IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL AUGUSTINE LOPEZ, Defendant and Appellant.	No. S099549 Alameda County Superior Court No. H-28492A

APPELLANT'S REPLY BRIEF

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

(HONORABLE PHILIP V. SARKISIAN, JUDGE, of the Superior Court)

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v.	)	No. H-28492A
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In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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I.

APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE ADMISSION OF UNRELIABLE STATEMENTS AND TESTIMONY BY THE PROSECUTION'S TWO CHILD WITNESSES

A. Introduction

Before trial appellant squarely challenged admission of testimony by six and a half-year old Sabra Baroni and almost five-year-old Michael Lopez, Jr. as lacking their personal knowledge under Evidence Code section 702.[1] (5 CT 1117.1-1117.6 [Sabra]; 5 CT 1140-1144 [Michael Jr.] 38 RT 2686-2688.) The trial court refused to hold a hearing as to Sabra and instead relied on the finding of the magistrate that she was competent to testify under section 701, and deemed Michael Jr. qualified to testify only after denying trial counsel the opportunity to question him about his personal knowledge.[2]

Respondent defends the trial court's actions by claiming that the court properly considered the issue of personal knowledge and made

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[1] All further statutory references are to the Evidence Code unless otherwise noted.

[2] Respondent repeatedly, and erroneously, refers to appellant's motions in the trial court as challenging the children's "competence." (RB 23-24.) As noted by this Court in *People v. Lewis* (2001) 26 Cal.4th 334, "Although many, including defendant, have referred to a witness's capacity to perceive and to recollect (Evid. Code, § 702) as an issue of competency to testify, the term "competency" is more precisely referring to a witness's qualification to testify under Evidence Code section 701, subdivision (b). (*Id.* at p. 356, fn. 4, citing *People v. Dennis* (1998) 17 Cal.4th 468, 525.)

appropriate findings. (RB 23-43.) In respondent's view, once that happened, it was up to the jury to decide whether or not to believe the children. Appellant's claims, according to respondent, are simply disagreements with the jury's verdicts. (RB 39, 40-41.)

As set forth below, however, respondent's arguments should be rejected for several reasons. First, respondent misconstrues the trial court's ruling as finding personal knowledge when, in fact, no such finding was made. Next, respondent mischaracterizes appellant's claim as simply quarreling with the verdict and complaining only about leading questions at trial. (See RB 32.) Respondent misreads the law on personal knowledge by equating capacity and opportunity to observe events with having actually observed them. Respondent ignores those parts of the record that demonstrate a lack of personal knowledge while at the same time misusing the record by equating the children's trial testimony that appellant injured Ashley with personal knowledge of this fact, i.e., that they observed appellant injure Ashley.

Significantly, respondent fails to address the substantial problems with the reliability of child witness testimony resulting from suggestive interview techniques, which the high court recognized in *Kennedy v. Louisiana* (2008) 544 U.S. 407, 443. As a result, respondent also avoids responding to appellant's claim that the trial court has, or should have, a gatekeeping role regarding admission of such child testimony, something that has been acknowledged or endorsed by the courts of at least six states and instead simply repeats the refrain that the issue is one for the jury to sort out.

Because the trial court erroneously refused to consider appellant's objection to the children's testimony on the ground that they lacked the requisite personal knowledge, the court also failed to address the effect of

the extensive suggestive questioning to which both children were exposed on the question of their personal knowledge. The trial court's errors in failing to properly consider the direct challenge made to the children's testimony, i.e., that they did not witness the events about which they were called upon to testify, but were merely repeating what they had been told by others, resulted in the admission of highly unreliable evidence in violation of the due process clause of the Fourteenth Amendment and the heightened reliability demanded by the Eighth Amendment.

B. The Trial Court's Rulings Denying Appellant's Motions to Exclude the Children's Testimony Were Erroneous Because the Trial Court Failed to Make a Determination of the Witnesses' Personal Knowledge Under Evidence Code Section 702 and Because the Record Does Not Support a Finding of Personal Knowledge

By refusing to conduct an inquiry into the personal knowledge of the two very young children upon whose testimony the entire prosecution case rested, the court failed in its most basic gate keeping function at trial, which is to ensure that only reliable evidence is presented to the jury.

Respondent misstates the record by claiming that the trial court found "the children's testimony reliable, trustworthy, and that it was based on their personal knowledge." (RB 22.) The trial court made no such findings. Instead, as to Sabra, the court relied on the magistrate's determination that she was "qualified" to testify (38 RT 2693), and as to Michael Jr. the court allowed him to testify after he had been questioned only about his understanding of the obligation to tell the truth. (53 RT 3666-3670.) As set forth at length in the opening brief, the preliminary hearing transcript makes clear that in ruling on the issue of Sabra's competence under section 701, the magistrate did not consider the question of personal knowledge under section 702. (See AOB 36-39.) For example,

when counsel for appellant argued at the preliminary hearing Sabra's responses made it impossible to determine what she "observed or what she saw or what happened," the magistrate did not address counsel's concern over the apparent lack of personal knowledge, but instead simply reiterated its ruling that Sabra was competent under section 701 because she understood her duty to tell the truth and she was capable of expressing herself so as to be understood. (4 CT 771-772.)

Similarly, at the Penal Code section 403 hearing when trial counsel sought to explore Michael Jr.'s personal knowledge and attempted to ask him whether anyone had told him what to say in court, the court cut him off, sustaining the prosecutor's objection that the question was the subject of cross-examination, rather than pertinent to the issue of the witness's ability to testify.

Had the trial court allowed the inquiry, as it should have, Michael Jr. would have admitted, as he did on cross-examination before the jury, that he did *not* witness his father kill Ashley and that he was only saying what others had told him to say. (53 RT 3680-3681.) That testimony clearly showed that Michael Jr. lacked the personal knowledge that the prosecution was required to show *before* he was allowed to testify. Respondent fails to address this point, instead treating Michael Jr.'s admissions on cross-examination solely as impeachment evidence that the jurors could "consider in weighing Michael Jr.'s testimony." (RB 39.) Michael Jr.'s testimony should not have been considered by the jury and should not be considered by this Court, as it was inadmissible under section 702. Respondent offers no argument why this is not the case.

Instead, citing *People v. Anderson* (2001) 25 Cal.4th 543, 573, respondent claims "there was no evidence that the children lacked the ability or opportunity to perceive the events leading to Ashley's death, and

that formed the basis of their testimony against appellant." (RB 25.) Respondent's argument is based on a selective – and inaccurate – reading of *Anderson*'s discussion of section 702. The portion of *Anderson* from which respondent quotes is taken from the Law Review Commission Comments following *section 701*. The comment distinguishes the limited capacities addressed in section 701 – to express oneself and understand the duty to tell the truth – from the capacities that are involved in a personal knowledge determination under section 702 – to perceive and recollect. As *Anderson* states, "the capacity to perceive and recollect particular events is subsumed within the issue of personal knowledge." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 573.) While those capacities may be "subsumed" in section 702, they do not define "personal knowledge," as the language of section 702 makes clear. That section does not parallel section 701 and refer to whether the witness is "capable" or "incapable" of perceiving or recollecting; rather, it frames the question as whether the witness "has personal knowledge of the matter." In this way, section 702 is about the "actuality" of the witness's personal knowledge, even if her "capacity" for such knowledge also is inherent in the requirement.

The "capacity to perceive and recollect particular events" under section 702 requires that the witness have "'a present recollection of an impression *derived from the exercise of the witness's own senses*.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 356, quoting Cal. Law Revision Com. Com., reprinted at 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 702, p. 300, italics added.) Personal knowledge of an event is what the witness *actually* perceived, not what she was *capable* of perceiving by virtue of physical ability, as the decisions in *Anderson* and *Lewis* clearly show. In both cases, this Court did not conclude its analysis of personal knowledge with a finding that the challenged witnesses had the capacity to perceive

and recollect, but looked at the evidence in the record supporting a conclusion that they *actually did* perceive and recollect the matters about which they testified.[3]

In arguing that the record supports a finding of Sabra's personal knowledge, respondent points to portions of Sabra's testimony as proof that she had personal knowledge of the subjects she was questioned about: "Rather than passively or reflexively agreeing with the prosecutor's questions, Sabra was specific in the facts that established her personal knowledge." (RB 32.) But Sabra's recollection of some facts does not establish her personal knowledge as to all the facts to which she testified. The requirement of personal knowledge is related to the "particular matter" about which a witness is called to testify, not their general competence as a witness. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1140 ["Even if a witness is not entirely disqualified for incapacity to communicate understandably or grasp the duty to tell the truth, his or her testimony on a particular matter is inadmissible if he or she lacks personal knowledge of the subject matter. (Evid. Code, § 702, subd. (a).)"].)

Respondent ignores this distinction, as shown by the fact that three of the examples cited involve subjects unrelated to the allegations against appellant, for which there was independent evidence and about which Sabra's personal knowledge was not challenged: the fact that Ashley came to live with her rather than Sabra going to live with Ashley; how many times she had seen Sandra Harris in court; and with whom she was living

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[3] Except for its citation to *Anderson*, respondent fails to dispute or even address the discussion of *Anderson* and *Lewis* in the opening brief. (AOB 41-42.)

when she turned six years old.[4] (RB 32-33.) Sabra was obviously able to easily answer these questions because she actually perceived them. On the central issues of the trial, however – whether Sabra saw appellant sexually assault and murder Ashley – the record makes clear that Sabra's words were not her own.

Respondent separately addresses the evidence of personal knowledge for these three areas of Sabra's testimony – lewd and lascivious conduct allegations, the "diaper bruise" and "the fatal blow." Appellant will respond to each separately as well.

1. The fatal blow

In the trial court, appellant moved to prevent Sabra from testifying about the circumstances of Ashley's death because she had been subjected to "brainwashing . . . to the point that it's no longer testimony from her personal knowledge." (38 RT 2688-2690.) The trial court denied the motion based on the magistrate's finding at the preliminary hearing that Sabra was competent to testify under section 701. In the opening brief appellant set forth at length the preliminary hearing proceedings and showed that Sabra's testimony could not support a finding of personal knowledge under section 702. (AOB 36-41.)

Respondent ignores the preliminary hearing testimony completely and relies instead on Sabra's trial testimony to demonstrate her personal knowledge of the events leading up to Ashley's death: "Sabra's testimony established that she was in close proximity when these events occurred since she shared a bed with Ashley." (RB 32.) According to respondent, Sabra's own testimony – which is the *only* evidence that Ashley was thrown

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[4] The fourth example cited by respondent, Sabra's testimony that she saw appellant punch Ashley "in her privates," is addressed below in section 3.

to the bedroom floor by appellant in the early morning hours of September 4, 1999 – proves that she personally witnessed the event. According to respondent, "Viewing Sabra's testimony and reluctant demeanor as a whole, the record demonstrates that she was present and witnessed appellant's violent murder of Ashley . . . ." (RB 31.) Beyond this bald assertion, however, respondent offers nothing to support a finding that Sabra witnessed appellant assaulting Ashley.

Instead, respondent returns to the argument that a witness's "opportunity to perceive events" is sufficient to establish personal knowledge. (See RB 25.) Contrary to respondent's claim, however, the fact that Sabra customarily shared a bed with Ashley in the room in which she was found in no way proves Sabra's claim at trial that she witnessed appellant commit the lethal assault.

In reviewing the testimony of a witness whose personal knowledge has been challenged, this Court looks at whether the witness's claim that she was present at the events to be recounted is plausible and corroborated. In *People v. Anderson*, *supra*, 25 Cal.4th 543, this Court pointed to the "many indicia by which a rational trier of fact could conclude that [the witness], despite her specific delusions, *was actually present* during the Mackey robbery and murder, *and had accurately perceived and recollected those events*." (*Id.* at p. 574, italics added.) These included details that were unlikely to be known by someone who was not present and were corroborated by independent evidence. Moreover, the witness was able, after a long absence from the city where the victim was killed to direct authorities to significant locations involved in the crime. (*Ibid.*)

Similarly, in *People v. Lewis*, *supra*, 26 Cal.4th 334, this Court found no error in admission of the testimony of a witness of "limited intellectual abilities," because he knew details of the crime "which were

unlikely to be known by anyone *not present*," and which were independently corroborated by the evidence. (*Id.* at p. 357, italics added.) For example, the witness led the police to where the murder weapon, a piece of wood, had been discarded, and the woodpile from which the defendant had procured it. (*Ibid.*)

In both *Anderson* and *Lewis*, the witnesses' personal knowledge was established not by the *opportunity* of a witness to perceive events, but by evidence that provided a sufficient basis for finding that the witnesses were actually present at the events about which they testified. Here, by contrast, there is nothing beyond Sabra's trial testimony that establishes her presence at the time of the fatal assault. Sabra provided no details that would be known only to an eyewitness, i.e., there is no evidence that she was actually present, nor is there independent corroboration of her trial testimony as to how, when and by whom Ashley was killed.

Respondent accuses appellant of taking "an exceedingly narrow view of the term 'corroboration.'" (RB 41.) While acknowledging that "no other witness saw appellant actually inflict the injuries on Ashley," respondent argues that the injuries suffered by Ashley corroborate the children's testimony: "The nature of the fatal injury was consistent with the attack described by the children, and inconsistent with the various explanations offered by appellant – fall against a dresser, being hit by Michael Jr. with the lid of a toy box." (RB 42.) In some cases, evidence that the fatal wounds match the witness's description of how the victim was killed could tend to show that the witness saw the killing, but only to the extent that the description demonstrates that the only source of the information about the manner of the killing was witnessing the homicide.

Here, however, simply because the fatal injuries are consistent with the story Sabra told at trial does not prove that she witnessed the infliction

of the injuries, because Sabra had another source of the information about Ashley's injuries. Sabra knew that Ashley had severe head injuries from having seen her when appellant, Harris and Strodtbeck went into the bedroom that morning and later when she was told by Detective Koller that Ashley was badly injured, and questioned about who hit Ashley on the head. (See Def. Exhs. HH & TT.)

The same is true about how the injuries were inflicted. Respondent notes that both children "testified and either demonstrated, or adopted the demonstration of the manner in which appellant held Ashley over his head before throwing her to the floor." (RB 42.) Again, respondent's reasoning is circular: Sabra's testimony that appellant threw Ashley to the floor is proof that she saw the event. This analysis fails to address the critical question in determining personal knowledge – whether she observed the event.

By paraphrasing Sabra's trial testimony, respondent tries to avoid the inescapable conclusion that the words spoken at trial are not her own. For example, respondent claims, "Sabra was in the room when appellant grabbed Ashley, hiding under the covers because she was afraid." (RB 29.) But Sabra did not say appellant "grabbed Ashley," rather, she simply responded to a leading question from the prosecutor: "Now do you remember *how he held* Ashley the night she died?"[5] (51 RT 3521, italics added.)

Respondent misstates the record by claiming, "When asked what appellant did, Sabra testified that appellant had thrown Ashley to the ground, repeating her answer three times before it became audible, and

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[5] Trial counsel's objection that the question assumed a fact not in evidence – Sabra had not testified that appellant held Ashley – was overruled. (51 RT 3521.)

confirming it a fourth time with a nod." (RB 29.) Sabra was asked, "Did he do something with Ashley? and she answered "Yes." Her first two responses to the question "What did he do?" were inaudible and thus were *not* repeats of her answer. It was only when the prosecutor asked her "What did he do when he held her like this?" while holding the Ashley-doll above his head, that Sabra answered, "Threw her on the ground." Then the prosecutor threw the doll on the ground and asked Sabra if that was what she saw. She responded by nodding. (51 RT 3522.)

As noted in the opening brief, until Sabra was confronted at trial by the prosecutor holding the Ashley-doll above his head and asking her to show him "how Big Mike held Ashley the night she died," she had never said that she saw appellant hold Ashley over his head. (AOB 81.) Nor had she ever before said that appellant threw Ashley to the ground. In addition, when assessing the source of Sabra's testimony, the court must also consider Michael Jr.'s testimony that "people" told him that his father picked Ashley up and threw her down[6], and that before he took the stand, the prosecutor used the Ashley-doll to show him how to throw it. (53 RT 3677.) It is not unreasonable to assume that Sabra was similarly coached. In the end, the fact that Sabra's trial testimony matched Ashley's injuries does not prove that she saw how and by whom they were inflicted.

Respondent argues that the timing of the injuries also corroborates Sabra's testimony. (RB 42-43.) As to the head injuries,[7] respondent cites Dr. Crawford's testimony that the skull fracture was inflicted perhaps as

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[6] Michael Jr. may have been referring to the meeting when the prosecutor asked him, "Do you remember when your dad cracked Ashley [sic] head and didn't wake up?" (53 RT 3690.)

[7] The timing of the injuries alleged to be the result of sexual assaults is discussed in section 2.

early as 12-24 hours before Ashley was seen at the hospital, but more likely within a 5-10 hour period. (47 RT 3303.) Dr. Crawford estimated the head injuries could have occurred within five hours of the first CAT scan, which was at 1:00 p.m., meaning as late as around 9:00 a.m., hours after appellant had left for work.[8] (47 RT 3303, 3338.) The fact that the fatal injury *could have been* inflicted before appellant went to work does not corroborate Sabra's testimony, it merely means that she may have had the opportunity to observe the event. As discussed above, however, a witness's opportunity and capacity to perceive does not demonstrate her personal knowledge, absent evidence that she actually observed the event.

Not only is there a complete lack of evidence from which a rational jury could find that Sabra "accurately perceived and recollected" the fatal assault (*People v. Anderson*, *supra*, 25 Cal.4th at p. 574), what evidence there is points to the opposite conclusion. Neither Sandra Harris nor Laurie Strodtbeck testified the children said anything that morning when they got up about having seen appellant enter the bedroom and throw Ashley to the floor. (43 RT 3065-3067; 58 RT 3915-3917.) That night, when Sabra was questioned by Detective Koller, she said she did not see what happened to Ashley (Def. Exh. HH), and she repeated this when she was questioned at the Calico center five days later. (Def. Exh. TT.) During two hours of testimony at the preliminary hearing Sabra never said she saw appellant inflict the fatal injuries.[9]

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[8] According to his employer, appellant came to work as usual on Friday, June 4, starting his shift at 6:00 a.m. and taking a lunch break at 10:00 a.m. (45 RT 3222.)

[9] As noted in the opening brief, early in the hearing the prosecutor asked Sabra, "Do you know what happened to Ashley?" Defense counsel's objection based on a lack of foundation was sustained. (4 CT 716.) After

Respondent must rely solely on Sabra's trial testimony because nothing she said before trial supports a finding of personal knowledge of the circumstances of Ashley's death. And it is only by ignoring the effects of suggestive pre-trial questioning – discussed further below – that respondent can argue that the trial testimony establishes that Sabra witnessed the infliction of the fatal head injury.

2. Lewd and lascivious conduct

The evidence offered by the prosecution in support of Count 3, which alleged a violation of Penal Code section 288, subdivision (b)(1), and the accompanying great bodily injury enhancement under Penal Code section 12022.8, was Sabra's trial testimony that at some unspecified time and place she saw appellant making "thrusting" motions with "his privates" and "Ashley's privates." (51 RT 3519-3520.)

Appellant argues in the opening brief that Sabra's testimony at the preliminary hearing – upon which the magistrate and the trial court based their findings that Sabra was competent to testify – was insufficient to establish that Sabra witnessed appellant sexually assault Ashley. (AOB 40-44.)

In response, respondent does nothing more than quote Sabra's trial testimony that she saw appellant making "thrusting" motions toward Ashley, and makes no attempt to explain how this testimony establishes Sabra's personal knowledge of the infliction of the genital laceration. (RB 26-27.) As discussed in connection with Sabra's testimony regarding the fatal head injuries, respondent offers no authority to support its claim that a witness's uncorroborated statements are sufficient evidence to establish her

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that, she was asked very few questions about her knowledge of violence committed against Ashley and none directly about whether she saw the fatal assault. (AOB 40-41.)

personal knowledge under section 702, especially when there is significant evidence that the witness has been subjected to suggestive questioning. Moreover, respondent fails to acknowledge that the likely source of Sabra's trial testimony was the prosecutor at the preliminary hearing showing Sabra the motion made while trying, unsuccessfully, to get Sabra to say she had seen appellant assaulting Ashley.[10] Indeed, respondent fails to even mention Sabra's preliminary hearing testimony in which she said she did *not* see this action. (4 CT 743.)

The medical testimony was that the genital tear was consistent with penetration by a man's penis within three to seven days before Ashley's death. (47 RT 3293, 3297.) The prosecution theory at trial was that the injury occurred on Sunday, May 30, between noon and 2 p.m., while appellant was at home with Ashley and Sandra Harris was at Santa Rita visiting her daughter Nicole. (68 RT 4471, 4476, 4494; see AOB 116.)

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[10] The following exchange took place at the preliminary hearing between the prosecutor and Sabra:

Q: Sabra, did you ever see big Mike holding Ashley like this . . . (indicating) . . . in front of him?

A: (Witness shakes head)

The Court: Shaking her head no.

Q: Did you ever see big Mike moving Ashley's body against him like this . . . (indicating)?

A: (Witness shakes head)

Q: Indicating sort of a back and forth motion –

A: (Witness shakes head)

Q: – in the pubic area?

A: (Witness shakes head)

The Court: Shaking her head no.

Q: You never saw that?

A: (Witness shakes head)

(4 CT 743.)

The only evidence of how the genital tear was inflicted cited by the prosecution was Sabra's testimony that she saw appellant making "thrusting" movements with his "private parts" toward Ashley's "private parts." (68 RT 4500, 4504, 4505-4506.)

Respondent goes along with the prosecutor's theory in this argument in order to argue that the injury corroborates Sabra's testimony for purposes of establishing that she saw appellant inflict the genital tear by his "thrusting." (RB 42 [discussing genital injury as corroboration of children's testimony and noting evidence that Ashley was walking awkwardly on Sunday, May 30].) Respondent fails, however, to address the fact that neither Sabra's trial testimony, nor any other evidence, establishes that she was present at the time the prosecution claimed appellant attempted to force his erect penis into Ashley's vagina, resulting in the laceration to the genitalia. On the contrary, Harris said Ashley and Michael Jr. were there when she got home from the jail at 2:00 p.m., but Sabra was not, and there was no evidence about when Sabra left. (60 RT 4016.) As noted previously, in her trial testimony Sabra did not say when or where she made her observations.

Moreover, as respondent acknowledges elsewhere in its brief in response to a different argument, Sabra allegedly told Laurie Strodtbeck that she saw appellant making the thrusting motions "in the middle of the night," meaning that it could not have been during the day on Sunday. (52 RT 3621.) Indeed, in light of this evidence, in response to Argument II, alleging insufficient evidence of the allegations of lewd and lascivious conduct as a basis for felony murder, respondent changes course and argues that the "thrusting" incident was "a separate occurrence from the Sunday afternoon incident." (RB 57-58 ["Since the Sunday incident did not occur at night, the only reasonable inference is that this was a second incident"].)

Respondent makes no attempt to explain when the "second incident" might have occurred or how Ashley could have been the victim of a second penetrating assault, but have sustained no corresponding injury.

Nor does respondent acknowledge how this shift in theory affects its argument in this claim. If the "thrusting" incident allegedly witnessed by Sabra did not happen on May 30 and was not the cause of the genital injury, then respondent is forced to speculate about how the injury was inflicted, without relying on Sabra as a witness, which is completely consistent with her lacking personal knowledge of the matter.

This is precisely what happens in the response to Argument III. Reciting the evidence in the record that supports the allegation of forcible lewd and lascivious act in Count 3 and the great bodily injury enhancement, respondent refers to the testimony of Laurie Strodtbeck, Lupe Murillo, David Smith, and Sandra Harris, but not the testimony of Sabra. (RB 62.)

Respondent misstates the record by claiming that "Debra Kavarias [Sabra's foster mother from January to July 2000] testified to statements made by Sabra regarding her observations of appellant making thrusting motions with his pelvis toward Ashley's pelvis." (RB 57.) Kavarias was questioned by the prosecutor:

Q : Did you ever ask her whether or not Big Mike had put his private parts in her private parts, for lack of a better term?

A : Yes.

Q: What was her response to that?

A: She said no, she said, not to her.

Q: Okay.

A. But –

Q: What did she say?

A: She said to Ashley.

Q: Now, did she ever tell you how she observed Ashley –

A: She – when I asked her about it, and she said that what she saw or she heard Ashley crying, and that she went and hid, but *she never told me – she didn't tell me that she observed or* –

(52 RT 3613-3614, italics added.)

Sabra's testimony about the alleged "thrusting" incident, untethered to any specific time or place and unsupported by the physical evidence, should not have been presented to the jury. This is especially true in light of the extensive suggestive questioning to which she was subjected, including the demonstration by the prosecutor at the preliminary hearing.

Respondent's complete and unexplained change of theories from one argument to the next demonstrates just how problematic Sabra's testimony is. In the end, respondent can point to nothing in the record from which a rational jury could find that Sabra was a witness to appellant sexually assaulting Ashley.

3. The "diaper bruise"

As with the lewd and lascivious acts, in discussing "the diaper bruise" respondent simply cites Sabra's trial testimony that she saw appellant punch Ashley "in her privates." (RB 28.) Again, however, there is no attempt to establish that this testimony was the product of Sabra's own observations rather than what she was told by others.

Contrary to respondent's argument, the nature of the injury does not corroborate Sabra's testimony. (RB 42.) As discussed in the opening brief (AOB 27), there was medical evidence that the diffuse area of hemorrhage around the pelvic area and lower abdomen could possibly be a secondary hemorrhage from deep bruising that came out later from the genital laceration. (47 RT 3314-3315; 56 RT 3809-3810.) Thus, because the "punch" to the diaper area is not the only possible source of the injury,

Sabra's alleged observations are not corroborated by Ashley's condition.

Even if one were to consider only the trial testimony, as respondent does, it is abundantly clear from this record that Sabra's status as the only eyewitness to the events that constituted the allegations of sexual abuse and murder of Ashley, was highly problematic. When viewed in light of the suggestive questioning to which she was exposed from the day of Ashley's death, up to and including the examination by the prosecutor at trial, the record is clear that Sabra lacked the requisite personal knowledge to allow her testimony to constitute the only evidence to convict appellant of the crimes with which he was charged and which led to the death sentence in this case.

C. Due Process Considerations of Reliability and Trustworthiness of Evidence Require an Adequate Determination by the Trial Court of a Witness's Personal Knowledge Before the Witness Testifies

Appellant argued in the opening brief that a determination of a witness's personal knowledge requires a trial court to consider the effects of suggestive questioning, especially with child witnesses and when there is, as in the present case, ample evidence that the witnesses were subjected to such questioning. (AOB 44-77.)

Respondent treats the question of the taint caused by suggestive questioning as strictly an aspect of a credibility determination and erroneously recasts appellant's argument as one of "dissatisfaction with the credibility findings made by the jury." (RB 33, 39-40.) Respondent relies on this Court's decision in *People v. Dennis*, *supra*, 17 Cal.4th at p. 525, but fails to address the distinguishing points about *Dennis* raised in the opening brief. (AOB 39-40, 42, 46.)

For example, in *Dennis*, the objection to the child's testimony was made only under section 701, not on the basis of a lack of personal

knowledge under section 702, as in the present case. Further, in *Dennis* this Court was not faced with evidence of suggestiveness like that which exists in the present case. Here, unlike in *Dennis*, trial counsel directly challenged admission of the testimony of the child witnesses on the ground that their testimony was solely the product of suggestive questioning. These critical differences are ignored by respondent.

Moreover, appellant argued that if the decision in *Dennis* is read to hold that the effects of suggestive questioning are not to be considered as part of the determination of a witness's personal knowledge under section 702, and that the determination is strictly one of credibility, then this Court must reconsider the decision in light of the extensive research that such testimony may be immune to the traditional means of evaluating credibility. (AOB 46.) Again, respondent offers no counter argument.

Respondent also fails to address appellant's argument that the determination of personal knowledge requires consideration of the effect of the child witness's exposure to information from outside sources in order to comport with the reliability standards of the due process clause and the Eighth Amendment. Instead, respondent is dismissive of appellant's argument, describing it as "a generalized assertion that children are not reliable, citing to dicta in the Supreme Court decision of *Kennedy v. Louisiana*, *supra*, 544 U.S. at p. 443, noting 'heightened concerns' over the reliability of evidence in child rape cases." (RB 39.)

Appellant's argument cannot be so easily dismissed. It was neither general nor did it rely only on the high court's dicta in *Kennedy*. As set forth at length in the opening brief, courts and legislatures throughout the country have recognized and responded to the well-established body of knowledge about the danger of suggestive questioning of children. (AOB 46-55.) Respondent offers nothing in response, except to reiterate its glib

and mistaken position that appellant's claim "comes down to a claim based entirely on credibility determinations made by the jury." (RB 39-40.) In respondent's view, the right of cross-examination cures whatever problems may inhere in child testimony that results from suggestive questioning. (RB 33-35, 38-39.) Yet, respondent neither acknowledges nor refutes the authorities presented in the opening brief regarding the imperviousness of tainted memories to cross-examination. (AOB 48-50.)

As the authorities cited by appellant make clear, due process considerations of reliability require that when challenged under section 702, a witness's personal knowledge must be established before the jury may be permitted to consider the testimony. (AOB 44-45.) Respondent's refusal to address appellant's argument in a meaningful way suggests that there is no viable response. In this way, respondent simply sidesteps the serious concerns presented here about the reliability of testimony of young children who have been subject to repeated, suggestive questioning.

The statements and testimony of Sabra and Michael Jr., which comprise the evidence of appellant's guilt, lack the reliability demanded by the due process clause of the Fourteenth Amendment and the Eighth Amendment. This Court should reverse the convictions and death sentence.

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II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FIRST DEGREE MURDER CONVICTION OR THE SPECIAL CIRCUMSTANCE FINDING OF TORTURE MURDER

Appellant argues in the opening brief that the record is insufficient to sustain the first degree murder conviction based on theories of premeditated and deliberate murder, torture murder, or felony murder, and that there is insufficient evidence of the torture-murder special circumstance. (AOB 89-112.) Respondent counters that, while this Court need only find sufficient evidence to support one theory of first-degree murder, the record contains sufficient of all three theories. (RB 45-60.)

A. Lack of Substantial Evidence of Deliberate Premeditated Murder

In the opening brief, appellant notes that the prosecutor never offered the jury a theory of premeditated and deliberate murder, but also acknowledges that the prosecutor's argument is not evidence and the jury may consider theories not offered therein. (AOB 92.) Respondent argues, and appellant does not disagree, that this is "in no way determinative of the sufficiency of the evidence." (RB 45.) The complete inability of the prosecutor to articulate a theory of first degree murder is, however, indicative of the lack of such evidence in the record.

1. Insufficient evidence of planning

The record contains insufficient evidence to support a finding that the killing was planned, "the most important prong of the [*People v.*] *Anderson* [(1968) 70 Cal.2d 15] test." (*People v. Alcala* (1984) 36 Cal.3d 604, 627.)

Respondent dismisses appellant's argument that killing Ashley in front of two witnesses and within earshot of Sandra Harris shows a lack of

planning by arguing that appellant obviously assumed that the children would not be credited as witnesses and that Harris would protect him. (RB 47.) Respondent misses the point, however, which is that appellant's actions must be evaluated for what they reveal about his state of mind. Certainly, as respondent argues, appellant *could have* discounted Sabra and Michael as credible witnesses, and believed that Sandra Harris would not betray him, but such a calculation takes away substantially from the force of the evidence as indicative of planning. In addition, given that appellant had access to Ashley many other times during the week, had he planned the homicide, he could easily have done it away from any witnesses. The fact that he allegedly chose to kill Ashley when he was not alone with her cuts against a finding of planning. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 202 [defendant taking "deliberate advantage" of mother's absence indicates premeditation and deliberation].)

Relying on this Court's decision in *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 201, respondent argues that the "'methodical infliction' of injuries and continuing and escalating acts of abuse" that occurred during the week leading up to Ashley's death support a finding of premeditation and deliberation. (RB 47.) But, as appellant notes in the opening brief in distinguishing *Whisenhunt* from the present case, missing from this case is a comparable manner of inflicting injuries, like that by the perpetrator in *Whisenhunt* who "methodically poured hot cooking oil onto various portions of [the victim's] body, repositioning her body so as to inflict numerous burns throughout her body, including her genital region." (*Id.* at p. 201; see AOB 97.) In *Whisenhunt*, that evidence demonstrated the mental state of premeditation and deliberation; respondent offers nothing to counter the lack of similar evidence in this case.

Instead, respondent cites appellant's failure to act in the face of

Ashley's injuries over the course of the week, which might show neglect or recklessness, but fails to explain how this is indicative of planning for purposes of proving premeditation and deliberation. (RB 47-48.) Similarly, it is unclear how evidence that appellant failed to alert Sandra Harris of Ashley's injuries, but instead put her back in the bed and went to work, or tried to dissuade Harris from taking Ashley to the hospital is indicative of planning behavior. (RB 48.)

2. Insufficient evidence of motive

Respondent echoes the prosecutor's argument that appellant's motive for killing Ashley was because he resented having her stay at the apartment and considered her a financial burden (RB 48-49), but ignores the fact that the financial aspect of appellant's objection to having Ashley stay with them was eliminated when he got the money Jesse Lopez had given to Laurie Strodtbeck. (AOB 94.)

3. Insufficient evidence of manner of killing

Respondent argues, as the prosecutor did, that the manner of killing demonstrates appellant's intent to kill. (RB 49.) As discussed in the opening brief, however, intent to kill alone does not equal premeditation. First degree murder requires a premeditated and deliberate intent. (*People v. Bender* (1945) 27 Cal.2d 164, 181, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Respondent fails to explain which facts about the killing show that it was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Respondent cites *People v. Pensinger* (1991) 52 Cal.3d 1210, for the proposition that "the victim's young age and resulting inability to defend

herself can be considered" in determining premeditation. (RB 49.) In *Pensinger*, it was not simply the victim's young age, but the fact that the victim was so young she could not walk or crawl or struggle against the defendant, that was relevant to this Court's finding that the manner of killing showed premeditation. The defendant, after driving the five-month-old victim to a remote dump, removed her from her car seat and carried her to the place where he then committed various violent acts that led to her death. The vulnerability of the child, which made such actions by the defendant unnecessary, were cited by this Court as evidence supporting an inference that the killing was preconceived. (*Id.* at p. 1238.) There is nothing analogous about the manner of killing posited in the present case.

Respondent also claims this case is similar to *People v. Whisenhunt*, *supra*, 44 Cal.4th 174, "in terms of reasoning." (RB 49.) As previously discussed, however, the "progression of bruises" on Ashley's body over the course of the week preceding her death cannot be compared to the pouring of hot oil over specific parts of the victim's body, as in *Whisenhunt*. (See *ante*, at p. 23.) It was the methodical nature of the injuries that raised the inference of premeditation, and is precisely what is missing from the present case.

The record contains insufficient evidence of planning, motive or manner of killing to support a finding of premeditated and deliberate murder.

B. Lack of Substantial Evidence of Murder by Torture

Appellant argues in the opening brief that the record contains insufficient evidence of torture based on the failure of the prosecutor to prove that the murder was committed with the requisite wilful, deliberate and premeditated intent to inflict extreme and prolonged pain. Instead, as appellant argues, the record shows that Ashley was a tragically abused

child, but not that she was tortured. (AOB 97-101.)

Respondent relies first on the condition of Ashley's body to establish sufficient evidence of the requisite intent to torture. (RB 51.) Listing the injuries to the body, respondent argues that the severity of the injuries and the violence required to inflict them demonstrate the intent to inflict cruel suffering. (RB 51-52.) Respondent acknowledges that the nature of the victim's wounds is not determinative of the issue of intent to torture (*People v. Davenport* (1985) 41 Cal.3d 247, 268), but offers no other circumstances that demonstrate the requisite intent to cause suffering.

Respondent argues that appellant's failure to seek medical treatment for Ashley after she was rendered unconscious by the skull fracture and his later attempts to dissuade Sandra Harris from taking Ashley to the hospital demonstrate an intent to cause pain and suffering in addition to death. (RB 54.) Respondent cites no authority for this assertion and fails to discuss the decision in *People v. Walkey* (1986) 177 Cal.App.3d 268, cited in the opening brief, in which the court rejected a similar argument. (See AOB 102.)

In *Walkey*, the defendant was convicted of the first degree torture murder of his girlfriend's two-year-old son who suffered a blunt force trauma wound that perforated his intestines. The child had various other injuries, including bite marks, a partially healed fractured rib and a large number of bruises. On the day of the child's death, the defendant was seen carrying the child who was motionless, unresponsive and wrapped in sheets or a blanket. The defendant bathed the child who was covered with bruises and cuts and was unconscious or in a depressed state, yet failed to seek medical attention for the child. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 275.)

The Court of Appeal reversed the conviction, finding insufficient

evidence of torture, despite evidence of the severity of the wounds, which were inflicted over a period of time, testimony that the injuries would have caused the child pain, and evidence that defendant resented having to take care of the child. (*People v. Walkey*, *supra*, 177 Cal.App.3d at pp. 275-276.) The court found that the evidence did not support a finding that appellant's intent was to cause the child to suffer and thus did not constitute torture. The same reasoning and conclusion apply here.

Respondent cites *People v. Gonzales* (2011) 51 Cal.4th 894, for the assertion that appellant's "ongoing maltreatment of [Ashley] in the face of her obvious suffering is evidence from which jurors could have inferred an intent to inflict 'cruel suffering.'" (RB 53.) The four-year-old victim in *Gonzales* was subjected to habitual torture at the hands of her aunt and uncle, culminating in being held down in a bathtub of scalding water and then burned with a hair dryer. The victim's body bore signs of injuries consistent with being hung by her neck, handcuffed and beaten with a brush. (*People v. Gonzales*, *supra*, 51 Cal.4th at pp. 901-902.) Similarly, in *People v. Pensinger*, *supra*, 52 Cal. 3d at p. 1240, also cited by respondent, the cuts inflicted by the defendant on the five-month-old victim were, as described by this Court, "carefully made with a sharp instrument, leaving no jagged edges, and showing no evidence of either hesitation or frantic slashing." (*Ibid.*)

There is simply no legitimate comparison between the facts of this case and those in *Gonzales* and *Pensinger*. Respondent's attempts to analogize the facts of the present case to those cases that involve physical evidence of the most extreme cruelty and sadistic behavior should be rejected.

Missing from this case is the additional evidence of intent to inflict pain for a sadistic purpose that exists in the cases cited by respondent and

others in which the torture murder theory has been sustained on appeal. For example, in *People v. James* (1987) 196 Cal.App.3d 272, the three-year-old victim sustained numerous injuries, including broken bones and bruises, in the five months leading up to her death. The fatal wounds were blunt force trauma to the abdomen resulting in significant internal injuries, including a ruptured pancreas, as well as bruises less than 12 hours old over her head and body. (*Id.* at p. 293.) The Court of Appeal made clear that its decision was not based on the death-causing injuries, which were described as "undeniably severe," but, following the decisions in *People v. Steger* (1976) 16 Cal.3d 539, and *People v. Walkey*, *supra*, 177 Cal.App.3d 268, were not of themselves sufficient to support the torture-murder theory. (*People v. James*, *supra*, 196 Cal.App.3d at p. 294.) In addition to the multiple injuries of various ages and the fatal trauma, there was evidence from numerous individuals who testified to seeing the defendant treat the child in an extremely cruel and sadistic manner. This testimony, along with evidence that the defendant had forced the child to ingest alcohol and tobacco before she died, supported an inference that his intent was to cause the child pain and suffering. (*Ibid.*)

Respondent cites *People v. Proctor* (1992) 4 Cal.4th 499, for the argument that the evidence of "ongoing acts of cruelty inflicted over the course of the week," supports a finding of cruelty and also relies on Dr. Rogers's testimony that, while the cause of death was the skull fracture, the blunt injuries to the body "contributed to the death." (RB 55.) *Proctor*, however, is not analogous to this case. The defendant in *Proctor* argued that the non-lethal knife cuts made to the victim should not be considered torture because they did not contribute to her death. This Court, in rejecting the argument, noted that "it is the continuum of *sadistic* violence that constitutes the torture." (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 530-531,

italics added.) As this Court observed,

> 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.

(*Id.* at p. 532.)[11]

Again, it is precisely that evidence – of a sadistic intent in the infliction of the injuries – that is missing in the present case. This is starkly demonstrated by respondent's own recitation of the facts in the cases of *People v. Jennings* (2010) 50 Cal.4th 616, 645 ("evidence of deliberate starvation, 'along with the evidence of chronic and acute physical abuse'"), and *People v. Mincey* (1992) 2 Cal.4th 408, 435 ("'the length of time over which the beatings occurred, the number of injuries inflicted, the variety of objects with which the injuries were inflicted and the fact that the victim was made to eat his own feces,' established the requisite planning to inflict cruel pain and suffering"). (RB 56.) Respondent can point to no similar behavior in this case.

Respondent argues that the "pattern of injuries . . . combined with the lack of any evidence that would support a 'heat of passion' argument"

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[11] The "continuum of violence" cited by the court in *Proctor* included the following: "the victim was subjected to strangulation by two different methods, her wrists were bound so tightly as to cut into her skin, she was beaten in the face severely enough to have caused her eyes to be swollen shut and her lips to be swollen, she received severe blows to other parts of her body, and she suffered repeated, incision-type stab wounds to her neck, chest, and breast area." (*People v. Proctor*, *supra*, 4 Cal.4th at p. 531.)

support a finding that "appellant intended to inflict cruel suffering." (RB 52.) Beyond this bald assertion, however, respondent offers nothing to support the claim. For example, respondent cites the injury to Ashley's ear, which *could have been* caused by tearing or squeezing the ear. (RB 51, citing 47 RT 3293-3294, italics added.) In addition, in response to a question by the prosecutor, Dr. Rogers agreed that the bruising to labia *could have been caused* by squeezing or pinching. (56 RT 3814, italics added.) In fact, because there was no evidence as to how these two injuries happened, no assumptions can be made about the mental state with which they were inflicted. Respondent can point to nothing in this case that brings it within the universe of cases in which a finding of torture murder rather than child abuse has been upheld.

Despite respondent's efforts to cast it as something different, in the end the only argument made in support of a finding of torture is that Ashley suffered painful injuries in the days leading up to the fatal head injury. (RB 51-56.) As the cases discussed here and in the opening brief make clear, however, that evidence, in the absence of proof of an intent to inflict pain for a sadistic purpose, is insufficient to support a finding of torture.

C. Lack of Substantial Evidence of Felony Murder

In the opening brief, appellant argues that the record lacks substantial evidence that the murder was committed in the perpetration of the felony of lewd and lascivious acts by force under Penal Code section 288, subdivision (b)(1). (AOB 104-110.)

The prosecutor's theory of felony murder appeared to be that either the felony – a forcible lewd and lascivious act – occurred when appellant was changing Ashley's diaper on the morning of the fatal head injury, or the lewd act resulted in the genital laceration, which was alleged to have

occurred the previous Sunday.

Respondent contends that the genital injury "likely . . . occurred on Sunday, May 30." (RB 57.) Recognizing the problem with having the felony occur five days before the fatal injury was inflicted, respondent's argument appears to be that if appellant was molesting Ashley throughout the week before she was killed, and *possibly fondled* her on Friday morning before the fatal head injury was inflicted, that is sufficient evidence to support a finding of felony murder. This argument is contrary to both the record and to well settled felony-murder law.

In support of the claim that appellant was sexually abusing Ashley, respondent cites Sabra's testimony that she saw appellant making "thrusting" motions with his private parts toward Ashley's private parts. As discussed in connection with Arguments I and III, respondent's theory of whether this testimony corresponds to the genital injury sustained by Ashley changes from argument to argument in its brief. Here, because Laurie Strodtbeck testified that Sabra told her she saw appellant making the "thrusting" motions at night, respondent adopts the position that Sabra's observations must have occurred sometime other than Sunday and therefore constitute a "second incident" of abuse. (RB 58 ["Since the Sunday incident did not occur at night, the only reasonable inference is that this was a second incident"].) In addition to the complete lack of any evidence of a injury associated with this alleged "second incident," respondent also cannot connect this incident to a specific time, and certainly cannot link it to the morning when the fatal injury was inflicted.

Similarly, Dr. Rogers's testimony that squeezing of the genitals could account for darker bruises on the labia and evidence of bruises on the insides of Ashley's thighs, referred to by respondent (RB 58), may be evidence that Ashley was being abused, there is no evidence that the abuse

was inflicted by appellant, nor that it was associated in any way with the killing for purposes of a finding of felony murder.

Finally, respondent opines that based on evidence that appellant changed Ashley's diaper in the mornings, even though her diaper was not routinely changed in the morning before she came to stay with Harris and appellant, the jury could "reasonably find that he continued to fondle Ashley under the guise of caring for her." (RB 58.) Respondent's arguments consist of nothing more than sheer speculation, and "speculation is not substantial evidence." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 661.)

Respondent offers no evidence, and indeed there is none, to show that appellant committed a forcible lewd act on the morning of June 4, at the time he allegedly threw Ashley to the floor. Respondent states, "Since Ashley was crying just before appellant threw her to the floor, the jury could reasonably have found that the fondling occurred that morning, or that appellant at least intended to continue fondling her when he entered the room." (RB 58-59.) Respondent's explanation for why Sabra and Michael, who were allegedly witnesses to appellant's actions in the bedroom that morning, did not report seeing appellant changing Ashley's diaper is that they may have been asleep, or "if they were awake and Ashley began crying when appellant entered the room, he may have avoided touching Ashley on that occasion." (RB 58.)

According to respondent, either appellant "fondled" Ashley long before the fatal injury – actions that do not constitute a killing during the commission of a forcible lewd act – or appellant "intended" to fondle Ashley, but did not, in which case no felony was committed. Thus, respondent's argument is that, even if appellant did not commit a forcible lewd act at the time the fatal injury was inflicted, the fact that he may have

molested Ashley at another time during the previous week is sufficient for a finding of felony murder. Respondent posits two legal theories to support this argument, neither of which is viable.

First, respondent argues that felony and the killing were part of "one continuous transaction," the existence of which is a jury question. (RB 59, citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1141; *People v. Sakarias* (2000) 22 Cal.4th 596, 624.) Neither case cited by respondent stands for the proposition that a scenario in which the commission of a felony and a killing are separated by a period of days, during which the victim is separated from the defendant, can be deemed a continuous transaction. In *Gutierrez*, the victim, Stopher, was killed in the midst of a burglary of Rose V.'s home. This Court noted, "There is no suggestion that *any appreciable time elapsed* between the time defendant and Joseph forced their entry into Rose V.'s home and subdued her and defendant's forcible entry into the master bathroom where he killed Stopher." (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1141, italics added.) Here, either the lewd act was committed five days before, as the prosecutor and respondent – at times – argue, or it happened at some other unspecified time in the week before Ashley died. Either way, there was an appreciable period of time between the commission of the felony and the killing, making this case distinguishable from *Gutierrez*.

In *People v. Sakarias*, *supra*, 22 Cal.4th 596, the killing took place during a burglary and robbery, many hours after the defendants had entered the victim's house. The issue in *Sakarias* was whether the trial court erred in telling the jury, in response to a question, that if the defendant entered with the intent to steal, the burglary and the killing were part of one continuous transaction. This Court held that the question of continuous transaction is one for the jury, but that the error was harmless. (*Id.* at pp.

623-624.)

Sakarias is not relevant. Not only was the jury in the present case not instructed on the issue of continuous transaction, there is no basis for such a finding in a case in which there is a period of several days between the felony and the killing, during which the victim and the defendant were physically separated and the victim was not otherwise restrained. No evidence supports the theory that the alleged felony and the killing were part of a continuous transaction.

The second theory posited by respondent is that of "continuous control." According to respondent, "Because Ashley was living in his home, she was constantly under his control, and most certainly was directly under his control on Friday morning, June 4. Such continuous control can support a finding of felony murder, even where there is a break between the underlying crime and the killing." (RB 59, citing *People v. Thompson* (1990) 50 Cal.3d 134.)

Thompson, as discussed by appellant in the opening brief, is completely inapposite. (See AOB 108-109.) The defendant was convicted of felony murder based on the commission of a lewd act and murder of the victim during the course of the same evening, probably within an hour or two of each other. During the entire period, the victim was under the defendant's control, and for much of the time was either bound, locked in a trunk, or both. (*People v. Thompson*, *supra*, 50 Cal.3d at pp. 171-172.)

Here, of course, the lewd act allegedly occurred five days before the killing. During that time, appellant went to work and left Ashley with Laurie Strodtbeck and Sandra Harris, as well as other care givers. Under these facts, a theory of continuous transaction for purposes of the felony-murder rule is completely untenable.

D. The Record Contains Insufficient Evidence to Support a True Finding of the Torture-Murder Special Circumstance

For the reasons set forth in section C., the record contains insufficient evidence to support the special circumstance of torture murder because the prosecution failed to prove that if appellant was responsible for the injuries inflicted on Ashley, it was done with the requisite mental state.

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III.

THE PROSECUTION FAILED TO ADDUCE SUFFICIENT CREDIBLE, RELIABLE EVIDENCE TO SUPPORT THE CONVICTION FOR FORCIBLE LEWD AND LASCIVIOUS ACTS ON A CHILD UNDER 14 AND THE GREAT BODILY INJURY ENHANCEMENT

Appellant argues that the record contains insufficient evidence that he inflicted the genital injuries that constituted the basis for the finding of forcible lewd and lascivious act and great bodily injury. (AOB 113-127.) Respondent counters with little more than conjecture in an attempt to implicate appellant.

A. Evidence of the Injuries to the Genital Area is Insufficient to Support a Finding that Appellant Committed a Lewd and Lascivious Act

As was done in the opening brief, the two injuries – the genital laceration and genital bruising – will be addressed separately based on the testimony of the medical doctors, one of whom opined that the injuries could have been the result of two separate incidents. (47 RT 3300.)

1. Genital laceration

In response to this argument, respondent abandons the claim made in Argument I that Sabra was a witness to the assault that caused the genital laceration and relies instead on the fact that Ashley was within appellant's care during the period of time when the injury could have been inflicted, and on Sandra Harris's observations of Ashley. (RB 61-62.) Respondent's argument distorts the record, ignores critical facts and in the end fails to demonstrate that appellant was responsible for the injury.

Dr. Crawford estimated that the genital laceration occurred "anywhere from three to five or six or seven days" before Ashley's death. He also testified "I would estimate it as in the order of 72 hours to perhaps

as long as a week." (47 RT 3297.)

According to the prosecution theory at trial, which respondent adopts, Ashley sustained the genital laceration on Sunday, May 30, 1999, between the hours of noon and 2 p.m. when she was with appellant while Sandra Harris was visiting Nicole at the jail. The prosecutor argued that the laceration was caused by appellant forcing his erect penis into Ashley's vagina, resulting in what the prosecutor described as a "horrific injury." (68 RT 4471, 4476, 4494.) No witness testified that this happened, and the physical evidence does not support such a scenario.

Dr. Crawford described the "area inside of the genitalia area called the posterior fourchette. Basically this area was ripped and torn, basically, from where her vagina opens, and the tear extends to the margin of her anus right where the sphincter is." (47 RT 3291-3292.) The object that caused the injury was "inserted very violently into her genitalia. And in the course of doing that, it tore the tissue." (47 RT 3292.) The tearing of that much tissue would have been "quite painful," according to Dr. Crawford. (47 RT 3297.) "If something had happened that morning, you would expect bleeding. You'd see things that happened, things that would be clearly visible because it was a recent injury." (*Ibid.*)[12]

Yet, when Sandra Harris got home at 2:00 – which would have been, according to the prosecution theory, no more than two hours after infliction of this injury – she noticed only that Ashley was "walking funny," and when she changed Ashley's diaper that afternoon, saw redness and bruising. (59 RT 3963.) It is not possible to reconcile Ashley's behavior and her physical condition as described by Harris with the ripped and torn tissue

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[12] In the testimony quoted here, Dr. Crawford was referring to the morning of Ashley's death, but the same opinion undoubtedly applies equally to infliction of the injury on the previous Sunday.

described by Dr. Crawford having been inflicted within the previous two hours. Respondent implicitly concedes this when, in discussing the genital laceration as evidence to support the felony murder theory, it refers only to diaper bruising, not a laceration. (RB 57 ["in light of Harris's observations regarding the first appearance *of the diaper area bruising*, it seems likely to have occurred on Sunday, May 30, while Ashley was in appellant's care"] italics added.) That is not the injury described by Dr. Crawford.

Respondent's attempts to explain away this damning fact fall far short. "While Ashley's initial suffering may have somewhat abated by the time Harris returned on Sunday, hence the lack of evidence that she was crying when Harris saw her . . . her continued fussiness was likely the result of constant irritation of the laceration from urine and feces in addition to the ongoing physical abuse evidenced by the growing constellation of bruises over her entire body." (RB 62.) Respondent fails to explain how, within two hours – at the most – of having sustained such a significant injury Ashley would not be crying or showing any signs of discomfort beyond "walking funny," and "fussiness." Respondent responds to the lack of evidence of any bleeding on Sunday by citing Laurie Strodtbeck's claim that she saw "a little bit of blood on [Ashley's] diaper" on *Wednesday* (RT 3059-3060), but fails to explain how that in any way proves that the injury was inflicted three days earlier. (RB 62.)

Not only did no one see appellant inflict the injury on Sunday (or at any time), no one who saw Ashley without her diaper after that saw a recent laceration. On Wednesday, Laurie Strodtbeck saw Ashley's "private area" which she described as "bruised badly, very badly. It was red and purple and blue." (43 RT 3059.) Strodtbeck did not describe a laceration. Similarly, Leonora Murillo, who babysat for Ashley during the week, was shown Ashley's "bottom area" while Sandra Harris was changing her diaper

on Thursday, and described "bruising" and "big, dark, swollen area," (41 RT 2944-2945), but did not say she saw a laceration. Both witnesses were shown People's Exhibit No. 7 and testified that the photograph – which does not show a recent laceration – depicted the condition of Ashley's diaper area as they observed it. (43 RT 3059 [Strodtbeck]; 41 RT 2945 [Murillo].)

Recognizing that Sabra's trial testimony that she saw appellant making "thrusting" motions with his "privates" and "Ashley's privates," does not correspond to the Sunday afternoon time frame[13], respondent abandons the prosecutor's trial theory and instead claims that Sabra was referring to a "separate occurrence from the Sunday afternoon incident" as part of "ongoing trauma" that caused the genital bruising. (RB 63.) Because Sabra never said when this happened, whether appellant and/or Ashley were clothed, or even whether there was physical contact, this testimony does not support a finding of lewd and lascivious conduct with great bodily injury.

In the absence of any direct evidence that appellant assaulted Ashley, respondent relies heavily on the assumption that the injury occurred "within the time frame that Ashley was under appellant's care." (RB 64.) If access to Ashley during the window of time Dr. Crawford estimated the injury could have been inflicted was as incriminating as respondent argues, then Harris and Strodtbeck were likely suspects. Ashley was with Strodtbeck both before Strodtbeck dropped her off on Saturday, and later during the week, she was with Strodtbeck and Harris while appellant was at work.

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[13] As noted, according to Sandra Harris, Sabra was gone from the apartment when Harris returned on Sunday afternoon. (60 RT 4016.) In addition, Strodtbeck claimed that Sabra told her she saw appellant doing this to Ashley in the middle of the night. (52 RT 3621.)

As argued in the opening brief, the medical evidence is far more consistent with the genital injury having occurred before Ashley came to stay with Sandra Harris and appellant. Given Dr. Crawford's estimate that the injury was as much as seven days old when he saw Ashley on Friday, June 4, 1999, it could have happened as early as the previous Friday, while Ashley was with Laurie Strodtbeck. (47 RT 3297.) By Sunday, the laceration would have started to heal, with hemorrhaging into the surrounding tissue causing the bruising in the diaper area observed by Harris. By riding a tricycle with no seat and without a diaper, as appellant allegedly reported to Harris, Ashley could have easily reinjured the laceration. This would account for her symptoms on Sunday – "walking funny" and a red, bruised appearance – and would also explain why the symptoms were not more severe.

In order to implicate appellant, however, the prosecutor was forced to rely completely on the word of Laurie Strodtbeck that Ashley was unhurt when she was dropped off on Saturday.[14] Respondent must also cast its lot with Strodtbeck, even though, as respondent admits elsewhere in the brief, she was hardly the ideal care giver.[15]

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[14] Respondent notes: "Laurie Strodtbeck reported that Ashley was fine when she was dropped off at appellant's home on Saturday. Harris likewise made statements to that effect." (RB 62.) Sandra Harris did not see Ashley's diaper area on Saturday so she was not in a position to say whether Ashley was "fine" when she was dropped off. (59 RT 3960; 60 RT 4018.)

[15] Respondent ignores Laurie Strodtbeck's obvious shortcomings except when they reflect poorly on appellant. In arguing that appellant had a motive to kill Ashley, because he did not want to take care of her, respondent argues: "[Appellant and Harris] actively refused to care for her twice, appellant apparently preferring to leave the 21-month-old in the care of her 16-year-old [sic] drug-addicted aunt rather than allow Harris to care

Respondent's description of Strodtbeck's activities during the time she had Ashley from Wednesday to Saturday – with the help of her friend, Kelly Reiss, Laurie took care of Ashley, keeping her on her usual schedule (RB 4) – is misleadingly benign. Respondent fails to mention that Strodtbeck took Ashley to a billiards parlor on Friday night (44 RT 3129), that she and Kelly Reiss were methamphetamine users (43 RT 3080) and that male friends of Strodtbeck were staying at the house while Ashley was there (40 RT 2866; 42 RT 2984), because those facts, combined with the physical evidence, make it far more likely that she was assaulted before she was dropped off with appellant and Harris on Saturday.

Based on the record in this case, there are no reasonable circumstances under which the jury could find that appellant was the person who inflicted the genital injury.

2. Genital bruising

If the diaper bruise was the result of trauma separate from the genital laceration, as Dr. Crawford opined and the prosecutor argued, respondent asserts that it was caused by 1) the incident described by Sabra in which she claims to have seen appellant punch Ashley in the genitals[16]; 2) the incident described by Sabra in which she claims to have seen appellant making "thrusting" motions toward Ashley; 3) ongoing trauma "such as pinching." (RB 63.)

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for her for a few days." (RB 48.)

[16] As noted in the opening brief, it is not clear from the record if the prosecutor relied on this alleged incident as proof of a lewd and lascivious act. During his closing argument, the prosecutor simply re-read the testimony of Dr. Crawford regarding the fact that the bruising of Ashley's genital area could have been the result of a punch to that area. (68 RT 4490.) Appellant will address it because respondent relies on it as evidence in support of Count 3.

Without citation to the record, respondent argues that the genital bruising "would be indicative of a fresh injury on Sunday in combination with ongoing trauma. The most severe bruising, however, was likely caused by the incident Sabra witnessed where appellant punched Ashley in the genitals." (RB 63.)

As appellant argued in the opening brief, if the genital bruising was intended to constitute a basis for the conviction for Count 3, there is insufficient evidence of the required specific intent to sustain such a conviction. Penal Code section 288, subdivision (b)(1) requires that the touching of a child be done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child. (CALJIC No. 10.42; 6 CT 1369.) Although the touching itself need not be sexual in nature, it must be committed with the specific intent to sexually arouse either the defendant or the child. (See *People v. Martinez* (1995) 11 Cal.4th 434, 442; AOB 123.)

Respondent misconstrues appellant's discussion of this requirement. (RB 63 ["Appellant's discussion of 'innocent' grooming and 'normal healthy upbringing' behaviors is preposterous"].) Appellant's argument is that certain acts are not so obviously sexual or obscene that the act itself provides evidence of the sexual motivation. The act of punching a child in the genital area does not in and of itself prove that the touching was done with the requisite lewd intent.[17] The circumstances of the act must be

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[17] Respondent claims, "Appellant's proffered alternatives – a bike with a broken seat, being kicked by Michael Jr., or being poked with a stick by Rouslen – are either inconsistent with the injuries or not credible." (RB 63) Contrary to respondent's assertion, appellant did not proffer alternative means by which the genital bruising could have happened, but addressed the record as presented by the prosecution, i.e., that the bruising was caused by punching the genital area.

evaluated in order to establish whether or not the perpetrator had the specific intent to sexually arouse himself or the victim. It is the union of the act and the intent that constitutes the offense. (See *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1324.)

Respondent neither responds to the authorities cited by appellant in the opening brief nor cites any authority to the contrary. Nor does respondent point to any evidence in the record to show a sexual motive for the alleged "punching." Instead, respondent refers to the genital laceration, which was consistent with insertion of a male penis. (RB 63.) That, however, is potentially a separate injury, the motivation for which cannot necessarily be ascribed to the "punching" injury.

B. The Record Contains Insufficient Evidence That Appellant Inflicted Ashley's Genital Injuries

Appellant argues in the opening brief that the record contains insufficient evidence that he was responsible for the infliction of the genital injuries to Ashley because he was not the only person with access to the victim during the time frame when the injuries could have been inflicted. (AOB 126.)

Respondent returns to the argument that the genital injuries must have been inflicted on Sunday, May 30, when appellant was with Ashley at the apartment and Harris was at Santa Rita. (RB 64.) As appellant has set forth in here and in Argument I, the physical evidence does not support such a scenario. Those arguments will not be repeated here.

The record contains insufficient evidence to support the conviction for Count 3 and the section 12022.8 enhancement and reversal of both is required.

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IV.

THE ERRONEOUS ADMISSION OF IRRELEVANT AND INFLAMMATORY EVIDENCE THAT APPELLANT BROKE SABRA BARONI'S LEG AND THREATENED TO KILL HER RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH SENTENCE

Appellant argues that the trial court erred in allowing the prosecutor to present extensive testimony that six months before Ashley was killed appellant broke Sabra Baroni's leg and threatened to kill her and Sandra Harris if she told anyone. The trial court failed to weigh the prejudicial effect of the evidence; had it done so, the court should have excluded it under section 352 because the prejudice far outweighed any probative value. (AOB 128-151.)

Respondent contends that the evidence of the broken leg was admissible to establish Sabra's fear of appellant and to explain why her testimony at the preliminary hearing was different than her trial testimony. If the ruling was error, respondent argues that it was harmless beyond a reasonable doubt because the evidence of appellant's guilt was overwhelming, because the trial court properly admonished the jury as to the limited admissibility of the evidence and because appellant elicited evidence that cast doubt on the truth of the allegations. (RB 65-74.)

Respondent does not, however, dispute that the trial court failed to address appellant's section 352 objection or attempt to defend the trial court's failure to consider the prejudicial impact of the evidence about Sabra's broken leg and appellant's alleged threats. Nor does respondent address any of the cases appellant cites in support of his argument that the prejudicial effect of the evidence outweighed its probative value. Respondent relies on the limiting instructions delivered by the trial court to

argue that any error was harmless, yet does not respond to appellant's argument that, in light of the extensive evidence admitted about Sabra's broken leg, the limiting instructions were inadequate to prevent the jury from considering the evidence for its truth. As a result, respondent offers this Court no basis upon which to find that the trial court's actions did not result in reversible error.

A. The Trial Court Abused Its Discretion In Admitting Evidence of Sabra's Broken Leg

In the opening brief, appellant argues that the evidence of appellant's alleged threat to Sabra was inadmissible because at the time the court ruled the prosecutor could question Sabra about the broken leg and threat evidence and present witnesses to testify about Sabra's statements, there was no aspect of Sabra's testimony that was explained by her fear of appellant, and additionally, at the time the court ruled that the broken leg evidence was admissible, the prosecution had not yet demonstrated that Sabra's testimony was inconsistent. (AOB 136-140.)

Appellant's argument relies on the cases of *People v. Yeats* (1984) 150 Cal.App.3d 983, and *People v. Brooks* (1979) 88 Cal.App.3d 180. Since appellant's brief was filed, this Court has disapproved both *Yeats* and *Brooks* on this point, holding that "in order to introduce evidence of the witnesses' fear, the prosecution was not required to show that their testimony was inconsistent with prior statements or otherwise suspect." (*People v. Valdez* (2012) 55 Cal.4th 82, 135, 136 & fn. 33, citing *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086.)

If the evidence is deemed relevant to Sabra's credibility, the trial court erred in not excluding it under section 352 because it is more prejudicial than probative.

Appellant argues in the opening brief that the record does not

affirmatively show that the trial court exercised its discretion by weighing the probative value of the broken leg evidence, an argument respondent fails to address. (AOB 141-142.) Respondent argues only that the evidence was admissible to establish that Sabra was fearful of appellant and thus relevant to her credibility, but does not address the question of section 352 weighing. (RB 70.) As respondent acknowledges, trial counsel objected to admission of the broken leg evidence on the grounds that it was irrelevant, and that it should be excluded as more prejudicial than probative under section 352. (RB 67, citing 38 RT 2707.) Respondent's silence on the issue of the trial court's failure to conduct any weighing suggests either a misapprehension of the two-step analysis required in a section 352 determination or a concession that the trial court failed to exercise its discretion and rule on the question.

A ruling on the admissibility of this evidence has two components, (1) whether the challenged evidence satisfied the "relevancy" requirement set forth in section 210, and (2) if the evidence was relevant, whether under section 352, the probative value of the evidence was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The record must demonstrate that "the trial court understood and fulfilled its responsibilities under section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

The admissibility of evidence of a witness's fear on the issue of their credibility is subject to evaluation under section 352. (*People v. Avalos* (1984) 37 Cal.3d 216, 232.) When evidence of a witness's fear is relevant, the jury is "entitled to know not just that the witness was afraid, but also, *within the limits of Evidence Code section 352*, those facts which would enable them to evaluate the witness' fear." (*People v. Olguin* (1994) 31

Cal.App.4th 1355, 1369, italics added.)

Here, the trial court made the first step in the section 352 analysis by ruling that the evidence was relevant to Sabra's credibility, but it did not rule on the second. In the recent case of *People v. Paniagua* (2012) 209 Cal.App.4th 499, the Court of Appeal reversed the conviction based on the erroneous admission of evidence admitted over defendant's section 352 objection, without any section 352 analysis. The trial court in *Paniagua* evaluated the proffered evidence only on the issue of its authenticity – part of the first step in the section 352 analysis – but did not weigh the probative value of the evidence against its prejudicial impact. Thus, the Court of Appeal found no discretion was exercised and the trial court's ruling was error. (*Id.* at pp. 886-887.)

The same is true in the present case, in which the trial court made only the first part of the determination of the admissibility of the broken leg and threat evidence, ruling that it was relevant to Sabra's credibility. As argued in the opening brief, the trial court's statements make clear that it believed that any impeachment of Sabra by the defense would "open the door" to admission of the broken leg evidence. None of the court's statements regarding the admissibility of the evidence refers to assessing the prejudicial impact of the evidence, but only to whether admission was triggered by trial counsel's questioning of the witness. (See, e.g., 38 RT 2703 [court observes that evidence is "probably going to come in in redirect"]; see also 38 RT 2706 ["It's hard for me to imagine, if she's cross-examined, it won't come up in redirect"]; 38 RT 2716 ["We'll just wait and see what the cross-examination is, and it may well be – I don't mean to prejudge this – it may be likely that the evidence would come in, if there is evidence of inconsistencies in her testimony. It just depends. We'll have to hear the cross-examination"].) In response to cocounsel's objection under

section 352 (38 RT 2705), the court noted "I know I have Mr. Chettle's objection. Notwithstanding, I can't imagine it won't come in as redirect." (38 RT 2706.)

The court's response to trial counsel's complaint that the ruling had the effect of precluding impeachment also suggests admission of the broken leg evidence was automatic: "It puts you in a very difficult position, I agree, and I'm sure it was a difficult decision for you to decide whether you were going to go into that area or not." (51 RT 3573.) This is clearly how the prosecutor understood the court's ruling: "Your ruling pretrial was if there is any impeachment, it can be gone into as a result of her state of mind and/or fear. Once there was impeachment done, the barn door was opened." (51 RT 3572; see also 51 RT 3511 [prosecutor states, "if, on cross-examination, things come out indicating the fear factor or anything like that, the Pandora's box is wide open and I'm jumping in with both feet"].)

The court in *Paniagua* also cited, as evidence of a lack of the exercise of discretion, the trial court's "absolute silence" on the subject of sanitizing the proffered evidence. (*People v. Paniagua*, *supra*, 209 Cal.App.4th at p. 886.) Similarly, in the present case, trial counsel's suggestion of how to limit the damage from the proposed evidence was never mentioned by the court. (38 RT 2708; 2716.) Further, the trial court's failure to evaluate or even mention the extensive nature of evidence produced by the prosecution, discussed below, is a clear indication that no weighing of the prejudicial effect of such evidence was done by the court. The failure to exercise discretion also may constitute an abuse of discretion. (See, e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 861, overruled on another ground by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

A meaningful analysis of the evidence under section 352 should have resulted in exclusion of the broken leg and threat evidence because, as discussed in the next section of this argument, the prejudicial impact of the evidence far outweighed its probative value. The trial court's failure to conduct such an analysis constitutes a complete lack of the required exercise of discretion and was error.

If the trial court is deemed to have conducted the requisite weighing process, then the court abused its discretion in admitting the extensive evidence of Sabra's broken leg because the probative value was greatly outweighed by the prejudicial effect of the evidence. Had the court intended that the evidence be used merely to explain Sabra's changed testimony, all that was needed was Laurie Strodtbeck's testimony that Sabra told her appellant broke her leg, and not the many other witnesses and records that were ultimately admitted.

Respondent's failure to address this aspect of the court's ruling, and its decision to move directly into a discussion of prejudice under the federal constitutional standard can only be read as a concession that if admission of the evidence was error, it violated the due process clause of the Fourteenth Amendment.[18] (See AOB 149-150.)

B. The Trial Court's Error In Admitting Evidence Of Uncharged Criminal Conduct Was Prejudicial And Requires Reversal Of Appellant's Convictions And Death Sentence

In the opening brief, appellant argues that the erroneous admission of the broken leg and threat evidence so infected the trial as to render

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[18] In Argument IV (B), respondent argues that the broken leg evidence was relevant to Sabra's testimony "and therefore admissible." (RB 70.) In section (C), respondent argues that "any error in its admission is harmless beyond a reasonable doubt." (RB 71.)

appellant's convictions fundamentally unfair under the due process clause of the Fourteenth Amendment. (AOB 150.) The United States Supreme Court has distinguished "ordinary trial error" from those errors that violate due process, such as the prosecutor's knowing use of false evidence or failure to disclose evidence under *Brady*. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646-647.) The distinction made by the court is that false evidence "may profoundly impress a jury and may have a significant impact on the jury's deliberations"; likewise, the manipulation of evidence caused by a *Brady* violation, is "likely to have an important effect on the jury's determination." (*Ibid.*) Appellant submits that this precisely describes the effect in the present case of the erroneous admission of the broken leg and threat evidence.

The prosecution's case against appellant was extremely thin, resting as it did on the highly questionable testimony of a very young child. The only other evidence came from Sandra Harris and Laurie Strodtbeck, the other two adults who had as much, if not more, access to Ashley in the last days and hours of her life. Evidence that appellant broke Sabra's leg by throwing her to the floor undoubtedly made a profound impression on the jury and had a significant effect on the jury's decision.

Respondent cannot meet its burden to show that the erroneous admission of this evidence is harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. This Court must determine on the basis of its "'own reading of the record and on what seems to [the court] to have been the probable impact . . . on the minds of the average jury,' [citation], whether [evidence of the broken leg and threats] w[as] sufficiently prejudicial to [appellant] as to require reversal." (*Schneble v. Florida* (1972) 405 U.S. 427, 432; accord, *Harrington v. California* (1969) 395 U.S. 250, 254; *People v. Anderson* (1987) 43 Cal.3d 1104, 1128.)

Framing the question as the high court did in *Schneble* – would the "minds of the average jury" have found the state's case significantly less persuasive had the testimony been excluded – the answer is clearly "yes." (*Schneble v. Florida*, *supra*, 405 U.S. at p. 432.) Without evidence that appellant had previously committed a grievous assault on another child in his care, the jurors had only Sabra's tentative, insubstantial and highly unreliable claim that appellant assaulted and killed Ashley. With the broken leg evidence, however, the prosecution's claim that it was appellant rather than Harris or Strodtbeck became much more compelling.

Respondent argues that if the evidence was erroneously admitted, the error was harmless because the jury was advised of the limited nature of the evidence by the court's instructions, and because appellant effectively impeached the claim that appellant broke Sabra's leg and threatened her. (RB 72-74.) Respondent is wrong on both counts.

Evidence of Sabra's statements accusing appellant of breaking her leg and threatening her was admissible only as non-hearsay evidence relevant to her credibility. Testimony admitted for a proper credibility purpose under section 780 is deemed non-hearsay and is not admitted for the truth of the matter asserted. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.)

As noted above, the trial court made no mention of the volume of evidence presented on the issue of Sabra's broken leg, despite its ostensible admission solely as "state of mind" evidence. Respondent is also silent on the topic, offering neither argument nor authority for admission of the testimony of six different witnesses who testified to hearsay statements by Sabra regarding her broken leg and the alleged threats. In addition, Dr. Crawford was permitted to testify at length about his examination of Sabra, his belief that she had been abused and his opinion that her leg was

intentionally broken. The court even went so far as to admit the medical records of the broken leg. (People's Exh. 55.) Remarkably, respondent offers no justification for admission of evidence of this type and volume.

Instead, respondent argues that any error was harmless beyond a reasonable doubt because the trial court told the jury that the broken leg evidence was admitted only as it bore on Sabra's state of mind. (RB 72-74.) Beyond the bare recitation of instances in the record of the court's limiting instructions, respondent makes no argument, cites no authority, and has no response to the cases and argument cited in appellant's opening brief that the improper admission of the broken leg evidence was prejudicial error.

The limiting instructions in this case could not begin to overcome the force of the evidence that all but demanded that the jury consider the truth of the allegation that appellant broke Sabra's leg and threatened to kill her. "The naive assumption that prejudicial effects can be overcome by instructions to the jury [citation] all practicing lawyers know to be unmitigated fiction. [Citation.]" (*Krulewitch v. United States* (1949) 336 U.S. 440, 453.)

This Court recognized the impossibility of a jury obeying a limiting instruction about the use of fear evidence in *People v. Hamilton* (1961) 55 Cal.2d 881. There, the Attorney General argued that evidence of the murder victim's fear of her husband was not prejudicial because the jury was told the statements were admissible only as to her state of mind. This Court rejected the argument and observed, "It is difficult to believe that even the trained mind of a psychoanalyst could thus departmentalize itself sufficiently to obey the mandate of the limiting instruction. Certainly a lay mind could not do so." (*Id.* at p. 896, fn. omitted.)

Similarly, in *People v. Guerrero* (1976) 16 Cal.3d 719, this Court

reversed a murder conviction because the trial court erroneously admitted evidence of an unrelated rape committed by defendant. The court found the evidence prejudicial "beyond a shadow of a doubt," and went on to observe, "No limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds the picture of defendant's role in raping a 17-year-old girl . . . 'The net effect to the jury was to paint a sign on (defendant) which said 'rapist.'" (*Id.* at p. 730, citation omitted.)

Echoing the holding in *Guerrero*, the Court of Appeal in *People v. Dellinger* (1984) 163 Cal.App.3d 284, reversed the defendant's conviction for the murder of his two-year-old stepdaughter after the trial court erroneously admitted evidence of prior cocaine use and evidence that two weeks before her death, the victim suffered a spiral fracture caused by someone twisting her leg. Rejecting the Attorney General's contention that the error was not prejudicial in part because a limiting instruction was read to the jury, the court, paraphrasing *Guerrero*, noted the futility of a limiting instruction in erasing from the jurors' minds the picture of a "'cokehead' brutally twisting the leg of an innocent toddler until it snapped." (*Id.* at p. 300.) Respondent offers no basis for this Court to find that the limiting instructions in this case were any more effective than the ones in *Guerrero* and *Dellinger* in preventing the jurors from considering for their truth allegations that appellant broke Sabra's leg and threatened to kill her and her grandmother.

Respondent also argues that admission of the evidence was harmless beyond a reasonable doubt because the defense effectively undercut its credibility:

> [A]ppellant extensively cross-examined Sabra and the other witnesses in an effort to demonstrate that Sabra's statements implicating appellant were planted by family members. Appellant also clearly established that Sabra and Michael Jr.

> were returned to appellant and Sandra Harris based on a conclusion by children's services that the broken leg was the result of an accident. Additionally, the jurors viewed the two video-taped interviews of Sabra containing statements inconsistent with her trial testimony. ¶ In light of the extensive impeachment efforts on cross-examination, the admission of the agency finding that the break was accidental, and particularly in light of the repeated instructions to the jury that the evidence was being admitted for a limited purpose, any error in its admission is harmless beyond a reasonable doubt.

(RB 74.)

Respondent's own argument shows that the danger that the jurors would consider the evidence that appellant broke Sabra's leg and threatened to kill her for its truth is not merely theoretical. By claiming that cross-examination and defense efforts to impeach the prosecution evidence of the broken leg rendered the erroneous admission of the evidence harmless, respondent necessarily treats the broken leg evidence as offered for its truth and offers no reason why the jury would not have done the same. As respondent points out, the evidence was extensive and contested by the defense in the same manner as other evidence at trial. The obvious conclusion to be drawn by the jurors – as respondent's own argument suggests – is that it was their job to determine the truth of the these allegations against appellant along with the others presented by the prosecution. Indeed, if respondent is confused about this, there can be little doubt at least one of the jurors was as well. Further, as noted in the opening brief (see AOB 149), the prosecutor argued that the allegations were true by referring to Sabra as "another victim of Michael Lopez" (68 RT 4483), a point respondent fails to address.

Respondent's argument in support of a finding of harmless error assumes that the jurors did not believe that the allegations about the broken

leg and threat were true. If, as is far more probable, the jurors took as true the fact that appellant intentionally broke Sabra's leg and threatened to kill her and Harris six months before he was accused of killing Ashley in the same manner, appellant did not receive a fair trial. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." (*Old Chief v. U.S.* (1997) 519 U.S. 172, 180.) This description aptly describes the effect of the admission of evidence of the broken leg and threat on the fairness of appellant's trial.

The erroneous admission of this evidence requires reversal of the convictions. In addition, at the penalty phase the jury was erroneously instructed that this evidence could be considered as aggravating evidence. (See Argument X, *post.*)

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V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

In the opening brief, appellant argues that the failure to require the jury to agree unanimously on the theory of first degree murder was erroneous, and that the error denied him his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense. (AOB 152-163.) Respondent initially asserts that the contention is waived because appellant failed to object at trial. (RB 75.) Respondent cites no authorities to support its waiver claim, and such a claim is unfounded. (Pen. Code, § 1259 ["the appellate court may . . .review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 75-76.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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VI.

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 164-170.) Respondent initially asserts that the contention is waived because appellant failed to object at trial. (RB 76.)

Respondent cites no authorities to support its waiver claim, and such a claim is unfounded. Appellant's failure to object to the trial court's instructions is of no moment. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel (*People v. Williams* (1999) 21 Cal.4th 335, 340), and since no accusatory pleading charging appellant with first degree murder had been filed, the court lacked subject matter jurisdiction to proceed with that charge (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368).[19]

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[19] In *People v. Toro* (1989) 47 Cal.3d 966, overruled on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3, this Court recognized a limited exception to this rule. *Toro* held that defense counsel could waive the jurisdictional bar in order to allow the defendant to be convicted of a lesser but not included offense. The exception was designed for the defendant's benefit, to provide the jury the broadest range of options supported by the evidence and allow the defendant to be convicted of a less serious offense if that is what the evidence showed. The exception has no application here, where the uncharged offenses were not lesser offenses but ones which, unlike the charged offense, could subject the defendant to a sentence of death.

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 76-77.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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VII.

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

Appellant argues in his opening brief that the torture-murder special circumstance fails to perform the narrowing function required by the Eighth Amendment and fails to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those in which it is not. (AOB 171-176.)

Respondent cites decisions of this Court that have rejected these claims. (RB 77-78.) The issue is joined and no further briefing is necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

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VIII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court's decisions rejecting these claims but asked that they be reconsidered. (AOB 177-192.) Respondent cites decisions of this Court that have rejected these claims. (RB 78-80.) The issue is joined and no further briefing is necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

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IX.

THE TRIAL COURT IMPROPERLY COERCED A DEATH VERDICT BY REFUSING TO ADDRESS MULTIPLE ASSERTIONS OF DEADLOCK AND FAILING TO DISMISS A JUROR WHO COULD NO LONGER FUNCTION PROPERLY AND IMPARTIALLY

Appellant argues in the opening brief that the death judgment was coerced by the actions of the trial court in refusing to address multiple assertions of deadlock over nine days of deliberations, by failing to respond to concerns of the jurors about their personal circumstances, and by refusing to dismiss a juror who could no longer deliberate. (AOB 193-214.)

Respondent counters that the trial court did not abuse its discretion in refusing to declare a mistrial, nor did the court err in refusing to discharge Juror No. 8. Respondent denies that the cumulative effect of the trial court's actions was coercive. (RB 81-89.)

Respondent's argument should be rejected because it ignores the coercive aspects of the trial court's actions toward the deliberating jurors and instead treats the issue as simply one of the court's discretion to order jurors to continue deliberating. Further, respondent's position that the trial court's refusal to discharge Juror 8 *at the request of the prosecutor*, was not error, is not only unseemly, it is legally indefensible.

Finally, respondent's position that the jury's penalty verdict was not coerced ignores the difficulty the jury had in reaching a decision – deliberating for nine days before finally reaching a death verdict, twice declaring they were deadlocked – even after convicting appellant of the torture murder of a young child and hearing aggravating evidence of other violent criminal activity. After the first four days the jurors declared a deadlock. (6 CT 1459-1460.) Ordered by the court to continue

deliberating, they did so for two more days before once again declaring they were "a deadlocked jury, with no hope of resolution!" (6 CT 1469.) At that point, after six days of deliberation and having taken at least four votes, the jury was evenly split on the issue of penalty. (83 RT 5199-5201.)

On the ninth day of deliberations, the last court day before one of the jurors was scheduled to leave on a prepaid vacation, and on the same day that the court refused the request of a distressed juror to be released from the jury, the jury finally reached a verdict. The effects of the trial court's coercive actions and its error in refusing to discharge Juror No. 8 cannot be ignored by this Court, and reversal of the penalty determination is required.

A. The Trial Court's Responses and Failure to Respond to the Jurors' Multiple Declarations of Deadlock and Concerns About Their Personal Circumstances Were Coercive

Respondent argues that the trial court did not abuse its discretion in refusing to declare a mistrial after the jury twice advised the court that it was deadlocked. (RB 83-84.)

As respondent notes, this Court has held in several cases that a trial court does not abuse its discretion by ordering jurors to deliberate further (RB 83-84, citing *People v. Bell* (2007) 40 Cal.4th 582, 616; *People v. Rodriguez* (1986) 42 Cal.3d 730, 774; *People v. Sandoval* (1992) 4 Cal.4th 155, 194-197.) As appellant argues in the opening brief, however, it was the combination of the trial court's actions – and failure to act – that created the coercive atmosphere that ultimately led to a death verdict. (AOB 200-206.) In addition to the two times the court refused to declare a mistrial after the jurors announced they were deadlocked, the trial court also failed to respond to inquiries by the jurors concerning their personal circumstances: Juror No. 5 informed the court of an upcoming pre-paid vacation, and one of the alternates, Juror No. 15, asked to return to work.

As respondent admits, neither request was acknowledged by nor responded to by the court. Respondent speculates that the jurors likely inferred from the court's silence and refusal to release the alternates that there were alternates available, should one of the jurors need to be released. (RB 89.) Respondent also cites the jury's continued deliberations and requests for clarification of instructions after each refusal by the trial court to declare a mistrial as support for the trial court's assessment that further deliberations were justified. (RB 84, 89.)

The fact that the jury continued to deliberate is also consistent with a belief that they had no other choice – the trial court's actions had made clear that the court was not going to release them for any reason, not deadlock, not a juror's vacation, nor a juror's extreme distress.

Respondent notes that at the time of the second deadlock, one of the jurors, Juror No. 3, expressed some possible disagreement with the foreperson's assessment that the jury was hopelessly deadlocked, and cites this as support for the trial court's decision to order further deliberations. (RB 84; see 83 RT 5202-5203.) Because the trial court made no further inquiry of Juror No. 3 or of any other jurors, but simply instructed the jury to continue their deliberations, it is difficult to assess the significance of Juror No. 3's statement. Moreover, this was not the only time the jury declared a deadlock, nor is it the sole basis for the claim of coercion.

As appellant argues in the opening brief, the trial court's actions – refusing to respond to the concerns about their personal circumstances expressed by the jurors, refusing to declare a mistrial after two declarations of deadlock and refusing to discharge a juror in obvious distress – resulted in coercive and undue pressure upon the jury to reach a verdict. Actions by a trial court that suggest to a jury that they will be kept until they reach a

verdict have deemed coercive in the context of an "*Allen* charge,"[20] and are thus relevant in assessing the court's actions here.[21] (See, e.g., *Tucker v. Catoe* (4th Cir. 2000) 221 F.3d 600, 611 [relevant consideration in reviewing an *Allen* charge is "suggestions or threats that the jury would be kept until unanimity is reached"]; *People v. Aponte* (N.Y.App.Div. 2003) 306 A.D.2d 42, 45-46 [recognizing coercive impact of an instruction that presents the jurors with the prospect of unending deliberations unless and until a verdict was reached]; *State v. Williams* (S.C. Ct. App. 2001) 344 S.C. 260, 265 [acknowledging the coercive effect of court's implying the jury would have to deliberate indefinitely].)

Respondent does not address the authorities cited by appellant in the opening brief in support of the claim of coercion (ee AOB 199-206; 210-214), and fails to offer this Court a basis for concluding that the trial court's actions were not coercive.

B. The Trial Court's Refusal to Discharge a Juror Who Had Become Incapacitated and Requested to Be Taken Off of the Case Denied Appellant His Right to Trial By a Fair and Impartial Jury

The trial court abused its discretion by refusing to discharge Juror No. 8 after she made clear her inability to perform a juror's functions. (*People v. Jablonski* (2006) 37 Cal.4th 774, 807.) Respondent's assertion

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[20] "*Allen* charge" refers to an instruction to a deadlocked jury under *Allen v. U.S.* (1896) 164 U.S. 492.

[21] As the Tenth Circuit Court of Appeals observed, "Even if the district's court's comments did not constitute an instruction (*Allen* or otherwise), its remarks still had the potential to coerce the jury, and, as coercion is the primary concern with the giving of an *Allen* instruction, the overall *Allen* analysis would still be applicable." (*U.S. v. McElhiney* (10th Cir. 2001) 275 F.3d 928, 941.)

that the claim is waived is not only legally incorrect, it is peculiar, as it puts respondent in the position of defending on appeal the denial of its own request at trial.[22]

As this Court has held, the reason for the forfeiture rule is that, "[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." [Citation.] (*People v. Collins* (2010) 49 Cal.4th 175, 226-227.) Here, the issue was brought to the court's attention by the prosecutor who urged the court to dismiss Juror No. 8 because of her obvious distress. (83 RT 5211-5212.) Defense counsel's addition of comments to the prosecutor's argument (see, e.g., 83 RT 5212) demonstrates their agreement with the position of the prosecutor. Certainly the court was made aware of the arguments in favor of dismissing the juror and had the opportunity to correct or avoid its erroneous ruling at the time. The claim was preserved, not forfeited.

Respondent attempts to distinguish the present case from *People v. Thompson* (2010) 49 Cal.4th 79, in which this Court upheld the discharge of a juror who asked to be dismissed because she was in extreme emotional distress during the penalty phase deliberations. (*Id.* at p. 137.) Respondent argues that, unlike the juror in *Thompson*, Juror No. 8 "did not state that she was unable to participate or come to a decision." (RB 88.) An obvious

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[22] Because the state did not prevail in the trial court, the doctrine of judicial estoppel, which prevents a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding, cannot be invoked. (See *New Hampshire v. Maine* (2001) 532 U.S. 742, 749.) The theory underlying the doctrine certainly applies, however: "Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts." (*Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037, citations and internal quotes omitted.)

difference is that the court in *Thompson* specifically asked the juror if she was *able* to continue deliberating; here the court asked Juror No. 8 only if she was "*willing* to continue." (83 RT 5210, italics added.) As this Court stated in *Thompson*, the issue there "was not whether [the juror] was *unwilling* to deliberate, but rather, based on her extremely distressed state, whether she was *unable* to deliberate." (*People v. Thompson*, *supra*, at p. 139, original italics.)

On the question of whether she was able to continue to deliberate, Juror No. 8 told the court she had been living with "a level of intolerable stress" for days, that was "affecting every part of my life . . . my job, my health." She felt that she "was going to snap," and "woke up crying in the night." (83 RT 5209-5210.) Respondent fails to explain how this description of Juror No. 8's mental state at the time she asked to be excused differs in any meaningful way from the juror in *Thompson* who was deemed unable to continue deliberating because of her "extremely agitated emotional state." (*People v. Thompson*, *supra*, at p. 137.)[23]

Moreover, it was the *prosecutor* who expressed his concern over Juror No. 8's mental state, observing that "it seems to me, Your Honor, somebody who wakes up crying in the middle of the night because of the

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[23] Respondent states, "While, as noted, the prosecutor asserted that she was on the verge of crying, the court's own observations were to the contrary." (RB 88.) What the record shows, however, is that the prosecutor stated, "I don't know if you were looking at her, judge. I think she did indicate reluctance. When you said would you go back, she almost broke down in tears. I could see the lips quivering." The court responded, "I didn't see that." (83 RT 5211.) It appears that the trial judge did not see that the juror was on the verge of tears because he was not looking at her, not because she was not visibly emotional as respondent suggests. Again, respondent is in the position not only of arguing a position on appeal diametrically opposed to the state's position at trial, but even challenging the veracity of statements made by the prosecutor.

stress factor, she has the mental makings of somebody under immense stress and medically unqualified to keep continuing." (83 RT 5212.) The veteran prosecutor added, "Never heard of jurors waking up in the middle of the night crying. It's a first for me." (*Ibid.*) Respondent makes no attempt to justify its complete repudiation of the state's position at trial.

Respondent also fails to address the ramifications of the trial court's stated intention to discharge Juror No. 8 if she were to ask again without any additional showing – "[i]f she asks to be excused again *for the reasons she's indicated*, I'm going to grant her request." (83 RT 5212, italics added.) Having determined that Juror No. 8 had made a sufficient case for discharge – as evidenced by the court's stated intention to dismiss her if she asked again without any additional showing – the trial court abused its discretion by sending her back to deliberate further.

The court's actions resulted in a coerced death verdict that should not be permitted to stand.

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X.

THE TRIAL COURT'S RESPONSE TO THE DELIBERATING JURORS' QUESTION ABOUT EVIDENCE OF ACTS OF VIOLENCE COUPLED WITH THE PROSECUTOR'S ARGUMENT ALLOWED THE JURORS TO CONSIDER IN THEIR PENALTY DETERMINATION EVIDENCE THAT WAS NOT ADMISSIBLE AS AGGRAVATION AND WHICH THEY WERE NOT REQUIRED TO FIND TRUE BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL RIGHTS

In the opening brief appellant argues that the court's response to the juror's question during penalty phase deliberations, coupled with the prosecutor's argument, erroneously allowed the jurors to consider evidence admitted at the guilt phase as evidence in aggravation in deciding appellant's punishment. (AOB 215-232.)

Respondent counters that the trial court's response was appropriate and the jurors were correctly instructed. (RB 90-98.) Respondent's argument rests, however, on readily distinguishable authority and an erroneous reading of the record.

A. The Trial Court's Response to the Jury's Question and the Prosecutor's Argument Were Misleading and Erroneous

The jury was instructed by CALJIC No. 8.87, which listed five incidents of unadjudicated violent criminal activity under Penal Code section 190.3, factor (b), and instructed that they could not consider evidence of other criminal activity as aggravation. (83 RT 5174.)

After hearing the prosecutor's argument urging them to consider evidence of other unadjudicated acts of violence from both phases of trial, including evidence that was admitted only against Sandra Harris at the guilt phase, the jury asked the court for clarification:

> Can any acts of violence be considered as an aggravating circumstance or are we limited to the 5 acts of violence listed on 8.87 of the jury instructions? "A juror may not consider any evidence of any other criminal acts as an aggravating circumstance" vs. C8841 [sic] "you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise."

(6 CT 1462.)

As argued in the opening brief (AOB 217-219), the court's response, to which trial counsel objected, was erroneous because it told the jurors that while they could not use the evidence of "any acts of violence," i.e., evidence other than the five incidents listed in CALJIC No. 8.87 *as an aggravating factor*, they were not foreclosed from considering the evidence as a basis for deciding in favor of the death penalty. The distinction made by the court – between consideration of evidence as "an aggravating circumstance" which the jurors were told was limited to the five acts listed in CALJIC No. 8.87, and consideration of evidence "in determining which penalty is to be imposed on the defendant," for which they "shall" consider all the evidence from both phases of trial – was reinforced by the prosecutor's question to the jury: "What is the appropriate penalty for the evidence you have before you *and* the factors in aggravation and mitigation?" (81 RT 5117, italics added.)

The trial court's response is contrary to California law governing the penalty phase, which permits the jury to consider evidence relevant to the penalty determination only if it falls into one of the statutory aggravating factors or is a mitigating factor under Penal Code section 190.3. Nonstatutory aggravation is not admissible, meaning that the jury may not consider or weigh guilt phase evidence that does not fall under section 190.3 as factor (a) a fact or circumstance of the crime or a special circumstance; factor (b) criminal activity involving the use or threat of force

or violence or factor (c) a prior felony conviction.

The trial court's response to the jury's question, coupled with the prosecutor's argument, improperly permitted the jury to consider non-statutory aggravating evidence, and to use evidence of unadjudicated criminal activity without finding it true beyond a reasonable doubt.

Respondent's reliance on this Court's decision in *People v. Lewis* (2001) 25 Cal.4th 610, is misplaced and respondent's interpretation of the issue – "essentially, appellant's complaint is that the instruction was incomplete" – demonstrates a misunderstanding of appellant's argument. (RB 92-93.)

In *Lewis*, one of the incidents of violent criminal activity admitted under factor (b) was not included in the list of incidents under CALJIC No. 8.87. Defendant argued on appeal that its omission from the jury instruction resulted in a failure to inform the jury that it had to find the incident true beyond a reasonable doubt before it could consider it as aggravation. The incident had been inadvertently left off the prosecutor's original notice of factors in aggravation from which the trial court compiled the list under CALJIC No. 8.87. (*People v. Lewis*, *supra*, 25 Cal.4th at pp. 665-666.)

This Court found that the instruction was not erroneous, only incomplete, and that it was trial counsel's responsibility to request a more complete instruction as to the missing incident. (*People v. Lewis*, *supra*, at p. 666.) Further, the court found that there was no reasonable possibility the jury misunderstood the requirement that it could only use the incident as a factor in aggravation if it found it to be true beyond a reasonable doubt. (*Id.* at pp. 666-667.)

Lewis is easily distinguishable from the present case. First, unlike the evidence erroneously considered by the jury in this case, there the

incident that was omitted from the list of under CALJIC No. 8.87 was statutory aggravation that was not challenged by the defendant.

Second, in *Lewis* this Court found no reasonable likelihood that the jury understood the instruction to mean that the omitted incident could be considered as aggravation whether or not it was found true beyond a reasonable doubt. Either the jury believed that it could not consider the omitted incident as a factor in aggravation because is was not "any of such alleged criminal activity" described by CALJIC No. 8.87, which would be beneficial to defendant. Or, if the jury believed it could consider the omitted factor in the same manner as the other evidence of violent criminal activity presented by the prosecution at the penalty phase, it would also have understood that it could not do so unless it found the incident true beyond a reasonable doubt. (*People v. Lewis*, *supra*, 25 Cal.4th at pp. 666-667.)

The same assumptions cannot be made in this case. Unlike the present case, in which the jury specifically asked about the apparent contradiction between CALJIC Nos. 8.87 and 8.85, in *Lewis* there was no jury question and no reason to believe the jury might consider evidence of other crimes as aggravation. The court's response and the prosecutor's argument negated any possible limiting effect because they allowed the jury to consider all of the guilt phase evidence, even if it did not constitute statutory aggravation. Further, by distinguishing "other acts of violence" from the five incidents listed in CALJIC No. 8.87, the court's response also eliminated the requirement in that instruction that uncharged acts of violence be proved beyond a reasonable doubt.

Respondent faults appellant for not objecting to the proposed CALJIC No. 8.87 instruction, or requesting inclusion of the additional incidents, which respondent claims "apparently were overlooked." (RB

92.) Appellant did not object to CALJIC No. 8.87 at trial because it was not the instruction that was the problem – it was the prosecutor's argument, the court's rulings on appellant's objections to the argument and the court's response to the juror's question that created the error.

Moreover, as discussed in more detail below, the error was not in the failure to include the additional incidents in CALJIC No. 8.87, but rather in permitting the jury to consider as aggravating factors guilt-phase evidence of defendant's conduct that was not noticed as an aggravating factor under, or subject to the substantive and proof requirements of, Penal Code section 190.3, factor (b).

B. The Jury's Penalty Determination Was Not Properly Confined to Consideration of Aggravating Evidence Under the Statutory Factors and Instances of Violent Criminal Activity that Were Proved Beyond a Reasonable Doubt

As set forth in the opening brief (AOB 221-229), because of the errors at the penalty phase, the following incidents of violent acts were impermissibly considered by the jury in making the penalty determination.

1. Allegations of violent acts against Sabra from the guilt phase

In his penalty phase argument, in the course of contrasting the aggravating and mitigating evidence, the prosecutor referred to, inter alia, "assaults against Sabra" as part of the aggravating evidence. (81 RT 5093-5094.) While it is true, as respondent notes, that trial counsel did not object to the prosecutor's argument at the time (RB 97), the real damage from the argument came later when the court's response to the jurors' question informed them that they could use as aggravation evidence that was not admissible under Penal Code section 190.2, and without finding proof beyond a reasonable doubt, to which counsel did object.

Respondent argues that the jury would not consider the broken leg evidence for its truth at the penalty phase because it was introduced at the guilt phase for the limited purpose of assessing Sabra's credibility. (RB 97.) Respondent does not address appellant's argument that it was for this very reason that the broken leg evidence was not admissible under factor (a) as a circumstance of the crime. (AOB 222.)

Appellant has addressed the futility of the limiting instructions to prevent the jury from considering the broken leg evidence for its truth in Argument IV. (See AOB 148-149; ARB 52-53.) Even assuming, arguendo, that the jury had properly followed the court's limiting instruction at the guilt phase, no limiting instruction was given at the penalty phase, and the jury was instructed to disregard the guilt phase instructions, so there was no constraint on the jury using the evidence for its truth and in aggravation. Thus, while respondent's cursory response, "Because the jury is presumed to follow the law, the prosecution's limited statement could not have been prejudicial to petitioner [sic]" (RB 97), states a valid concept, it is not applicable in this context and does not negate the likely harm from the error.

Respondent tries to minimize the harm from the argument by reducing it to simply "the three words 'assaults against Sabra'" and mentions only the broken leg evidence, but, of course, that is not all the evidence that the prosecutor's words invoked for the jury. At the guilt phase, in addition to the extensive evidence of Sabra's broken leg, Dr. Crawford also testified about seeing bruises on Sabra's body when she was admitted to the hospital, and there was evidence presented that Pilar Ford, appellant's neighbor, said she saw bruises on Sabra after she was with appellant. Having been told that they should consider all of the guilt phase evidence, including the plural "assaults" against Sabra, the jury likely

included this evidence in their penalty phase determination. Respondent offers no argument to the contrary.

Nor does respondent address appellant's argument (AOB 222-223) that the contradictory and speculative evidence about Sabra's broken leg was inadmissible under factor (b) because it does not constitute "substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 587.)

2. Evidence of Sandra Harris's allegations from the guilt phase

As respondent acknowledges (RB 94-95), the trial court overruled appellant's objection to the prosecutor's argument that the jury should consider evidence that was admitted only against Sandra Harris at the guilt phase. (81 RT 5084-5085.)

In his closing argument, the prosecutor told the jury to consider as evidence in aggravation statements made by Sandra Harris at the guilt phase that were admitted only against her. Respondent argues that the record with regard to the admission of the Harris tapes is "somewhat muddled," and ultimately argues that regardless of whether the tapes were limited to Harris, any error in their admission was harmless. (RB 94-95.) Respondent's confusion about whether the tapes could be considered by the jurors against appellant strongly suggests the jurors were similarly confused and likely considered the allegations made on the tapes for their truth.

Respondent argues that it would be "pure speculation" to assume that the jury would consider any portions of the tapes other than those specifically mentioned by the prosecutor. (RB 96.) On the contrary, not only did the prosecutor not tell the jury to confine themselves to the portions of the tape he mentioned, he made sure that the jury *would*

consider all the statements on the tape. Trial counsel objected to the prosecutor's telling the jury they could rely on Harris's taped statements from the guilt phase, which was "testimony you have before you" (81 RT 5084), on the ground that the evidence at the guilt phase had been admitted only against Harris. Before the trial court could overrule the objection, the prosecutor interjected: "I believe they are instructed they can consider all the evidence from the initial part of the trial, your Honor." (81 RT 5084-5085.) Thus, in addition to the trial court's response to the jury's question in which the court told the jury to consider evidence from both phases of trial, at the very moment the issue of the tapes was raised, the prosecutor told the jury they could consider all of the evidence presented at trial.

Respondent offers no reason why the jury would *not* consider all of the statements made by Sandra Harris in her taped statements, which include accusations against appellant of drug use (60 RT 4042, 4077), verbal abuse of Harris and her daughter, Laurie (60 RT 4064), and speculation by Harris that appellant was responsible for Ashley's death (60 RT 4067). And because respondent assumes the jury did not consider these allegations, it does not counter appellant's showing about their prejudicial impact.

3. Violent Acts Against Donna Thompson Not Listed in CALJIC No. 8.87

As appellant argues in the opening brief, the prosecutor told the jury to consider as aggravation two incidents described by Donna Thompson that were not included in the list of crimes under CALJIC No. 8.87 – the 1994 incident where appellant allegedly pushed Thompson out of her car and took her purse which contained money from her job, and an alleged threat by appellant to have Thompson's brother and son killed by the Mexican Mafia. (AOB 228.)

Respondent notes that appellant did not object to CALJIC No. 8.87 as given or request inclusion of these incidents. Respondent further argues, "given these failures, even assuming that the jurors did consider them, there is no error, nor, under *Lewis*, is there any basis to suppose that the jurors would not have applied the appropriate standard before giving such consideration." (RB 94.) While the argument is not completely clear, if respondent is simply trying to bring this issue within the holding of *People v. Lewis*, *supra*, 25 Cal.4th 610, then the same distinctions apply, as discussed above in subsection A. of this argument. Unlike the incident omitted from the list in *Lewis*, these incidents were not admissible aggravating evidence, and here, the jury specifically asked about "other incidents" and were given misleading instructions about whether they could consider such evidence as aggravation. Respondent does not address these differences with *Lewis*.

Given the questionable nature of Thompson's claims as to both incidents, had the jury been properly instructed that they had to find these incidents true beyond a reasonable doubt before they could consider them as aggravating evidence, it is unlikely they would have done so.

C. The Jury's Improper Consideration of Nonstatutory Aggravating Evidence and the Trial Court's Failure to Give a Reasonable Doubt Instruction As to Incidents of Alleged Criminal Activity Constitute Prejudicial Error

Respondent claims, in cursory fashion, that any error was harmless "given the brutal nature of the murder, appellant's prior convictions and his other violent criminal behavior," but makes no effort to meet its burden of showing that the error was harmless beyond a reasonable doubt. (RB 98.)

There is, in fact, a clear indication that the improper consideration of nonstatutory aggravating evidence and the failure to instruct the jury that

unadjudicated criminal activity must be proved beyond a reasonable doubt *did* affect the verdict. The jurors had been deliberating for five days at the time they asked the question about which incidents could be considered as aggravation. Presumably, over those five days they had considered the facts of the crime, appellant's prior convictions and other violent criminal behavior, but had been unable to come to a decision about penalty. It was only after they were told they could consider evidence of additional unadjudicated criminal activity that they reached the death verdict.

That evidence included allegations that were different and more aggravating than the incidents that were listed in CALJIC No. 8.87. Respondent claims that the assertion that the jurors would consider this evidence is "speculative at best." (RB 97.) On the contrary, having asked the court for guidance on this precise point and being told specifically to consider all the evidence from the guilt phase, it is difficult to see why the jurors would not follow the court's direction. To this point, respondent has no answer.

The trial court's response to the jury together with the prosecutor's argument permitted the jury to consider inadmissible evidence in aggravation and failed to require that incidents of violent conduct be proved beyond a reasonable doubt. The errors were prejudicial and require reversal of appellant's death judgment.

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XI.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE WHEN HE IMPROPERLY REFERRED TO APPELLANT'S LACK OF REMORSE AND FAILURE TO TESTIFY

Appellant argues in the opening brief that the prosecutor's argument at the penalty phase commenting on appellant's lack of remorse and failure to testify violated his constitutional rights and require reversal of the death judgment. (AOB 233-236.)

Respondent claims that the comments were not directed at appellant's failure to testify and, taken in context, were properly addressed to the absence of remorse. Further, if there was any error, it was harmless. (RB 100-103.)

A. The Prosecutor Impermissibly Commented on Appellant's Failure to Testify at the Penalty Phase

The prosecutor in the present case argued that none of the family members called to testify at the penalty phase had said that appellant had expressed remorse to them. (81 RT 5110-5111.) He then went on to ask the jurors "Did you ever hear one word of remorse from him?" (81 RT 5111.) Respondent claims that the prosecutor's comments did not constitute error under *Griffin v. California* (1965) 380 U.S. 609, because "taken in context" they referred only to the failure of appellant to express remorse to his family and friends, and not to his failure to testify at the penalty phase. (RB 100.)

The first comments are arguably comparable to those in *People v. Lewis* (2001) 25 Cal.4th 610, cited by respondent. In *Lewis*, the prosecutor told the jurors that they could consider defendant's lack of remorse and argued that "[n]owhere in this trial did you see any evidence of any remorse on his behalf." (*Id.* at p. 673.) Similarly, in *People v. Crittenden* (1994) 9

Cal.4th 83, the prosecutor's cross-examination of mitigation witnesses and reference in closing argument to defendant's lack of remorse was held to be not a comment upon his failure to testify during the trial, but a legitimate reference to defendant's never having expressed remorse for the murders in communication with numerous individuals. (*Id.* at p. 147.)

Where these cases differ from appellant's, however, is in the clear distinction made by the prosecutor between what appellant told his family and friends and what he failed to say to the jury. The argument made by the prosecutor – asking the jurors if *they* heard any words of remorse *from appellant* – could not have been more clear. Respondent claims that the statement "would be understood, in context to reference non-testimonial statements by appellant" (RB 101), but fails to explain why this is so.

People v. Zambrano (2007) 41 Cal.4th 1082, cited by respondent is also distinguishable, because there the prosecutor's comments about the lack of evidence that the defendant had ever expressed remorse were not tied to his failure to testify, as they were here. By focusing on appellant's failure to testify at the penalty phase and express remorse, the prosecutor's argument constituted *Griffin* error.

B. The Prosecutor's Comments Violated Appellant's Constitutional Rights and Were Prejudicial

Respondent argues that any error was harmless beyond a reasonable doubt. (RB 102.) But respondent makes no mention about the lack of any of the factors upon which this Court has relied in finding *Griffin* error harmless. As noted in appellant's opening brief (AOB 223-224), not only did the trial court fail, after sustaining appellant's objection to the prosecutor's argument, to instruct the jury not to draw any adverse inference, the court denied counsel's request to admonish the prosecutor and did nothing more than urge him to "move on." (81 RT 5111.)

In the absence of an instruction to the jury not to draw an adverse inference from appellant's decision not to testify at the penalty phase and express remorse or an admonition to the jury to disregard the prosecutor's comments and not to discuss appellant's failure to testify, respondent cannot show that the error is harmless beyond a reasonable doubt. The prosecutor's misconduct at the penalty phase requires reversal of the death judgment.

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XII.

THE ADMISSION OF EVIDENCE THAT APPELLANT COMMITTED WELFARE FRAUD WAS IMPROPER REBUTTAL AND VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO A FAIR TRIAL AND REASONABLE PENALTY DETERMINATION

In the opening brief, appellant argues that evidence that he committed welfare fraud was not proper rebuttal because it did not relate directly to the mitigation evidence presented by appellant at the penalty phase. (AOB 237-238.)

According to respondent, because appellant introduced evidence of his dedication to his religion, the evidence of dishonesty was proper rebuttal. (RB 106.) The cases cited by respondent for this position are distinguishable because appellant did not offer evidence of his religious faith as part of an argument that he had a character trait for honesty that could properly be rebutted by evidence of dishonest behavior.

In *People v. Ramos* (1997) 15 Cal.4th 1133, this Court found no error in the prosecution's impeachment of the testimony of a character witness for defendant who had testified to the defendant's rededication to religion while he was at San Quentin. As noted by this Court, the "testimony tended to suggest not only devout faith but concern for others to embrace its spiritual benefits by turning away from past misdeeds involving force and violence." (*Id.* at pp. 1172-1173.) Evidence that the defendant was frequently in possession of weapons while in custody, evidence which, "particularly in a prison environment, would reasonably implicate a violent character was proper impeachment of this testimony." (*Id.* at p. 1173.)

In *People v. Siripongs* (1988) 45 Cal.3d 548, the defendant had requested a ruling from the trial court about the admissibility of prior theft convictions if he presented mitigation evidence that he was "a devout

Buddhist and a good son." (*Id.* at p. 577.) On appeal, the defendant argued that the trial court's ruling prevented him from presenting mitigation evidence. This Court found no such restriction and noted that "as long as he did not introduce testimony showing that one of the characteristics of a 'devout Buddhist' was truth or honesty, he was free to introduce this evidence as well without fear of impeachment by the Thai priors." (*Id.* at p. 578.) Respondent overlooks this law in arguing that evidence of dishonesty was proper rebuttal because "[a] well-known tenet of Christianity is honesty and truthfulness." (RB 106.) Under respondent's reasoning, evidence of a defendant's behavior that is inconsistent with *any* teaching of his religious faith would be admissible rebuttal, even when he has offered no evidence of character in conformity with that particular religious principle. Such a rule plainly would be inconsistent with both the law and common sense.

Missing from the present case is any attempt by appellant to argue that his religious faith was evidence of his character traits for truth or honesty. Thus, it was error to permit rebuttal with evidence of welfare fraud.

Nor was the evidence admissible to rebut the mitigation evidence of appellant's intellectual limitations. (RB 107.) It was never suggested by the defense that appellant's mental health limitations were so significant as to preclude his ability to act in a dishonest or manipulative manner, thus "opening the door" to contrary evidence, as respondent suggests. (*Ibid.*)

Respondent argues that any error was harmless because of the limited nature of the evidence and the overwhelming nature of the aggravating evidence. (RB 107.) As appellant claims, however, the evidence was used by the prosecutor to argue that the evidence was indicative of appellant's "anti-social personality or psychopathic disorder" (81 RT 5105), which was prejudicial beyond the bare fact of a conviction

for welfare fraud. (AOB 238.) Further, as previously noted, the jury struggled with their penalty decision, deliberating over the course of nine days, evenly divided for much of the deliberations, and twice declaring they were deadlocked. These actions belie respondent's assertion that the aggravating evidence was so overwhelming as to render any error harmless.

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XIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Appellant believes that his trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 239-241.)

Even though as to three of the arguments propounded by appellant, respondent has argued that any error is harmless, respondent does not address appellant's cumulative error argument. (See, e.g., RB 65-74 [Arg. IV]; RB 98 [Arg. X]; RB 100-103 [Arg. XI].) As such, it does not merit a response, and appellant merely reiterates what he has set forth in his opening brief.

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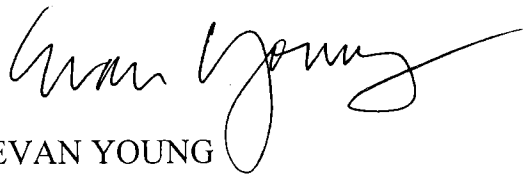
CONCLUSION

For all of the reasons stated above and those in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: January 25, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

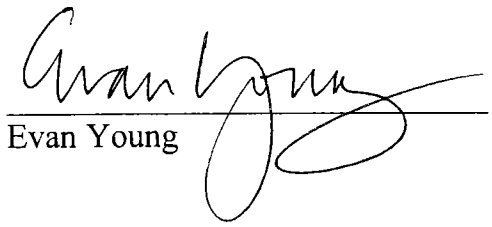


EVAN YOUNG
Supervising Deputy State Public Defender
Attorneys for Appellant

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

I, Evan Young, am the Supervising Deputy State Public Defender assigned to represent appellant, Michael Lopez, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 23,239 words in length excluding the tables and certificates.

Dated: January 25, 2013



Evan Young

DECLARATION OF SERVICE

Re: People v. Michael Augustine Lopez

Alameda County Sup. Ct.
No. H-28492A

Cal. Sup. No. S099549

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

Michael A. Lopez, # T-24622
CSP-SQ
4-EB-98
San Quentin, CA 94974

Miro Cizin
Habeas Corpus Resource Center
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San Francisco, CA 94107

Attorney General's Office
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Superior Court of Alameda County
Attn: Honorable Philip Sarkisian
1225 Fallon St.
Oakland, CA 94612

Each said envelope was then, on January 25, 2013, sealed and deposited in the United States mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on January 25, 2013, at Oakland, California.

Glenice Fuller
DECLARANT