IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Case No. SO99274
Plaintiff and Respondent,	Superior Court No. PA032918
v.	
DONALD L. BROOKS,	
Defendant and Appellant.	

Appeal from the Superior Court of Los Angeles County

Honorable Warren G. Greene, Judge

APPELLANT'S REPLY BRIEF

John L. Staley
Attorney at Law
State Bar No. 129624
11770 Bernardo Plaza Court
Suite 305
San Diego, CA 92128

(858) 613-1047

Counsel for Appellant by
Appointment of the
California Supreme Court

TABLE OF CONTENTS

GUILT PHASE ISSUES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

SECONDARY AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONALD L. BROOKS, Defendant and Appellant.	Case No. SO99274 Superior Court No. PA032918

Appeal from the Superior Court of Los Angeles County

Honorable Warren G. Greene, Judge

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this Reply Brief, appellant responds to contentions by the State that require an answer in order to fully present the issues before the Court. However, appellant does not reply to arguments that are fully addressed in his Opening Brief. The failure to address any particular argument, sub-argument, or allegation made by the State, or to reassert any particular point made in the Opening Brief, does not constitute a concession, abandonment, or waiver of the point by appellant (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented. The arguments in the Reply

Brief are numbered to correspond to the arguments in the Opening Brief.

GUILT PHASE ISSUES

I

THE JUDGMENT OF GUILT, AND THE PENALTY, SHOULD BE REVERSED AND THE CASE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS ON APPELLANT'S MOTION TO EXCLUDE HIS STATEMENTS FOR VIOLATION OF HIS MIRANDA RIGHTS BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS, ERRONEOUSLY STRUCK APPELLANT'S TESTIMONY OFFERED DURING THE 402 HEARING TO EXCLUDE HIS STATEMENTS FROM EVIDENCE.

Appellant argued in his Opening Brief that the trial court erred by striking his testimony during the hearing to suppress his statements made to law enforcement officers. The trial court struck appellant's testimony because he refused to testify about facts which were not relevant to whether his pre-trial statements should be suppressed. Respondent argues the judgment should be affirmed because: (1) the trial court properly struck appellant's testimony because his credibility was in issue; and (2) any error in the striking of appellant's testimony was harmless error. Respondent's arguments must be rejected because the striking of appellant's testimony was a drastic and unnecessary remedy and prejudicial

A. THE TRIAL COURT ERRED BY STRIKING APPELLANT'S TESTIMONY AND BY FAILING TO CONSIDER LESS DRASTIC ALTERNATIVES.

Respondent cites cases holding that a defendant is not entitled to put his credibility

in issue before the jury without being tested through cross-examination. (RB at p. 47, citing *People v. Seminoff* (2008) 159 Cal.App.4th 518, 527; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1246-1249.) The fact that appellant's credibility was in issue when he testified was not a basis, by itself, to strike his testimony. Every witness puts his credibility at issue by testifying. Nevertheless, striking the testimony of a witness is a drastic solution only to be employed after less severe alternatives have been considered and rejected. (*Fost v. Superior Court* (2000) 80 Cal.App.4tn 724, 735.) Furthermore, the refusal of a witness to answer one or two questions does not require the strike of his or her testimony. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 760.)

Appellant's refusal to answer the prosecutor's question about whether he told the detectives he had killed Kerr was marginally, if at all, relevant. Appellant's direct testimony was limited solely to whether he requested the appointment of attorney prior to his first interrogation at police headquarters on July 22, 1999. (4RT 346-350.) Appellant's direct testimony did not refer to the trip back to California on July 26, 1999, when appellant allegedly admitted to Detective Gligorijevic that he had killed Kerr. (4RT 291-308.) Respondent argues appellant's purported admission to killing Kerr was especially crucial to assessing his credibility because it provided a strong motive for him to maintain that he had requested an attorney prior to his first interrogation. However, appellant's alleged admission to killing Kerr was already before the court through Detective Gligorijevic's testimony about appellant's statement to her during the airplane ride. (4RT 292-308.) There was no need to

elicit from appellant an admission to Detective Gligorijevic that he had killed Kerr to assess his motive to falsely claim that he had requested an attorney when he was arrested and prior to the first interrogation.

Furthermore, during the ride to the airport, Detective Gligorijevic told appellant his statements could not be used against him and she had no intention of doing so. (4RT 301-312.) The trial court suppressed appellant's statements to Detective Gligorijevic because of this promise. (4RT 365-366.) Detective Gligorijevic's promise to appellant should have precluded using appellant's statements to attack his credibility during the hearing to exclude his statements. Otherwise, the State breached its promise to appellant when Detective Gligorijevic told appellant his statements would not be used against him. (*People v. Quatermain* (1997) 16 Cal.4th 600, 617-618 [finding a due process violation when the prosecutor used the defendant's statements to him and an investigator to be a due process violation when the prosecutor had promised the defendant that his statements would not be used against him and the prosecutor offered the statements for impeachment].)

Respondent argues that appellant's failure to suggest less drastic alternatives waived any error pertaining to the trial court's failure to do so. This argument must be rejected. The trial court was required to consider the least drastic alternative when deciding the appropriate remedy for appellant's refusal to answer the prosecutor's questions. (*Fost v. Superior Court*, 80 Cal.App.4th at p. 736.) Appellant did not have a duty to propose less drastic alternatives.

The cases cited by respondent do not establish that appellant waived the issue of the

trial court's failure to consider less drastic alternatives than striking appellant's testimony. In *People v. Rundle* (2008) 43 Cal.4th 76, disapproved of on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, the defendant testified during a hearing to exclude his evidence for a *Miranda* violation. Several of the defendant's answers to the prosecutor's questions were admitted for the limited purpose of showing the defendant's state of mind. The prosecutor tried to impeach the defendant's trial testimony before the jury with the defendant's testimony during the hearing to exclude his statements. The defendant objected because the questions would have disclosed that the defendant had tried to exclude those statements from evidence and thus prejudiced him. The trial court agreed to not allow disclosure of that fact.

On appeal, the defendant argued the prosecutor should not have been allowed to impeach the defendant with his testimony from the hearing because that testimony was admitted for the limited purpose of showing his state of mind and not for the truth of the matter asserted. This Court rejected the argument because the defendant had not made this objection in the trial court. *People v. Rundle* applied the standard rule that objections to the admission of evidence which were not made in the trial court are waived on appeal. *People v. Rundle* did not address the procedure for the trial court to follow to determine whether the testimony of a witness should be stricken because of the refusal of a witness to answer questions during cross-examination.

Similarly, *People v. Seminoff* (2008) 159 Cal.App.4th 518, did not hold that a

defendant waives the trial court's failure to consider less drastic alternatives to the striking of testimony by failing to make that request. In *People v. Seminoff*, the defendant's girlfriend testified during a hearing to exclude testimony. She refused to answer crucial questions during cross-examination, and the trial court struck her testimony. The defendant argued on appeal that the trial court erred by striking her testimony. The Court noted, "We recognize the trial court did not expressly contemplate any remedies short of a complete striking in deciding what to do in the face of Bassett's repeated assertion of her Fifth Amendment rights. However, defense counsel did not offer any." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 527.) This was simply an anecdotal observation by the Court of Appeal that the defense counsel had not suggested any option other than striking the witness' testimony. The Court of Appeal did not hold the trial court did not have a duty to consider such options. The Court then noted that the only option--other than striking the witness' testimony-- would have been for the trial court to allow her to answer question-by-question, and the trial court in effect followed that procedure. The Court concluded, "Other lesser sanctions are simply indistinguishable from the one employed under the circumstances of this case." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 528.) Hence, *People v. Seminoff* does not support respondent's waiver argument.

People v. Thompson (2010) 49 Cal.4th 79, also does not assist respondent. The defendant argued the trial court should have stricken the testimony of a witness, but that relief was not requested in the trial court. (*People v. Thompson, supra*, 49 Cal.4th at pp. 129-

130.) *People v. Thompson* again applied the standard rule of waiver applicable to the admission and exclusion of testimony.

In the instant case, the trial court had options other than striking appellant's testimony. The trial court could have considered the significance of the question appellant refused to answer, and appellant's reason for not answering it, in assessing his credibility. (See *People v. Seminoff, supra*, 159 Cal.App.4th at p. 526 [a remedy available for a witness' refusal to answer a question is to allow the trier of fact to consider that refusal in evaluating his credibility].) Appellant's refusal to answer the prosecutor's question did not require the categorical rejection of his credibility. The trial court still could have found credible appellant's testimony that he requested an attorney when he was initially interrogated despite his refusal to answer the above question. During the taped interrogation, appellant stated, "there's no one sitting there for me. . .," (2CT 432), before he made his unequivocal request for an attorney. He later repeated this comment. (2CT 450.) Appellant then commented about having a public defender. (2CT 452-453.)[1] This provided corroboration of appellant's testimony that he requested an attorney prior to any of the interrogations occurring.

In *People v. Seminoff*, the court stated, "the trial court . . . could have refused to strike the testimony, but then completely discounted its credibility because Bassett had refused cross-examination: Different sanction, same result." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 528.) In that case, the complete discounting of the witness' credibility was

---

[1] The trial court's suppressed appellant's statements which were made after page 455, line 14, of the clerk's transcript. (4RT 363; 2CT 455.)

necessary because, "[w]hether Bassett personally transported the marijuana and intended to sell it were questions that had a clear and logical bearing on her connection to the marijuana and her knowledge of how it was packaged. These answers directly touched upon her interest in the case and were therefore crucial to assessing her credibility." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 588.)

This reasoning does not apply to appellant's case. Whether appellant admitted to Detective Gligorijevic that he killed Kerr was peripheral to whether he requested an attorney four days earlier. Hence, appellant's failure to answer the prosecutor's question about whether he told Detective Gligorijevic that he killed Kerr did not require a complete discounting of his credibility. The instant case is not similar to *People v. Seminoff*, in which "Different sanction: same result," (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 528), applied because of the peripheral nature of the question appellant refused to answer. Hence, the trial court erred by striking appellant's direct testimony during the hearing on the motion to suppress evidence.

B. THE TRIAL COURT'S STRIKING OF APPELLANT'S TESTIMONY WAS NOT HARMLESS ERROR.

Respondent argues the trial court's striking of appellant's testimony was harmless error because his statements to Detective Graham, were cumulative and tangential to his alleged statements to Heiserman and Jayne in which he admitted killing Kerr. Respondent further argues that appellant did not challenge evidence that he killed Kerr. (RB, pp. 46-47.) Respondent's argument ignores how the trial court's denial of appellant's motion to exclude

his statements to Detective Graham impacted his trial strategy and bolstered the testimony of Heiserman and Jayne. Appellant argued in the Opening Brief that the denial of the motion impacted the defense theory of the case and the presentation of the evidence. Had the trial court excluded appellant's statements to Detective Graham from evidence, it was unlikely the defense counsel would have conceded that appellant killed Kerr. Respondent has not addressed this prejudice argument and has therefore conceded its merit. (*Cf. People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112, fn. 3.)

Appellant's admissions to Detective Graham impacted how the case was tried. Detective Graham testified that appellant said that he met Kerr around 1:30 a.m., the morning of her death, drove past the area where her vehicle was burning, and felt betrayed because he believed Kerr was sleeping with Mark Harvey. (20RT pp. 2215, 2217, 2222.) These admissions placed appellant close to Kerr near the time of her death and put appellant at the location where her burning vehicle was found. These admissions provided corroborating testimony from a police officer to the testimony of Heiserman and Jayne.

For the reasons above, the trial court's striking of appellant's testimony during the hearing to exclude evidence was prejudicial. The judgment of guilt must be reversed.

II

THE JUDGMENT OF DEATH, AND THE SPECIAL CIRCUMSTANCE FINDING THAT APPELLANT COMMITTED MURDER IN THE COMMISSION OF KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The jury found true the special circumstance allegation that appellant murdered Kerr during the commission of a kidnaping. (24RT 2704-2705.) The definition of asportation provided to the jury was prejudicially erroneous because it allowed the jury to find the kidnaping allegation true based on facts other than the distance Kerr was moved. Respondent concedes that: (1) the trial court erred by giving the 1999 version of CALJIC No. 9.50; and (2) the version of CALJIC No. 9.50 given to appellant's jury improperly described an element of the offense of kidnaping and violated appellant's federal constitutional rights.[2] Respondent argues that the distance appellant moved Kerr was sufficient to find him guilty

---

[2] The Attorney General also implicitly conceded that the erroneous instruction violated appellant's federal constitutional rights. The Attorney General only addressed the prejudice issue under the harmless beyond a reasonable doubt. The Attorney General did not argue that the standard for state law error in *People v. Watson* (1956) 46 Cal.2d 818 governed the prejudice inquiry.

of kidnaping under the law prior to *People v. Martinez* (1999) 20 Cal.4th 225, and hence the error was harmless beyond a reasonable doubt. This argument must be rejected because it ignores the test for finding harmless error from a jury instruction which improperly defines an element of an offense.

A. BRIEF SUMMARY OF THE TRIAL COURT'S INSTRUCTIONAL ERROR

For purpose of clarity, appellant will briefly review the instructional error that occurred. Kidnaping was alleged as a special circumstance. (2CT 315-317.) The jury instruction for the kidnaping special circumstance allegation referred to kidnaping in violation of Penal Code section 207. (23RT 2538.) Prior to *People v. Martinez*, the asportation element of kidnaping in violation of section 207 considered only the distance the victim was moved. (*People v. Martinez, supra*, 20 Cal.4th at p. 225; *People v. Caudillo* (1978) 21 Cal.3d 562, 574.) *People v. Martinez* expanded the range of factors the trier of fact could consider in determining if asportation had occurred. (*People v. Martinez, supra*, 20 Cal.4th at p. 225.) The jury instructions in this case allowed appellant's jury to consider the additional factors outlined in *People v. Martinez* in deciding if Kerr was kidnaped rather than simply limiting the jury to considering the distance she was moved.

B. THE STANDARD OF REVIEW FOR INSTRUCTIONAL ERROR REQUIRES REJECTION OF RESPONDENT'S HARMLESS ERROR ARGUMENT.

Respondent's harmless error argument must be rejected. The issue is not whether the distance appellant moved Kerr was sufficient for a hypothetical jury to find appellant guilty of kidnaping under the pre-*Martinez* standard for asportation. The question for harmless error

analysis is whether, "the error complained of did not contribute to the verdict obtained." (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.) "The question ... the reviewing court [must] consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks ... to the basis on which the jury actually rested its verdict." (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting (*Yates v. Evatt* (1991) 500 U.S. 391, 404, 111 S.Ct. 1884, 114 L.Ed.2d 432.) "What is clear from *Yates* and [*Sullivan v. Louisiana* (1993) 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182] is that for an appellate court simply to reweigh the evidence presented at trial and determine whether a hypothetical reasonable jury would have found the existence of the missing elements is impermissible." (*People v. Flood, supra*, 18 Cal.4th at p. 514 (J. Werdegar concurring).) The issue for harmless error analysis is not the sufficiency of the evidence, but whether the jury's verdict was improperly influenced by an incomplete instruction. (*People v. Flood, supra*, 18 Cal.4th at p. 506 [the question is what effect the instruction had on the guilty verdict in the case at hand].)

For the reasons below, this Court cannot conclude beyond a reasonable doubt that the expanded definition of asportation in CALJIC No. 9.50 did not contribute to the jury finding true the special circumstance allegation of kidnaping.[3]

---

[3] Footnote 15 of Respondent's Brief cites Mapquest.Com to establish the distance between the 5900 block of Woodman Avenue in Van Nuys and Roscoe Boulevard as approximately four miles. (Respondent's Brief at p. 57, fn. 15.) Appellant objects to this evidence based on information acquired from Mapquest.Com because it was not presented to the jury. Appellant will be filing a motion to strike this portion of Respondent's Brief.

C. THE INSTRUCTIONAL ERROR CONTRIBUTED TO THE JURY'S VERDICT REGARDING THE KIDNAPING SPECIAL-CIRCUMSTANCE ALLEGATION.

The prosecutor, during his opening and rebuttal arguments, stressed the factors the jury was allowed to consider to argue that asportation had occurred. He argued at length that appellant had moved Kerr in a manner that increased her risk of harm and minimized the probability that he would be observed by third parties. (23RT 2556-2557, 2564, 2565; 24RT 2659-2660.) The prosecutor's use of the impermissible *Martinez* factors were not simply fleeting references, but repeated references, which built the foundation for the prosecutor's argument that Kerr was kidnaped.

Respondent's argument that the prosecutor briefly referred to the kidnaping charge during opening and rebuttal arguments, (RB at p. 58), is contradicted by the many pages of the prosecutor's argument stressing the impermissible *Martinez* factors. The prosecutor's opening argument commenced on page 2,548 of the reporter's transcript and ended at page 2,576. (23RT 2548-2576.) The prosecutor never once mentioned the distance Kerr was moved to argue that appellant kidnaped her. Respondent has not cited a single instance when the prosecutor, during his opening or rebuttal arguments, referred to the distance Kerr was moved to establish that she was kidnaped. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432.) This Court cannot conclude the prosecutor's repeated references to the impermissible *Martinez* factors did not contribute to

the verdict.

Respondent notes that appellant moved Kerr for several miles between her residence and the Roscoe off-ramp. Respondent then argues this distance was greater than the 200 feet distance the court found sufficient in *People v. Stender* (1975) 47 Cal.App.4th 413, 421-423, to establish asportation.[4] It is not relevant that a court, in another case, found asportation based on a shorter distance than Kerr was moved because harmless error analysis focuses on whether "the error complained of did not contribute to the verdict obtained." (*People v. Mayfield, supra*, 14 Cal.4th at p. 774.)

Respondent also argues the instructional error was harmless because the distance Kerr was moved was not disputed, and appellant conceded the asportation element by failing to contest it. The distance appellant moved Kerr was not undisputed. The jury was not required to accept appellant's out-of-court statements, or the prosecutor's theory, of how the crime occurred. The jury did not make any specific findings of fact regarding the distance Kerr was moved or whether she was moved without consent. Appellant never conceded that he kidnaped Kerr.

Furthermore, the defense counsel argued Kerr was dead when she was transported to the location where the car was set on fire. (23RT 2585-2586; 24RT 2606-2610.) A dead person cannot be kidnaped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498.) The defense counsel's closing argument concentrated on the voluntary manslaughter theory. (23RT 2587-

---

[4] *People v. Stender* was cited with approval in *People v. Martinez, supra*, 20 Cal.4th at p. 240 and *People v. Caudillo, supra*, 21 Cal.3d at p. 574.)

24RT 2635.) The prosecutor's rebuttal argument appears on pages 2,636 through 2,671. (24RT 2636.) The prosecutor argued, "why, once again, are we so concerned about this strange fiction of a corpse breathing three hours after it's been killed? Why does that come up? Because he knows that not only is that arson, but it's kidnaping. Because you harm someone, you make them unconscious, strangle them, put them in a position of vulnerability and drive them around in that car, that's kidnaping." (24RT 2659-2660.) This argument failed to argue appellant had kidnaped Kerr because of the distance she was moved. It was simply a reference to driving Kerr around in the car.

The cases cited by respondent do not support the conclusion that appellant conceded Kerr was kidnaped. For instance, in *People v. Flood, supra*, 18 Cal.4th 470, the defendant was found guilty of evading a peace officer. The defendant fled from the officers in his vehicle. The trial court's jury instruction failed to define a "peace officer." This Court concluded the defendant had conceded the police officers who had pursued him were "peace officers" within the meaning of the statute for the following reasons:

> Although defendant in the present case did not affirmatively admit—through testimony or by stvipulation, for example—that Bridgeman and Gurney were peace officers, several circumstances indicate that defendant effectively conceded this issue. As noted above, the record indicates that defendant requested the CALJIC instruction that included the optional, bracketed phrase instructing the jury that the officers were peace officers, and nothing in the record suggests that he objected to the trial court's informing the jury that Bridgeman and Gurney were peace officers. Defendant never referred to this element of the crime during the trial and did not argue to the jury that the prosecution had failed to prove this element beyond a reasonable

> doubt; indeed, he did not ask that the issue even be considered by the jury. Furthermore, defendant presented no evidence regarding the peace officer element, and failed to dispute the prosecution's evidence regarding the issue. Although a defendant's tactical decision not to "contest" an essential element of the offense does not dispense with the requirement that the jury consider whether the prosecution has proved every element of the crime (*see Estelle v. McGuire*, supra, 502 U.S. at p. 69 [112 S. Ct. at pp. 480-481]), in our view defendant's actions described above are tantamount to a concession that Bridgeman and Gurney were peace officers.

(*People v. Flood, supra*, 18 Cal.4th at pp. 504-505.)

Appellant's case is materially different. There is a fundamental difference between a fact beyond reasonable dispute—whether police officers employed by a city are "peace officers" within the meaning of Vehicle Code section 2800.3, subdivision (a)--- and the issue of whether a person was moved a substantial distance for the purpose of kidnaping. The issue of whether the police officers were "peace officers" was easily resolved by examining their testimony and the statute defining a "peace officer." The issue of whether a movement was substantial is inherently a factual question for the jury which cannot be easily resolved by reading a statute. Unlike *People v. Flood*, where the defendant did not object when the trial court informed the jury that the police officers were "peace officers," appellant contested whether he kidnaped Kerr.

People v. Miller (1999) 69 Cal.App.4th 190, is also distinguishable. The defendant in that case was convicted of a number of crimes, including the illegal possession of dangerous fireworks. The defendant possessed 3,000 to 4,000 firecrackers and Roman candle

bottle rockets. The prosecutor argued these fireworks were dangerous and could blow off the hand of a child. The defense counsel did not respond to this argument. The trial court did not provide the jury with a definition of "dangerous fireworks." The appellate court concluded the trial court had a duty to define that term because it had a technical meaning peculiar to the law. (*People v. Miller, supra*, 69 Cal.App.4th at p. 207.) The Court determined, however, that the error was harmless because, "the undisputed evidence clearly established that the fireworks were dangerous within the meaning of Health and Safety Code section 12505, subdivisions (b) and (d)." (*People v. Miller, supra*, 69 Cal.App.4th at pp. 209-210.) The record established "the element as a matter of law." (*Id.*, at p. 210.)

In the instant case, the record did not establish that Kerr was moved a sufficient distance to prove, as a matter of law, the asportation element of kidnaping. In *People v. Miller*, there was no realistic dispute the possession of 3,000 to 4,000 firecrackers and Roman candle bottle rockets was dangerous. It is common knowledge that such items can cause serious injury. It is not common knowledge what constitutes substantial movement for purpose of asportation. The undisputed evidence did not establish that Kerr was transported because appellant argued she was dead when she was moved.

Neder v. United States (1999) 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35, also does not support respondent's harmless error argument. The trial court in that case erroneously failed to submit the element of materiality to filing false tax returns. The defendant failed to report more than one million dollars in income for 1985 and more than four million in

income for 1986. The Court first concluded that the omission of an element from a jury instruction was subject to harmless error analysis. (*Neder v. United States, supra*, 527 U.S. at p. 16.) The Court found the omission of the materiality element from the jury instruction harmless error because, "At trial, the Government introduced evidence that Neder failed to report over $5 million in income from the loans he obtained. The failure to report such substantial income incontrovertibly establishes that Neder's false statements were material to a determination of his income-tax liability. In fact, Neder did not argue to the jury –and does not argue here—that his false statements of income could be found immaterial." (*Neder v. United States, supra*, 527 U.S. at p. 16.)

Appellant's case is materially different. The Supreme Court was able to conclude the prosecution had established materiality by reference to an easily understood and undisputed fact----millions of dollars of income omitted from a tax return. Whether appellant moved Kerr a substantial distance could not be so easily determined. There was a dispute about whether she was dead. Neither the distance Kerr was moved, nor the period of time when the movement occurred, were clear. Appellant's jury could have found the movement was not substantial. Harmless error analysis focuses on whether the instructional error was prejudicial with regard to appellant's jury, and not some hypothetical jury. (*People v. Flood, supra*, 18 Cal.4th at p. 514 (J. Werdegar concurring).) Appellant's jury never knew it had to find the kidnaping allegation true based solely on the distance Kerr was moved.

People v. Ryan (1999) 76 Cal.App.4th 1304, also does not warrant finding harmless

error in this case. The defendant in that case was convicted of child abduction. An element of that crime was the lack of right to custody of the child. The defendant abducted his own child who had been living with the mother. The defendant had lost custody rights because he had abandoned the child. The trial court failed to define abandonment for the jury. The court concluded the evidence of abandonment was overwhelming:

> For the first year of the child's life, he denied paternity. Appellant moved from Oakland, where the child lived with his mother, to Washington, without even advising Carolyn of his address or whereabouts. He sent no support payments to Carolyn, and visited with the child approximately three times in the first four years of his life. Carolyn testified unequivocally that she was the "sole custodial parent" of Cleve. While Carolyn's testimony was rife with inconsistencies, the evidence, viewed as it must be on appeal in the light most favorable to the judgment, establishes that appellant declined her requests to support Cleve--save perhaps a box of clothes and other sundry items on a few rare occasions--and never provided him with a home. Appellant may not have explicitly announced his refusal to take custody, but from the evidence presented the inference that he did so is inescapable.

(*People v. Ryan , supra*, 76 Cal.App.4th at pp. 1314-1315.)

Appellant's case is clearly distinguishable. A different factual determination was at issue in *People v. Ryan*. As explained above, appellant's movement of Kerr for a substantial distance was disputed. The prosecutor's closing and rebuttal arguments led appellant's jury to find that appellant kidnaped Kerr based on impermissible factors. The jury in *People v. Ryan* could not have found the defendant abandoned his child based on impermissible factors.

Respondent's harmless error argument relies on appellate court cases that found asportation based on movement of the victim for a shorter distance than what Kerr was moved. This argument must be rejected because it ignores the legal standard for finding error from a jury instruction which improperly defines an element of an offense. The issue is whether the erroneous instruction was prejudicial in this case. Clearly it was prejudicial. Furthermore, the cases relied on by the prosecution involve situations in which an element was missing from the instructions. Here, the jury was provided with the element of the offense, but provided an incorrect definition which the prosecutor exploited to argue the truth of the kidnaping special circumstance allegation.

The reversal of the kidnaping special circumstance allegation requires reversal of the judgment of death.

III

THE DUE PROCESS CLAUSE AND APPELLANT'S RIGHT TO A FAIR TRIAL AND A MEANINGFUL DEFENSE, THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION, REQUIRE REVERSAL OF THE TRUE FINDING TO THE KIDNAPING SPECIAL CIRCUMSTANCE ALLEGATION BECAUSE THE TRIAL COURT REFUSED TO GIVE A MISTAKE OF FACT INSTRUCTION.

The jury found true the special circumstance allegation that appellant murdered Kerr during the commission of a kidnaping. (24RT 2704-2705.) Appellant argued in the Opening Brief that the trial court should have given a mistake of fact instruction for the kidnaping allegation because there was evidence appellant believed Kerr was dead when he moved her body. A dead person cannot be the victim of a kidnaping. Respondent argues: (1) appellant waived the issue of the trial court's failure to give a mistake of fact instruction because the instruction was requested in connection with the intent to kill, and not the kidnaping allegation; and (2) the trial court properly refused to give a mistake of fact instruction. Respondent's arguments must be rejected because: (1) the mistake of fact instruction was requested in connection with the kidnaping allegation; (2) the trial court had a sua sponte duty to give the instruction even if it was not requested; and (3) there was substantial evidence to support giving the mistake of fact instruction.

A. THE TRIAL COURT WAS ON NOTICE OF THE DEFENSE THEORY THAT APPELLANT HAD NOT KIDNAPED KERR BECAUSE HE BELIEVED SHE WAS DEAD WHEN SHE WAS MOVED; ALTERNATIVELY, THE TRIAL COURT HAD A SUA SPONTE DUTY TO GIVE A MISTAKE OF FACT INSTRUCTION.

Respondent's argument that the mistake of fact was directed only to whether appellant had the intent to kill is mistaken. The requested instruction was directed to whether appellant knew Kerr was dead when he transported her to the location where her vehicle was lit on fire.

The entire context of the discussion regarding the mistake of fact instruction must be considered. The kidnaping allegation was alleged solely as a special circumstance to make appellant eligible for the death penalty. (CT pp. 315-317.) The defense counsel explained that the mistake of fact instruction should be given because appellant was not guilty of murder, based on setting Kerr's vehicle on fire, if he believed she was already dead. (22RT 2455-2456.) The trial court reserved making a ruling. (22RT 2457.)

The trial court, and the attorneys, later discussed the mistake of fact instruction. The defense counsel repeated his comment that appellant was not guilty of murder, based on setting Kerr's vehicle on fire with her in it, if he believed she was already dead. (24RT 2673-2674.) The trial court then commented, "if he's driving around thinking she's dead, it's still —well, that's an issue about whether or not it would be kidnaping at that point in time because, presumably, you can't kidnap a dead person." (24RT 2675.) The defense counsel agreed. (*Ibid.*) The trial court later commented, "The other point is what if you thought she was dead. You can't kidnap her." (24RT 2676.)

The prosecutor argued the mistake of fact instruction should not be given because a

mistake of fact did not make appellant's conduct lawful. (24RT 2676-2677.) The trial court responded, "but the fact is that he's driving around, and it's alleged to be kidnaping, but because she's dead, it may not be kidnaping. It may not be the fact of driving around with this body is then unlawful." (24RT 2677.) The trial court refused to give the mistake of fact instruction because the arson, and felony murder, meant there was no mistake of fact by appellant that made his conduct fully lawful after he strangled Kerr. (24RT 2677-2678.)

The trial court understood the defense requested mistake of fact instruction to pertain to the kidnaping allegation. The trial court mentioned several times that appellant had not kidnaped Kerr if he believed she was deceased when he was driving around with her. (24RT 2676-2678.) The prosecutor also believed the mistake of fact instruction was requested for the kidnaping allegation because he stated, "This might mitigate kidnaping, and he argued that and they've got that. It doesn't make it lawful conduct whatsoever. This is wholly misplaced." (24RT 2677.) The defense counsel agreed with the trial court's comment that appellant was not guilty of kidnaping if he believed Kerr was already dead when he drove around with her. (24RT 2675.)

The legal standard for an objection provides a useful analogy for whether the defense counsel sufficiently alerted the trial court to give a mistake of fact instruction for the kidnaping allegation:

> The objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility. What is important is

> that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.

(*People v. Huggins* (2006) 38 Cal.4th 175, 241, fn. 18.)

The trial court was on notice to consider giving a mistake of fact instruction for the kidnaping allegation because of the above discussions. The prosecutor argued why a mistake of fact instruction should not be given for the kidnaping allegation. The trial court mentioned the theory several times and explained why it believed a mistake of fact instruction should not be given. Under these circumstances, the trial court considered whether a mistake of fact instruction should be given for the kidnaping allegation. Hence, appellant did not waive his claim that the trial court should have given a mistake of fact instruction for the kidnaping special circumstance allegation.

The trial court also had a sua sponte duty to give a mistake of fact instruction. "[A] trial court's obligation to instruct on a particular defense arises only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.) Appellant was relying on the defense that he believed Kerr was dead when she was transported and he, therefore, had not kidnaped her. The theory was discussed at length by the trial court and the attorneys. There was evidence supporting the defense because appellant's out-of-court statements, when he

stated he had killed Kerr in her apartment, were admitted into evidence. The mistake of fact instruction was consistent with appellant's defense that he was guilty of voluntary manslaughter. Hence, appellant did not waive the issue of whether the trial court should have given a mistake of fact instruction for the kidnaping allegation.

B. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE GIVING OF A MISTAKE OF FACT INSTRUCTION FOR THE KIDNAPING ALLEGATION.

Respondent argues appellant's alleged statements to Heiserman and Jayne that he had killed Kerr was not substantial evidence to support the giving of a mistake of fact instruction. Respondent's argument ignores the standard of review for the giving of jury instructions.

The trial court does not assess the credibility of witnesses when determining if there is sufficient evidence to warrant giving a jury instruction. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) Substantial evidence warranting a jury instruction means "evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.) The testimony of one witness, including the defendant, may constitute substantial evidence to warrant a requested instruction. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 477.) All doubts as to the sufficiency of the evidence must be resolved in favor of the accused. (*People v. Flannel* (1979) 25 Cal.3d 668, 685.)

Appellant's statement to Jayne, "Well, I'm going to jail for assault anyway, so I might as well kill her," accompanied by appellant's gesturing in a strangling motion, (20RT 2237-2238), established that appellant believed he had killed Kerr when he assaulted her.

Respondent argues that appellant's statement to Jayne "only revealed that he had strangled or assaulted Kerr at her apartment, not that appellant believed he had killed her by strangling her." (RB at p. 67.) This argument ignores the clear inference from the statement that appellant believed he had killed Kerr and the requirement that doubts regarding the sufficiency of the evidence for an instruction be resolved in the defendant's favor. Heiserman testified that appellant said he strangled Kerr after she left Harvey's residence. (18RT 2097-2098.) Appellant's statement suggested that he believed he had killed her. It was a reasonable inference that appellant believed he had killed Kerr before her body was transported to the location where the car was set on fire.

Respondent refers to Heiserman's testimony, when appellant asked him if Kerr was still dead, to argue appellant knew Kerr was alive when he set the car on fire. The existence of conflicting evidence is not a basis to refuse to give a jury instruction. It means there is a question of fact to be resolved by the jury. There was conflicting evidence whether appellant believed he had killed Kerr when he strangled her after she left Harvey's residence or at some later point in time. If appellant believed Kerr was dead when he transported her body, then a mistake of fact instruction should have been given because a deceased person cannot be kidnaped. Because there was substantial evidence appellant believed Kerr was dead before he moved her body, the mistake of fact instruction should have been given.

The trial court erroneously believed that appellant had to be exonerated of all criminal liability in order to obtain a mistake of fact instruction for the kidnaping special circumstance

allegation. (24RT 2677-2678.) This conclusion was wrong because appellant's commission of some other crime, e.g., the unlawful moving of a corpse, did not negate the fact that appellant did not commit a kidnaping if he believed Kerr was dead when he moved her body. The appropriateness of giving a mistake of fact instruction had to be determined with each specific crime.

C. THE TRIAL COURT'S FAILURE TO GIVE A MISTAKE OF FACT INSTRUCTION FOR THE KIDNAPING ALLEGATION WAS NOT HARMLESS ERROR.

Respondent argues the trial court's failure to give a mistake of fact instruction was harmless error because the issue of whether appellant knew Kerr was alive, when she was transported to the location where the car was set on fire, was resolved under the trial court's other jury instructions. Respondent notes that the torture-murder special circumstance allegation required the jury to find that appellant intended to inflict physical pain upon a living human being. (23RT 2540.) The torture allegation was based on appellant setting the vehicle on fire with Kerr in it. The true finding to the torture allegation did not resolve whether appellant knew Kerr was alive when he moved her.

As argued above, appellant's out-of-court statements to Heiserman and Jayne suggested that appellant believed he had killed Kerr when he strangled her and he was therefore moving a deceased person. Appellant had no reason to lie to Heiserman and Jayne about how he killed Kerr. Appellant's statements to them were admissions against his interest and had indicia of reliability. The medical examiner concluded that Kerr was alive when the

car was burning because she had soot in her larynx, trachea, and bronchi. (18RT 1977-1978.) It was possible appellant believed Kerr was deceased when he transported her body because of his out-of-court statements to Heiserman and Jayne, but then realized she was alive when he poured the accelerant because he would have been able to see her breathing. Hence, the jury's conclusion that appellant had tortured Kerr did not resolve whether he had not kidnaped her because he believed she was dead when he transported her body.

For the reasons above, the true finding to the kidnaping special circumstance allegation must be reversed.

IV

THE FEDERAL AND STATE DUE PROCESS CLAUSES REQUIRE REVERSAL OF THE TRUE FINDING TO THE TORTURE MURDER SPECIAL CIRCUMSTANCE, AND THE FIRST DEGREE MURDER CONVICTION BASED ON MURDER BY TORTURE, AND THE JUDGMENT OF DEATH, BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT TORTURED THE VICTIM.

The jury found true the special circumstance allegation that appellant tortured Kerr during the commission of her murder. (24RT 2704-2705.) Torture was also one of the felony-murder theories given to the jury. (23RT 2533-2534.) Appellant argued in the Opening Brief that the evidence was insufficient as a matter of law to prove that appellant tortured Kerr because there was no evidence he intended to cause her extreme pain or acted for purpose of revenge, extortion, persuasion, or for any other sadistic purpose. Respondent argues the torture special circumstance allegation should be affirmed because: (1) there was substantial evidence appellant intended to inflict extreme pain on Kerr: (2) the jury could infer appellant knew Kerr was alive when he set the car on fire because he later asked Heiserman if she was alive; (3) there was sufficient evidence appellant acted for revenge when he set the car on fire; and (4) it was not necessary for Kerr to feel pain.

The medical examiner testified Kerr was probably unconscious when the fire occurred and she died. (18RT 1995-1997.) This evidence was not contradicted. Other evidence showed appellant either knew Kerr was unconscious or thought she was dead when he set the car on fire. Appellant's purported statement to Jayne suggested that appellant believed

that he had killed her when he strangled her. (20RT 2237.) Even if it could be inferred appellant believed Kerr was alive when he set the fire because he asked Heiserman if she was dead, there was no evidence appellant believed she was conscious. The uncontradicted evidence strongly suggested appellant believed Kerr was at least unconscious when the fire was started. Appellant could not have started the fire to cause Kerr to experience pain if he knew she was unconscious.

The cases relied upon by respondent are all distinguishable because they involved a manifest intent to inflict pain on conscious victims. In fact, the cases suggest the evidence in this case was insufficient to support a finding of torture. In *People v. Whisenhut* (2008) 44 Cal.4th 174, the defendant killed a 19 month old child by beating her and pouring hot cooking oil on her. The victim was alive and conscious during the incident. (*People v. Whisenhut, supra*, 44 Cal.4th at pp. 184-195, 201-202.) In *People v. Proctor* (1992) 4 Cal.4th 599, 531-532, the defendant inflicted a vicious beating on the victim while she was alive:

> [the victim] suffered repeated, incision-type stab wounds to her neck, chest . . . [P]
>
> [M]any of the victim's wounds, particularly the knife "drag" marks, were inflicted while she still was alive but after she had been rendered incapable of avoiding further attack. The wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence. The nature of many of the wounds, including the repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggests that they were administered over a substantial period of time and

> that defendant intended to inflict cruel pain and suffering on the victim.

(*People v. Proctor, supra,* 4 Cal.4th at pp. 531-532.)

In *People v. Cole* (2004) 33 Cal.4th 1158, 1203, the defendant poured a flammable liquid in two places in the victim's bedroom while she was lying in bed, and told her, as he started the fire, that he hoped she burned in hell. Although the Court observed that "fire historically has been used as an instrument of torture and is generally known to cause great pain," it made that observation in response to an argument by the prosecutor concerning the use of fire during the Spanish inquisition and the persecution of early Christians. (*People v. Cole, supra*, 33 Cal.4th at p. 1203.) That observation bears no relevance to this case, where the evidence was that Kerr was not conscious at the time of the fire.

Respondent argues the evidence was sufficient for the jury to conclude appellant acted for a sadistic purpose, which was revenge. The evidence does not support this conclusion because appellant must have known Kerr was unconscious, or believed she was deceased, when the fire was started.[5]

The reversal of the true finding to the torture special circumstance allegation requires reversal of count one and the judgment of death.

---

[5] Appellant argued in the Opening Brief that the crime of torture should require the victim to feel pain. (AOB at p. 97, fn. 1.) This argument is addressed in Issue V.

V

THE FEDERAL AND STATE DUE PROCESS CLAUSES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, REQUIRE REVERSAL, OF: (1) THE TRUE FINDING TO THE TORTURE-MURDER SPECIAL CIRCUMSTANCE; (2) THE MURDER CONVICTION BASED ON THE THEORY OF MURDER BY TORTURE; AND (3) THE JUDGMENT OF DEATH, BECAUSE THE DEFINITION OF TORTURE WAS UNCONSTITUTIONALLY VAGUE

Respondent argues appellant waived any claim that the definition of torture was unconstitutionally vague. Pure issues of law may be raised for the first time on appeal. (*People v. Hines* (1997) 14 Cal.4th 997, 1061.) Hence, appellant did not waive his claim that the definition of torture was unconstitutionally vague.

People v. Chatman (2006) 38 Cal.4th 344, does not conclusively resolve appellant's challenge to the definition of torture. Because a statute is judged on an as-applied basis when it is challenged on due process vagueness grounds, (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362, 108 S.Ct. 1853, 100 L.Ed.2d 372), it must be determined whether the definition of torture is vague as applied to the circumstances of this case. The definition of torture was vague as applied to the facts of this case. Appellant's jury was allowed to find that appellant tortured Kerr even if she was unconscious when the torture occurred. (23RT 2540.) The jury was told, "Awareness of pain by the deceased is not a necessary element of torture." (23RT 2540.) An individual cannot be in pain unless he or she is aware of it. A statute is void for vagueness if it fails to provide adequate notice to ordinary people of the

prohibited conduct. An ordinary person would not believe torture had occurred unless the victim was aware of the pain. Because the issue of whether a statute is unconstitutionally vague is determined on an as-applied basis, and an ordinary person would not believe it was possible to torture someone who could not feel pain, the definition of torture given to appellant's jury was unconstitutionally vague. Alternatively, in order to avoid constitutional infirmity, this Court should reverse its prior decisions and hold that the crime of torture does require the victim to feel pain. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1154 [courts have a duty to interpret a statute to avoid serious constitutional questions].) Appellant will otherwise rest on the arguments in the Opening Brief. For the reasons above and in the Opening Brief, the reversal of the torture special circumstance allegation requires reversal of the judgment of death.

VI

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, THE RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, THAT THE DEFINITIONS OF KIDNAPING AND ARSON APPLIED TO THE FELONY MURDER CHARGE.

Respondent argues: (1) appellant waived any issue pertaining to the trial court's failure to define kidnaping and arson for the felony murder charge; (2) it was reasonably likely the jury applied the definitions of kidnaping and arson in the jury instructions to the felony-murder allegation.

The waiver doctrine does not apply to erroneous jury instructions which are prejudicial. (Pen. Code, §1259.) Respondent's argument that the jury instructions accurately stated the law is wrong because the jury was never provided definitions of kidnaping, and arson, for the felony murder allegations. The jury would have had to conclude that the definitions of arson and kidnaping it was provided applied to the felony murder allegation through its own interpretation of the jury instructions.

Respondent argues there is no reason to believe the jury did not apply the definitions of kidnaping and arson to the felony murder allegation. The definitions of kidnaping and

arson appeared in different portions of the jury instructions. It cannot be assumed the jury knew to apply those definitions to the felony murder allegation. The felony murder instruction referred only to "arson or kidnaping." (23RT 2522.) The definition of arson appeared 23 pages later in the transcript. The instruction defined arson by reference to arson causing "great bodily injury," in violation of section 451, subdivision (a), (23RT 2545), and by arson which "causes to be burned any property," (23RT 2546), in violation of section 451, subdivision (d). The jury did not know whether either form of arson constituted "arson" for the felony murder allegation or whether the arson had to involve the infliction of great bodily injury. The difference was important because the jury may have concluded appellant was not guilty of arson causing great bodily injury if he mistakenly believed Kerr was dead at the time he started the fire.

The jury instructions were conflicting regarding the mental state required for arson. The jury was instructed that arson was a general intent crime. The instruction stated, "In the crime arson causing great bodily injury, charged in count 3, and the crime of arson of property, which is a lesser crime, there must exist a union or joint operation of act or conduct and general criminal intent." (23RT 2518.) The felony-murder instruction stated, "the unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime as a direct causal result of arson or kidnaping is murder of the first degree when the perpetrator had the specific intent to commit that crime. /P/ The specific intent to commit arson or kidnaping and the

commission or attempted commission of such crimes must be proved beyond a reasonable doubt." (23RT 2523.) Respondent's argument that the jury naturally applied the definition of arson to the felony-murder charge means the jury was provided with conflicting jury instructions regarding the mental state required for the crime of arson. As in *Francis v. Franklin* (1985) 471 U.S. 307, 322, 85 L.Ed.2d 344; 105 S.Ct. 1965 "[N]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jury applied in reaching their verdict." The felony-murder charge, based on arson, cannot be affirmed if the jury erroneously applied general intent to the mental state required to find felony-murder by arson. There is no evidence the jury found specific intent for the felony-murder conviction based on arson. Hence, the trial court's failure to instruct the jury regarding the definition of arson for the felony-murder charge was prejudicial. (*People v. Green* (1980) 27 Cal.3d 1, 69.) Appellant will otherwise rest on the arguments in the Opening Brief.

VII

THE TRUE FINDING TO THE TORTURE SPECIAL CIRCUMSTANCE ALLEGATION, THE FIRST DEGREE MURDER CONVICTION BASED ON MURDER BY TORTURE, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FELONY ASSAULT, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, EQUAL PROTECTION, RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

Respondent argues the trial court did not err by failing to give a lesser included offense instruction for felony assault because it is not a lesser included offense of torture. *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1456, concluded that felony assault was not a lesser included offense of torture because it was possible to torture an individual without committing an assault. *People v. Hamlin* gave the deprivation of food and water as an example of torture without an assault. *People v. Hamlin* did not cite any cases holding deprivation of food and water constituted torture. The plain wording of Penal Code section 206 suggests that it is not torture. Section 206 applies to any "person who . . . inflicts great bodily injury as defined in Section 12022.7 upon the person of another. . .." The word "inflicts" suggests bodily contact. Inflict means to "strike or beat against. . . To give or cause pain (pain, wounds, blows, etc) by or as by striking . . .." (Webster's New World Dict. (2nd College ed. 1984) p. 722, col. 2) *People v. Hamlin* did not cite or discuss the language from

People v. Martinez (2005) 125 Cal.App.4th 1035, 1055, stating assault by means of force likely to cause great bodily injury was a lesser included offense of torture under the elements test.

In *People v. Jennings* (2010) 50 Cal.4th 616, the jury asked, during guilt phase deliberations, whether starvation could constitute extreme physical pain for purpose of torture. The trial court instructed the jury that it was up to them to decide whether the requisite legal intent had been established and whether starvation constituted torture. The defendant argued on appeal that this answer was erroneous. This Court concluded that the defendant had waived the issue because he agreed with the trial court's response. *People v. Jennings* noted that *People v. Lewis* (2004) 120 Cal.App.4th 882, 887, had held battery was not a lesser included of torture because torture could be committed without a touching. Torture could be committed by deprivation of food and water causing starvation. (*People v. Jennings, supra,* 50 Cal.4th 684.) The defendant in *People v. Jennings* argued starvation could not constitute torture as a matter of law because it was incapable of causing extreme physical pain. This Court concluded, "whether the starvation in this case constituted torture was not a legal determination to be made by the court, but instead was a question of fact for the jury to decide." (*People v. Jennings, supra*, 50 Cal.4th at p. 685.)

The conclusion in *People v. Jennings* that starvation can be torture was dicta. This Court concluded the defendant had waived any error pertaining to the trial court's response to the jury question by agreeing with the response. The text of section 206 uses the word,

"inflicts." The dictionary definition of "inflict" suggests that a physical assault is required. *People v. Jennings* focused only on whether starvation could cause "cruel or extreme pain and suffering," (Pen. Code, §206), without considering how the inclusion of the word, "inflicts" impacted the analysis.

For the reasons above, the trial court erred by failing to instruct the jury with assault with a means of force likely to cause great bodily injury as a lesser included offense of the special circumstance allegation of torture. Hence, the true finding to the special circumstance allegation of torture, and the judgment of death, must be reversed.

VIII

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED THE VICTIM'S HEARSAY STATEMENTS OVER DEFENSE OBJECTION AND THEREBY VIOLATED: (1) APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW; (2) APPELLANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; AND (3) THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

The trial court admitted, over defense objection, numerous hearsay statements made by Kerr which were offered for the limited purpose of showing that she feared appellant. Kerr's fear of appellant was relevant to the stalking charge. Appellant argued in the Opening Brief that the trial court erred by admitting Kerr's hearsay statements because the jury would inevitably use those statements as evidence that he murdered Kerr with premeditation. Respondent argues: (1) the trial court properly admitted Kerr's hearsay statements to prove appellant's motive to murder her; and (2) the admission of Kerr's hearsay statements was harmless error. Respondent's arguments must be rejected.

A. THE TRIAL COURT ADMITTED KERR'S HEARSAY STATEMENTS FOR THE SPECIFIC AND LIMITED PURPOSE OF PROVING THE FEAR ELEMENT OF STALKING AND SO INSTRUCTED THE JURY.

The trial court ruled Kerr's hearsay statements that she feared appellant were admissible only for the specific purpose of proving the fear element of stalking. (16RT 1729-1730, 1741-1742; 17 RT 1931.) The jury was instructed the hearsay statements could be

considered only to prove the fear element of stalking, and could not be considered as evidence that appellant murdered Kerr. (16RT 1824-1825; 17 RT 1925-1926, 1938; 18 RT 2013-2014.)

The first limiting instruction given by the trial court stated as follows:

> The Court: All right. Ladies and gentlemen, with respect to this testimony, I am allowing you to hear what, in effect, was said—or what the witness is saying was said to Ms. Kerr by the defendant who, in turn, told this to Mr. Harvey.
>
> There are several levels of hearsay there, and I'm allowing you to hear it because one of the counts in this case is stalking, and an essential element of the crime is that the victim must be afraid or in fear of his or her personal safety.
>
> But I'm allowing you to hear this evidence as it is relevant to the issue of whether or not Lisa Kerr was afraid. I am not, however, allowing this evidence in to prove anything else. **Indeed, I'm limiting the scope of this evidence to the proof of the fear element with respect to the stalking count.**
>
> **What I specifically am asking that you not consider it for is this is not proof of an intent to commit a murder or any sort of proof of premeditation or anything like that.** I'm not allowing it in for that purpose, and you are not to consider it for that purpose for any reasons whatsoever.

(16 RT 1824-1825)(emphasis added.)

The next limiting instruction given by the trial court stated:

> The Court: Ladies and gentlemen of the jury, I need to tell you again that I'm allowing you to hear this evidence regarding what the victim, Lisa Kerr, said to Ms. Farnand because it is evidence of her then-existing state of mind and whether or not she was afraid of the defendant, which is an element of the stalking crime, which is charged in this case.

> I am not allowing this evidence in as proof that the defendant was indeed stalking her or that he was doing anything to make her afraid. But one of the elements of the crime is that the victim must be afraid, and for that limited purpose, I'm allowing this hearsay — or this evidence to be received by you within an exception to the hearsay rule.

(17RT 1925-1926.) Lynda Farnand testified Kerr told her that appellant said no one could have her if he could not. (17RT 1938.) The trial court then instructed the jury, "Ladies and gentlemen, I remind you again, this evidence is being received only for the limited purpose of establishing — or bearing on the issue of whether or not the victim was afraid under the stalking count. It is not proof that such acts occurred or that the defendant actually did something to the victim. None of that is part of this evidence." (17RT 1938.)

Kim Hyer testified that Kerr made her promise to take care of her son if anything happened to her. (18RT 2013-2014.) The trial court then instructed the jury as follows:

> The Court: Now, ladies and gentlemen, I'm again allowing you to hear this evidence only for the purpose of the proof of an element of the stalking charge; that is, fear of the victim.
>
> It is not proof that any stalking actually occurred or that any other conduct was undertaken by the defendant. It's being received for that limited purpose.

(18RT 2014.)[6]

---

[6] Respondent's Brief states that the trial court gave limiting instructions at pages 1,847, 1,923, and 2,041-2,048. At page 1,847, the trial court struck Harvey's testimony that Kerr said appellant would kill Harvey and his children if Kerr moved into Harvey's residence. (17RT 1846-1847.) The trial court did not give a limiting instruction on page 1847. On page 1923, the trial court stated that it had, "overruled the [defense] objection, but with limitation on the question." (17RT 1923.) Farnand then testified that Kerr told her during three conversations that she was afraid of appellant. (*Ibid.*) At pages 2,041

The trial court also gave a limiting instruction as part of its final jury instructions. It stated, "certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted." (23RT 2508-2509.)

The above limiting instructions establish that the trial court admitted Kerr's hearsay statements for the limited purpose of proving the fear element of stalking.

B. RESPONDENT'S ARGUMENT THAT KERR'S HEARSAY STATEMENTS WERE ADMISSIBLE TO PROVE THAT APPELLANT MURDERED KERR IGNORES THE LIMITED PURPOSE FOR WHICH THE EVIDENCE WAS ADMITTED AND DEMONSTRATES WHY THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THOSE STATEMENTS.

The subtitle of respondent's argument on page 95 of the Respondent's Brief is that Kerr's hearsay statements were admissible to prove the fear element of stalking. However, respondent's arguments fail to address whether Kerr's hearsay statements were admissible to prove the fear element of stalking, but address only whether those statements were admissible to prove appellant murdered her. Respondent spends many pages arguing that Kerr's hearsay statements were admissible to prove appellant murdered Kerr. (RB 95-101.) The trial court, however, specifically ruled Kerr's hearsay statements were not admissible to prove appellant murdered her and gave the limiting instructions above to implement that ruling. Respondent's argument simply ignores the trial court's clear ruling regarding the

---

through 2,046, the parties discussed the admissibility of Kerr's hearsay statement to Kim Hyer that she was with appellant for the money. This evidence was offered by appellant. (18RT 2041-2047.)

narrow and specific purpose for which Kerr's hearsay statements were admitted.

Respondent argues, "A murder victim's fear of the alleged killer may be in issue . . . when, according to the defendant, the victim behaved in a manner inconsistent with that fear." (Respondent's Brief at p. 96, citing *People v. Hernandez* (2003) 30 Cal.4th 835, 872 and *People v. Guerrera* (2006) 37 Cal.4th 1067, 1114.) Respondent further argues, "But, where there is a disputed issue as to the victim's state of mind, evidence that tends to show how the victim was feeling about the defendant is admissible because it tends to explain [the victim's] conduct toward the defendant, and that evidence may in turn logically tend[ ] to show [the defendant's] motive to murder [the victim]." (Respondent's Brief at p. 97, citing *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594.)

The trial court did not admit Kerr's hearsay statements for any of these purposes. Even if Kerr's hearsay statements could have been admitted to prove appellant murdered Kerr, respondent may not now rely on that theory when the trial court explicitly rejected it. (Cf. *People v. Geier* (2007) 41 Cal.4th 555, 608-609 [objections must be specific to be preserved on appeal].) Respondent's arguments that Kerr's hearsay statements were admissible to prove appellant murdered Kerr are irrelevant.

Respondent's arguments, furthermore, demonstrate why the trial court abused its discretion by admitting Kerr's hearsay statements to prove the fear element of stalking. It was inevitable, as appellant argued in the trial court and in the Opening Brief, that the jury would also use Kerr's hearsay statements to prove appellant murdered Kerr. (16RT 1731-1732; 17

RT 1930; Appellant's Opening Brief at pp. 150-151.) If respondent was unable to recognize the limited purpose of the admission of Kerr's hearsay statements, then it was inevitable the jury would use those statements in the same impermissible manner.

C. THE ERRONEOUS ADMISSION OF KERR'S HEARSAY STATEMENTS WAS NOT HARMLESS ERROR.

Respondent argues that the admission of Kerr's hearsay statements was harmless error because appellant's inculpatory statements established intent to kill and premeditation. This argument must be rejected. Appellant's statements to Heiserman, Jayne, and Detective Graham, suggested appellant killed Kerr in the heat of passion as the result of provocation. Appellant should have been found guilty of voluntary manslaughter. Kerr's hearsay statements were used as evidence of appellant's motive to murder Kerr. Indeed, respondent argues, "here, evidence of Kerr's fearful mind was highly relevant to showing appellant's motive for murdering her." (RB 100.) Respondent's argument that Kerr's hearsay statements were admissible, because they were compelling evidence of appellant's motive to murder, cannot be reconciled with respondent's harmless error argument.

The admission of Kerr's hearsay statements that she feared appellant was prejudicial error. The judgment of guilt must be reversed.

IX

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT MADE A SERIES OF ERRONEOUS RULINGS WHICH INDIVIDUALLY AND CUMULATIVELY (1) DEPRIVED APPELLANT OF THE FAIR TRIAL GUARANTEED BY THE FEDERAL AND STATE DUE PROCESS CLAUSES; (2) DEPRIVED APPELLANT OF HIS RIGHT TO A JURY DETERMINATION OF THE FACTS AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS; (3) DEPRIVED APPELLANT OF HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; AND (4) VIOLATED THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION.

A. APPELLANT'S CONSTITUTIONAL CLAIM WAS NOT WAIVED.

Appellant will first address respondent's forfeiture argument regarding appellant's constitutional claims. This Court can review whether the impact of a trial court's ruling was to deny appellant due process of law despite the lack of a due process objection being made in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 435 [holding that a defendant who failed to assert a constitutional basis for an Evidence Code section 352 evidentiary objection at trial, could, nevertheless, argue on appeal that the trial court's evidentiary error had the additional legal consequence of violating a federal constitutional right]; in accord *People v. Perry* (2006) 38 Cal.4th 302, 317, fn. 6.) "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental

constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276-277; See also *People v. Brents* (2012) 53 Cal.4th 599, 608, fn. 3 [stating that the waiver rule does not apply to new arguments that are based on factual or legal standards no different from those the trial court was asked to apply, but raise the additional legal consequence of violating the Constitution]; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

The trial court's evidentiary ruling, individually and cumulatively, deprived appellant of a fair trial and due process of law. Ordinary evidentiary rulings by the trial court do not deprive a defendant of any federal or state constitutional rights. (*People v. Robinson* (2005) 37 Cal.4th 592, 626-627.) However, evidentiary rulings which impact the fundamental fairness of a trial deprive a defendant of due process of law. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 [holding that a defendant was deprived of due process of law when the confession of a third party to the murder was excluded from evidence because of the state voucher rule].) The issue of whether evidentiary rulings deprive a defendant of a fair trial, and due process of law, is a question of degree. Here, the trial court's rulings stepped across the constitutional line and deprived appellant of a fair trial.

B. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF MARK HARVEY'S RELATIONSHIP WITH OTHER WOMEN HE MET AT AA MEETINGS.

Respondent argues: (1) appellant waived the argument that Harvey's relationships with other women he met at AA was admissible to prove appellant acted as the result of

provocation, and to establish appellant's belief that Harvey had a romantic relationship with Kerr; (2) Harvey's relationship with other women at AA meetings did not have any tendency to prove he had a romantic relationship with Kerr, or to prove appellant's state of mind; and (3) appellant was given sufficient latitude to explore the relationship between Harvey and Kerr.

Respondent's waiver argument must be rejected. Appellant argued in the trial court that Harvey's relationship with other women bolstered his heat of passion defense and caused appellant to believe Kerr was having a sexual relationship with Harvey. Appellant's defense was that he was guilty of voluntary manslaughter based on a theory of heat of passion. This theory was explained during the defense counsel's opening statement. (14RT 1471.) The defense counsel, during his opening statement, stated that appellant heard Kerr and Harvey discussing having a sexual relationship, became furious, and strangled her. (14RT 1469-1471.) The defense counsel stated that appellant knew about Harvey's sexual relations with other women at AA. (14RT 1468.) This evidence was offered to bolster appellant's theory that Harvey and Kerr had a sexual relationship which provoked appellant's rage.

The defense counsel, referring to Harvey's relationships with other women, argued "the provocation of Mr. Brooks is, I think you'll agree, relevant, because that goes to whether it was manslaughter or not. Even if it was untrue, if it was heard by Mr. Brooks, then that's relevant." (15RT 1681.) He continued, "[T]he question is whether the fact that it–there's additional evidence of its truth supports Mr. Brooks belief that it was true." (*Ibid.*) Hence,

the reasons appellant articulated in the Opening Brief explaining the relevance of Harvey's relationships with other women were raised by the defense counsel in the trial court.

Harvey's relationship with other women he met at AA meetings was central to appellant's defense. The jury was likely to reject appellant's heat of passion theory if it concluded that his belief that Kerr intended to have a romantic relationship with Harvey was false or lacked any basis in fact.

Harvey's sexual relations with other women he met at AA meetings increased the likelihood that he was having a sexual relationship with Kerr or intended to have one. If Harvey had a habit and custom of using AA meetings to start relationships with women, then it was reasonable to believe he followed that habit and custom with Kerr. The Attorney General argues it was a speculative inference Harvey had a romantic relationship with Kerr simply because he developed romantic relationships with other women he met at AA meetings. This argument ignores the force of habit evidence. Evidence Code section 1105 provides, "[a]ny otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." *Wallis v. Southern Pacific Co.* (1921) 184 Cal. 662, 667, concluded, "[o]f the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom there can be no doubt. Every-day experience and reasoning make it clear enough." If Harvey had a custom and habit of using AA meetings to develop romantic relationships, the trier of fact could have concluded he was following that pattern with Kerr.

Respondent argues the character of Harvey's relationship with other women had no tendency in reason to establish appellant's state of mind. This argument ignores basic human reasoning. If appellant believed Harvey had used AA meetings to develop romantic relationships with women he met there, he was likely to believe Harvey was engaging in the same conduct with Kerr. That belief by appellant was the key to his defense. Appellant's heat of passion defense was based on his belief about the truth of certain facts. Appellant should have been allowed to prove that he believed Harvey was having, or going to have, a sexual relationship with Kerr because he had engaged in sexual relations with other women he met in the same manner.

Respondent argues appellant was allowed to adequately explore the relationship between Harvey and Kerr. This argument was wrong because appellant's inability to present evidence that Harvey used AA meetings to develop romantic relationships with women resulted in the jury not having a full portrait of his conduct. Harvey denied having sexual relations, or intentions, with Kerr. (17RT 1891.) The jury would have been more inclined to believe Harvey was lying about his relationship with Kerr, had it known about his conduct with other women he met at AA meetings, because a sexual relationship with Kerr would have been consistent with Harvey's pattern of conduct. Impeachment of Harvey's credibility would have made it more likely the jury would have discounted his testimony in its entirety. (CALJIC No. 2.21.2 [a witness who is willfully false in one portion of his testimony is to be distrusted in other parts of his testimony].) The jury also would have been more likely to

conclude appellant acted in the heat of passion because he believed Kerr was engaging in sexual relations with Harvey—or appellant believed that to be true. Hence, the trial court erred by excluding evidence of Harvey's relationships with other women.

C. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF APPELLANT'S THREATS AGAINST CASEY KERR.

Respondent argues: (1) the trial court properly admitted Harvey's testimony about appellant's threats against Casey Kerr because there was a connection between appellant's threats and Kerr's death; (2) appellant waived any objection to the admission of Harvey's testimony; and (3) any error was harmless because witnesses, other than Harvey, testified to similar statements.

Appellant did not waive his objection to the admission of Harvey's testimony. The trial court anticipated the basis of the defense counsel's objection and stated it on the record. The trial court commented, "Mr. Murphy will argue that under a 352 analysis, this is a threat —a homicidal threat directed to someone other than the victim and that, as a result, its prejudicial impact far outweighs its relevant, probative value. /P/ Is that how you would argue?" (17RT 1855.) The defense counsel responded, "that's better than me." (*Ibid.*) The trial court then said it was not a winning argument and overruled the objection. (17RT 1856.) An objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought. (*People v. Huggins* (2006) 38 Cal.4th 175, 241, fn. 18.) The trial court knew the basis of the defense counsel's objection.

Appellant's comments about getting rid of Casey Kerr were made seven months prior to Lisa Kerr's death. (17RT 1850.) The comments were too remote in time to have probative value. It was appellant's threats against a third person that made Harvey's testimony unduly prejudicial. Because appellant's theory of the case was that he was guilty only of voluntary manslaughter, the probative value of appellant's statements to Harvey about wanting to kill Casey Kerr was limited. The prosecution did not need appellant's statements to Harvey to establish identity.[7] Furthermore, Harvey's credibility with the jury was enhanced because appellant was not allowed to challenge his credibility by cross-examining him about his sexual relationships with other women he met at AA meetings.

D. THE TRIAL COURT ERRED BY EXCLUDING HARVEY'S TESTIMONY THAT LISA KERR REFERRED TO HERSELF AS LISA BROOKS.[8]

Respondent argues that appellant waived any error pertaining to exclusion of evidence that Lisa Kerr had referred to herself as Lisa Brooks by failing to make an adequate offer of proof. The defense counsel attempted to elicit this evidence during cross-examination of Harvey. (17RT 1900.) An adequate offer of proof can be made through an explanation by the

---

[7] Respondent cites other evidence where appellant made threats against Casey Kerr. (18 RT 2081-2082; 20RT 2288, 2294, 2299-2300.) A defense objection should have been made to this testimony, but that issue will have to be raised in a petition for a writ of habeas corpus. The admission of this testimony did not warrant the admission of Harvey's testimony about threats appellant made to kill Casey Kerr. All such testimony should have been excluded.

[8] Page 184 of Appellant's Opening Brief states for subtitle 3, "The Trial Court Erred by Admitting Evidence that Lisa Kerr Referred to Herself as Lisa Brooks." This was error. The word "Admitting," should have been "Excluding."

trial attorney or by the self-evident nature of the testimony offered into evidence. Evidence Code section 354, subdivision (a), provides that a judgment shall not be reversed, based on the exclusion of evidence, unless, "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." The defense counsel was trying to elicit that Kerr referred to herself as Lisa Brooks to demonstrate she did not fear appellant. The defense counsel obviously anticipated that Harvey would say he had heard Lisa Kerr refer to herself as Lisa Brooks. Otherwise, he would not have asked the question.

Respondent argues that the exclusion of the above evidence was harmless because the rental agreement was admitted into evidence. The rental agreement had been signed in the names of Lisa Brooks and Donald Brooks. Respondent's argument was wrong because the jury most likely viewed the execution of the lease as simply a manipulative financial move by Kerr to get away from her husband at appellant's expense. Once appellant signed the lease, he was obligated to pay the rent even if Kerr thereafter chose to ignore him–which is what she did. Lisa Kerr referring to herself as Lisa Brooks was more persuasive evidence of her affection for appellant than signing a lease.

Sheila Peet testified that Kerr appeared happy with appellant and did not appear to fear him. (21RT 2383-2386.) Peet was a defense witness and appellant's friend. The jury most likely viewed her as biased in favor of appellant. Harvey was a prosecution witness and hostile to appellant. Testimony from Harvey that Lisa Kerr had referred to herself as Lisa

Brooks was significant evidence that she did not fear appellant and he had not stalked her.

E. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT LISA KERR HAD SENT APPELLANT PANTIES

Respondent argues the trial court properly excluded evidence of the panties because there was an inadequate foundation that Kerr had sent appellant the panties. Circumstantial evidence can provide the foundation for the admission of evidence. (*People v. Coddington* (2000) 23 Cal.4th 529, 591 [holding that circumstantial evidence established that the defendant was the caller during a telephone conversation].) Kerr had a sexual relationship with appellant. There was no evidence appellant was involved with any other woman. Lujan, the witness who saw appellant open the package with the panties, heard Kerr's voice on appellant's answering machine expressing her affection for him. (21RT 2322, 2326-2327.) The circumstantial evidence was sufficient for the jury to conclude Kerr sent appellant the panties. If there was sufficient evidence for a reasonable juror to conclude Kerr sent the panties to appellant, then the evidence should have been admitted. It was a question of fact for the jury whether Kerr had, in fact, sent appellant the panties and the weight to be attached to that evidence.

F. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT CASEY KERR BEAT LISA KERR

Respondent argues appellant waived the exclusion of evidence that Casey Kerr beat Lisa Kerr because appellant failed to argue in the trial court that the evidence was not being offered to "dirty up the victim." This waiver argument is flawed. Appellant argued in the trial

court that evidence Casey Kerr beat Lisa Kerr was relevant because it showed her motive to be with appellant rather than her husband. (21RT 2382.) Appellant renewed this argument in the Opening Brief at pages 185 through 188. The trial court excluded evidence that Casey Kerr had physically abused Lisa Kerr because it believed it portrayed her in a negative manner. Appellant argued in the Opening Brief that the evidence portrayed Casey Kerr, rather than Lisa Kerr, in a negative manner. Hence, the trial court excluded the evidence for the wrong reason. Appellant did not change, on appeal, his theory of admissibility of this evidence.

Respondent also argues there was no logical connection between Lisa Kerr's fear of Casey Kerr and her desire to be with appellant. This argument does not make sense. Lisa Kerr had a motive to be with appellant if Casey Kerr was physically abusing her. Most people try to avoid being physically assaulted. The admission of evidence that Lisa Kerr did not fear appellant did not make harmless the exclusion of evidence that Casey Kerr beat Lisa Kerr. The single most compelling piece of evidence that Lisa Kerr had a motive to be with appellant was Casey Kerr's violence towards her. Absent that evidence, the jury was deprived of crucial evidence about whether Lisa Kerr would actually reunite with her husband. Hence, the trial court's exclusion of this evidence was erroneous and prejudicial.

G. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF LISA KERR'S CONVICTION FOR WELFARE FRAUD.

Respondent argues the trial court did not abuse its discretion under Evidence Code section 352 by excluding evidence of Kerr's welfare fraud conviction. This argument must

be rejected. The conviction was not remote in time. It occurred in 1998. Welfare fraud is a crime of moral turpitude. Kerr was killed during March 1999. Kerr committed welfare fraud during the time period when the relevant events of her relationship with appellant occurred. Respondent argues that the trial court was not required to admit evidence that merely makes a victim look bad. The impeachment of any witness with a criminal conviction makes the witness look bad. That is the very purpose of offering that evidence. Kerr was not entitled to a false veneer of credibility because she was deceased or the victim. Kerr's credibility was in issue because the prosecution offered into evidence numerous statements by her to prove appellant was stalking her. Appellant was entitled to attack Kerr's credibility in the same manner that the prosecution was allowed to attack the credibility of defense witnesses. The Rules of Evidence should not shift depending on the needs of the prosecution.

The above errors were not harmless. The jury was deprived of crucial evidence which would have rebutted the prosecution argument that appellant stalked Kerr and premeditated her murder. Evidence that supported appellant's claim that Harvey was having a sexual relationship with Kerr would have significantly bolstered the defense argument that he was guilty only of voluntary manslaughter Kerr's conviction for welfare fraud would have demonstrated that many of her out-of-court statements should have been distrusted.

For the reasons above, the judgment must be reversed.

X

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED THE DEFENSE REQUEST TO OMIT THE "VIEWED WITH CAUTION" LANGUAGE FROM CALJIC NO. 2.71, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW, SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION OF THE FACTS, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

Over defense objection, the trial court instructed the jury with CALJIC No. 2.71, and included the "viewed with caution," language. The "viewed with caution" language told the jury to view with caution appellant's out-of-court statements. Appellant argued in the Opening Brief that the trial court erred by rejecting the defense request to excise the "viewed with caution" language from CALJIC No. 2.71, because appellant's out-of-court statements operated to reduce the crime from murder to voluntary manslaughter and were thus exculpatory in nature. Respondent argues the trial court properly gave CALJIC No. 2.71 because the instruction made it clear that appellant's exculpatory statements should be viewed with caution. Respondent is wrong. The jury was told an admission was "a statement by the defendant . . . which tends to prove his guilt . . ..:" (23RT 2514.) The jury was then told, "[e]vidence of an oral admission of the defendant not made in court should be viewed with caution." (23RT 2514-2515.) The jury could only have viewed appellant's statements, which suggested that he had killed Kerr in the heat of passion, as statements "which tend[]

to prove his guilt." This was the very reason the defense attorney wanted the "view with caution" language excised from CALJIC No. 2.71. (22RT 2443.)

Respondent cites *People v. Slaughter* (2002) 27 Cal.4th 1187, in support of the argument that the trial court properly included the "view with caution" language in CALJIC No. 2.71. *People v. Slaughter* supports appellant's argument that the trial court erred by giving CALJIC No. 2.71. The defendant in that case shot three victims. The defendant told the police that he shot one victim in self-defense and accidently shot the other two victims when the gun just kept discharging. The trial court instructed the jury with CALJIC No. 2.71. The defendant argued on appeal that the jury was erroneously instructed to view with caution his exculpatory statements to the police. The Court concluded that the instruction should not have been given because the defendant's statements had been tape recorded. However, the instruction was not prejudicial because the "view with caution" language applied only to the defendant's inculpatory statements and not his exculpatory statements. (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1200.)

In *People v. Williams* (2008) 43 Cal.4th 584, defendant made a statement to the police which was initially exculpatory. The defendant finally admitted participating in the murder after continued interrogation. The defendant argued the "view with caution" language in CALJIC No. 2.71 should not have been given. The Court stated, "[b]y its terms, the language applies only to statements which tend to prove guilt and not to statements which do not. Juries understand that this instruction by its terms applies only to statements tending to prove

guilt, not to exculpatory ones. To the extent a statement is exculpatory it is not an admission to be viewed with caution." (*People v. Williams, supra*, 43 Cal.4th at pp. 639-640.)

In *People v. Slaughter*, the defendant's statements to the police were purely exculpatory. If the jury had believed the defendant's claim that he shot the victim in self-defense, and accidently shot the other two victims, the defendant would have been found not guilty of the charges. Because the defendant's statements in *People v. Slaughter* were purely exculpatory, there was no possibility the jury applied the "view with caution" language to those statements because of the definition of an "admission" in CALJIC No. 2.71.

The same reasoning applies to *People v. Williams*. The defendant's statement to the police in that case was partly exculpatory and partly inculpatory. However, because an admission was defined to refer only to statements which established guilt, the jury would not have applied the "view with caution" language to the exculpatory portion of the statement.

In the instant case, appellant's theory of the case was that he was guilty of voluntary manslaughter. Appellant's admissions to third parties, and law enforcement, suggested he killed Kerr in the heat of passion as the result of provocation. (20RT 2236-2237, 2244, 2252-2253.) The trial court found sufficient evidence of provocation to give voluntary manslaughter instructions. (23RT 2524-2528.) Appellant's statements suggesting he killed Kerr in the heat of passion met the definition of an "admission" in CALJIC No. 2.71 because it "tend[ed] to prove his guilt." Hence, the jury applied the "view with caution" language in CALJIC No. 2.71, to appellant's statements suggesting that he killed Kerr in the heat of

passion. It was the inculpatory nature of appellant's out-of-court statements, which he argued established his guilt of voluntary manslaughter, and not murder, that distinguishes this case from *People v. Slaughter* and *People v. Williams*.

Respondent's brief also cites *People v. Frye* (1998) 18 Cal.4th 894, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 11, and *People v. Howard* (2010) 51 Cal.4th 15. Neither of those cases dealt with the precise issue raised herein. The defendant in *People v. Frye* argued that CALJIC No. 2.71 was flawed because it failed to provide the jury with a standard of proof to determine whether the defendant had made the statement in question. The Court concluded that the instruction was beneficial to the defendant under any standard of proof. (*People v. Frye, supra*, 18 Cal.4th at pp. 959-960.) *People v. Frye* did not address whether it was error to give CALJIC No. 2.71 when the defendant attempted to use an inculpatory statement to prove his guilt of a lesser included offense. The defendant in *People v. Howard* simply argued there was insufficient evidence to warrant giving CALJIC No. 2.71. The Court rejected this argument because witnesses had testified to an out-of-court statement made by the defendant which connected him to the crime. (*People v. Howard, supra*, 51 Cal.4th at pp. 36-37.) *People v. Howard* did not deal with a claim that CALJIC No. 2.71 should not have been given because the jury would apply the instruction to inculpatory statements being used by the defendant in an exculpatory manner.

Appellant vigorously objected in the trial court to the giving of CALJIC No. 2.71

because it included the "viewed with caution" language. (22RT 2442-2443.) If the "viewed with caution" language was actually helpful to appellant, then his trial defense counsel would not have been objecting to the giving of CALJIC No. 2.71. The trial court was clearly alerted to appellant's objection to the inclusion of the above language in CALJIC No. 2.71. Appellant is not raising this argument for the first time on appeal.

The giving of CALJIC No. 2.71 was prejudicial. There was compelling evidence that appellant was guilty only of voluntary manslaughter. Appellant's out-of-court statements suggested that he believed he had killed Kerr when he strangled her. There is no precise time line between when appellant heard the discussion between Harvey and Kerr and when he assaulted Kerr. Appellant told David Jayne that he followed Kerr to her apartment and strangled her. (20RT 2236-2237, 2252-2253.) Hence, appellant assaulted Kerr shortly after overhearing her conversation with Harvey. CALJIC No. 2.71 was prejudicial because it instructed the jury that the statement appellant made to Jayne that he killed Kerr by strangling her in the apartment, and other similar statements, should be "viewed with caution." Appellant's statements that he believed he had killed Kerr when he strangled her would have resulted in the jury not finding true any of the special circumstance allegations and appellant would not have been eligible for the death penalty.

For the reasons above, the judgment of guilt must be reversed.

XI

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH CALJIC 8.75, OVER A DEFENSE OBJECTION AND IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW, THE EIGHTH AMENDMENT PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS IN THE CALIFORNIA CONSTITUTION.

Respondent argues the giving of CALJIC No. 8.75 was proper because the instruction allowed the jury to consider appellant's guilt of lesser included offenses without the necessity of first returning a verdict for the greater offenses. Appellant's claim of error, however, is that CALJIC No. 8.75 required the jury to first return a verdict of not guilty for the murder charge before it could find appellant guilty of voluntary manslaughter. The fact that the jury was allowed to discuss appellant's guilt of voluntary manslaughter, without the necessity of first returning a verdict for the murder charge, did not mitigate the prejudice to appellant from the jury being instructed with the acquittal-first rule in CALJIC No. 8.75. The "reasonable effort" standard in *State v. LeBlanc* (S.Ct. Az. 1996) 186 Ariz. 437, 439-440, 924 P.2d 441, better protects a defendant's right to have the jury give adequate consideration to his guilt of a lesser included offense. Appellant will otherwise rest on the arguments in the Opening Brief.

XII

THE FEDERAL AND STATE DUE PROCESS CLAUSES, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, AND EVIDENCE CODE SECTION 352, REQUIRE REVERSAL OF THE JUDGMENT OF CONVICTION BECAUSE THE TRIAL COURT ADMITTED INFLAMMATORY PHOTOGRAPHS OF THE VICTIM OVER DEFENSE OBJECTION.

Respondent argues that appellant waived any constitutional claims, with the exception of his due process claim, pertaining to the admission of the autopsy photographs because an objection was not made in the trial court. This Court can review whether the impact of a trial court's ruling was to deny appellant due process of law despite the lack of a due process objection being made in the trial court. (*People v. Partida*, *supra*, 37 Cal.4th at p. 435.) Hence, appellant agrees with respondent that this Court can review on the merits whether the admission of the autopsy photographs violated appellant's right to due process of law. (See *People v. Brents, supra,* 53 Cal.4th at p. 608, fn. 3 [the waiver doctrine does not apply to the raising of new arguments on appeal which are based on factual and legal standards no different from those the trial court was asked to apply, but raise the additional legal consequence of violating the Constitution].)

This Court can also review on the merits appellant's Eighth Amendment claim without the necessity of an objection in the trial court. The Eighth Amendment prohibition against cruel and unusual punishment requires heightened reliability when a death sentence is

imposed. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2594, 57 L.Ed.2d 973.) This Court can examine the photographs in question. This Court is therefore situated to assess whether the admission of the autopsy photographs inflamed the passions of the jury and undermined its ability to accurately assess whether appellant should have been found guilty of voluntary manslaughter. Hence, this Court should review appellant's Eighth Amendment claim on the merits.

Respondent argues the admission of the photographs was proper because it helped explain the medical examiner's testimony that Kerr was alive when the fire was started. The photographs were simply not necessary to explain this testimony from the medical examiner. The medical examiner based his opinion that Kerr was alive, when the fire was started, based on the presence of soot in her airway. (18RT 1983-1984, 1987.) If appellant had contested whether there was soot in Kerr's airway, the admission of the autopsy photographs would have been proper because he would have opened the door to their admission. Appellant did not dispute that soot was in Kerr's airway. The admission of the autopsy photograph was an abuse of discretion.

Appellant will rest on the arguments in the Opening Brief regarding prejudice. The judgment of guilt must be reversed.

XIII

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER IN THE COMMISSION OF KIDNAPING SHOULD BE REVERSED BECAUSE THE EVIDENCE FAILED TO PROVE APPELLANT COMMITTED THE KIDNAPING FOR AN INDEPENDENT FELONIOUS PURPOSE IN VIOLATION OF APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, TO A JURY TRIAL, TO A RELIABLE GUILT AND DEATH VERDICT, AND HIS RIGHTS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

A true finding to a special circumstance allegation can be affirmed only if the defendant committed the felony special circumstance for an independent felonious purpose. Appellant argued in the Opening Brief that the evidence failed to prove that appellant committed the kidnaping for an independent felonious purpose. Respondent argues that substantial evidence supports the kidnaping special circumstance allegation because the jury could have concluded that appellant transported Kerr knowing she was alive and while contemplating whether to kill her. The issue raised by appellant applies the incidental felony doctrine articulated in *People v. Green* (1980) 27 Cal.3d 1, 62-63. Under that rule, a felony special circumstance allegation cannot be sustained when the defendant's primary goal was to kill the victim rather than to commit the felony. (*People v. Riel* (2000) 22 Cal.4th 1153, 1201.)

A. THE PROSECUTION THEORY OF THE CASE WAS THAT APPELLANT HAD A LONG STANDING PLAN TO KILL KERR WHICH HE IMPLEMENTED THE MORNING SHE DIED.

The prosecution is shifting theories in order to sustain the kidnaping special circumstance allegation. The prosecution theory in the trial court was that appellant had a long contemplated plan to kill Kerr. Kerr's kidnaping was incidental to her murder. The prosecutor argued at length during his opening argument that appellant had a long standing plan to kill Kerr. (23RT 2549, 2552-2555, 2561.) The prosecutor then turned to the felony-murder arson theory. The prosecutor acknowledged that felony-murder did not require an intent to kill. (23RT 2562.) Even when discussing felony-murder, the prosecutor never wavered from the theory that appellant's sole intention was to kill Kerr. (23RT 2563-2564.) The prosecutor then turned to the felony-murder kidnaping theory. (23RT 2564.)[9] The prosecutor again never wavered from the theory that appellant's intention was to kill Kerr. (23RT 2564-2568.) During rebuttal argument, the prosecutor continued with the argument that appellant planned to kill Kerr. (24RT 2659, 2663.)

The prosecutor's theory was that appellant planned to kill Kerr well before he kidnaped her. The jury was not required to accept the prosecutor's argument that appellant's plan all along was to kill Kerr. (*People v. Raley* (1992) 2 Cal.4th 870, 902 [the jury was not bound to accept the prosecutor's argument that defendant's plan from the beginning was to kill his victims.) However, the prosecutor's theory that appellant planned to kill Kerr, demonstrated that under any view of the evidence, that the kidnaping was incidental to that

---

[9] The issue raised herein is whether the true finding to the kidnaping special circumstance can be affirmed. However, the prosecutor's argument regarding appellant's guilt of first degree murder based on a theory of felony-kidnaping illuminates whether Kerr's kidnaping was incidental to her murder.

goal.

B. THE EVIDENCE CITED BY RESPONDENT FAILS TO ESTABLISH THAT APPELLANT KIDNAPED KERR FOR AN INDEPENDENT FELONIOUS PURPOSE.

Respondent argues that appellant's question to Heiserman, "Is she okay," (18RT 2096), suggested that he drove around with Kerr's body while contemplating whether to kill her. However, the prosecutor asked the jury to infer that appellant knew all along his intention was to kill Kerr. He argued, "it's the only rational interpretation of that. He knew she was alive when he started that fire. It's just what he said he was going to do, and he did it, but he knew." (23RT 2564.) The inference that appellant drove around with Kerr's body while contemplating whether to kill her was inconsistent with every argument made by the prosecutor during opening and rebuttal arguments. There was no serious contention, furthermore, that appellant actually believed Kerr had lived. He left her body in a flaming vehicle.

Respondent also relies on the gap of time between when Kerr was last seen at 1:15 a.m., and when the report of the vehicle fire was received, to argue appellant drove around with Kerr's body contemplating whether to kill her. Again, this inference was inconsistent with the prosecutor's theory of the case. The lack of additional information about what happened between 1:15 a.m., and when the fire was reported, precludes the inference urged by respondent. Assuming appellant strangled Kerr at her apartment, there is no way to know how long appellant spent at the apartment before he left with her body. The prosecution had

the burden of showing Kerr's kidnaping was committed for an independent felonious purpose. (*People v. Green* (1980) 27 Cal.3d 1, 59.) It failed to do so.

C. THE TRUE FINDING TO THE KIDNAPING SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON A THEORY OF CONCURRENT INTENT.

Respondent also argues the kidnaping special circumstance allegation can be affirmed based on appellant having a concurrent intent to kill and to kidnap. This argument must be rejected.

The independent felonious purpose requirement was adopted in *People v. Green* (1980) 27 Cal.3d 1. This Court found the evidence insufficient to prove a robbery special circumstance allegation because the defendant's purpose was to murder his wife and the disposal of her personal property was to avoid identification. (*People v. Green, supra*, 27 Cal.3d at pp. 61-62.)

In *People v. Weidert* (1985) 39 Cal.3d 836, the defendant was employed with a janitorial service as a janitor. He burglarized one of the offices he cleaned. The owner of the business confronted the defendant and told him that another employee of the janitorial company had been an eyewitness to the crime. The defendant arranged with another individual to kidnap and murder the eyewitness. The victim was lured from his apartment to a truck where he was tied up, taken to a remote location, and murdered. The defendant argued on appeal that the kidnaping-special circumstance allegation must be reversed. The Court stated, "The Attorney General concedes that the evidence was insufficient to establish

that appellant committed the kidnaping to advance any felonious purpose independent of the killing. Appellant's avowed purpose was to kill Morganti in order to prevent him from testifying, not to kidnap him." (*People v. Weidert, supra*, 39 Cal.3d at p. 842.)

In *People v. Ainsworth* (1988) 45 Cal.3d 984, the defendant shot and kidnaped the victim, put her in the car, and let her bleed to death over a period of hours. The Court concluded there was evidence from which the jury could have concluded the kidnaping was not merely incidental to the murder. (*People v. Ainsworth, supra*, 45 Cal.3d at p. 1026.) *People v. Ainsworth* is distinguishable. The victim bled to death during the period of time she was being kidnaped. The kidnaping was instrumental in her death. In the instant case, according to the prosecution argument, Kerr's kidnaping was an afterthought to appellant's desire to kill her.

In *People v. Raley*, the defendant worked as a guard at a mansion. The mansion was not open to the public, but the defendant occasionally gave unauthorized tours to visitors. The defendant sexually assaulted two young girls to whom he gave tours. The defendant then put the women in his vehicle and drove them to his home. He then drove them from his home and then left them in a ravine. One of the victims died. The defendant argued that the kidnaping was incidental to the murder. The Court rejected this argument:

> In the instant case, defendant did not immediately dispose of his victims once he had them in the trunk of his car, but brought them to his home. He may have been undecided as to their fate at that point. It could reasonably be inferred that defendant formed the intent to kill after the asportation, so that the kidnaping could not be said to be merely incidental to the

murder.

> Defendant's suggestion that if the jury found he had any intent to kill at the time he kidnapped the victims there could be no kidnap-murder special circumstance is ill-founded. Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance (*People v. Clark, supra*, 50 Cal.3d at pp. 608- 609.) It is when the underlying felony is merely incidental to a murder that we apply the rule of Green, supra, 27 Cal.3d 1.

(*People v. Raley*, 2 Cal.4th at p. 903.)

The prosecution maintained, and presented evidence, that appellant's "avowed purpose" was to kill Kerr. This purpose was formed prior to Kerr's body being moved to where the vehicle was set on fire. The instant case is not the situation described in *People v. Ainsworth* or *People v. Raley*, where there was equivocation by the defendants about whether to kill the victims. The instant case is governed by *People v. Green* and *People v. Weidert*, where there was certainty about the defendants' intention to kill the victim prior to the commission of the felony and hence the felonies were not committed for an independent felonious purpose.

The kidnaping felony special circumstance allegation cannot be affirmed based on *People v. Brents* (2012) 53 Cal.4th 599. The defendant in that case got into an argument with a women over the proceeds from a drug sale. The defendant choked the victim and then put her in the trunk of a car. The defendant drove 16 miles to a remote location where he poured gasoline on the victim and the vehicle. He then set the car and the victim on fire. She burned to death in the trunk. The jury found true the special circumstance allegation of torture and

imposed the death penalty.

The defendant argued on appeal that the torture special circumstance allegation had to be reversed because there was no evidence he had an independent felonious purpose for the kidnaping. The defendant argued that the evidence established that he intended to kill the victim from the time of the initial confrontation. The Court rejected this argument because the jury could have concluded that the defendant was deciding whether to kill the victim during the 16 mile drive. (*People v. Brents, supra*, 53 Cal.4th at p. 610.)

Appellant's case is distinguishable. The defendant in *People v. Brents* knew the victim was alive and in the trunk during the 16 mile drive. Appellant believed that he had killed Kerr during the initial confrontation when he strangled her. (20RT 2237.) Hence, appellant did not drive around with Kerr in the backseat of the vehicle for the purpose of deciding whether to kill her.

People v. Brents also noted that the jury only had to find that the defendant had a concurrent intent to kidnap the victim in order to find true the kidnaping special circumstance allegation. (*People v. Brents, supra*, 53 Cal.4th at p. 610.) The Court concluded there was evidence of a concurrent intent because the defendant knew that the victim must have been in a state of terror while he drove around with her locked in the trunk of the vehicle. The Court concluded, "[O]ur own view of what the evidence shows is irrelevant. The relevant inquiry is whether it would be irrational for a jury to conclude that defendant intended to kidnap Gordon for some reason (such as to instill fear) that was in addition to and

independent of his intent to murder her. (*People v. Raley, supra*, 2 Cal.4th at p. 902). Although the evidence of such a goal is far from overwhelming, it is sufficient to support the jury's verdict." (*People v. Brents, supra*, 53 Cal.4th at p. 611.)

Appellant believed he had killed Kerr when he strangled her. (20RT 2237.) The medical examiner testified that she was unconscious when the fire occurred and when she died. (18RT 1995-1997.) There was no evidence appellant drove Kerr's vehicle around with her in the back for the purpose of terrorizing her. Hence, appellant lacked a concurrent felonious intent when he kidnaped Kerr.

For the reasons above, the true finding to the kidnaping special circumstance allegation must be reversed. The judgment of death must also be reversed.

XIV

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED OVER DEFENSE OBJECTION AND IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, A PHOTOGRAPH OF THE VICTIM WHILE SHE WAS STILL ALIVE.

Respondent's waiver argument must be rejected. It is not clear Exhibit 13 was the document referred to during the discussion before the opening statements. The prosecutor stated he had discussed with the defense attorney the "boards" he was going to use during his opening statement. The defense counsel stated, "there won't be an objection." (14RT 1444.) It is not possible to know whether this discussion specifically included Exhibit 13. The prosecutor, during his opening statement, did not refer specifically to Exhibit 13. (14RT 1448-1462.) The defense counsel's opening statement was interrupted for the lunch recess. (14RT 1471.) The discussion then occurred about a juror not being able to see a photograph of Kerr. There was still no reference to an exhibit number. (14RT 1472.) After the lunch recess, the photograph was shown to all the jurors. An exhibit number was still not associated with what the jury viewed. (14RT 1476.)

When the prosecutor laid the foundation for Exhibit 13, and offered it into evidence, the defense counsel made a relevance objection, which was overruled. (15RT 1636.) Assuming the photograph being referred to on pages 1,462 through 1,476 of the reporter's transcript was Exhibit 13, the defense counsel objected to its admission at the time it was

offered into evidence. This was sufficient to preserve the issue for appeal. The defense counsel's failure to object to its admission at an earlier time did not waive the issue because he made a timely objection when it was offered into evidence. Appellant's argument in the Opening Brief was that a photograph of Kerr, while she was alive, was not relevant and therefore not admissible. The defense counsel's relevance objection thus preserved this issue for appeal. Appellant's federal constitutional claims have not been waived because a defendant can argue on appeal that the effect of the admission of evidence was to deprive him of due process even if he failed to make a due process objection in the trial court. (*People v. Partida, supra*, 37 Cal.4th at p. 435; *People v. Brents, supra*, 53 Cal.4th at p. 608, fn. 3.)

Respondent argues Exhibit 13 was properly admitted because witnesses identified Kerr from the photograph. Kerr's identity was never in issue. There was no dispute that it was her body found in the vehicle or that appellant had been in a relationship with her. The photograph of any deceased victim, while they were alive, elicits sympathy from the jury and anger towards the defendant. The photograph of Kerr elicited undue sympathy for her and undue prejudice against appellant. The emotional power of a photograph should not be underestimated. Appellant otherwise will rest on the arguments in the Opening Brief.

XV

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRONEOUS RULINGS DURING THE GUILT PHASE OF THE TRIAL WAS TO DEPRIVE APPELLANT OF: (1) A FAIR TRIAL IN VIOLATION OF HIS STATE AND FEDERAL RIGHT TO DUE PROCESS OF LAW; (2) HIS RIGHT TO A JURY DETERMINATION OF THE FACTS AS REQUIRED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION.

Respondent argues that the verdicts should be affirmed because appellant was entitled to a fair trial and not a perfect trial. The errors identified in Issues I through XIV were not insignificant trial errors. The special circumstance finding of kidnaping must be reversed for instructional error and insufficiency of the evidence. Because the kidnaping special circumstance finding must be reversed, the judgment of death must be reversed pursuant to *Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723].)

The evidence was also insufficient as a matter of law to prove appellant tortured Kerr. The reversal of both the special circumstance findings of kidnaping and torture removes appellant from eligibility for the death penalty. The trial court admitted numerous hearsay statements of Kerr, which were improperly used by the prosecutor to establish that appellant had a long standing plan to murder Kerr. Despite the prosecution theory in the trial court that appellant had a long standing plan to murder Kerr, the Attorney General now argues on appeal appellant was contemplating whether to kill Kerr while he was traveling with her in the vehicle in order to argue that the kidnaping of Kerr was not incidental to her murder.

Appellant had a seriously flawed trial. This Court cannot have confidence in the verdicts or the true findings to the special circumstance allegations. As asserted in the Opening Brief, the errors raised in Issues I through XIV, individually and in combination, and incorporating the additional arguments in this Reply Brief, prejudiced appellant, and requires reversal.

XVI

THE FEDERAL AND STATE DUE PROCESS CLAUSES, THE RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 16, OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, REQUIRE THE JUDGMENT OF GUILT TO COUNT ONE, AND THE JUDGMENT OF DEATH, TO BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE WHETHER APPELLANT WAS GUILTY OF FIRST DEGREE MURDER BASED ON FELONY MURDER OR BASED ON PREMEDITATION.

This Court has continued to hold that the jury is not required to unanimously agree whether the defendant is guilty of first degree murder, based on felony-murder, or premeditated murder. (*People v. Moore* (2011) 51 Cal.4th 386, 413.) This Court should change its position and hold that jury unanimity is required for whether the defendant was guilty of first degree murder, based on the felony-murder, or because of an intentional killing. Different mental states are required for felony-murder and premeditated murder. Felony-murder does not require an intention to kill. (*People v. Harris* (2008) 43 Cal.4th 1269, 1322.) Premeditated murder requires an intention to kill. (*People v. Lee* (2011) 51 Cal.4th 620, 637.) The different mental states required for felony-murder, and premeditated murder, means they define different offenses, for the purpose of the due process requirement of proof beyond a reasonable doubt, and the Sixth Amendment requirement of a jury determination of the facts

which establish the defendant's guilt. (*Schad v. Arizona* (1991) 501 U.S 624, 654-655, 111 S.Ct. 2491, 115 L.Ed.2d 555 [dis. opn. of J. White].) Justice White's dissenting opinion in *Schad v. Arizona* foreshadowed the definition of an "offense" developed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435), and its progeny. Appellant will otherwise rest on the arguments in the Opening Brief.

XVII

APPELLANT'S CONVICTION OF MURDER, IN COUNT ONE OF THE INFORMATION, MUST BE REVERSED PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT OFFENSE; AND (2) THE TRIAL COURT COMMITTED NUMEROUS PREJUDICIAL INSTRUCTIONAL ERRORS RELATED TO THAT COUNT.

Appellant argued in the Opening Brief that the prosecution evidence was insufficient to prove appellant guilty of first degree murder based on a theory of premeditation or felony-murder. The reasons why the evidence was insufficient to prove any of the theories of first degree murder was explained at length in the Opening Brief, were fully joined, and do not need to be repeated. Appellant will simply respond to respondent's arguments. Respondent argues: (1) the evidence was sufficient to prove appellant committed first degree premeditated murder; (2) the evidence was sufficient to prove appellant committed felony-murder; and (3) *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723, does not require reversal of the judgment of death.

Respondent argues the evidence proved appellant committed first degree premeditated murder because there was evidence of a preexisting motive, planning, and the method of killing. However, the evidence demonstrated that appellant killed Kerr in the spur of the moment in a fit of rage. Respondent relies heavily on appellant's behavior leading up to Kerr's death to argue he had a motive and plan to kill her. The undisputed evidence was that

appellant did not decide to kill Kerr until the evening he listened to the conversation she had with Harvey. Appellant did not have a plan to kill Kerr that was developed over time and had a predetermined sequence of events. Appellant reacted in anger when he heard Kerr talking about a relationship with Harvey, and refer to appellant as "squirrel boy."

Respondent argues the jury could have found premeditation based on appellant driving around with Kerr in the vehicle and then setting it on fire. The lack of evidence appellant knew Kerr was alive undermines this argument. Respondent relies on appellant setting the car on fire to argue the method of killing supported an inference of premeditation. Appellant, however, believed he had killed Kerr when he strangled her. (20RT 2236-2237, 2244.)

Respondent's argument that the evidence proved appellant committed felony-murder must also be rejected. The prosecution felony-murder theories were arson, kidnaping, and torture. (23RT 2522-2523, 2533-2534.) The commission of a felony which is "merely incidental to, or an afterthought to, the killing," (*People v. Prince* (2008) 40 Cal.4th 1179, 1259), cannot support a felony-murder conviction. Accepting the prosecution interpretation of the evidence, the felonies of arson, kidnaping, and torture were all incidental to Kerr's murder.

The prosecutor argued at length that Kerr's murder was the culmination of weeks of planning and stalking by appellant. Respondent's argument that the jury could have inferred appellant drove around with Kerr in the backseat, while he contemplated her fate, was not a reasonable inference from the evidence and inconsistent with the theory advanced by the

prosecutor during the trial. The timing, and sequence of events, between when Kerr was last seen at 1:15 a.m., and when the fire was discovered, is unknown. The prosecution should not be allowed to switch theories on appeal to save the first degree murder conviction based on a felony-murder theory.

Brown v. Sanders requires reversal of the judgment of death. The special circumstance allegations found true by the jury were kidnaping and torture. (16CT 3886.) To the extent this Court reverses the true findings to the special circumstance allegations, the applicability of *Brown v. Sanders* is moot. Appellant is not eligible for the death penalty unless at least one special circumstance allegation is found true. However, even if one of the special circumstance allegations is affirmed, the judgment of death must be reversed. The jury's conclusion that appellant kidnaped, or tortured Kerr, increased its view of the aggravated nature of appellant's conduct and tipped the scales towards death. Hence, the judgment of death must be vacated.

XVIII

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE APPOINT A SECOND ATTORNEY TO REPRESENT APPELLANT AND THEREBY VIOLATED APPELLANT'S: (1) RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION; (2) RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION; (3) RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES IN VIOLATION OF THE RIGHT OF CONFRONTATION IN THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION; (4) RIGHT TO AN INDIVIDUALIZED DETERMINATION OF DEATH ELIGIBILITY AND SENTENCE AS REQUIRED BY FEDERAL AND STATE DUE PROCESS OF LAW AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND CALIFORNIA CONSTITUTIONS; (5) RIGHT TO EQUAL PROTECTION UNDER FIFTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION; AND (6) RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.

Respondent argues: (1) the trial court did not commit error by failing to appoint a second trial attorney for appellant because he did not make such a request; and (2) appellant failed to demonstrate prejudice from the trial court's failure to appoint a second attorney.

Appellant's argument is that the trial court should have sua sponte appointed a second

attorney to represent appellant. Hence, appellant's failure to request appointment of a second attorney is not relevant. The ABA Guidelines discussed in the Opening Brief explain at length why two attorneys are required for the competent representation of a capital defendant and should be the norm.

Respondent's prejudice argument ignores appellant's claim. The failure of the trial court to appoint a second attorney to represent appellant was structural error. The United States Supreme Court has defined structural defects as errors which "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, 111 S. Ct. 1246; 113 L. Ed. 2d. 302.) Structural errors include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. (*Id.* at pp. 309-310.) Such structural errors cannot be harmless. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. (*Id.* at p. 310, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578, 92 L.Ed.2d 460, 106 S.Ct. 3101.)

The trial court's failure to sua sponte appoint a second attorney to represent appellant was structural error. Because of the importance of a capital defendant's representation by two attorneys, appellant's trial did not "reliably serve its function as a vehicle for determination of innocence or guilt. . .." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310.) Hence, the

judgment must be reversed.

PENALTY PHASE ISSUES

XIX

THE SENTENCE SHOULD BE VACATED BECAUSE THE TRIAL COURT COERCED A VERDICT BY FORCING THE JURY TO CONTINUE DELIBERATIONS WHEN IT WAS HOPELESSLY DEADLOCKED, IN VIOLATION OF: (1) PENAL CODE SECTION 1140; (2) APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW; (3) APPELLANT'S SIXTH AND FOURTEENTH AMENDMENTS RIGHT TO A JURY TRIAL; (4) THE EIGHTH AND FOURTEENTH AMENDMENTS RIGHT AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT; AND (5) THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA STATE CONSTITUTION.

The jury was hopelessly deadlocked regarding the appropriate penalty. The prosecutor had conceded that a mistrial should be declared. The trial court nevertheless compelled the jury to continue deliberating until it reached a verdict. A coerced verdict is not a reliable verdict and violates a defendant's right to due process of law. Appellant argued in the Opening Brief that the jury's penalty phase verdict had been coerced. (AOB at pp. 290-313.) Respondent argues the trial court did not coerce the jury's verdict because: (1) the jury had deliberated for only two days, and the numerical split for the most recent vote was seven-four-one, when the trial court ordered the jury to continue deliberating; (2) the trial court's response to the first note sent by the jury foreperson was narrowly tailored to determine the numerical breakdown of the jurors' votes, and their opinion, about the possibility of reaching a verdict; (3) the trial court's comment that everyone had a lot of time and energy invested in the case was not coercive; (4) the short period of time the jury had deliberated warranted

continued deliberations; and (5) *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, is distinguishable because that case dealt with a single, holdout juror.

The issue of whether the trial court coerced a jury verdict depends on "all the circumstances," (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237, 108 S.Ct. 546, 98 L.Ed.2d 568.) Hence, the length of jury deliberations is not the sole criteria to determine whether a verdict was coerced. The jury commenced deliberations the afternoon of June 19, 2001, and deliberated through the next morning and most of the afternoon. (27RT 3042-3043, 3045; 16CT 3910-3912.) The 12 jurors agreed there was nothing the trial court could do to assist them to reach a verdict. (27RT 3053-3055.)

This was not a situation in which the jurors had deliberated for just a few hours and declared they were hopelessly deadlocked. None of the jurors believed they could reach a verdict. The trial court's decision to require the jury to continue deliberating may have been reasonable if one or more jurors had stated that something could be done to assist them to reach a verdict. Appellant's jury, however, had deliberated the penalty for an adequate amount of time. They were unanimous that nothing could be done to break the deadlock. After the jurors declared that they were hopelessly deadlocked, and nothing could be done to reach a verdict, the trial court inquired of the jurors about the numerical breakdown of the votes. (27RT 3059-3061.) The need to declare a mistrial only became more clear when the trial court then announced that the voting trend was away from unanimity. (27RT 3062.) When additional inquiry was made, juror number one stated, "I do not believe this jury will

ever come to a verdict, ever." (27RT 3070.)

Following additional brief discussion with juror number one, even the prosecutor conceded a mistrial was appropriate. (27RT 3072.) Nevertheless, the trial court required the jury to continue deliberating despite the fact the jury had deliberated about a day and one-half and the prosecutor's belief that a mistrial should be declared. The necessity for declaring a mistrial was clear. It appears, furthermore, that the deadlock was broken for impermissible reasons. The jury asked to hear from appellant. (16 CT 3939.) That request was refused. (28 RT 3090.) The jury's death verdict was returned later that day. (28RT 3113; 16 CT 3936.) During the hearing on the motion for a new trial, the trial court stated that the jury's verdict may have been different if appellant had testified. (29RT 3149-3150.) This sequence of events strongly suggests that the jury verdict was coerced and the jury considered appellant's failure to testify when it decided the penalty.

Respondent states, "Defense counsel had no objection to the prosecutor's request to ask the remaining jurors the question initially posed solely to the foreperson of whether there was anything that the court could to do assist the jury to reach a decision." (Respondent's Brief at p. 175.) This is a misstatement of the record. Respondent cites pages 3,073 through 3,075 of the reporter's transcript. After the prosecutor stated that it was appropriate to declare a mistrial, and the defense concurred, the prosecutor requested the trial court to ask the jury one more time if anything could be done to break the deadlock. (27RT 3072.) The defense counsel objected, stating, "I would not ask that . . .." (*Ibid.*) The trial court replied that it had

only asked the jury foreperson if there was anything that could be done to help it break the deadlock and had not asked all the jurors that question. (*Ibid.*) Hence, the trial court overruled the defense counsel's objection. The defense counsel suggested questioning commence with juror number two. (*Ibid.*) This suggestion was not a waiver of the previously overruled objection, or consent, to the trial court's inquiry. The defense counsel was simply suggesting an orderly way to proceed after his objection had been overruled.

Respondent's argument that the trial court scrupulously focused its inquiry to determine the numerical division of the jurors' votes, and their opinion about the possibility of reaching a verdict, ignores the trial court's comments. The trial court asked the jurors whether anything could be done to break the deadlock at pages 3,073 through 3,075 of the reporter's transcript. The trial court then commented, "obviously, each and every one of us in this courtroom has a lot invested in the case in terms of our time, our energy, and if we can reach a decision, I'd like to." (27RT 3075.) This comment was not a narrowly focused inquiry to determine if the deadlock could be broken, but a coercive statement designed to remind the jury of the enormous amount of time wasted if a verdict was not returned.

Following its comment about the time and energy invested in the case, the trial court stated, "I'm not suggesting that you should reach any decision one or way or the other." The trial court made a similar comment at page 3,068 of the reporter's transcript. This comment did not mitigate the coercive nature of the trial court's comment about the time everyone had invested to reach a verdict. The trial court's pressure on the jurors to reach a verdict was not

diminished because it failed to suggest a particular verdict.

The cases cited by respondent do not warrant affirming the judgment of death. In *People v. Butler* (2009) 46 Cal.4th 847, the jury, during the third day of penalty phase deliberations, sent a note to the trial court stating it was deadlocked. The trial court gave a long statement to the jury which mentioned "what other people have already sacrificed and given on this case. If you can imagine what [defense counsel] and [the prosecutor], the sacrifice and time that they have given this case – we're not talking days or weeks here; we are talking months; we are talking years. This case has been going on since March of 1994. I don't need to remind you of that. That's two years. So here we are two years later in time with a great deal of sacrifice on behalf of attorneys, parties, the witnesses, for a two-year period." (*People v. Butler, supra*, 46 Cal.3d at p. 618.)

The defendant argued that the above comment was coercive. This Court rejected the argument:

> Defendant contends the court's comments before and after this special instruction improperly referred to considerations of hardship suffered by the court itself, the attorneys, and the Cities of Long Beach and San Pedro. He argues that these comments unduly introduced concerns over the waste of government resources if no verdict were reached and a retrial became necessary. Defendant also claims the court's statement that the cities, the parties, and the witnesses "deserved better" suggested that a penalty verdict was "deserved." These inferences are unwarranted. The court's comments were explicitly and emphatically directed at the brief amount of time the jury had spent deliberating. The court made no reference to the subject of costs, the prospect of a retrial, or the desirability of a verdict.

(*People v. Butler, supra*, 46 Cal.4th at p. 884.)

The instant case is distinguishable. The trial court's comment that, "each and every one of us in this courtroom has a lot invested in the case in terms of time and energy," (27RT 3075), was not directed specifically to the length of time the jury had deliberated, but instead to the entire trial process. The comment was a reminder to the jury of the wasted court time, and resources, if a verdict was not reached.

Neither *People v. Price* (1991) 1 Cal.4th 324, nor *People v. Keenan* (1988) 46 Cal.3d 478, warrants affirming the judgment of death. In *People v. Price*, the entire trial lasted seven months and the penalty phase was three weeks. The jurors reported that they were unsure whether they were deadlocked. The trial court simply urged the jurors to forget about the problems they were having reaching a verdict over the July 4 holiday weekend and come back fresh to resume deliberations. (*People v. Price, supra*, 1 Cal.4th at p. 466.) The trial court's statement to the jury in *People v. Price* did not mention anything about the significant amount of time the court, the attorneys, and the jurors had spent on the case. There was simply nothing coercive about telling the jurors to forget about the case over the weekend and come back fresh next week to resume deliberations. The jurors in *People v. Price* were unsure whether they were at an impasse. The jurors in appellant's case, conversely, were firm that they were at an impasse and even the prosecutor believed it was time to declare a mistrial.

In *People v. Keenan*, the jury had deliberated for a day when the trial court received

a note from the foreperson which identified a problem with a juror. The trial court read a supplemental instruction. The trial court noted for the jury the desirability of reaching a verdict, but stated it was not urging any juror to surrender his honest convictions. Later, a second note was received from the jury foreperson stating that one juror was unable to morally vote for the death penalty. With the defense counsel's consent, the trial court released the jurors for the weekend. At 4:30 p.m., the jury was called into the courtroom. The trial court stated that it appeared the jury had a problem which required investigation based on the note it had received. The trial court also stated that he thought the jury would have had a verdict by that afternoon. The jury foreperson stated that he believed the jury would be able to reach a verdict by Monday. The trial court stated that it would appreciate that.

After the jury left, the defense counsel objected to the trial court's comment that it would appreciate receiving a verdict on Monday. When the trial resumed on Monday, the trial court told the jurors that it did not intend to give it the impression what verdict it should reach or what facts it should find. The defendant argued on appeal that the trial court's comment about expecting a verdict by the afternoon was coercive. This Court stated, "[a] trial judge should refrain from placing specific time pressure on a deliberating jury and never should imply that the case warrants only desultory deliberation. Such comments risk persuading legitimate dissidents, whatever their views, that the court considers their positions unreasonable." (*People v. Keenan, supra*, 46 Cal.3d at p. 534.) This Court found no error, however, because the trial court had dispelled any such inference, not insisted the deadlock

be resolved, not urged minority jurors to give attention to the view of the majority jurors, and not suggested to the jury that its failure to reach a decision would have any specific consequence. (*Ibid.*)

The coercion in the instant case was different from what occurred in *People v. Keenan*. The trial court in appellant's case reminded the jurors of the enormous investment of time everybody had in reaching a verdict. (27RT 3075.) The trial court in *People v. Keenan* did not tell the jury not to feel pressured because of the substantial investment of time and energy in the case, but simply that it was not suggesting a particular verdict should be returned. (*Ibid.*) The jurors in *People v. Keenan* did not state they were hopelessly deadlocked. Appellant's jury stated they were hopelessly deadlocked, and even the prosecutor agreed that a mistrial should be declared. (27RT 3054-3055, 3072.)

Respondent distinguishes *Jiminez v. Myers*, *supra,* 40 F.3d 976, on the basis that it involved a single, holdout juror, who was coerced by an Allen[10] instruction. However, it was likely the Ninth Circuit would have found the trial court's actions coercive even if the case had involved more than a single, holdout, juror. The trial court in *Jiminez v. Myers* had urged the jurors towards unanimity. The trial court's comment to the jury that everyone had invested a lot of time and energy further urged the jurors towards unanimity. This comment was analogous to the admonition in an Allen charge that the case must at some time be decided and a retrial would be inconvenient and expensive. (*People v. Gainer* (1977) 19

---

[10] *Allen v. United States* (1896) 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154.

Cal.3d 835, 845, 852 [the three common features of an Allen instruction is that it encourages minority jurors to rethink their view in light of the majority's view, suggests that the case must at some time be decided, and refers to the expense and inconvenience of a retrial].)

The trial court in *Jiminez v. Myers* determined the numerical split of the jury in the same manner the trial court ascertained the split of appellant's jury. In each instance, when the trial court ascertained the split of appellant's jury, there was a majority block of seven to nine jurors. The trial court's insistence the jury continue deliberating put pressure on the minority jurors in the same manner the trial judge's insistence in *Jiminez v. Myers*, that the jury continue deliberating, put pressure on the lone, holdout, juror.

For the reasons above, the trial court erred by requiring the jury to continue deliberating after it stated that it was hopelessly deadlocked and the defense counsel moved for a mistrial. Hence, the judgment of death must be reversed.

XX

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INQUIRED INTO THE NUMERICAL DIVISION OF THE JURY IN VIOLATION OF: (1) PENAL CODE SECTION 1140; (2) APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW; (3) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; AND (4) THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

Appellant argued in the Opening Brief that the trial court's inquiry, during penalty phase deliberations, regarding the jury's numerical split, contributed to a coerced verdict and violated appellant's federal and state constitutional rights. Respondent argues: (1) appellant forfeited any error pertaining to the trial court's numerical inquiry into the split of the jury; and (2) this Court has held many times that the trial court may inquire into the numerical division of the jury and appellant has failed to provide any reason for this Court to alter that practice.

Respondent's arguments are contradictory. If the trial court's authority to ask the jury about its numerical split is well established, as argued by respondent, then the trial court in appellant's case would have overruled a defense objection to such an inquiry. This Court approved of the practice of the trial court inquiring about the jury's numerical split in *People v. Carter* (1968) 68 Cal.2d 810, 815. The practice had been approved, and followed, for 32 years when appellant's case was tried. An objection by the defense counsel to the trial court's inquiry regarding the numerical split of the jury clearly would have been futile and

hence was not necessary. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Respondent points out that the defense counsel failed to object to further inquiry by the trial court regarding the two ballots that had been cast and asking clarifying questions to the jury foreperson about the last ballot cast. There is nothing about those facts which suggests an objection by the defense counsel to the trial court asking the jurors how they were split would not have been futile.

The defense counsel made it clear he believed the jury was hopelessly deadlocked. (27RT 3058.) Nevertheless, the trial court decided to ask the jury how they were split on the two ballots. (27RT 3058.) The trial court disregarded the defense counsel's opinion that the jury was deadlocked and inquired about its numerical split. The trial court would not have sustained an objection by the defense counsel to the jury being asked its numerical split.

None of the cases cited by respondent address waiver regarding the trial court asking the jury its numerical split. *People v. Lewis* (2006) 39 Cal.4th 970, 1038, and *People v. Anderson* (1990) 52 Cal.3d 453, 469, both dealt with allegedly coercive comments to the jury. In *People v. Lewis*, the trial court simply discussed with the jurors the scheduling of deliberations in light of a three day weekend. The defendant argued on appeal that the discussion was coercive, but the defense attorney failed to object to the discussion. This Court concluded the defendant had waived any alleged coercive comments made by the trial court. (*People v. Lewis, supra*, 39 Cal.4th at p. 1038.)

In *People v. Anderson*, the trial court stated that the jury would commence

deliberating on December 19, it was likely a verdict would be reached that day, and any further deliberations, if needed, would occur the next day. The trial court also commented that the issue of the defendant's intent to kill was a simple question. The trial defense counsel did not object to these comments. This Court stated, "trial judges should avoid any potentially coercive predictions at any stage of the trial, concerning the ease with which the jury should decide the case or particular issues," (*People v. Anderson, supra*, 52 Cal.3d at p. 469), but concluded the defendant had waived any claim of error by failing to object. The Court also concluded the statements were not sufficiently coercive to constitute error. (*Ibid.*) In *People v. Anderson*, there was no inquiry by the trial court regarding the jury's numerical split.

People v. Depriest (2007) 42 Cal.4th 1, also fails to establish that an objection by the defense counsel to the trial court asking the jury its split would not have been futile. The issue in *People v. Depriest* was whether the trial court erroneously deferred to the jury's verdict when it denied the automatic motion to reduce the penalty from death to life in prison. The defendant argued the trial court had also failed to cite with sufficient specificity the facts upon which it was denying the motion. The case which imposed an objection requirement in order for the defendant to raise the above issues on appeal was decided prior to the defendant's sentencing hearing. The defendant's argument that an objection would have been futile was rejected because the case requiring an objection had been decided prior to the sentencing hearing and the trial court's dialogue with the attorneys demonstrates that an

objection would not have been futile. (*People v. Depriest, supra*, 42 Cal.4th at p. 56.)

People v. Depriest has nothing to do with the issue raised herein. That case did not involve a defense objection to the trial court engaging in a long sanctioned practice. The trial court's dialogue with the attorneys during the hearing on the motion to modify the verdict demonstrated that it was willing to provide greater specificity for its decision had the defense attorney requested. In the instant case, the defense attorney stated that he believed the case was deadlocked. (27RT 3058.) The trial court ignored the defense counsel and asked the jury its numerical split. (27RT RT 3058-3060.) It was clear that an objection by the defense counsel to the trial court's inquiry to the jury about its split would have been futile.

Appellant explained at length in the Opening Brief that the doctrine of judicial inquiry into the jury's numerical split became part of California law through judicial error. *People v. Talkington* (1935) 8 Cal.App.2d 75, 84, erroneously interpreted *Brasfield v. United States* (1926) 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345, to mean that error occurred when the trial court asked the jury both its numerical split and how many jurors had voted for guilty and not guilty. Subsequent cases stated that *People v. Talkington* held that error did not occur when the trial court asked the jury its numerical split, but failed to ask how the jurors were divided on guilty and not guilty. (E.g., *People v. Badenthal* (1935) 8 Cal.App.2d 404, 410; *People v. Curtis* (1939) 36 Cal.App.2d 306, 325.) The erroneous interpretation in *People v. Talkington*, of the holding of *Brasfield v. United States*, became settled law when this Court decided *People v. Carter* (1968) 68 Cal.2d 810.

This Court should correct its error in *People v. Carter*. *Brasfield v. United States* wisely recognized that judicial inquiry into the jury's numerical split is coercive. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) The coercive effect of such an inquiry does not vanish because it occurs in state court. The American Bar Association Criminal Justice Standards do not authorize judicial inquiry into the numerical division of the jury. *(ABA Criminal Justice Standards*, Standard 15.4.)[11] Furthermore, California is in the minority of states that have considered and decided this question. (Priest, *Propriety and Prejudicial Effect of Trial Court's Inquiry as to Numerical Division of Jury*, 77 A.L.R.3d 769 ["*Trial Court's Inquiry*"].) Fourteen states likewise hold it is improper for a trial court to inquire into the numerical division. (Priest, *supra, Trial Court's Inquiry,* 77 A.L.R.3d 769, § 3.) Nine states, including California, hold inquiry into numerical division alone is not error. (*Id.* at § 4.) This Court should conform its practice to the rule followed by the federal courts, the majority of state courts, and the standards adopted by the American Bar Association.

For the reasons above and in the Opening Brief, the judgment must be reversed.

---

[11] The Standard can be found at www.americanbar.org/publications/ criminal_justice_section _archive/crimjust_standards_jurytrial_blk.html#5.4

XXI

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE JURY CONSIDERED APPELLANT'S FAILURE TO TESTIFY IN VIOLATION OF HIS RIGHT TO SILENCE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

During penalty phase deliberations, the jury asked to hear from appellant. (16CT 3929.) The request was refused. (28RT 3090.) Appellant argued in the Opening Brief that this question demonstrated that the jury improperly considered appellant's failure to testify when it decided the penalty. The error could not have been more clear. Respondent argues the jury's request to hear from appellant: (1) was a transitory comment about appellant's failure to testify; and (2) did not mean the jury drew a negative inference from appellant's failure to testify because the question was submitted by the jury in response to the question from the trial court about what could be done to help it break the deadlock. Respondent also argues appellant waived, and invited any error, pertaining to the trial court's failure to take any action in response to the jury's request to hear from appellant.

The jury's request to hear from appellant was not "transitory comments of wonderment and curiosity" about appellant's failure to testify. The request to hear from appellant was, itself, serious misconduct, (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425), and established that his failure to testify was part of the jury's decision making process.

The cases relied upon by respondent are distinguishable or support appellant's argument. In *People v. Leonard*, affidavits from two jurors were submitted in connection with a motion for a new trial. One affidavit stated the juror, as well as several other jurors, had expressed the opinion during penalty phase deliberations that they would have liked to hear from the defendant so they could better understand why he killed six people. The other declaration stated several jurors discussed the fact that they would have liked to hear from the defendant so they could better understand the extent of his impairment. This Court concluded the declarations established misconduct because the jurors had discussed the defendant's failure to testify. (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) The only issue was whether the misconduct was prejudicial. This Court concluded it was not:

As mentioned earlier, the purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself. Here, the comments on defendant's failure to testify mentioned in defendant's new trial motion merely expressed regret that defendant had not testified, because such testimony might have assisted the jurors in understanding him better. In the words of the trial court: "I think that wanting to hear defendants testify is natural. We do the best we can to deter jurors from speculating and from drawing negative inferences, but merely referencing that they wish he would have testified is not the same as punishing the Defendant for not testifying. It is not the same as drawing negative inferences from the absence of testimony." We conclude there is no substantial

likelihood that defendant was prejudiced by the jury's brief discussion of his failure to testify at the penalty phase.

(*People v. Leonard, supra*, 40 Cal.4th at p. 1425.)

People v. Leonard supports appellant's argument because it found misconduct by the jurors because they considered the defendant's failure to testify. The only issue was prejudice. What occurred in *People v. Leonard*, and what occurred in the instant case, are materially different. The declarations in *People v. Leonard* established only that the jurors engaged in wishful thinking about wanting the defendant to testify. There was no evidence in the declarations that the jurors drew an adverse inference from the defendant's failure to testify or that it had become part of the jurors' deliberative process.

In the instant case, the request from the jury to hear from appellant spoke for all the jurors and established that his failure to testify was part of their deliberative process. Appellant's jury engaged in more than idle chatter that they wished they had heard from appellant. They demanded to hear from appellant. That demand occurred when the trial court asked whether anything could be done to break the deadlock. It would be difficult to conceive of a more patent example of prejudicial juror misconduct. Even the trial court commented, during the hearing on the motion for a new trial, that appellant's failure to testify hurt him with the jury during its penalty phase deliberations. (29RT 3149-3150.)

People v. Leonard held that juror misconduct occurred because the jurors discussed

the defendant's failure to testify. The Court simply held that the discussions were harmless under the facts of that case. Prejudice is a fact specific inquiry. Hence, *People v. Leonard* is of limited value in assessing whether reversible error occurred because appellant's jury sent a demand to hear from him.

People v. Loker (2008) 44 Cal.4th 691, is also distinguishable. In that case, an initial set of declarations was submitted to the trial court in connection with a motion for a new trial. The declarations stated that the jurors had discussed the defendant's failure to testify, his lack of remorse, and his failure to testify had weighed heavily against him. Additional declarations from other jurors, as well as amended declarations from the jurors who signed the initial declarations, were submitted. These subsequent declarations substantially contradicted the statements in the initial declarations. The declaration from the foreperson stated that when the defendant's failure to testify was mentioned, the foreperson cut them off and reminded the other jurors the defendant had the right not to testify. The discussion of the defendant's lack of remorse was based on a tape that was played. The defendant argued on appeal that the penalty had to be reversed because the jurors discussed his failure to testify. This Court rejected that argument because the trial court had accepted the statements in the later declarations as accurate, the discussion of the defendant's failure to testify was brief, had been terminated by the foreperson, and the subject was thereafter dropped. (*People v. Loker, supra*, 44 Cal.4th at p. 749.)

In the instant case, the jury's consideration of appellant's failure to testify was not

brief or transitory and was not immediately dropped as a subject by the jury when it was mentioned. Instead, the jury discussion of appellant's failure to testify was sufficiently substantial that it demanded to hear from appellant.

Respondent distinguishes between the jury simply wishing they had heard from appellant and punishing him for failing to testify. *People v. Leonard* concluded the jurors' wish the defendant had testified was not the same "as drawing negative inferences from the absence of testimony." (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) Because appellant's jury demanded to hear from him, this Court cannot conclude beyond a reasonable doubt that the jury did not punish appellant for not testifying. Furthermore, this Court should abandon its reasoning, which inquires whether the jury drew a "negative inference," (*People v. Leonard, supra*, 40 Cal.4th at p. 1425), from the defendant's failure to testify. This inquiry requires the Court to guess about the jurors' state of mind.

Respondent argues the jury did not draw a negative inference from appellant's failure to testify because the jury demanded to hear from appellant in response to the trial court's question to the jury about whether anything could be done to help them break the deadlock. It was not clear the jury's demand to hear from appellant was solely in response to the trial court's question to the jury about whether anything could be done to break the deadlock. The trial court asked the jury during the afternoon session of June 20, 2011, whether anything could be done to help it break the deadlock. (27RT 3073-3074.) It was not until the next morning that the jury sent the note demanding to hear from appellant. (28RT 3079, 3085;

16CT 3929.) Furthermore, the nature of the juror misconduct did not change even if the jury asked to hear from appellant in response to the trial court's question about whether anything could be done to break the deadlock.

The jury drew a negative inference from appellant's failure to testify, even if its demand to hear from him, was in response to the trial court's question about whether anything could be done to break the deadlock. The only logical inference from the jury's demand to hear from appellant was that it had discussed his failure to testify and viewed it adversely. Otherwise, appellant's failure to testify would not have been important to the jury and they would not have demanded to hear from him.

Respondent's invited error, and forfeiture arguments, are misplaced. When the jury demanded to hear from appellant, the defense counsel did not request the trial court to instruct the jury that appellant had a right to not testify and it would not be hearing from him. The defense counsel requested the trial court to tell the jury that its demand to hear from appellant was denied without further explanation. The trial court followed this request. (28RT 3087-3090.) Respondent argues that appellant invited any error pertaining to the trial court's failure to admonish the jury about his right to not testify. Appellant's claim of error, however, is not that the trial court erred by failing to advise the jury of appellant's right to not testify after it sent the note demanding to hear from him. Appellant's claim is that the note, by itself, established prejudicial misconduct by the jury. The jury obviously ignored the instruction given during the guilt phase regarding appellant's right to silence. Respondent's

invited error argument addresses a claim not raised by appellant. Respondent's forfeiture argument thus fails for the same reason.

The jury's demand to hear from appellant established that appellant's failure to testify was discussed by the jury. This Court cannot conclude beyond a reasonable doubt that the jury's discussion of appellant's failure to testify did not influence its decision to sentence appellant to death. The judgment must be reversed.

XXII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND A FAIR TRIAL, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, BY REFUSING TO GIVE A DEFENSE REQUESTED INSTRUCTION THAT A SINGLE FACTOR IN MITIGATION WAS SUFFICIENT TO IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Respondent argues the trial court properly rejected the defense request that the jury be instructed that a single factor in mitigation was sufficient to sentence appellant to life in prison, without the possibility of parole, because: (1) the rereading of CALJIC No. 8.88 was the appropriate response to the jury's question; and (2) the instruction requested by appellant was argumentative and misleading.

Appellant objected in the trial court to the re-reading of CALJIC No. 8.88. Appellant may argue on appeal the deficiencies with CALJIC No. 8.88, which made it error for the trial court to refuse the defense instruction regarding a single mitigating factor, without having articulated each and every deficiency in the trial court.

The re-reading of CALJIC No. 8.88 was not an adequate response to the jury's question because it gave the jury the impression that a single factor in mitigation was not sufficient to impose a life sentence. The jury's question stated, "There's a lot of — do you need just one item–if you find one item in mitigation, is that enough for life in prison, if you

find just one, or do you need several for each, or is it a scale? How does that operate?" (28RT 3091-3092.) The jury asked, in a very straightforward manner, whether a single factor in mitigation was a basis to impose a life sentence. The trial court's failure to tell the jury, in a straightforward manner, that a single factor in mitigation was the basis to sentence appellant to life in prison implied that it was not. Once the jury asked the above question, it obviously anticipated being instructed that a single factor in mitigation was sufficient to sentence appellant to life in prison if that was the law.

The jury formulated the above question after having been instructed with CALJIC No. 8.88. The rereading of the same instruction which the jury found confusing, and led to the asking of the above question, did not assist the jury to understand that a single factor in mitigation was a basis to sentence appellant to a life sentence. (*People v. Hinton* (2006) 27 Cal.4th 839, 912 [holding that a single factor in mitigation was a sufficient basis to sentence the defendant to life in prison].)

The trial court had a duty to do more than simply reread CALJIC No. 8.88. "The Court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) When the jury is confused about the law, "a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*Ibid.*) The trial court's rereading of CALJIC No. 8.88 was the trial court figuratively throwing up its hands and telling the jury it could not provide assistance. *People v. Gonzales* (1999) 74 Cal.App.4th 382, 391, observed that, "Unfortunately, the trial court's failure in the

present case to aid the jury during its deliberations by providing adequate instruction in response to its inquiry is a failure we perceive is all too common. Rereading previously given standard CALJIC instructions in response to a jury's question on the law when those instructions are inadequate rather than responding directly to the jury's question out of fear of committing error is not a rarity. The trial court left the jury in this case floundering." The trial court's rereading of CALJIC No. 8.88 left the jury floundering.

The cases relied upon by respondent are distinguishable because they did not involve the jury: (1) affirmatively demonstrating confusion about how to apply CALJIC No. 8.88 by asking a question; and (2) asking whether a single mitigating factor was sufficient to impose a life sentence. In *People v. Redd* (2010) 48 Cal.4th 691, the defendant requested the trial court to instruct the jury that, "[a] single mitigating factor is sufficient to support a decision that death is not the appropriate punishment." The trial court instead gave a similar instruction, but it also mentioned the weighing of aggravating factors. This Court concluded the defense requested instruction was argumentative because it failed to mention aggravating factors. There was no evidence in *People v. Redd* that the jury was confused about how to apply CALJIC No. 8.88. Furthermore, the instruction given by the trial court made specific reference to a single mitigating factor. In the instant case, CALJIC No. 8.88 did not make reference to a single mitigating factor and the jury did not understand how to apply it.

In *People v. Davis* (2009) 46 Cal.4th 539, 621, the defendant requested the trial court to give a multi-part instruction which stated in part, "Any one of the [mitigating] factors may

be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case." This Court concluded the trial court properly rejected the instruction as argumentative. The defendant did not request the instruction in response to juror confusion about how to weigh the aggravating and mitigating factors. The language was also part of an instruction which contained many other points of law couched in argumentative language. Appellant's requested instruction was not argumentative, responded specifically to the jury's question, and clarified what the jury perceived as an ambiguity in CALJIC No. 8.88.

Similar reasoning applies to *People v. Kelly* (2007) 42 Cal.4th 763 and *People v. Salcido* (2008) 44 Cal.4th 93, 162-163. The jury, in neither case, asked whether a single factor in mitigation was sufficient to impose a life sentence. There was no evidence of juror confusion about how to apply CALJIC No. 8.88. In *People v. Kelly*, the instruction regarding a single mitigating factor was requested as part of a series of defense requested instructions which were argumentative, misstated the law, and were incomplete. The requested instruction in *People v. Salcido* was an incorrect statement of the law, and argumentative, because it stated a single factor in mitigation could outweigh multiple factors in aggravation. (*People v. Salcido, supra*, 44 Cal.App.4th at pp. 162-163.)

Similarly, the requested instruction in *People v. Carter* (2003) 30 Cal.4th 1166, 1225, was an improper statement of the law because it told the jury that any mitigating evidence could be the basis for a life sentence and failed to make any reference to aggravating

evidence. Appellant's jury demonstrated confusion about how to apply CALJIC No. 8.88, which should have been corrected by the trial court.

In *People v. Lewis* (2009) 46 Cal.4th 1255, the defendant argued on appeal that CALJIC No. 8.88 failed to adequately convey that a single factor in mitigation was sufficient to sentence the defendant to a life sentence. The jury did not ask whether a single factor in mitigation was sufficient to sentence the defendant to life in prison without the possibility of parole. Hence, there was no evidence the jury was confused about how to apply CALJIC No. 8.88. The defendant also did not ask for a single factor in mitigation instruction. This Court concluded that CALJIC No. 8.88 adequately explained the concept of aggravation and mitigation. Because the jury in *People v. Lewis* did not demonstrate any confusion about how to apply CALJIC No. 8.88, that decision did not resolve the issue raised by appellant concerning the trial court's refusal to give the single mitigating factor instruction.

Several of the cases above found defense requested instructions regarding a single factor in mitigation to be argumentative because the instructions failed to refer to aggravating factors. Appellant's requested instruction also failed to refer to aggravating factors. Appellant's instruction, however, was not argumentative because it was responding to a narrow and specific point of juror confusion as manifested by the jury's question about a single mitigating factor.

Appellant's jury did not understand that a single factor in mitigation was sufficient to impose a life sentence. There were numerous factors in mitigation which warranted a life

sentence. The penalty of death must be reversed.

XXIII

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND A FAIR TRIAL AND STATE AND FEDERAL RIGHT TO A JURY TRIAL: (1) ERRONEOUSLY DENIED A DEFENSE MOTION FOR A MISTRIAL BASED UPON JUROR MISCONDUCT AT BOTH THE GUILT AND PENALTY PHASES OF THE TRIAL; AND (2) ERRONEOUSLY FAILED TO REMOVE A JUROR WHO ENGAGED IN SERIOUS MISCONDUCT; ALTERNATIVELY, THE JUDGMENT OF DEATH MUST BE REVERSED FOR THE SAME REASONS.

Respondent argues: (1) Juror Number Five did not commit misconduct because she stopped reading "The Gift of Fear" when she realized its topic and had only read to page 17; and (2) any misconduct was not prejudicial.

The prosecutor stated the topic of the book was stalking. (26RT 2918.) It was unlikely Juror Number Five had to get all the way to page 17 before she realized the topic of the book was stalking.[12] The topic of the book must have been apparent within the first couple of pages, if not from the juror's discussion with the chiropractor who recommended the book as one every woman should read. The prosecutor was even quoted in the book. (Becker, **The**

---

[12] The juror's mendacity can be easily determined. Juror Number Five told the trial court, "I'm on like page 17 or something. I didn't get very far." (27RT 2956.) The prosecutor for appellant's case was Scott Gordon. Gordon's name first appeared on page 182, where it stated, "[a]s prosecutor Scott Gordon, now the chairman of L.A.'s forward-thinking Domestic Violence Council said, `Simpson was killing Nicole for years–she finally died on June twelfth'." Prosecutor Gordon's name was mentioned again on page 185. That page stated, "[a]fter Christopher Darden's closing argument in the Simpson trial, co-prosecutor Scott Gordon and I joined him in his office." Page 337 listed the members of the "Victory over Violence Board." The prosecutor was listed as a co-chair.

Gift of Fear (1998) p. 182.) This fact alone established serious misconduct because appellant's case was about stalking.

The sequence of events suggests, furthermore, that Juror Number Five was not truthful with the trial court. After the conclusion of evidence for the penalty phase, the prosecutor informed the trial court that he saw Juror Number Five carrying a book that dealt with stalking. This occurred on Friday, June 15, 2001. (26RT 2820, 2918.) The trial court stated that it would deal with the issue when the jurors returned the next Tuesday. On Monday, June 18, 2001, the trial court and the attorneys discussed the penalty phase jury instructions. (26RT 2920-2943.) The next day, Tuesday, June 19, 2001, Juror Number Five was questioned about the book and said she had stopped reading it when the prosecutor's name was mentioned. (27 RT 2954, 2956.) She also claimed she stopped reading the book last week. (27RT 2955.) Juror Number Five's claim that she stopped reading the book the prior week was inconsistent with the fact that the prosecutor saw her in possession of the book at the end of the previous Friday court session. Juror Number Five also said she had read the book at night at home and then brought it to court. (27RT 2956.) If she stopped reading the book when she realized the topic, she would not have had it with her in court on Friday.

Respondent argues that Juror Number Five's misconduct was not prejudicial because she did not seek out the book, read only a few pages, and stopped reading it when she realized the topic of the book was stalking and the prosecutor's name was mentioned in the book. The fact that Juror Number Five read the book, after its topic was apparent,

demonstrated her disqualifying bias. Juror Number Five, furthermore, did not report her misconduct to the trial court after she realized that she had committed misconduct by reading it. Juror Number Five would have reported her misconduct if she was an impartial juror.

The fact that the prosecutor was quoted in the book was especially prejudicial. It gave the prosecutor an undue amount of credibility with that juror. The juror must have believed that the prosecutor had some elevated status in addressing the problem of domestic violence because he had been quoted in a widely read book on that topic.

For the reasons above and in the Opening Brief, Juror Number Five should not have been a member of appellant's jury. The judgment of guilt must be reversed. Alternatively, the penalty of death must be reversed.

XXIV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND CALIFORNIA CONSTITUTIONS, ADMITTED AGGRAVATING EVIDENCE PURSUANT TO PENAL CODE SECTION 190.3, SUBDIVISION (B) WITHOUT: (1) SUA SPONTE DEFINING THE ELEMENTS OF THE CRIMES APPELLANT ALLEGEDLY COMMITTED; AND (2) REQUIRING THE PROSECUTOR TO INFORM THE JURY WHAT CRIMES APPELLANT HAD COMMITTED.

Respondent argues: (1) this Court should follow its prior cases which held that the trial court does not have a sua sponte duty to define the elements of crimes admitted as aggravation pursuant to Penal Code section 190.3, subdivision (b); (2) appellant forfeited any challenge to CALJIC No. 8.87, by failing to raise an objection in the trial court; and (3) neither the trial court, nor the prosecutor, had a duty to identify the specific aggravating crimes committed by appellant because all the crimes involved appellant's ex-wife, Mary Christian.

This Court has adhered to the view that the trial court does not have a sua sponte duty to define the elements of crimes offered as aggravating evidence. Appellant provided many reasons in the Opening Brief for the Court to change this rule. This Court has refused to impose a sua sponte duty on the trial court to define the elements of crimes offered as aggravation because the defendant may be making a tactical choice to forego such

instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 207.) This problem can be addressed by imposing a sua sponte duty on the trial court to define the elements of crimes offered as aggravation unless the defendant objects to such instructions. This rule will preserve the right of the defendant to omit such instructions if he perceives that choice to be for his benefit, but otherwise channel and direct the jury's sentencing discretion to avoid an arbitrary choice. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859[joint opinion of Stewart, Powell, and Stevens, JJ.].)

The forfeiture doctrine does not apply. Penal Code section 1259 allows a defendant to raise on appeal issues pertaining to jury instructions without the necessity of an objection in the trial court. The only issue is whether the trial court's failure to define the elements of crimes offered as aggravation was prejudicial. Respondent's reliance on *People v. Elam* (2001) 91 Cal.App.4th 298, is misguided. The defendant in that case was convicted of a number of counts, including assault with intent to commit forcible oral copulation. The defendant argued the trial court had a sua sponte duty to define the term "force." The Court of Appeal rejected this argument because the term did not have a technical meaning peculiar to the law. (*People v. Elam, supra*, 91 Cal.App.4th at p. 306.) The Court also held that the defendant had waived any objection to CALCRIM No. 17.41.1, unless it impacted his substantial rights. (*Id.*, at p. 311.)

The holding of *People v. Elam* that "force" did not need to be defined, because it did not have a technical meaning, does not apply to the instant case. Appellant's argument is that

crimes needed to be defined by providing the jury with their elements. The statement in *People v. Elam* that the defendant waived any challenge to CALCRIM No. 17.41.4, unless the instruction was prejudicial, suggests that the forfeiture doctrine does not apply to the instant case. If the trial court's failure to define the elements of crimes offered as aggravation was prejudicial, then that error can be reviewed on the merits pursuant to section 1259.

Respondent's argument there was no need for the trial court to define the elements of the crimes admitted as aggravating evidence, because all such crimes pertained to Mary Christian, fails to respond to appellant's argument. During the penalty phase, the prosecution presented four separate acts of violence by appellant towards Christian. (25RT 2783-2789.) The jury was provided with no guidance regarding what specific crimes were committed by these acts and whether the acts were felonies or misdemeanors. Because the jury did not know whether the acts were felonies or misdemeanors, it lacked guidance to assess whether the acts weighed in favor of a death sentence. (See *People v. Johnson* (2006) 145 Cal.App.4th 895, 904 [the seriousness of an offense can be determined in the first instance by whether it is a felony or misdemeanor].) The mere fact that all the crimes offered as aggravation pertained to Christian did not mean the jury understood what crimes were committed and whether those crimes were felonies or misdemeanors.

Appellant is not arguing the jury could have been confused, and believed the crimes offered as aggravation, pertained to someone other than Christian. Even if all the crimes pertained to Christian, the jury still needed to be provided with guidance regarding what

crimes were committed. The trial court's failure to define the elements of the crime offered as aggravation resulted in the jury exercising arbitrary sentencing discretion. The judgment of death must be reversed.

XXV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE A SERIES OF DEFENSE-REQUESTED INSTRUCTIONS REGARDING HOW THE JURY SHOULD DETERMINE WHETHER TO IMPOSE THE DEATH PENALTY IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS

A. THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED VICTIM IMPACT STATEMENT

Respondent argues the trial court properly rejected appellant's victim impact instruction because it suggested to the jury that it should not consider the victim impact testimony when it decided the penalty. In *People v. Tate* (2010) 49 Cal.4th 635, this Court upheld the trial court's refusal to give a defense requested instruction which told the jury that the victim impact testimony was not to divert its attention from its proper role in deciding whether the defendant should live or die. The Court concluded the instruction was misleading because it "suggest[s] the jury not be moved by sympathy for the victim and their survivors, and that the standard instructions adequately convey to the jurors the proper consideration and use of victim impact evidence." (*People v. Tate, supra*, 49 Cal.4th at p. 708.)

This Court should reverse itself and hold that it was error for the trial court to refuse appellant's victim impact statement. Appellant's requested instruction attempted to make sure the jury did not put undue emphasis on victim impact testimony and ignore the other

factors that were also relevant to its sentencing decision. The phrase "divert your attention," (26RT 2929), in appellant's requested instruction was the not the same as using the word "ignore." Appellant's proposed instruction left the jury free to consider the victim impact testimony because the first paragraph of the proposed instruction referred specifically to that evidence. Because of the emotionally overwhelming nature of impact victim testimony, it was critical for the jury to be told that, "You may not impose the death penalty as a result of an irrational, purely emotional response to this evidence." (26RT 2929.)

Respondent also argues that there was nothing especially inflammatory about the victim impact testimony in this case. Tyler was Kerr's 10 year old son. Helen Sorena was Kerr's mother. (25RT 2745-2747.) Kim Hyer was Kerr's friend. (25RT 2764-2765.) Soreno testified that Hyer helped Tyler release balloons with notes to his mother in heaven. (25RT 2751.) The emotional impact of this testimony on the jury was devastating. The jury needed to understand not to be emotionally overwhelmed by this testimony. Appellant's victim impact statement was designed to achieve that goal. The trial court erred by failing to give the instruction.

B. THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S PROPOSED MERCY INSTRUCTION.

Respondent argues the trial court properly failed to instruct the jury with the second paragraph of appellant's proposed mercy instruction because: (1) a mercy instruction was given; (2) CALJIC No. 8.85 adequately instructed the jury regarding the role of mercy; (3) the jury was told it could consider sympathy or pity for appellant; and (4) the defense counsel

told the jury during closing argument that it could consider mercy in deciding the penalty.

The sentence requested by appellant, and omitted by the trial court, stated "You may decide not to impose the penalty of death by granting the defendant mercy regardless of whether or not you determine he deserves your sympathy." (26RT 2932.) This sentence was necessary for the jury to understand that it had absolute discretion to not impose the death penalty as an act of mercy. The instruction given stated, "You may decide to impose the penalty of life in prison without the possibility of parole in exercising mercy on behalf of the defendant." (27RT 3038.) This sentence erroneously required the jury to first make the determination that exercising mercy was appropriate before it could elect to do so.

This Court has previously held that CALJIC No. 8.85 adequately instructs the jury regarding the role of sympathy and mercy. (*People v. Ervine* (2009) 47 Cal.4th 745, 801; *People v. Burney* (2009) 47 Cal.4th 203, 261.) The relevant language is factor K in CALJIC No. 8.85. It told appellant's jury that it could consider in mitigation, "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (27RT 3036.) This sentence failed to convey to the jury its absolute discretion to sentence appellant to life in prison as an act of mercy. The instruction did not refer specifically to mercy. It also linked imposing a life sentence, as an act of sympathy, to the existence of a specific mitigating factor.

Appellant's jury was told, "You may consider sympathy or pity for the defendant if you feel it is appropriate to do so . . ." (27RT 3039.) The qualifying phrase, "if feel it is appropriate to do so," meant that appellant's jury was not informed of its absolute discretion to impose a life sentence as an act of mercy.

Respondent finally argues that the trial defense counsel argued the jury could exercise mercy towards appellant and give him a life sentence. Argument of counsel is not an adequate substitute for proper jury instructions. (*People v. Harris* (2008) 43 Cal.4th 1269, 1320.) The defense counsel did not explain to the jury during his closing argument that it had the absolute discretion to impose a life sentence as an act of mercy. Instead, he argued the factors in mitigation concerning appellant's background. (27RT 2981-2984.)

The trial court's failure to give the defense requested mercy instruction was prejudicial error. The judgment of death must be reversed.

C. THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED LINGERING DOUBT INSTRUCTION.

Appellant requested a lingering doubt instruction which referred specifically to his heat of passion defense raised during the guilt phase. (Augmented Record, Oct. 17, 2008.) The instruction given by the trial court referred generally to lingering doubt, but failed to refer to the heat of passion defense or the possibility that appellant was guilty only of voluntary manslaughter. (27RT 3038-3039.) Respondent argues the lingering doubt instruction given adequately conveyed the concept. This argument must be rejected because appellant's guilt phase theory of the case was that he was guilty of voluntary manslaughter.

The jury could not have understood, without further explanation, that "lingering doubt," referred to lingering doubt about appellant's guilt of murder, rather than voluntary manslaughter.

Respondent also argues that the concept of "lingering doubt" was encompassed in CALJIC No. 8.85, factors (a) and (k). Factor (a) was the circumstances of the crime. This portion of CALJIC No. 8.85 did not make any reference to lingering doubt. Factor (k) also failed to make any such reference. (27RT 3034-3036.) Neither *People v. Thompson* (2010) 49 Cal.4th 79, 138-139, nor *People v. Rogers* (2009) 46 Cal.4th 1136, 1176, dealt with a situation in which the defense theory of the case was that the defendant was not guilty of murder, but guilty of some lesser included offense. The defense in *People v. Thompson* was alibi. (*People v. Thompson, supra*, 49 Cal.4th at p. 92.) The defense in *People v. Rogers* was also that the defendant did not kill the victims. (*People v. Rogers, supra*, 46 Cal.4th at p. 1146.) Appellant's defense that he was guilty of voluntary manslaughter distinguishes his case from other cases which have found CALJIC No. 8.85 an adequate substitute for a lingering doubt instruction.

The defense counsel argued appellant's emotional state as a factor in mitigation during his penalty phase closing argument. (27RT 3003-3004.) This argument was not an adequate substitute for the requested lingering doubt instruction. The arguments of counsel are the words of a biased advocate. The jury needed to be properly instructed that its lingering doubt about whether appellant was guilty only of voluntary manslaughter was a basis to impose a

life sentence. The jury had lingering doubt about exactly what crime appellant committed as demonstrated by the jury's request, during its penalty phase deliberations, to hear from appellant. (16CT 3929.) The trial court's failure to give the defense requested lingering doubt instruction was prejudicial error. The judgment of death must be reversed.

D. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE DEFENSE REQUESTED SYMPATHY INSTRUCTION.

Respondent argues the trial court properly refused to give the sympathy and pity instruction because it was argumentative and duplicated the mercy instruction. Sympathy and pity are distinct from mercy. Mercy is an act of leniency above and beyond what is perhaps appropriate under the particular circumstances. Sympathy and pity are factors based on the defendant's particular circumstances. Appellant presented numerous factors which should have triggered sympathy and pity in a reasonable juror. He had a chaotic childhood punctuated by violence. The jury needed an instruction couched specifically in terms of sympathy and pity. Appellant's requested instruction was not argumentative. It did not tell the jury that it could impose a life sentence based on sympathy and pity alone and to disregard all other factors. The instruction pinpointed particular factors for the jury to consider. The defense counsel's penalty phase argument about appellant's good character was not an adequate substitute for the sympathy and pity instruction. The defense counsel did not use those terms during his argument.

The jury was obviously deeply split because it told the trial court that it could not reach a penalty phase verdict. (27RT 3053-3054.) Given the close nature of the penalty

phase deliberations, the trial court's failure to give the defense requested sympathy and pity instruction was prejudicial error. The judgment of death must be reversed.

XXVI

THE PENALTY OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY DURING THE PENALTY PHASE THAT IT COULD APPLY THE GUILT PHASE INSTRUCTIONS THAT IT DEEMED APPLICABLE, THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, AND HIS RIGHT AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS PROVIDED IN THE FEDERAL AND STATE CONSTITUTIONS.

Respondent argues that appellant invited any error pertaining to the trial court's instruction to the jury that it could consider the guilt phase instructions, "to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial." (27RT 3033.) Respondent's invited error and estoppel arguments must be rejected.

The defense counsel never suggested to the trial court to instruct the jurors that they could decide which guilt phase instructions applied to its penalty phase deliberations. (27RT 2946-2951.) The defense counsel objected to the trial court giving any guilt phase instructions to the jury and objected to the written guilt phase instructions being in the jury room during deliberations. (27RT 2945-2949, 2951.) After the trial court announced that it would instruct the jury that it could decide which guilt phase instructions applied to its penalty phase deliberations, the defense counsel did not agree with this ruling. (27RT 2951.) Invited error occurs when the defense counsel made a "conscious and deliberate tactical choice." (*People v. Lucero* (2000) 23 Cal.4th 692, 724.) The defense counsel did not make a conscious and deliberate tactical choice for the jury to be instructed that it could decide

which guilt phase instructions applied to its penalty phase deliberations. He objected to the jury being told anything about the guilt phase instructions or having the written guilt phase instructions with them during penalty phase deliberations. These objections were not the same as making a tactical choice for the jury to be instructed to decide which guilt phase instructions applied to its penalty phase deliberations.

The cases cited by respondent are distinguishable. *People v. Harris* (2008) 43 Cal.4th 1269, supports appellant's argument that the trial court erred by instructing the jury to determine which guilt phase instructions applied to its penalty phase deliberations. The trial court in that case instructed the jury, "You are to be guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty. However, you are to completely disregard any instructions given in the first phase which prohibited you from considering pity or sympathy for the defendant. In determining penalty, the jury may take into consideration pity and sympathy for the defendant." (*People v. Harris, supra*, 43 Cal.4th at p. 1318.) The jury was also instructed with CALJIC No. 8.84.1, which instructed the jury to accept the law as stated by the trial court, but to disregard the guilt phase instructions with the exception that the jury could consider pity or sympathy. (*Ibid.*)

This Court agreed with the defendant that the above instructions were erroneous because, "[i]f the court tells the jury to disregard the guilt phase instructions, it must later provide it with those instructions applicable to the penalty phase." (*People v. Harris, supra*,

43 Cal.4th at p. 1319.) The trial court in appellant's case made the same error as the trial court in *People v. Harris*. It failed to tell the jury which guilt phase instructions applied to its penalty phase deliberations. In *People v. Harris*, this Court found invited error because the trial defense counsel explicitly agreed with the jury being instructed that it was to be guided by the guilt phase instructions which were applicable and pertinent. (*People v. Harris*, supra, 43 Cal.4th at p. 1319.) Appellant's trial defense counsel did not agree, explicitly or implicitly, with the trial court instructing the jury to determine which guilt phase instructions applied to its penalty phase deliberations. This Court also noted that the defense counsel in *People v. Harris* did not ask the trial court to instruct the jury with CALJIC No. 8.84.1, and his mere acquiescence to it being given was not invited error. (*People v. Harris, supra*, 43 Cal.4th at p. 1319.) Hence, even if this Court construed the defense counsel's statements as acquiescence to the trial court instructing the jury that it could determine which guilt phase instructions applied to its penalty phase determinations, those statements were not invited error.

In *People v. Ervine* (2009) 47 Cal.4th 745, the trial court instructed the jury with the standard penalty phase instructions and told them to disregard any guilt phase instructions which conflicted with the penalty phase instructions. The trial court then instructed the jury with CALJIC No. 8.84.1, which included the sentence, "disregard all other instructions given to you in other phases of the trial." The trial court did not orally instruct the jury with the applicable instructions regarding the evaluation of evidence. The defendant argued the trial

court erred by failing to reinstruct the jury with numerous instructions given during the guilt phase. This Court first rejected the defendant's argument that the jury was not aware to apply the guilt phase instructions to its penalty phase deliberations because it was also instructed to disregard any guilt phase instructions which conflicted with the penalty phase instructions. This Court did not see any reasonable likelihood the jury failed to understand that the guilt phase instructions also applied to its penalty phase deliberations because of the contents of the penalty phase deliberations and a copy of the guilt phase instructions being provided to the jury during its penalty phase deliberations. (*People v. Ervine, supra*, 47 Cal.4th at p. 804.)

Similar reasoning does not apply to the instant case. Appellant's jury was instructed to "disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (27RT 3036.) *People v. Ervine* appeared to conclude that a similar instruction made it implicitly clear to the jury that the guilt phase instructions applied to its penalty phase deliberations. In appellant's case, however, the trial court also instructed the jury that, "you should consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial." (27RT 3033.) This additional instruction created confusion about whether the guilt phase instructions applied to the penalty phase deliberations.

People v. Ervine also concluded the defendant forfeited any issue pertaining to the trial court's failure to reinstruct the jury with guilt phase instructions by failing to request such instructions. (*People v. Ervine, supra*, 47 Cal.4th at p. 804.) Appellant's claim is not

that the trial court erred by failing to give jury instructions, but that it erred by instructing the jury to determine which guilt phase instructions applied to its penalty phase deliberations. Appellant's claim of error can be reviewed in the absence of an objection in the trial court pursuant to Penal Code section 1259. Furthermore, appellant objected to the jury being told anything about the guilt phase instructions. (27RT 2945-2949, 2951.) This objection was sufficiently broad to constitute an objection to the trial court instructing the jury to determine which guilt phase instructions applied to its penalty phase deliberations. *People v. Halvorsen* (2007) 42 Cal.4th 379, 416, also cited by respondent, simply stated the general principle of law that invited error can occur regarding jury instructions. It did not apply that principle in the context of penalty phase deliberations and thus does not apply to the instant case.

Respondent also argues that appellant is estopped from claiming error because the trial court drafted the penalty phase instruction in issue as a result of the defense counsel's objection. This argument must also be rejected. Respondent's estoppel argument is nothing more than the invited error argument with a new label. Appellant's trial defense counsel did not intentionally, and for a strategic reason, cause the trial court to instruct the jury to determine which penalty phase instructions applied to its penalty phase deliberations. The trial court arrived at that solution on its own after consulting with another judge. (27RT 2949-2950.)

In *People v. Coffman* (2004) 34 Cal.4th 1, 49, this Court applied the invited error doctrine to the defendant's claim that the trial court erroneously granted a challenge for cause

to a juror. *People v. Coffman* did not deal with jury instructions and does not apply to the issue before this Court.

People v. Prieto (2003) 30 Cal.4th 226, 264-265, suggests that appellant's objection to the jury being given any instructions about the guilt phase instructions does not estop him from arguing on appeal that the trial court erred by instructing the jury to determine which guilt phase instructions applied to its penalty phase deliberations. The defendant in that case argued that a sentence in CALJIC No. 8.87 was erroneous. The Attorney General argued that the invited error doctrine barred the defendant's claim of error. This Court rejected this argument because the defendant had objected to CALJIC No. 8.87 in its entirety and that objection was overruled. The defendant then objected to specific aspects of the instruction while acknowledging that modifications had improved the instruction. This Court rejected the Attorney General's invited error argument because the defendant had initially objected to the instruction in its entirety and did not make a deliberate and tactical choice to request the instructions or its modified version. (*People v. Prieto, supra*, 30 Cal.4th at p. 265.)

Similar reasoning applies to the instant case. Appellant objected to the jury being given any instruction regarding the guilt phase instructions. The trial court overruled that objection and gave a modified instruction which appellant did not request.

People v. Rodrigues (1994) 8 Cal.4th 1060, also does not apply to the instant case. During penalty phase deliberations, the jury asked whether its decision had to be unanimous and what would happen if it could not reach a verdict. With the express consent of the

defense attorney, the jury was told that its decision had to be unanimous and it was not to speculate about what would happen if it failed to reach a verdict. This Court applied the invited error doctrine because of the defendant's express consent to the trial court's answer to the jury's question. In appellant's case, his defense counsel did not assent to the instruction in issue.

Respondent also argues that appellant was not prejudiced by the trial court's instruction to the jury that it could determine which guilt phase instructions applied to its penalty phase deliberations. Appellant discussed above why *People v. Ervine* does not apply and will not repeat those arguments in the interest of brevity. Respondent's argument that appellant was not prejudiced because his jury was provided with a written copy of the guilt phase instructions during its penalty phase deliberations must be rejected. Supplying the guilt phase instructions to the jury did not inform them which instructions applied. The jury had to make a legal determination regarding which instructions applied. Appellant's jury was obviously not equipped to make that legal determination.

Respondent also argues that appellant has failed to explain how the erroneous instructions impacted the jury's assessment of the evidence during its penalty phase deliberations. Appellant's Opening Brief explained at length on pages 410 through 414 how the erroneous instructions contributed to error during the penalty phase. For instance, appellant argued in the Opening Brief that the jury lacked guidance regarding how to assess the credibility of appellant's ex-wife, Mary Christian. Respondent did not respond to this

argument. The jury asked during its penalty phase deliberations to hear from appellant. Respondent did not respond to this argument. Respondent's failure to respond to these arguments constitutes an implicit concession regarding their merit. (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112, fn. 3.)

For the reasons above and in the Opening Brief, the trial court erroneously instructed the jury that it could determine which guilt phase instructions applied to its penalty phase deliberations. Because this error was prejudicial, the judgment of death must be reversed.

XXVII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTIONS FAILED TO CONVEY TO THE JURY THE SCOPE OF ITS DISCRETION REGARDING IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND A FAIR TRIAL AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

Respondent argues that CALJIC No. 8.88 properly conveyed to the jury its sentencing discretion because: (1) the phrase, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances," did not allow the jury to arbitrarily disregard mitigating factors when all the other instructions were considered; and (2) the arguments of counsel informed the jury of its sentencing discretion. These arguments must be rejected.

This Court has held that CALJIC No. 8.88 properly informs the jury of its sentencing discretion. (*People v. Dykes* (2009) 46 Cal.4th 731, 816.) *People v. Brasure* (2008) 42 Cal.4th 1037, 1063, concluded jurors understand they have the discretion to determine the appropriate penalty when they are instructed to assign whatever value they determine is appropriate to the factors in aggravation and mitigation. This conclusion is wrong because the jury's ability to assign whatever weight it deems appropriate to a factor in mitigation grants the jury the power to arbitrarily disregard that factor. Penal Code section 190.3, subdivisions (a) through (k), specifies factors in aggravation and mitigation of the sentence.

If the Legislature deemed certain facts to be mitigation of the death penalty, the jury was required to treat those facts in that manner. The jury could not assign zero weight to a fact in mitigation without violating section 190.3, appellant's right to due process of law, and the prohibition against cruel and unusual punishment in the federal and state constitutions. The sentence, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider," (27RT 3040), allowed the jury to assign zero weight to a factor in mitigation.

The arguments of counsel were not an adequate substitute for proper jury instructions. The prosecutor referred to the factors in mitigation, but failed to tell the jury that it was required to give at least some weight to a fact in mitigation. (27RT 2966-, 2978-2979.) The prosecutor's argument aggravated the prejudice to appellant from the above referenced deficiency in CALJIC No. 8.88, when he argued, "the only mitigating factor . . . is one of sympathy . . .." (27RT 2978.) The prosecutor explicitly stated that the only factor in mitigation was sympathy. Appellant's difficult childhood was a significant factor in mitigation. He witnessed serious domestic violence. Appellant's mother was shot by his stepfather when appellant was a young boy. (26 RT 2881-2883. 2856, 2884; 27RT 2850-2851, 2879.) The prosecutor's argument that sympathy was the only factor in mitigation, combined with the language in CALJIC No. 8.88, allowed the jury to arbitrarily disregard a factor in mitigation and resulted in the jury failing to give any weight to significant factors in mitigation. The judgment of death must be reversed.

XXVIII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S PENALTY PHASE ERRORS: (1) DEPRIVED APPELLANT OF STATE AND FEDERAL DUE PROCESS OF LAW: (2) DEPRIVED APPELLANT OF HIS RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; AND (3) VIOLATED THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

Respondent argues there were no errors which infected the penalty phase of appellant's trial. As argued above and in the Opening Brief, numerous errors occurred during the penalty phase.

The trial court coerced a verdict by requiring the jury to continue deliberating even after the prosecutor had conceded that it was appropriate to declare a mistrial. (27RT 3072.) The jury clearly and explicitly considered appellant's failure to testify during penalty phase deliberations. (16CT 3929.) The jury asked a question about the weighing process and was confused about whether a single factor in mitigation was sufficient to impose a life sentence. (28RT 3091-3092.) Despite the law squarely holding that a single factor in mitigation was a basis for the jury to impose a life sentence, (*People v. Berryman* (1993) 6 Cal.4th 1048, 1109), the trial court refused to answer the jury's question in a straightforward manner and instruct them with that point of law. The trial court's failure to tell the jury, in response to its question, that a single factor in mitigation was a sufficient basis to impose a life sentence

most likely caused the jury to erroneously believe otherwise. The above errors were not inconsequential procedural defects with the trial. All of the above issues went to the heart of the accuracy and reliability of the jury's decision making process during its penalty phase deliberations. The above errors, individually and cumulatively, and based on the arguments in the Opening Brief which are incorporated herein, require reversal of the judgment of death.

For the reasons above and in the Opening Brief, the judgment of guilt must be reversed.

XXIX

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY CONSIDERED APPELLANT'S FAILURE TO TESTIFY WHEN IT DENIED HIS AUTOMATIC MOTION TO VACATE THE JUDGMENT OF DEATH IN VIOLATION OF: (1) APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION IN THE FIFTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; (2) APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW; AND (3) THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION .

The jury asked to hear from appellant during its penalty phase deliberations. (16CT 3929.) The request was denied. (28RT 3090.) During the hearing on the automatic motion to reduce the penalty to life in prison, the trial court commented that the outcome of the penalty phase deliberations may have been different had the jury heard from appellant.(29RT 3149-3150.) Appellant argued in the Opening Brief that the trial court erroneously considered appellant's failure to testify when it denied the automatic motion to reduce the penalty to life in prison. Respondent argues that: (1) appellant waived any error pertaining to the trial court's denial of the motion for automatic modification of the penalty by failing to make an objection; and (2) the trial court did not erroneously consider appellant's failure to testify when it denied the motion.

An objection in the trial court is required to preserve for appellate review errors by the trial court when it rules on the automatic motion to vacate the death verdict. (*People v.*

Riel (2000) 22 Cal.4th 1153, 1220.) The requirement of an objection is excused when it would have been futile. The requirement of an objection or motion to strike will be excused if either would be futile or if an admonition would not have cured the harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) During the hearing on the motion, the defense counsel argued the jury ignored the trial court's instruction to not consider appellant's failure to testify. (29RT 3139.) The trial court rejected this argument when it denied the motion. The trial court had already denied a defense motion for a mistrial made after the jury requested to hear from appellant. (28RT 3084.) When the trial court commented about appellant's failure to fill in the gaps for the jury when it denied the automatic motion, it was repeating the same mistake it made when it denied the defense motion for a mistrial. Hence, an objection by the defense counsel to the trial court's comment about why it believed error did not occur as a result of the jury's request to hear from appellant would have been futile.

The trial court drew a negative inference from appellant's failure to testify. The trial court expressly stated that the answer to whether appellant knew Kerr was alive, when he set the car on fire, could have changed the outcome of the case. (29RT 3149-3150.) The trial court also had the same question. (29RT 3149-3150.) The presumption that the trial court acted to achieve legitimate sentencing objectives cannot be the basis to uphold the trial court's denial of the automatic motion when the record establishes that the trial court committed error by considering appellant's failure to testify when it ruled on the motion.

For the reasons above and in the Opening Brief, the trial court's denial of the automatic motion to reduce the penalty to life in prison must be reversed.

XXX

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

Appellant argued in this issue that: (1) section 190.2 was unconstitutionally overbroad; (2) section 190.3, subdivision (a), allowed for arbitrary and capricious imposition of the death penalty; (3) the penalty phase jury instructions did not guard against arbitrary imposition of the death penalty; (4) the burden of proof for the factors in aggravation should be beyond a reasonable doubt with the jury required to unanimously agree regarding these factors and that finding should be reduced to writing; (5) intercase proportionality review was required; (6) the prosecution was erroneously allowed to rely on unadjudicated criminal acts as aggravation evidence; and (7) the list of mitigating and aggravating factors properly uses adjectives.

Both appellant and respondent acknowledge that this Court has resolved the above

issues in many cases. Appellant will simply point out that his case demonstrates the arbitrary nature of the death penalty. The jury easily could have found appellant's crime to be voluntary manslaughter. This would have excluded him from receiving the death penalty.

This Court can search through the published, and unpublished appellate court decisions, and find cases in which the defendant received life in prison with facts more aggravating than the instant case. For instance, in *People v. Nazeri* (2010) 187 Cal.App.4th 1101, the defendant stabbed his wife and mother-in-law to death. He was convicted of first degree murder for both victims and sentenced life in prison without the possibility of parole. The killings were planned. One victim had nine separate wounds around the neck and fatal stab wounds to the lungs, heart, and chest. One stab wound penetrated the tissue around the eye. The other victim was also stabbed numerous times round the neck and head, and also had fatal stab wounds to the lung, diaphragm, and stomach. (*People v. Nazeri, supra*, 187 Cal.App.4th at p. 1108-1109.) The defendant's crimes in *People v. Nazeri* were more aggravating than appellant's crime. The defendant in that case killed two victims who must have suffered horribly because of the manner of death. In the instant case, Kerr was most likely unconscious when the vehicle was set on fire. (18RT 1995-1997.) The defendant in *People v. Nazeri* planned the death of the victims. Appellant talked about killing Kerr, but the decision to do so was ultimately a spur of the moment decision caused by his anger at the demeaning manner in which she referred to him. (20 RT 2236-2237, 2252-2253.)

In *In re Rozzo* (2009) 172 Cal.App.4th 40, the Court of Appeal upheld the Governor's

decision to deny the defendant parole. The defendant was found guilty of second degree murder. The defendant in that case committed a racially motivated assault upon a stranger who was walking alongside a rural road. The victim was kidnaped and severely beaten while he pled for his life. The defendant told his confederates that he was sure the victim was dead because he pushed his thumb into his Adam's apple and it burst. (*In re Rozzo, supra*, 172, Cal.App.4th at p. 45.)

The defendant in *In re Rozzo* committed a completely unprovoked, racially motivated, assault upon a complete stranger and beat him to death. It was unclear whether Kerr was strangled to death or died while unconscious as the vehicle burned. Kerr's death was less aggravating that the death of the victim in *In re Rozzo*. Appellant obviously had no justification for killing Kerr. However, there was evidence appellant's emotional vulnerability was manipulated by Kerr for her own benefit. Appellant did not kill a stranger for an utterly senseless and heinous reason.

Appellant did not discuss the above cases to make a proportionality argument regarding his sentence. The facts of appellant's case, and the facts of the above cases, simply demonstrate the arbitrary nature of the death penalty. This arbitrariness exists at all levels, from selection by the District Attorney's Office of the cases in which a death penalty is pursued to the jury's decision whether to impose capital punishment. There are no procedures which can truly eliminate the arbitrary nature of the death penalty. However, the standards argued by appellant in this issue, such as proof beyond a reasonable doubt for aggravating

factors, jury unanimity regarding those aggravating factors, and written findings regarding the aggravating factors, would all greatly assist in minimizing the arbitrary nature of the death penalty.

For the reasons above and in the Opening Brief, the judgment of guilt must be reversed.

Dated: 3/08/2012

John L. Staley

I declare under penalty of perjury that this Reply Brief contains 39,509 words. The word count was determined by using the Properties feature in Wordperfect X4.

John L. Staley

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
(People v. Brooks, Superior Court
case No. PA032918; Supreme Court
Case No. SO99274)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On March 9, 2012, I served the foregoing documents described as:

APPELLANT'S REPLY BRIEF

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Office of the Attorney General
300 S. Spring St.
Fifth Floor
Los Angeles, CA 90013

Clerk's Office
California Supreme Court
350 McAllister St.
San Francisco CA 94102-3600

Docketing/Intake Section
California Appellate Project
101 Second St.
Sixth Floor
San Francisco CA 92064

Los Angeles Superior Court
Clerk's Office
900 3rd St.
San Fernando, CA 91340

Los Angeles Superior Court
Clerk's Office-Capital Appeals Unit
210 W. Temple St.
Los Angeles, CA 90012

District Attorney's Office
210 W. Temple St., 18th Floor
Los Angeles, CA 90012

Donald Lewis Brooks
T-24668
San Quentin State Prison
San Quentin, CA 94974

Edwin Murphy
20700 Pacific Coast Highway
#6
Malibu, CA 90265

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on March 9, 2012, in San Diego, California

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

John L. Staley