latter situation, as in *Ervine, Weatherford,* and *Alexander*, the defendant cannot establish the interception chilled his ability to confide in counsel for the simple reason that he was not even aware of the interception until it was a *fait accompli*. In that situation, it is not surprising that more must be shown than the mere interception of a privileged communication to establish a violation of the state or federal right to counsel.

Even in *Weatherford*, however, the Supreme Court acknowledged that "[o]ne threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard." (*Weatherford, supra,* 429 U.S. at p. 554, fn 4.) The Court went on to note that, in the usual case, such a fear can simply be avoided "by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings." (*Id.*) Appellant here had no opportunity, let alone power, to exclude the guards from his conferences with counsel, and thus the only means available to him to "avoid" the "fear" was to remain silent about case strategy, prison matters, relationships with guards or other inmates, his personal background and history, or, in other words, about anything that mattered to his defense.

When the claimed harm is the interception of specific privileged communications, the impact of the interception can be determined by examining what information was revealed and whether it was actually used to the defendant's detriment at trial. In contrast, the harm here can only be established by proving to the court *what was not said* during attorney-client conferences due to the inhibiting circumstances under which they were

conducted. The "difficulties of proof" required by such a showing are apparent and thus warrant application of a presumption of prejudice.

Further, while respondent attempts to equate the present case with the circumstances of *Ervine* by claiming that the facts there also showed "egregious and pervasive government interference," (RB at 42), neither this Court nor the trial court found that the interception of the attorney-client notes during *one* cell search conducted by jail personnel employed by a different county than the prosecuting attorneys was "egregious" or "pervasive." In situations such as in *Ervine*, *Alexander* and *Weatherford*, where the precise universe of intercepted communications is limited in time or number, and the contents of the specific communications can be identified, described and reviewed by the court, there is no basis for a presumption of prejudice because what was actually communicated to the prosecution and/or used to prosecute the case, as well as the harm it did or did not cause the defendant, can readily be determined. Indeed, in *Ervine* one reason this Court rejected the claimed violation was because the defense could have, but did not, submit the seized notes to the trial court to demonstrate what specific information had been intercepted. (*Ervine*, 47 Cal.4th at p. 770.) Here, the guards were privy not to just one document or conversation, or even two or three, but to every word spoken and every gesture made between counsel and client before and during his capital trial. An unconstitutional condition that persists throughout every phase of the judicial process, unlike a one-time search or overheard conversation, is truly pervasive and infects the entire framework of the adversary process.

Even assuming appellant must show a realistic possibility of harm, appellant's argument is not based on a speculation, but on the actual conditions that persisted throughout his trial and denied him the right to converse freely and in private with counsel. These conditions alone are enough to establish the requisite possibility of harm, but even if this Court finds that more is required, appellant's inability to communicate with counsel appears on the record here. (See CCT 34, where appellant informed the court, immediately after arraignment and his first meeting with

counsel and the prison guards, that he had "no intentions to discuss anything with [counsel].") To the extent this Court finds that appellant must make an additional showing of possible harm beyond that which realistically arose from the arrangement that prohibited him from meeting with counsel outside the earshot of guards employed at the same prison where the charged crimes occurred, that showing has been met here.

H. Appellant's State Constitutional Right to Counsel Was Violated When the Court Authorized the Presence of Prison Guards at All Attorney-client Conferences Resulting in a Miscarriage of Justice

Respondent concedes that the right to counsel under the California Constitution "embodies the right to communicate in absolute privacy with one's attorney" and thus concedes that appellant's right to counsel under state law was in fact violated. (RB at 43.) Nonetheless, it argues that reversal is not warranted here because the California Constitution also prohibits the reversal of a criminal judgment on procedural grounds in the absence of a "miscarriage of justice."

As discussed at length, *ante*, the circumstances under which appellant was tried, convicted and sentenced to death do not mirror anything found in existing cases. *Barber v. Municipal Court* (1979) 24 Cal.3d 742, which discussed the state right to counsel as distinct from that under the Sixth Amendment, imposed the most extreme remedy, the dismissal of all charges, for the "intrusion, through trickery" into the attorney-client relationship by the presence of undercover officers at pretrial meetings between counsel and their clients. Respondent's attempt to both distinguish and apply *Barber* here must be rejected. *Barber* addressed a situation unlike the present one, where the presence of government agents at defense strategy meetings was surreptitious, but was discovered prior to trial. Once defense counsel learned of the invasion of the attorney-client privilege, he immediately went to the court and requested relief. The trial court ordered that nothing overheard by the law enforcement agents could be used at trial, and that the prosecution would have to prove any such evidence came from an independent source. This Court held that the trial

court's remedy did not go far enough, and granted dismissal of the charges. One of the reasons for dismissal was the testimony of one of the defense attorneys in the trial court that his clients still were suspicious and paranoid, and were now refusing to speak with counsel, thereby impeding trial preparation. This Court required no greater showing of harm than that to justify imposition of the most severe penalty.

Relying on the minimal showing put on the record by concerned counsel in *Barber,* respondent asserts appellant has shown no miscarriage of justice because there is no similar record of harm here. However, the record in this case *does* show a breakdown of the attorney-client relationship at its very inception. After arraignment, appellant told the court he was not talking to counsel. The court ignored his statement, showed no interest in appellant's plight, and offered appellant no opportunity to explain why he was not willing to speak to counsel. Under the circumstances, appellant's comment is sufficient to show impairment of the attorney-client relationship, and his failure, in his very brief statement, to articulate the basis for his refusal to speak to counsel cannot be held against him. To the extent respondent relies on the absence of any further record of harm here, that absence must be attributed to attorney Tarter, an attorney who had agreed to the presence of the prison guards and the violation of appellant's rights before she even represented appellant.[20]

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20. Although a claim of ineffective assistance of counsel based on counsel's trial performance cannot be resolved on the appellate record here and thus is not before this Court, the record does establish that Tarter's advocacy during her representation of appellant was extremely passive. She filed no written motions before or during either the guilt or penalty phases of the trial, except to seek more time, no written opposition to any of the prosecution's written motions, and no trial briefs. She made no opening statement at either phase of the trial. On more than one occasion, the trial court stepped in and raised, *sua sponte*, matters that one would usually expect trial counsel to raise. For example, the court reminded Tarter she did not need to stipulate to matters just because they were proposed by the prosecutor (4RT 852), questioned the sufficiency of some of the prosecution evidence presented at the penalty phase, and raised several instructional issues for the benefit of the defense. (See e.g., 6RT 1234-

(continued...)

I. Appellant's Due Process and Statutory Rights to Be Present Were Violated by His Exclusion from the Conference Where the Court Authorized the Denial of His Right to Private Attorney-client Communications

The Sixth Amendment right of the accused to be present during trial proceedings depends on whether the defendant's presence would "contribute to the fairness of the proceeding." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745.) The right to be present, under both the California Constitution and state statutory provisions, depends on whether the personal appearance of the accused bears a "reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Davis* (2005) 36 Cal.4th 510, 530.) This Court has tended to conflate the federal and state standards. (See e.g., *People v. Gonzales* (2012) 54 Cal.4th 1234, 1253-1254.)

Respondent contends that appellant's assertions that his presence was mandated at the in camera hearing where the court sanctioned the stipulation between prospective counsel and the prosecutor "are speculative." (RB at 50.) To the contrary, both the substantial relation of the proceeding to appellant's ability to defend against the charges, and the importance of appellant's presence to the fairness of that proceeding are established by the record of what transpired at the hearing.

In the AOB, at pages 68-70, appellant set forth the reasons why his right to private consultation with counsel could not be eliminated fairly in his absence, in what ways his presence would have contributed to the fairness of the proceeding, and how the proceeding bore a substantial relation to the entire course of his defense. The purpose of the in camera proceeding was to get judicial authorization and enforcement of a stipulation that struck at the heart of appellant's relationship with his attorney by impeding his ability to cooperate with and assist counsel, to obtain counsel's candid advice, and to share vital and personal information

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20. (...continued)
1235; 7RT 1479-1481.) This Court thus cannot assume an absence of harm solely from Tarter's failure to make a record thereof.

essential to an adequate guilt and penalty investigation. The purported stipulation was not valid without appellant's knowledge or consent, and the presence of an attorney, particularly one who was not representing appellant or his interests, could not supplant the need for appellant's own personal presence. Without appellant, the court could not, and did not, assure that appellant was aware of and/or consented to the requested stipulation, the reasons therefor, his prospective counsel's position on the matter, or the purported extension of the attorney-client privilege to the two guards who were present that day. Without such information, appellant's acceptance of counsel at his subsequent arraignment reflected no implicit consent to the arrangement. No speculation is required for this Court to hold that appellant had a right to be present at this critical proceeding.

Respondent does not address these points and instead predicates its argument entirely on its own speculation, based on what it considers reasonable inferences, as to what transpired *after* the hearing. (See RB at 50.) Nothing in the record provides any support for respondent's proffered inferences that Tarter explained to appellant the reasons for the guards' presence, explained that she had "desired" the guards to accompany her, or advised him of the admonishment of the two guards prior to his acceptance of her appointment as counsel. Because of this, any inference that appellant accepted her appointment, and/or reappointment in the superior court, "knowing that Tarter desired officers to accompany her" must be rejected. But even assuming arguendo that appellant, at some point after the hearing, learned of everything that transpired at the hearing from which he was excluded, he still had a right to be present at the hearing itself because his presence would have greatly contributed to its fairness, for the reasons set forth above and in the opening brief.

J. The Violation of Appellant's Right to Be Present Requires Reversal

The violation of appellant's right to be present at the in camera proceeding in this case cannot be considered a "trial error" that is amenable to usual harmless error review. Trial errors are those which occur during

the presentation of the case to the jury, and unlike structural errors, can be readily assessed in the context of "other evidence." In contrast, structural errors affect the framework in which the trial proceeds, and permeate the entire conduct of the trial. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Respondent cites to *People v. Perry* (2006) 38 Cal.4th 302, 312, which in turn cited *Rushen v. Spain* (1983) 464 U.S. 114, to argue that the denial of the right to be present can never, under any circumstance, be treated as structural error. Respondent does not address the point raised in appellant's opening brief, which is that the *Rushen v. Spain* decision did not so hold. As appellant argued there, the Supreme Court merely stated that a violation of the right to be present is, like other constitutional rights, subject to harmless error review, *"unless the deprivation, by its very nature, cannot be harmless."* (*Rushen v. Spain*, 464 U.S. at p. 119, fn. 2.) To the extent that this Court has held otherwise, it should reconsider its position.

Respondent also argues that any harm from the error here is "quantifiable, and is determinate," and thus does not defy harmless error analysis. (RB at 49.) The sole basis for this argument is that appellant could have, but did not, voice any complaints to the judge about the presence of the guards after the hearing at which the stipulation was accepted. Respondent thus incorrectly assumes that any harm arising from the in camera, sealed proceedings was cured because appellant was not prevented from complaining at a later time.

Whether or not appellant's exclusion from the hearing prevented him from voicing any objection to the presence of the guards, as discussed previously, his presence was required for far more than that. The fact that appellant was able to speak to the court does not ameliorate the invalidity of the stipulation to extend the attorney-client privilege. The fact that he could have complained about the guards' presence did not ameliorate the failure of the judge to assure that appellant was aware of the requested stipulation, the reasons therefor, his prospective counsel's position on the matter, or to the purported extension of the attorney-client privilege to the two guards present that day. The "opportunity" to voice his concerns about the

presence of guards would have little meaning if he did not know why the guards were there, or whether their presence had been requested by the prosecutor, his prospective attorney or simply imposed by the court. The harm from appellant's absence was heightened by the trial court's order to seal the transcript of the in camera hearing, solely at defense counsel's request. There was absolutely nothing said at the hearing that warranted the sealing of the transcript from the public.[21] The fact that attorney Tarter requested the sealing herself undercuts respondent's insistence throughout its brief that this Court may infer that Tarter explained what happened at the proceeding to her client.

A hearing at which the right to consult in private with counsel is abrogated for the entire criminal proceeding, and at which no one represented appellant's interests, is not a routine trial conference about legal matters. The hearing resulted in the impairment of appellant's right to counsel and to due process in ways that cannot be quantified. As such, it is one of the rare instances where this Court should reverse without any further showing of harm.

K. Appellant is Not Estopped from Asserting that the Court Acted in Excess of Jurisdiction by Authorizing the Stipulation Regarding the Extension of the Attorney-client Privilege

Respondent argues that appellant is estopped from arguing that the court acted in excess of jurisdiction at the sealed, in camera proceeding from which he was excluded because he didn't raise the jurisdictional issue in the trial court. Respondent contends that estoppel is appropriate here because there is no procedural or substantive policy precluding it. (RB at 53.) That conclusory statement, without explanation, is insufficient to support respondent's argument for estoppel under the very cases it cites.

Respondent points out that whether estoppel will be imposed on "a

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21. The court did not follow any of the procedures required for sealing the transcript as set forth in *NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, on which current Rules of Court 2.550 and 2.551 are based. Notably, the court made no express finding of an overriding interest warranting the sealing of the record.

party who sought or agreed" to an act in excess of jurisdiction depends on the importance of the irregularity and considerations of public policy, and that reviewing courts have sometimes found claims regarding acts in excess of jurisdiction to be estopped when the acts were "beneficial to all parties and did not violate public policy" or when "allowing objection would countenance a trifling with the courts." (RB at 52-53, citing *People v. Lara* (2010) 48 Cal.4th 216, 225 and *In re Andres G.* (1998) 64 Cal.App.4th 476, 482.) But respondent does not argue why or how any of those circumstances are relevant here, and, indeed, they are not.

First, the record does not show that appellant sought or agreed to the act in excess of jurisdiction. Even assuming the stipulation was at Tarter's request, she did not represent appellant at the time she entered into it and thus her purported request and her agreement cannot be attributed to appellant. Respondent's further speculation that Tarter must have informed appellant of her request, which also finds no support in the record, does not address appellant's knowledge of *the court's* acts in excess of jurisdiction. Appellant cannot be estopped from challenging judicial acts of which he was completely unaware. (See e.g., *People v. Mendez* (1992) 234 Cal.App.3d 1773 [Attorney General, representing the Department of Justice, is not estopped from challenging on appeal a court order stipulated to by the District Attorney, even though they both represented "[t]he People," and were bound by the stipulation, where neither the AG or the DOJ received notice of the order].)

Second, there are public policy reasons to disallow estoppel of claims involving the right to confer privately with counsel. (*Ex parte Rider* (1920) 50 Cal.App. 797, 799 [The right of an accused to consult freely and in private with his counsel is so fundamental that no Legislature or court can ignore or violate it].) Third, respondent does not argue that the stipulation was beneficial to all parties, and it most certainly did not "benefit" appellant. Even if there had been a showing that counsel needed protection from her client, the method authorized by the court was unnecessary and harmed, rather than benefited, appellant. Extending the

attorney-client privilege to individuals who were, by virtue of their positions, antagonistic to appellant's interests did not serve him in any way.

Finally, respondent does not point to, and the record does not show that appellant was or is "trifling with the courts." Courts have typically found such trifling in criminal cases where the defendant enters a guilty plea and then attempts to overturn the plea by arguing the court lacked jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. (See e.g., *People v. Chatmon* (2005) 129 Cal.App.4th 771.) Similarly, a defendant has been estopped from raising claims regarding conditions of probation where she lead the trial court into error, obtained the benefit of the court's error by avoiding immediate incarceration, and then exploited on appeal the error she induced the trial court to commit. (*People v. Jackson* (2005) 134 Cal.App.4th 929, 933). Here, appellant had nothing to gain by awaiting his conviction and sentence before raising the issues presented herein, and everything to lose. Without the ability to consult freely with counsel, appellant did not have any better chance of acquittal, conviction of lesser crimes, or obtaining a life sentence than he would have had he gone to trial with all the identifiable benefits of confidential consultation with counsel.

Moreover, the court's extension of the attorney-client privilege was not only an act in excess of jurisdiction, but also was ineffectual because it did not extend to any other correctional guards beyond the four whom the court specifically admonished. Respondent counters that the record does not show that any other officers besides Master and Close needed to be admonished. In making this argument respondent makes wholly unsupported representations about both the record and appellant's opening brief. (RB at 53, citing AOB at 75.) Nowhere in his brief did appellant "acknowledge that none of the officers . . . disclosed" any of appellant's conversations.

More importantly, while conceding that a third officer, Griem, was one of the officers stationed around appellant at all times in open court, respondent claims that Griem did not need to be admonished because the record does not show there was a risk he might overhear communications between counsel and appellant. Respondent bases this argument on a fact that itself is unsupported and essentially contradicted by the record: respondent states that "Officer Griem and the two other officers sat *at some distance behind appellant* during the trial." (RB at 53, fn 10, italics added; RB at 55.) Whether or not all three guards were "circling around appellant" or some were "to his rear," there is nothing in the record from which this Court could possibly infer that they were "at some distance" from appellant and his attorney. According to Griem himself, who was responsible for security during trial, at all times during the trial there would be three officers surrounding appellant: "One to the left and one to the right and one *directly* behind [appellant]." (1RT 114, italics added.) The word "directly" in this context necessarily indicated close proximity rather than "some distance," because the guards were present for security and, ostensibly, to keep appellant in check while he sat at counsel table. If the guards were in fact, "some distance" from appellant, they would not have served their purported purpose. Respondent's other incorrect factual assertions regarding the record of security arrangements in court (RB at 32-33, fn 9 and RB at 53, fn 10) have either been addressed in Section G, *ante*, or will be addressed further in Section M, *post*. To the extent those assertions are relevant to the issue of the court's acts in excess of jurisdiction, appellant's reply to them is incorporated by reference here.

Respondent concedes that any acts which exceed the defined power of a court in any instance, whether defined by constitution, statute or court rules, are acts in excess of jurisdiction. (RB at 52, quoting *County of San Diego v. Gorham* (2010) 186 Cal.App.4th, 1215,1225-1226.) It does not present any argument to suggest the court here *did* have the power to extend the attorney-client privilege or to deny appellant the right to consult freely with counsel. Because appellant is not estopped from pursuing this issue on

appeal, this Court must find the court's order was in excess of its jurisdiction.

L. Appointment of an Attorney with Whom Appellant Would Not be Able to Confer Privately Violated Appellant's Right to Counsel

In his opening brief, appellant demonstrated that the appointment of counsel who has agreed to never meet confidentially with her client cannot satisfy the constitutional guarantees of the assistance of counsel. In response, respondent "disagrees," and "adopts" arguments made in a earlier section of its brief. (RB at 54.) The prior argument, however, does not address whether the court fulfills its duty to appoint counsel when it appoints an attorney unable or unwilling to provide an essential and vital ingredient of effective representation. (See AOB at 76-78.) Further, respondent again miscasts the record and appellant's claim into one about Tarter's "desire" for the presence of the officers. Whether or not Tarter "desired" the arrangement, it was authorized by the court, and maintained throughout the trial. Thus, regardless of Tarter's own feelings, appellant was denied counsel who could perform the functions necessary for representation of her client.

M. The Record Clearly Establishes that During the Trial, Appellant Was Surrounded by Uniformed Prison Guards Who Prevented Him from Communicating Privately with Counsel

In response to appellant's argument that he was, in essence, tried in absentia because he could not consult with counsel in the courtroom or during trial breaks, respondent contends that appellant *could* communicate with counsel in the courtroom because the guards were not "sitting at counsel table."[22] Whether or not the guards were seated, the record shows that at least one guard was in between appellant and his attorney throughout

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22. Respondent claims that appellant has a "faulty belief that security officers were seated at counsel table," and points to page 79 of the AOB. Appellant has never represented that the officers were "sitting," but only that they were "present" at counsel table and that there was an officer on either side of appellant, separating him from his attorney. That arrangement is precisely what the record indicates. (See Section G, *ante*.)

the trial. As respondent concedes, the officer in charge of security assured the court that there would be one officer to the left of appellant, one to the right and one directly behind him at all times. (1RT 114.) To the extent respondent now claims that actually was not the case, appellant has already addressed that claim in Section G, *ante*. As set forth there, District Attorney investigator Ebner was asked twice during his testimony to identify appellant. Once, he testified that appellant was sitting "*between* three correctional officers and to the right of defense attorney, Donna Tarter." (3RT 702.) The prosecutor confirmed the description. The second time, Ebner stated that the officers were to appellant's "rear," but the prosecutor corrected him and established on the record that appellant had "three correctional officers in green circling around him." The trial court agreed with this description. (5RT 996.)

Respondent now contends that Ebner's second description of the officers' position as "to [appellant's] rear" (5RT 996) is sufficient to establish that the guards were not at or next to counsel table in between appellant and his attorney but that, instead, they were "sitting at some distance behind appellant." (RB at 55.) The only evidence as to the distance between the guards and appellant was Griem's assurance to the court that one guard was to be placed "directly behind" appellant. The record thus does not show that there was any appreciable distance between appellant and the guards. (See Section K, *ante*.) Indeed, there is no apparent contradiction between Ebner's descriptions, the prosecutor's restatements of those descriptions, or the arrangements discussed with the court prior to the trial. There was a guard on appellant's right, on appellant's left, and one behind him. All three may have, in fact, been standing to appellant's "rear" rather than in a direct horizontal line with him, but the record is clear that they also were positioned "between" appellant and his attorney, purportedly to protect her from her client.

Respondent's reliance on this significant misinterpretation of the record undermines its argument that appellant was not impeded from assisting counsel in court during the trial, as well as during conferences

when the court was in recess or on a break.[23] Because there was a guard between appellant and counsel, he was unable to assist counsel without disclosing his comments to the correctional officers at the same time. He could not whisper to his attorney, nor pass her confidential notes, without also revealing his communications to the correctional guards who were "circling around" him, at least one of whom was never even admonished to keep anything he heard confidential. Under these circumstances, appellant was essentially tried in absentia, in violation of his Sixth Amendment right be present and the California Constitution.

N. Conclusion

The right to counsel includes the right to consult freely, in private and in complete confidentiality with counsel. The importance of confidential consultation has been acknowledged by both state and federal courts, and is considered "essential" to the fulfillment of the role of counsel. Yet in this case, appellant was appointed a legal representative who could not fulfill her role because she was accompanied by correctional guards who were allowed to sit in on every meeting between her and her client, and who stood between appellant and counsel during the presentation of the trial.

The chilling impact on appellant caused by the presence of law enforcement personnel within earshot of his every word to counsel was exacerbated by the unwarranted and unjustified use of prison guards who were employed at the very prison where the crimes occurred. The nature of the crimes for which appellant stood trial made the use of Corcoran Prison guards a singularly poor, irrational, and legally indefensible choice for security. Appellant was charged with two murders which occurred at Corcoran Prison, while appellant was supposedly under watch by other Corcoran guards. One of the murders involved possible misconduct,

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23. Respondent has interjected another unsupported "fact" into its argument – that the officers charged with courtroom security were "sitting" during the trial. The record does not so indicate, and if the officers were "sitting" they would not have been described as "circling around," appellant, words that plainly indicate movement.

malfeasance, or, at a minimum, dereliction of duties by a Corcoran correctional guard. Further, appellant was also charged with an assault on another Corcoran officer. Virtually all the witnesses were employed as officers at Corcoran. (See Section A, *ante*.) The penalty phase included evidence of other crimes of violence that appellant supposedly committed while at Corcoran, several directly involving prison guards. As if that was not chilling enough, appellant remained housed at Corcoran during the entire trial, putting him in daily contact with, and under the complete control of these and other prison guards and their supervisors, who had the power to make his life intolerable. It is hard to imagine an arrangement, short of a muzzle, that would be more discouraging to open and free communication between a death penalty defendant and his attorney than the arrangement authorized by the court in appellant's absence, and without his knowledge or consent.

Appellant's rights to counsel, to be present at all crucial proceedings, and even to be present at trial were violated. These violations undermined and infected the fairness of every step of the proceedings against him, from arraignment through sentencing, and cannot be measured in terms of trial error. The errors were structural, and, accordingly, appellant's convictions and death sentences must be reversed.

II.

APPELLANT'S MURDER CONVICTIONS ARE LESSER INCLUDED OFFENSES OF HIS CONVICTIONS FOR MURDER BY A LIFE PRISONER, AND THUS MUST BE REVERSED

Appellant was charged and convicted of two separate capital offenses for the death of Mendoza, and two separate capital offenses for the death of Mahoney. Because all of the elements of murder as defined in Penal Code section 187 are included in the elements of a killing that occurs following an assault by a life prisoner pursuant to Penal Code section 4500, the former is a lesser included offense of the latter.

Respondent does not dispute that appellant's convictions under section 187 and section 4500 were based on identical elements found by the jury beyond a reasonable doubt. It also does not dispute that, to determine whether one offense is a lesser included offense of another, this Court looks only to the elements set forth in the statutes themselves, and not the facts alleged in the accusatory pleading or proven at trial. Instead, respondent argues that section 4500 is merely an aggravated assault statute, with a built-in sentencing enhancement mandating either the death penalty or life without the possibility of parole when the victim dies within a year and a day of the assault. Respondent argues that, if the death of the victim requirement is construed as a sentencing enhancement, rather than an "element," then murder is not a lesser included offense of section 4500, and there is no prohibition against appellant's multiple convictions for identical crimes.

The issue appears to be one of first impression for this Court.[24] While section 4500 does contain an additional sentencing factor for a *lesser*

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24. In its brief, respondent cites two cases to support its argument, *People v. Smith* (1950) 36 Cal.2d 444, 448 and *People v. McNabb* (1935) 3 Cal.2d 441, 458. (RB at 59.) Neither of these cases sheds any light on the issue now before this Court because at the time they were decided, section 4500 prescribed a mandatory death sentence for any intentional, aggravated assault by a life prisoner, whether or not the victim actually died. (See AOB at 84, setting forth the history of section 4500.) To the extent those cases considered whether murder was a lesser included offense of section 4500, the statute has materially changed since they were decided.

sentence where the victim does not die within a year and a day from injuries caused by the assault, nothing in the statute creates an "enhancement" as that term is defined under California law. An "enhancement" is an element that justifies *additional or greater,* not lesser, punishment. (*People v. Ahmed* (2011) 53 Cal.4th 156, 161; *People v. Felix* (2000) 22 Cal.4th 651, 655.) "Enhancements typically focus on an element of the commission of the crime . . . which justifies a higher penalty than that prescribed for the offenses themselves." (*People v. Hernandez* (1988) 46 Cal.3d 194, 207–208.) Here, however, on its face section 4500 prescribes a sentence of death or life without parole for the offense of an assault, with malice aforethought, by a life prisoner. There is no portion of the statute that creates an enhancement or higher penalty if certain factors are met, rather the statute contains what can only be described as the opposite of an enhancement, i.e. it prescribes a lower penalty, a sentence of life without the possibility of parole for nine years in cases where the victim does not die within a year and a day.

Although this Court may only look to the "statutory elements" of an offense when determining whether it includes another offense, the elements of section 4500 are not clearly identified in the statute. Respondent argues that the death of the victim is not an element of the offense, but only a sentencing factor. However, death of the victim is not expressly listed as *either* an element or a sentencing factor on the face of statute. Despite this, both the original and the current version of the statute describe a crime that is a capital offense for which the death penalty may be imposed. In order to meet constitutional requirements, the current version eliminated the mandatory death penalty portion of the statute and allowed for an alternate sentence of life without the possibility of parole. It later added a proviso that, in essence, creates a non-capital offense where the victim survives the assault: "however, in cases where the person subjected to such an assault does not die within a year and a day . . . ." (AOB at 84, n.84.)

If, as respondent argues, the victim's death is not an element of section 4500, then the statute is unconstitutional on its face because it

makes an assault a death penalty crime. The United States Supreme Court has held that, in cases of crimes against an individual, the death penalty must be reserved for "for crimes that take the life of the victim." (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 447.) A statute that allows use of the death penalty for crimes not involving the death of the victim thus violates the Eighth Amendment.

The courts have long recognized the principle that if the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with constitutional requirements, the statute will be given that meaning, rather than another interpretation which is in conflict with the state or federal Constitution. (*San Francisco Unified Sch. Dist. v. Johnson* (1971) 3 Cal. 3d 937, 948; *People v. Davis* (1968) 68 Cal.2d 481, 483-484; *County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353.) The court's duty in interpreting a statute is not limited to merely avoiding the construction which makes it clearly unconstitutional and, if possible, the statute must be construed so that the constitutional difficulties will never arise. (*Kramer v. Municipal Court* (1975) 49 Cal.App.3d 418.) When two alternative interpretations are presented, one of which would be unconstitutional and the other constitutional, the court is compelled to chose the construction that will uphold the validity of the statute and will be constitutional. (*County of Los Angeles v. Legg, supra,* 5 Cal.2d at p. 353.)

Accordingly, this Court must reject respondent's argument that the death of the assault victim is not an element of section 4500. Without that element, the statute is unconstitutional on its face. To the extent that section 4500 is also charged in cases where the victim does not die within a year and a day, the clause of the statute establishing a lesser sentence operates as an exception to the statute which renders only those specific cases non-capital.

This Court should find that murder is a lesser included offense of murder by a life prisoner, and reverse both of appellant's convictions for murder.

III.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT

In his opening brief, appellant argued that the lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to provide a meaningful basis for distinguishing the cases in which it is imposed from the many cases in which it is not. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Appellant raised three separate arguments: (1) that this Court's interpretation of the lying-in-wait special circumstance is so broad that it does not distinguish between murders committed while lying-in-wait and simple premeditated murder; (2) that this Court has blurred any distinction between lying-in-wait murder and the lying-in-wait special circumstance; and (3) that the lying-in-wait special circumstance, as interpreted by this Court, does not provide a meaningful basis to distinguish defendants who may be subjected to the death penalty from those who may not. Appellant noted that this Court has rejected each of these arguments in the past, but requested that this Court reconsider its previous rulings and explained why reconsideration is warranted. (AOB at 88-97.)

Respondent does not address any of the arguments for reconsideration presented in the opening brief, nor does it address the substance of appellant's arguments relating to this Court's interpretation of the special circumstance. Instead, respondent merely repeats that this Court has previously rejected similar claims and cites the very cases that appellant asserts have stretched the lying-in-wait special circumstance into an ever-expanding, seemingly limitless net, in which virtually all first-degree murders can be captured. Thus, in response to the argument that this Court

has expanded the circumstances under which it finds sufficient evidence of lying-in-wait so broadly that it now includes virtually all premeditated murders, respondent merely quotes this Court's restatement of the elements of the special circumstance and its holding that the elements on their face do not "undermine the narrowing function." (RB at 63, quoting *People v. Stevens* (2007) 41 Cal.4th 182, 201.) Such response does not address the gravamen of appellant's argument, which goes not to the wording of the elements, but to how those words have been applied by this Court.

Similarly, respondent merely quotes from the decision in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149, which stated that the additional requirements of an intent to kill and that the killing take place during the period of concealment and watchful waiting are enough to distinguish special circumstance lying-in-wait from murder by means of lying-in-wait. Again, respondent focuses on the language of the elements rather than the application of that language by this Court. Finally, in response to appellant's arguments that the lying-in-wait special circumstance does not distinguish between defendants who are subject to the death penalty and those who may not be subjected to capital punishment, respondent merely asserts the obvious, that this Court has repeatedly rejected that contention. (RB at 64-65.)

For the reasons set forth in his opening brief, appellant urges this Court to reverse the lying-in-wait special circumstance, and the death sentences predicated upon it.

IV.

GUILT PHASE AND PENALTY PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH SENTENCES

At the guilt phase, the trial court instructed the jury with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (5RT 1082-1083, 1085-1086, 1096-1097; 9CT 2525, 2530, 2532, 2533, 2534, 2556.) At the penalty phase, the parties agreed that the trial court would re-instruct the jury with all general guilt phase instructions, including most of the instructions listed above. Accordingly, the trial court read CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, and 2.51 again to the jury before they began their penalty phase deliberations. (8RT 1636-1637, 1639-1640; 10CT 2709, 2714, 2716, 2717, 2718.) These instructions violated appellant's constitutional rights to due process and trial by jury and the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof at either the guilt or penalty phase. As argued in the opening brief at pages 98-108, these instructions violated constitutional precepts in a manner that can never be harmless.

In his opening brief, appellant noted that this Court has rejected each of these arguments in the past, but requested that this Court reconsider its previous rulings and explained at length why reconsideration is warranted. Respondent has not addressed the grounds for reconsideration set forth in appellant's brief, but merely repeats that this Court has rejected the underlying claims. (RB at 65-66.)

For the reasons set forth in the opening brief, this Court should find that the challenged instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, to the extent that the reliability of the jury's findings of guilt and the appropriate penalty are undermined. The judgments against appellant and his death sentences must be reversed.

V.

THE TRIAL COURT ERRONEOUSLY ADMITTED AND ERRONEOUSLY INSTRUCTED ON EVIDENCE PRESENTED IN AGGRAVATION PURSUANT TO PENAL CODE SECTION 190.3 SUBDIVISION (b) AND THE EVIDENCE WAS INSUFFICIENT FOR ANY JUROR TO FIND THAT APPELLANT COMMITTED THE UNCHARGED CRIMES OF FORCE OR VIOLENCE BEYOND A REASONABLE DOUBT

A. Appellant Did Not Forfeit His Claims that Evidence of Unadjudicated Offenses at the Penalty Phase Was Improperly Admitted, and/or Was Insufficient to Establish the Elements of the Uncharged Crimes

Respondent contends that all of appellant's claims regarding the admission and sufficiency of the evidence presented to prove uncharged offenses pursuant to "factor (b)" are forfeited because appellant did not "object to the admission" of this evidence at trial. (RB at 66.)[25] Appellant urges this Court to reconsider its prior holding that the forfeiture rule applies to all challenges to the sufficiency of evidence of unadjudicated offenses introduced to obtain a death sentence.

1. There is No Rationale for Requiring an Objection to the Sufficiency of Factor (b) Evidence

It is well-established that appellate claims of sufficiency of the evidence to establish the elements of criminal offenses are cognizable on appeal even in the absence of any objection in the trial court. "Parties may generally challenge the sufficiency of the evidence to support a judgment for the first time on appeal because they 'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough* (2013) 56 Cal.4th 589, 596; see *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [sufficiency challenge to prior "strike" allegation not

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25. Respondent also argues that all claims regarding factor (b), including instructional error and claims regarding the constitutionality of factor (b), are forfeited. (RB at 67.) To the extent those arguments are specifically raised in regard to specific claims discussed in this brief, appellant will address the arguments therein.

forfeited by lack of objection]; *cf. In re Troy Z.* (1992) 3 Cal.4th 1170, 1180–1181 [guilty plea or no contest plea waives challenge to the sufficiency of the evidence].) Thus, there is an exception to the general rule that an objection must be raised in the trial court to avoid forfeiture of sufficiency of the evidence claims, and this Court has held that "questions of the sufficiency of the evidence are not subject to forfeiture." (*People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128, & fn. 4; *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["contention that a judgment is not supported by substantial evidence" is an "exception" to the rule that "points not urged in the trial court cannot be raised on appeal"].)

Despite the long-standing principle that sufficiency of the evidence claims are not forfeited by lack of objection, this Court has applied a different rule in connection with claims challenging the sufficiency of factor (b) evidence introduced in aggravation at the penalty phase. (*People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23.) For the same reasons that claims challenging the sufficiency of the evidence of the charged offenses, of the special circumstances, or of other sentencing factors do not require a trial level objection for appellate review, no objection should be required to permit appellate review of the evidence of unadjudicated offenses presented at the penalty phase of a capital trial.

Before the opinion in *Montiel*, this Court was faced several times with sufficiency of factor (b) evidence claims that had not been raised in the trial court. In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that factor (b) required that the underlying uncharged offenses be proven beyond a reasonable doubt. This Court then assessed the evidentiary sufficiency of several incidents under factor (b), some of which were objected to and some of which were not. (*Id.* at pp. 777-778.) With regard to the unobjected to factor (b) incidents, having found the evidence sufficient, this Court declined to "decide whether the defense's failure to object bars it from raising this point on appeal." (*Id.* at p. 777.) After *Boyd*, this Court continued to reach and reject the merits of factor (b) sufficiency claims without deciding whether or not such claims were forfeited by lack of

objection. (See e.g., *People v. Carrera* (1989) 49 Cal.3d 291 [assuming sufficiency of factor (b) evidence claim was properly raised despite the lack of objection, and finding the evidence sufficient].)

However, this Court has also found factor (b) evidence to be insufficient despite the lack of any objection before the trial court. In *People v. Thompson* (1988) 45 Cal.3d 86, this Court considered, among other factor (b) evidence, the defendant's alleged discussion about killing a witness against him. Although the record does not indicate that trial counsel objected to the sufficiency of this factor (b) evidence, in *Thompson* this Court cited the substantive rule applied in *Boyd* and held that there was insufficient substantial evidence to establish a violation of the criminal statute prohibiting solicitation of murder. (*Id.* at p. 129 ["Since there was insufficient substantial evidence to establish violation of section 653f as a separate crime, we conclude that whatever the relevance of this evidence at the guilt phase to show defendant's consciousness of guilt, the trial court should not have permitted it to be argued under factor (b) at the penalty phase"].)

Application of the general forfeiture exception to sufficiency of the evidence claims where the challenged evidence was presented to prove unadjudicated criminal activity under factor (b) at the penalty phase of a capital trial was first squarely addressed by this Court in *People v. Montiel, supra*, 5 Cal.4th at p. 928. Without citation to any prior authority on the issue, this Court explained its rejection of the general rule in a brief footnote:

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his *conviction* is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents. (§ 190.3, factors (b), (c).) If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground.

(*People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, italics in original.)

This forfeiture holding in *Montiel* has been reiterated in subsequent decisions of this Court. (See e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1175; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060.) In *Livingston*, this Court was confronted with the argument that there is a distinction between claims that the factor (b) evidence was so insubstantial that it should never have been presented to the jury, i.e. that it was error to admit the evidence in the first instance, and claims that such evidence, once presented, was insufficient to actually establish the uncharged offense. This Court apparently rejected such distinction for the sole reason that factor (b) evidence is admitted as aggravating evidence to obtain a death sentence, and not to obtain a conviction. Other than quoting the above-cited footnote from *Montiel*, this Court only explained the distinction as follows:

> Defendant claims he is not challenging the admission of the evidence but its sufficiency, a challenge a defendant may make on appeal from a conviction without an objection. But, as we explained in *Montiel*, here the evidence was admitted at the penalty phase of a capital trial as aggravating evidence, not to support a conviction for that crime.

(*People v. Livingston*, 53 Cal.4th at p.1175.)

The reasons stated in *Montiel* and *Livingston* provide no basis for a distinction between sufficiency of evidence claims directed toward evidence of the charged offenses or special circumstances and claims directed toward evidence of uncharged offenses at the penalty phase. Claims relating to the sufficiency of guilt phase evidence are not subject to forfeiture because the defendant "'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough, supra*, 56 Cal.4th at p. 596.) This is apparently the rule whether the defense actually mounted any challenge, either through objections, motions to exclude or strike, cross-examination, presentation of evidence or argument, to the prosecution's evidence regarding one or more elements of any of the charged offenses. Even where the defendant at trial did not argue to the jury that the prosecution failed to meet its burden as to *any* element of a charged offense, under *McCullough,* he is deemed to have "contested" the

sufficiency of the evidence for that offense simply by going to trial on that charge. This Court has apparently entertained the merits of sufficiency of the evidence claims regarding a specific crime in cases where multiple crimes were charged, but the defendant presented no defense whatsoever to the specific crime for which he challenges the sufficiency of the evidence on appeal, as well as in cases where multiple special circumstances are alleged, but defendant challenged none or only one special circumstance during trial.

To the extent that this Court's footnote in *Montiel* distinguished factor (b) evidence from evidence presented at the guilt phase based on the fact that the prosecution may present evidence of multiple prior criminal incidents to support a death sentence when it stated that "evidence on that issue may *include* one or more other discrete criminal incidents," the rationale for this distinction is not clear. While, unlike at the guilt phase, the penalty phase jury is not required under California law to indicate which, if any, of the factor (b) offenses were established beyond a reasonable doubt, the same is true when the defendant is convicted of first-degree murder and evidence was presented on more than one factual theory, such as premeditated and deliberate murder, torture murder, lying in wait, felony murder or any of the other grounds described in section 189. Where multiple theories of first-degree murder are presented to the jury, this Court does not require the jury to render a unanimous verdict or make specific findings as to which theory or theories it found were established beyond a reasonable doubt. (*People v. Beardslee* (1991) 53 Cal.3d 68, 92 [a jury may convict a defendant of first degree murder . . . without making a unanimous choice of one or more of several theories proposed by the prosecution, e.g., that the murder was deliberate and premeditated or that it was committed in the course of a felony"].) Nonetheless, this Court addresses all guilt phase sufficiency of evidence claims regardless of whether or not there was an objection below.

Similarly, where burglary murder is alleged or argued as the basis for first-degree felony murder or the felony-murder special circumstance, the

prosecution may rely on more than one "target offense," such as theft, rape, or any other felony and "the jury need not unanimously decide, or even be certain, which felony defendant intended as long as it finds beyond a reasonable doubt that he intended some felony." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132–1133.) Despite the fact that, just like factor (b) evidence, evidence of intent to support a burglary-murder conviction or special circumstance "may *include* one or more other discrete criminal incidents," i.e. the evidence may support the intent to commit one or more target offense, this Court does not require an objection to the sufficiency of the burglary murder or special circumstance evidence to preserve the issue for appeal. (See e.g., *People v. Tully* (2012) 54 Cal.4th 952, 1007-1008 [evidence sufficient to support burglary-murder conviction and special circumstance based on intent to commit theft, *or* intent to commit rape.]

In light of this, there is no logical reason why a penalty phase trial, at which the defendant necessarily argues that the prosecution has failed to establish that the aggravating factors, including any uncharged factor (b) crimes, outweigh any mitigating factors, does not serve to "contest" the prosecution's evidence in the same way that a guilt phase trial does. If this Court discerns some distinction between the strength of the evidence needed to support the elements of a crime or a special circumstance finding at the guilt phase, and the strength of the evidence needed to support the elements of a crime as a sentencing factor at the penalty phase of a capital trial, the law does not support any such distinction. Each element of each unadjudicated offense under factor (b) must be established beyond a reasonable doubt before it can be weighed as an aggravating factor at sentencing just as each element of a crime or special circumstance must be established by precisely the same quantum of proof.

Nor do this Court's cases about forfeiture create a meaningful difference between sufficiency of evidence claims that affect guilt versus claims that affect only the sentence. In *People v. Rodriguez*, *supra*, 17 Cal.4th 253, for instance, the Court addressed the sufficiency of the evidence supporting a prior felony "strike" under the three strikes law. (*Id.*

at pp. 261-262.) This Court found that the prosecution's abstract of judgment offered at trial to support one of the strike allegations was insufficient to sustain the trial court's finding and reversed. (*Id.* at p. 262.) Applying the rule set forth in *McCullough*, *supra*, 56 Cal.4th at p. 596, this Court rejected the Attorney General's argument that the claim was forfeited because the defendant raised the issue for the first time on appeal, stating: "[t]o the contrary, defendant at the outset mounted the most complete challenge possible to the strike allegation: He demanded a trial." (*Ibid*; see also *People v. (Roger) Rodriguez* (2004) 122 Cal.App.4th 121, 129 [no forfeiture of insufficiency claims relating to sentencing enhancements].)

The logic of *Montiel* also does not hold up in light of how and when factor (b) sufficiency is considered by trial courts and weighed by juries. Under the reasoning of *People v. Montiel*, *supra*, 5 Cal.4th at p. 928, fn. 23, the defendant must necessarily "object, or [] move to exclude or strike the evidence" in support of each insufficient factor (b) incident to preserve the claim for appellate review. But it is entirely unclear when the time is ripe for such an objection or motion to be made. The issue cannot adequately be resolved at an in limine *Phillips* hearing because at such a hearing, the trial court does not make the ultimate sufficiency determination based on all available evidence at such a hearing and it may lack, or indeed properly exclude, critical defense evidence. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225 [trial court need not consider defense rebuttal testimony at the *Phillips* hearing].) The prosecutor's proffer at the hearing also may go beyond what it actually presents to the jury.

Nor does it suffice to require a defendant to move to "exclude or strike the evidence," *People v. Montiel*, *supra*, 5 Cal.4th at p. 928, fn. 23, after the actual evidence demonstrating insufficiency is adduced during trial. It is often entirely speculative when evidence tips from the point of relatively weak to legally insufficient. Even a formalistic requirement of a motion to strike at the close of evidence would be both legally premature and ineffectual. It would be premature because sufficiency error does not even *occur* until the jury finds against the defendant. (Cf. *People v. Guiton*

(1993) 4 Cal.4th 1116, 1125 [sufficiency error "occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient"].)[26] Even if the close of evidence were the legally appropriate point at which to raise claimed insufficiency of the evidence and request its exclusion, striking the evidence at this juncture would do little to prevent the very same claim from being raised on appeal, because the jury's thought process would have been infected by presentation of the evidence in the first place. In other words, even if such a motion to strike or exclude were granted, this Court would be faced with a constitutional claim that the jury's individualized weighing process was tainted by irrelevant and inflammatory evidence, despite the court's instruction to strike it from consideration after the close of evidence. Thus, the purposes of the forfeiture doctrine would not be served. (Cf. *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 ["[t]he purpose of the waiver doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided"].)

Moreover, while application of the forfeiture rule to a claim that the trial judge improperly admitted certain evidence may be warranted because the claim is based on trial court error, in contrast, a sufficiency of the evidence claim is not based on any notion of judicial error but on fundamental constitutional principles of due process and/or reliability.

Finally, given the heightened standard for reliability in death determinations, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, forfeiture should not be applied to factor (b) sufficiency claims. In a capital case, it is critical that evidence of a defendant's past crimes that are used to put him to death is not wholly insufficient. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1138 [allowing collateral challenge of prior murder

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26. Because this Court has steadfastly refused to require special findings on factor (b) evidence (see, e.g., *People v. McDowell* (2012) 54 Cal.4th 395, 443), the only evidence available to the defendant that the jury may have improperly used insufficient factor (b) evidence against him is after the verdict is reached.

conviction because "the unique nature of the death penalty imposes a special need for reliability in the determination of the applicability and appropriateness of this ultimate sanction."].) The gravity and seriousness of a death judgment should not be undermined by insubstantial allegations of wrongdoing that may inflame and confuse a jury.

As Justice Arabian noted in his concurrence in *People v. Welch* (1993) 5 Cal.4th 228, when the allegedly forfeited claim "implicat[es] fundamental principles of policy and constitutional guaranties . . . the prerequisite of an objection to appellate review would frustrate rather than subserve the interests of justice." (*People v. Welch* (1993) 5 Cal.4th 228, 241, (conc. opn. of Arabian, J.).) The importance of rendering a fair and reliable death judgment based on substantiated evidence implicates just such important policy and constitutional guarantees, regardless of whether defense counsel argued the insufficiency of evidence to the judge.

For all these reasons, this Court should reconsider its ruling that the sufficiency of factor (b) evidence must be challenged in the trial court or such challenges will be deemed forfeited on appeal. Appellant urges this Court to address the merits of each of the challenges to the evidence presented in this appeal, despite the lack of objection.

2. The Forfeiture Rule Does Not Apply to Issues the Trial Court Addressed and Rejected Sua Sponte

In the event that this Court declines to reconsider application of the forfeiture rule to sufficiency of factor (b) evidence claims raised for the first time on appeal, that rule should not be applied, where, as here, the trial court actually ruled against appellant on the admissibility of some of the evidence. In raising its forfeiture argument, respondent does not distinguish between two incidents which the trial court expressly held admissible following a sua sponte hearing (the March 8, 1997, cell extraction at High Desert State Prison and the April 18, 2000, cell extraction at Corcoran State Prison), and the other incidents the prosecution presented in aggravation. Even if the forfeiture rule is upheld, it should not apply to the two incidents that the trial court expressly ruled admissible in this case.

There is a general exception to the forfeiture rule for instances when an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Futility has been found not only where there is no support for the appellant's position in the existing case law, but also where the trial court has already addressed an issue and there is no basis to think that a specific objection would have resulted in a different ruling. (*Ibid.*) In this case, the trial court addressed on its own whether there was sufficient evidence to permit admission of the March 8, 1997, and the April 18, 2000, incidents and found the evidence sufficient for both offenses. Under these circumstances, any objection by counsel would have been futile and thus appellant's arguments that neither incident should have been admitted are not forfeited and are preserved for review.

B. The Trial Court Erred in Admitting Evidence Regarding the March 8, 1997, Extraction at High Desert State Prison

Turning to the merits of appellant's argument that the March 8, 1997, incident did not involve an act of force or violence, respondent relies on irrelevant and/or misstated facts. The only issue is whether there was sufficient evidence that appellant's act of holding a mattress in front of him when he tried to leave his cell after repeatedly being shot at with a volley of potentially lethal rubber projectiles and sprayed with pepper spray was an act of force or violence. Nonetheless, respondent asserts that, because prisoners are not allowed to leave their cells without cuffs on, and appellant had not voluntarily exited his cell when provided an opportunity to "cuff-up" *before* the third deployment of ammunition into his cell, the evidence shows that his attempt to exit during the extraction was an act of force or violence.[27]

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27. In making its argument, respondent relies in part on the video tape of the incident (Exhibit A-1), which was only shown to the court and the jury *after* the court made its ruling. While appellant does not concede that the video in any way supports respondent's view of the evidence, particularly that appellant "stood by the entrance and waited for the officers to open the door," (RB at 75), in addressing the propriety of the trial court's ruling, this Court may not consider evidence not before the court when it

(continued...)

Other than repeating the word "charged" to describe appellant's attempts to exit the cell (RB at 74-75), respondent does not explain how holding a mattress up as shield renders appellant's attempted exit from the cell an act or threat of force or violence, particularly where, as here, there was minimal or no evidence that appellant made or attempted to make any contact with another person in doing so. Further respondent wholly ignores the arguments that factor (b) evidence should be limited to assaults that cause or threaten to cause serious bodily or violent injury and that a simple assault with no contact or injury is no more than a trivial incident that should not influence a life or death decision. (AOB at 119-122). Accordingly, appellant will not restate those arguments here.

As argued here and in the opening brief, the trial court abused its discretion in admitting evidence of the March 8, 1997, extraction as an unadjudicated crime of force or threatened force or violence.

C. The Trial Court Erred in Admitting Evidence Regarding the April 18, 2000, Incident at Corcoran State Prison

Respondent, in its argument, states that the only evidence to support the introduction of the April 18, 2000, offense was that appellant "contacted Officer Gatto's hand" while he was attempting to grab a pepper spray cannister away from Gatto. (RB at 78.) In doing so, respondent overstates the facts before the court at the time of its ruling. Gatto had not testified that appellant "contacted" his hand, but only that he had a vague memory "of some kind of somewhat feeling of a touch." (7RT 1479-1480.) Further, respondent once again ignores the arguments that factor (b) evidence should be limited to crimes that cause or threaten to cause serious bodily injury or violent injury and that a "technical battery" alone is no more than a trivial incident that should not influence a life or death decision (AOB at 131-133), and accordingly, appellant will not restate them here.

As argued here and in the opening brief, the trial court abused its discretion in admitting evidence of the April 18, 2000 incident as an

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27. (...continued)
made its ruling. (See e.g., *People v. Tully, supra*, 54 Cal.4th at p. 1029.)

unadjudicated crime of force or threatened force or violence.

D. The Admission of Evidence Regarding the March 8, 1997, and the April 18, 2000, Incidents Violated the Federal Constitution

Appellant raised two arguments that the admission of the March 8, 1997, and April 18, 2000, incidents violated the Sixth, Eighth and 14th Amendments to the United States Constitution. (AOB at 134-139.) Respondent contends that both arguments are forfeited, and that both fail on the merits.

For the reasons stated in Section A of this argument, *ante*, appellant's federal constitutional claims are not forfeited. In addition to the reasons set forth there, the use of de minimis or trivial acts as factors in aggravation unconstitutionally introduced irrelevant matters into the penalty phase. If section 190.3, factor (b) allows the introduction of acts that are only "technical batteries" or "technical assaults" in that they did not involve any violence or serious bodily harm, then California's death penalty statute violates the Eighth Amendment. This argument raises an issue of pure law and a facial constitutional defect in the death penalty statute, of the type that appellate courts may consider despite the possible application of the forfeiture rule. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, citing *People v. Welch* (1993) 5 Cal.4th 228, 235-236.) For these reasons, appellant's Eighth Amendment claim should be considered on the merits. (See also, *In re Clark* (1993) 5 Cal.4th 750, 798, [finding that "the magnitude and gravity of the penalty of death" outweighs the values that otherwise justify procedural bars in capital habeas corpus cases].)

With regard to the merits, respondent argues only that the trial court did not abuse its discretion in admitting the two incidents, and thus, their admission did not violate the United States Constitution. (RB at 79.) The trial court's decision that there was sufficient evidence to admit these offenses has no bearing on the constitutionality of a statute that allows the jury to consider such minor "technical" crimes when determining whether the defendant should live or die. Since respondent has not addressed the

merits of the argument raised in the opening brief, appellant will not further reply.

E. Evidence Presented in Aggravation Pursuant to Penal Code Section 190.3 Subdivision (b) Was Insufficient to Establish that Appellant Committed Uncharged Crimes of Force or Violence Beyond a Reasonable Doubt

Respondent again asserts that appellant's claims regarding the sufficiency of the evidence of the factor (b) incidents are forfeited. Appellant addressed that contention in Section A of this argument, *ante,* and incorporates that discussion here.

1. The Evidence Was Insufficient to Establish That Appellant Committed an Assault When He Attempted to Exit His Cell on March 8, 1997

Respondent argues that appellant's description of the evidence is no more than a "one-sided view" that appellant had innocent explanations for his actions. To the contrary, appellant's description is fully supported by the evidence as set forth in his opening brief at pages 113-118, and 141-142. Rather, it is respondent who is ignoring the evidence and asking this Court to draw inferences that are contradicted by the record.

Regardless of whether appellant cuffed-up when given an opportunity to do so in between the rounds of pepper spray and lethal rubber bullets, the best evidence, the videotape of the incident, does not show that appellant charged out of the cell towards the guards. Instead, it shows a projectile launcher being fired into the cell, and then a mob of guards in riot gear entering the cell, struggling to remove a mattress, and eventually dragging appellant out. (Exhibit A-1.) Moreover, there was no testimony or evidence from which it could be inferred that appellant "waited" by the door for the officers to open it; Dewall testified that appellant threw himself over the webbing that was blocking the door when the third round of bullets were fired. (6RT 1256.)

To the extent respondent argues that appellant knew he would come in contact with officers, that fact does not provide any evidence of an intent to commit an assault. Appellant was holding a mattress in front of his body with both hands, in the position of a shield, when he attempted to exit the

cell. A shield is not a weapon. Had he intended violent contact with the guards, the mattress was in the way.

Respondent also argues that the appellant did not act in self-defense in response to unreasonable or excessive force when he used the mattress to shield himself as he attempted to exit his cell. Although it contends that the evidence showed that using pepper spray and/or "less-lethal" weapons[28] to remove an inmate from his cell for refusing to be handcuffed is reasonable and not excessive, there was absolutely no evidence presented on this point. Respondent does not explain why the use of pepper spray and now-banned lethal weapons to force prisoners out of their cells is not an excessive response to violations of prison regulations that do not involve any force or violence. Dewall merely testified as to prison policy, and neither he nor any other witnesses testified as to the reasons for the policy or the reasonableness of the use of such force. (See RB at 88-90.)

Moreover, it was the prosecutor's burden to prove beyond a reasonable doubt that 1) the correctional officers did not use excessive force; 2) the correctional officers did not engage in behavior that appellant actually and reasonably believed put him in danger of suffering excessive force; and 3) appellant used unreasonable force to defend himself against a real or apparent danger. (AOB at 146.) No evidence was presented on any of these issues. To the extent respondent relies on *People v. Moore* (2011) 51 Cal.4th 1104, 1136, for the proposition that the prosecution doesn't need to introduce evidence to negate "possible justifications" for the defendant's actions where none is raised by the evidence, its reliance is misplaced. In *Moore*, the appellant had been involved in a jailhouse scuffle with another inmate. No officers were involved. Unlike the present case, in *Moore*, "the evidence . . . did not raise any legal justification for defendant's actions." (*Id.*) In contrast here, as the trial judge found, there was evidence from which self-defense and/or the use of excessive force could have been established, and, indeed, the court felt that the evidence required an

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28. A "less lethal" weapon is still lethal.

instruction on these issues even in the absence of a defense request. (7RT 1610-1612; 8RT 1627.) Under these circumstances, the prosecutor was required to present evidence to show the force was not excessive, that the guard's behavior did not cause appellant to reasonably believe he was in danger of becoming a victim of excessive force, and that appellant's "use of force" was unreasonable. No such evidence on any of these issues was presented.

Respondent does argue that the prosecution met its burden of showing that appellant did not reasonably believe the officers would use excessive force because appellant had refused to comply with their previous orders "knowing" that the officers would deploy pepper spray and potentially lethal projectiles. (RB at 91.) Respondent does not explain how appellant's knowledge that excessive force would be used negates a reasonable belief that such force would be used and, indeed, that very knowledge defeats its argument.

For all the reasons stated here and in appellant's opening brief, there was insufficient evidence to prove appellant committed an assault on March 8, 1997.

2. The Evidence Was Insufficient to Establish that Appellant Committed a Battery on March 12, 1997, at High Desert State Prison

In the absence of any evidence that it was appellant, and not his cellmate, Romo, who "gassed" the guards on March 12, 1997, respondent first claims that the evidence supported an inference that two people, instead of one, threw the two cartons of noxious liquid through the food port of their cell. Respondent's interpretation of the evidence is not based on the actual evidence nor on any reasonable inferences that could be drawn therefrom.

First, there was no evidence that the two cartons were thrown "simultaneously or in rapid succession" as respondent asserts (RB at 93), but even if they were thrown quickly, no "accuracy" is required to hurl a milk carton though a food port opening. According to the trial testimony, the size of a food port was variously described as either 14 ½ or 18 inches

wide, and four or five inches high. (4RT 739; 7RT 1469.) The cartons were described as "small" (6RT 1239), indicating that they were single-serving or half-pint sized cartons, and the food port is designed to accommodate a food tray on which such cartons would be placed together with other items.[29] The port opening apparently was large enough for someone in a cell to fling a large piece of plastic through it using a broad, swinging arm motion. (6RT 1386-1387.) But more to the point, respondent does not reasonably infer that one individual standing directly in front of the port would have any difficulty hurling two cartons through the opening in rapid succession. Indeed, the size of the cell, as depicted in the very evidence on which respondent relies, would have precluded two individuals from standing next to each other in front of the door, particularly when moving their arms to make throwing motions.

Respondent also argues that, even if appellant did not throw one of the cartons himself, he was guilty of aiding and abetting a battery committed by Romo. (RB at 93.) While the court is not required to instruct on the elements of uncharged offenses absent a request by the defense, the jury in this case was instructed on the elements of all asserted factor (b) offenses. The court asked the prosecution on several occasions to identify the specific uncharged crimes it was relying on and which instructions pertained to those offenses. (See e.g., 5RT 1192-1194; 7RT 1593-1596.) The prosecutor never mentioned it was relying on an aiding and abetting theory for this or any other factor (b) incident and did not request any instructions on aiding and abetting at either phase of the trial. Further, the prosecution never argued that appellant aided and abetted a battery. Indeed, the only argument presented to the jury on this incident was that "Mr. Delgado and his cellmate *each* throw a container" on the officers. (8RT 1671.) The government cannot now argue the evidence was sufficient to

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29. The food port is also used to put handcuffs on a prisoner before he exits a cell. This is accomplished by the inmate placing *both hands,* up to his wrists, through the port simultaneously. It is thus big enough for two hands to come through at the same time. (4RT 738.)

establish an aiding and abetting theory when it failed to present that theory to the court or to the jury in any form.

Whether or not the evidence may have also established appellant was an aider and abettor is irrelevant to this issue of whether the prosecution met its burden of proof of establishing the elements of the identified uncharged crimes as presented and argued to the jury. Nonetheless, the evidence is also insufficient to show that any reasonable juror could have found the elements of liability as an aider and abettor beyond a reasonable doubt.

Aider and abettor liability requires that the defendant 1) know of the perpetrator's unlawful purpose; 2) have the intent or purpose of encouraging or facilitating the commission of the crime; and 3) aid, promote, encourage or instigate, by act or advice, the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) Respondent's argument that these elements were proven is circular and nonsensical. It first argues that it was reasonable to conclude that appellant and Romo were in agreement to force a cell extraction. Because of this supposed "collusion," respondent argues that it was also reasonable to conclude that appellant knew that Romo had the cartons of noxious liquid in the cell and that Romo was going to throw them. From this, respondent theorizes that "the jury could reasonably conclude that appellant, acting with the intent for Romo to commit a battery and with knowledge that Romo would throw the milk cartons . . . , encouraged or instigated the battery by colluding with Romo to force the officers to initiate a cell extraction." (RB at 94.) Regardless of appellant's intent with regard to the cell extraction, however, respondent can point to no evidence to support a reasonable inference that appellant intended to aid and abet the gassing battery offense, and certainly no evidence that would establish his intent to do so beyond a reasonable doubt. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1129 [to be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also intend the criminal act the perpetrator commits].) Despite appellant's history of incarceration and extractions, there was no

evidence he ever committed a gassing and no basis for an inference of an intent to assist Romo here.

3. The Evidence Was Insufficient to Establish that Appellant Committed an Assault or Battery on March 12-13, 1997, at High Desert State Prison

Respondent argues that the evidence shows appellant committed a battery during the extraction that followed the incident discussed above and that the appellant did not act in self-defense in response to unreasonable or excessive force when he struck an officer attempting to forcibly remove him from his cell for a violation of a prison regulation that did not involve force or violence. (RB at 95-100.) Although the extraction followed the gassing incident, the evidence showed the extraction was performed because Romo and/or appellant failed to remove the coverings from their windows.

Although respondent contends that the evidence showed that using pepper spray and/or "less-lethal" weapons to remove an inmate from his cell for refusing to be handcuffed is reasonable and not excessive, there was no evidence presented on this point. Respondent does not explain why the use of pepper spray and now-banned lethal weapons to force prisoners out of their cells is not an excessive response to violations of prison regulations that do not involve any force or violence. Dewall merely testified as to prison policy, and neither he nor any other witnesses testified as to the reasons for the policy or the use of such force. (See RB at 97-99.)

Moreover, as set forth above in Section E1, *ante*, it was the prosecutor's burden to prove beyond a reasonable doubt that 1) the correctional officers did not use excessive force; 2) the correctional officers did not engage in behavior that appellant actually and reasonably believed put him in danger of becoming a victim of excessive force; and 3) appellant used unreasonable force to defend himself against a real or apparent danger. Respondent's reliance on *People v. Moore, supra,* 51 Cal.4th at p.1136, is misplaced. As explained above, in *Moore*, unlike here, "the evidence . . . did not raise any legal justification for defendant's actions" *(Id.)* In this case, the trial judge found there was evidence from which self-defense

and/or the use of excessive force could have been established and instructed on these issues, even though the defense did not request the instructions. The prosecutor thus was required to present evidence to show the force was not excessive, that the guard's behavior did not cause appellant to reasonably believe he was in danger of becoming a victim of excessive force, and that appellant's "use of force" was unreasonable. No such evidence on any of these issues was presented.[30]

As it did before, respondent argues that the prosecution met its burden of showing that appellant did not reasonably believe the officers would use excessive force because appellant had previously refused to comply with orders "knowing" that the officers would deploy pepper spray and potentially lethal projectiles. (RB at 100.) Again, respondent does not explain why appellant's knowledge that excessive force would be used supports, rather than defeats, its argument that he didn't reasonably believe such force would be used.

For all the reasons stated here and in appellant's opening brief, there was insufficient evidence to prove appellant committed an assault or battery on March 12-13, 1997.

4. The Evidence Was Insufficient to Show that Appellant Committed an Uncharged Act of Possession of a Weapon or Assault at Corcoran State Prison on November 13, 1999

Respondent contends the evidence was sufficient to show that appellant possessed the sharpened instrument that Officer Tovar found while escorting another inmate, Lopez, to the shower. As set forth in the opening brief, however, Tovar provided no testimony from which a juror could conclude, beyond a reasonable doubt, that appellant actually or

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30. Because the prosecution bore the burden of proving beyond a reasonable doubt that appellant did not act in self-defense, respondent's argument that "a lack of evidence that appellant was not acting in self-defense is not evidence that he was lawfully defending himself," (RB at 100), is unavailing. The missing evidence here was evidence *the prosecution* had to present pursuant to the instruction given to the jury: "The burden is on the people to prove that the use of force or violence was not in lawful self-defense." (8RT 1649; 10CT 2732.)

constructively possessed the sharpened instrument. (AOB at 157-158.)

Respondent also finds the evidence of assault to be sufficient, arguing that the mere fact that a sharp object was discovered sticking out of a crack in appellant's cell door when another prisoner happened to be walking by is sufficient to prove beyond a reasonable doubt that appellant willfully placed the instrument in a crack in his door, that doing so would naturally, probably and "directly" result in the application of force to the other prisoner, that appellant was aware of these probable results, and that appellant had the present ability to apply force to the other prisoner. (RB at 105.) As stated in the opening brief, in the absence of any evidence that appellant himself put the instrument in his door, whether he did so before or while Lopez was walking by, whether he did so with any force or propulsion, or whether he even knew Lopez was there, no reasonable juror could properly draw the inferences required to find appellant guilty of assault beyond a reasonable doubt. (AOB at 158-159.)

Respondent also asserts the evidence showed appellant had the present ability to assault Lopez because he possessed the instrument. It relies on case law that finds a present ability may be established even if some "steps remain to be taken," and even if the victim thwarts the attack. (RB at 105.) Respondent overlooks that there was no evidence that appellant was "capable of inflicting injury on the given occasion" as the very case law it cites requires. (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) No evidence at all was presented on this crucial element of assault, and there was no evidence from which this element could be inferred.

5. The Evidence Was Insufficient to Show that Appellant Committed an Uncharged Act of Violence at Corcoran State Prison on March 29, 2000

Respondent argues that appellant's contention that the evidence does not establish that appellant committed an act or threat of force or violence on March 29, 2000, is forfeited because, in its view, only the judge is required to find such a fact and the judge here was never asked to do so. (RB at 107-108.)

To the extent respondent relies on *People v. Thomas* (2012) 53 Cal.4th 771, *People v. Butler* (2009) 46 Cal.4th 847, and *People v. Nakahara* (2003) 30 Cal.4th 705, appellant has asked this Court in a related argument to reconsider its ruling in those and other cases that the question of whether the uncharged crimes are acts of force or violence is not to be considered by the jury. Appellant addresses respondent's response to that argument in Section F, *post*.

In this case, the supposed weapon was in plain view and within appellant's reach for a significant length of time while Mascarena, who had 12 years of experience as a correctional officer, calmly watched and video-taped his superior, Lt. Pearson, standing just outside of the cell conversing with appellant. Mascarena did not warn Pearson or take any steps to remove the "weapon" despite the supposed danger to his superior officer. Pearson did not even learn of the "threat" until after Mascarena had thrown away the "weapon." (AOB at 163-165.) Under these circumstances, the evidence was insufficient to establish that appellant committed an act of force or threatened the use of force.

6. The Evidence Was Insufficient to Show that Appellant Committed an Uncharged Act of Violence at Corcoran State Prison on April 15, 2000

The evidence presented at the penalty phase showed that one correctional guard observed appellant jumping up to cover a light in the cell he had been placed in, that appellant voluntarily removed the covering, and that, after he was escorted out of his cell, plastic scrapings were seen on the floor and several weapons were found on the bed. Respondent asserts that this evidence is sufficient to establish that appellant "knowingly exercised control over" the items found in the cell, even though no evidence was presented to prove this element of the uncharged offense. Respondent's argument is based on unreasonable and unsupported inferences.

First, respondent concedes that appellant had not been in his cell continuously before he was escorted out of it on April 15, 2000, and that no one "*other than officers*" had access to it. (RB at 111-112, italics added.)

The fact that other individuals, whether prison staff or prisoners, had access to the cell before the weapons were found, however, disproves that appellant had sole access during all relevant time periods. Second, respondent asserts that it is reasonable to infer that, because appellant was jumping towards the light, and grooves and plastic shavings were later found on the floor, he was making the weapons found in his cell. (*Id.*) However, because no one made a record of the condition of the cell when appellant was placed there, no evidence was presented from which the jury could infer the grooves and shavings were not present before appellant was placed in the cell. Third, respondent contends the evidence shows that appellant knew the weapons were in his cell because they were found hidden on his bed. In an argument drawn straight out of "*The Princess and the Pea*," respondent contends that a jury could reasonably infer that, even if appellant did not put the weapons there himself, he would have felt the weapons when he lay down. (RB at 113.) However, there was no evidence that appellant had ever slept, laid down, or sat on the bed, and without any evidence establishing that he had been in the cell overnight, it was unreasonable for the jury to infer that he would have known the items were on the bed.

7. The Evidence Was Insufficient to Establish that Appellant Committed a Battery on April 18, 2000, at Corcoran State Prison

Respondent disputes appellant's argument that the evidence was insufficient to establish that appellant was not acting in self-defense against excessive force when he grabbed a canister of pepper spray from the hand of a guard who was spraying the chemical at close range at appellant while he was confined in his cell.[31] Although respondent contends the prosecution proved that the guard did not use excessive force in response to appellant's refusal to leave his cell, not one shred of evidence was presented

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31. Respondent does not contend the evidence was sufficient to establish appellant possessed a weapon on that date, as the prosecutor had argued to the court. Respondent essentially concedes the evidence was not sufficient to establish this offense. (RB at 114, fn. 25.)

on this issue. Whether or not appellant was violating a prison rule, respondent does not explain why the use of pepper spray and now-banned lethal weapons to force prisoners out of their cells is not an excessive response to violations of prison regulations that do not involve any force or violence. (See RB at 116-117.)

Moreover, as set forth above in Section E1, *ante*, it was the prosecutor's burden to prove beyond a reasonable doubt that 1) the correctional officers did not use excessive force; 2) the correctional officers did not engage in behavior that appellant actually and reasonably believed put him in danger of becoming a victim of excessive force; and 3) appellant used unreasonable force to defend himself against a real or apparent danger. Respondent's reliance on *People v. Moore, supra,* 51 Cal.4th at p.1136, is misplaced. As explained above, in *Moore*, unlike here, "the evidence . . . did not raise any legal justification for defendant's actions" *(Id.)* In this case, the trial judge found there was evidence from which self-defense and/or the use of excessive force could have been established and instructed on these issues in the absence of a defense request. The prosecutor thus was required to present evidence to show the force was not excessive, that the guard's behavior did not cause appellant to reasonably believe he was in danger of becoming a victim of excessive force, and that appellant's "use of force" was unreasonable. No such evidence on any of these issues was presented.

Respondent faults appellant for misinterpreting the length of time that Gatto held down the trigger of the pepper spray canister, and claims that, instead of subjecting appellant to a 13 second burst of the chemical, the burst lasted only "four to five seconds." Of course, as respondent admits, appellant has shown that pepper spray is normally used in bursts of no more than *two* seconds' duration, and generally last no more than a half-second. (RB at 117.) Despite this, it makes no attempt to explain why the use of the spray for even four or five seconds was not an excessive response

to appellant's refusal to leave his cell.[32]

Respondent again argues that the prosecution met its burden of showing that appellant did not reasonably believe the officers would put him in danger of suffering excessive force, because appellant had refused to comply with their previous orders "knowing" the officers would deploy pepper spray. (RB at 119.) As before, respondent does not explain how appellant's knowledge that excessive force would be used negates a reasonable belief that such force would be used, and again, that very knowledge defeats its argument.

For all the reasons stated here and in appellant's opening brief, there was insufficient evidence to prove appellant committed an assault on April 18, 2000.

F. The Instructions Erroneously Directed the Jury to Find that Appellant's Unadjudicated Other Crimes Involved the Use or Threat of Force or Violence and Were Incomplete and Misleading

As argued in appellant's opening brief, this Court's jurisprudence regarding the jury's role in determining the defendant's guilt of uncharged offenses presented in aggravation pursuant to factor (b) has not been entirely consistent. Appellant also showed that, in keeping with the death penalty statute, the jury must be allowed to decide whether the evidence actually presented at trial involved a crime of force or threatened force or violence. (AOB at 175-176.)

Respondent focuses on whether this Court decision in *People v. Dunkle* (2005) 36 Cal.4th 861, held that the jury decides whether a crime is one of force or violence when determining whether uncharged offenses may be weighed in aggravation. In *Dunkle*, although this Court was addressing whether "burglary for theft" is not, categorically, a crime of force or violence, it also stated in general terms that the question of the nature of the crime *is* to be decided by the jury and that the circumstances of an offense

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32. Contrary to respondent's contention, appellant was not pointing to the length of the bursts from the second canister when he claimed the use of force was excessive. (RB at 119, fn. 27.)

are relevant to whether it involves force or violence. (*Id.* at pp. 922-923.) To the extent this Court intended to distinguish between burglary for theft and other uncharged offenses, it provided no principled reasons to do so and indeed, there are none. Even though a burglary can be based on a intent to commit violent as well as generally non-violent target offenses, i.e. robbery as well as theft, the same is true of other potential factor (b) offenses, such as certain assaults, false imprisonment or escape, for example. If the decision as to whether a specific burglary involves force or violence is properly decided by the jury, then the same decision with regard to other crimes is also properly decided by the jury.

As appellant argued in his opening brief, while the trial court is charged with the threshold question of the admissibility of factor (b) evidence, once that evidence is admitted, the jury must decide whether it should be given any weight as an offense involving the use of force or violence. (AOB at 175-178.) Neither respondent nor this Court has addressed this contention in light of California's death penalty scheme. Further, respondent relies on this Court's previous rejection of arguments that CALJIC 8.87 creates an impermissible mandatory presumption that the uncharged offenses alleged under factor (b) are crimes of force or violence, yet it has ignored the grounds for reconsideration of those decisions set forth in appellant's opening brief. *(Id.)*

G. Admission and Reliance on Evidence of the Unadjudicated Crimes at the Penalty Phase Requires the Reversal of Appellant's Death Sentences

Respondent argues that reversal is not warranted from the erroneous introduction of any of the factor (b) evidence because there is no reasonable possibility that such errors influenced the penalty phase verdict.[33] Respondent concedes that it must show that any error was harmless beyond a reasonable doubt (RB at 126), but it has failed to meet that burden.

Respondent contends that even without any of the challenged factor

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33. Respondent's forfeiture arguments made in connection with this point have already been addressed in Section A of this argument, *ante*.

(b) evidence, the jury would have sentenced appellant to death because of the following: there were several other incidents involving force or violence that were properly presented under factor (b); the circumstances of the capital crimes "sealed appellant's fate"; there was very little mitigating evidence provided to the jury; and the prosecutor mentioned the uncharged offenses only "fleetingly." (RB at 127-128.) Respondent misconstrues the importance of the unadjudicated offenses to the prosecution's penalty case.

Contrary to respondent's characterization of the prosecution's penalty argument, the uncharged factor (b) evidence was integral to the reasons it offered to return the death verdicts. Rather than "fleeting" mention of the uncharged crimes, the prosecution set forth in detail the facts of each of the uncharged incidents that occurred. (8RT 1670-1673 1677-1681.) Further, the prosecutor interwove these incidents with the capital offenses to paint appellant as a man whose purpose in life was to "draw blood," "to live his life with violence and threats of violence (8RT 1677)," and "to assault, to attack, to injure." (8RT 1678.) The prosecutor further pointed to the uncharged offenses to show "the measure of the man of Anthony Delgado" (8RT 1680), and that appellant is a "thinker and planner" who chooses carefully when to seize an opportunity to engage in violence. (8RT 1681.)

For these reasons, together with the reasons set forth in the opening brief, there is a reasonable possibility that the jury's consideration of these unproven and invalid aggravating factors affected the penalty verdicts. (*People v. Brown* (1988) 46 Cal.3d 432, 447). The state cannot prove that the introduction of the insufficient factor (b) evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, appellant's death sentences should be reversed.

CONCLUSION

For all the foregoing reasons, appellants convictions must be reserved and his judgments of death vacated.

DATED: March 19, 2014

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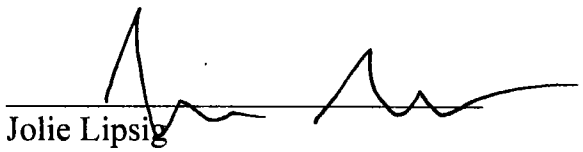
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360(b)(1))

I, Jolie Lipsig, am the Senior Deputy State Public Defender assigned to represent appellant, Richard Leon, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 29, 698 words in length excluding the tables and certificates.

Dated: March 19, 2014



Jolie Lipsig

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Anthony Delgado***
Case Number: **Supreme Court No. S089609**
Superior Court No. 99CM7335

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on March 19, 2014, as follows:

Anthony Delgado, #D-29974
CSP-SQ
1-AC-2
San Quentin, CA 94974

Jessica Jackson
Habeas Corpus Resource Center
303 Second Street, Suite 400
San Francisco, CA 94107

Tia M. Coronado
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 19, 2014, at Sacramento, California.

Saundra Alvarez