IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. SOCORRO SUSAN CARO, Defendant-Appellant.	Crim. No. S106274 Ventura County Superior Court Case Number: CR 47813

AUTOMATIC APPEAL

APPELLANT'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

THE HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

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INTRODUCTION

Appellant, Socorro Caro, submits the following as her reply brief. Appellant has not responded to those points which were covered adequately in her opening brief. This Court should not construe appellant's election not to respond to a particular argument, sub-argument or allegation made by respondent as a concession or waiver by appellant. (*People v. Hill* (1992) 3 Ca1.4th 959, 995 n.3.)

In writing this reply, appellant assumes that this Court is familiar with the salient facts and arguments raised in the opening brief and only recounts certain facts, law, and argument as needed to put the reply response in context.

ARGUMENT

JURY SELECTION ISSUES

I.

RESPONDENT HAS FAILED TO ADDRESS THE CONFLICTING CASE LAW FROM THE WASHINGTON SUPREME COURT FINDING THAT THE EXCUSAL OF JURORS VIA EMAIL WITHOUT THE KNOWLEDGE OR PRESENCE OF THE DEFENDANT VIOLATES THE DEFENDANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL

Appellant argued in her opening brief that her federal and state constitutional rights to be present at trial were violated when the trial court, the prosecution, and defense counsel agreed via email to excuse 62 potential jurors.[1] (AOB 125-133.) Nothing in the record shows that appellant had a role in the decision-making regarding the juror excusals or that she consented to the jurors being excused out of her presence.

In support of her argument, appellant cited and discussed

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[1] Respondent suggests that 8 of the 62 jurors referenced in the email exchanges had been excused previously in open court in appellant's presence. (RB 64.) The trial court's off-the-record maneuvering of the jury selection process makes it difficult to track exactly what the court was doing. Nevertheless, even if the excusals based solely on emails involved 54 jurors rather than 62 jurors, the same argument applies: dozens of jurors were excused for reasons not specified on the record, out of the presence of and without any input from appellant at her trial in which she was facing a death sentence.

the Washington Supreme Court decision in *State v. Irby* (Wash. 2011) 246 P.3d 796, which found that the defendant's absence from seven juror excusals decided via email discussions between the trial court, the prosecution, and defense counsel violated both Washington state law as well as the Fourteenth Amendment right to be present at all critical stages of a trial. (AOB 128-131.) In her discussion, appellant acknowledged that this Court has repeatedly rejected arguments that a defendant's absence from some aspect of jury selection violates federal or state constitutional law or state statute. (AOB 130-131.) Nevertheless, appellant urged this Court to reconsider its position in light of *Irby* and the United States Supreme Court cases upon which *Irby* relied.

Respondent makes several responses to appellant's argument. First, respondent notes that before the jury selection process began, appellant's counsel waived appellant's presence for discussions regarding hardships and stipulations regarding hardships. (RB 59; 6RT 768.) Appellant did not personally waive her presence as required by Penal Code section 977, subdivision (b), nor has respondent cited any case law establishing that counsel can waive a defendant's presence without input from the defendant. In addition, counsel's waiver, even if valid, did not cover discussions outside appellant's presence concerning issues other than excusals for hardship.

Next, respondent cites and discusses California case law discussing when a defendant's presence is deemed necessary and when it can be dispensed with. Respondent makes the very argument that appellant already acknowledged: this Court has found that a defendant's absence from parts of the jury selection process does not implicate state or federal constitutional concerns or run afoul of state statutory law. (RB 63-65.)

Appellant, however, disagrees with respondent's contention that the trial court in this case established an agreed-upon parameter for excusing jurors by email. (RB 66.) Although the court and the parties discussed that there might be excusals for cause for which the two sides might stipulate, the court also noted, correctly, that "theoretically you have a chance to rehab some." (9RT 1428.) More importantly, the court set a hearing date to discuss possible stipulations. (9RT 1429.) With the exception of a brief mention of using email to discuss a defense motion to dismiss a Mr. Smith, at no time did the parties contemplate, on the record and in front of appellant, that any discussion of stipulated excusals, whether for cause or otherwise, would take place via email rather than in open court. (9RT 1431.) Thus, this case differs from *People v. Ervin* (2000) 22 Cal.4th 48, 72-73, where the parties agreed to a screening procedure whereby counsel for both sides would jointly review the 600 questionnaires and stipulate to screen out "strong candidates" for excusal: those

who would automatically vote for death or who would never vote for death and those with financial or physical hardship.

As appellant has shown, this Court's interpretation of the federal constitutional right to be personally present during critical trial proceedings directly conflicts with the Washington Supreme Court's views as set forth in *Irby, supra*. Respondent dismisses this argument in one sentence, simply noting that *Irby* conflicts with this Court's case law. (RB at 66.) While the Washington Supreme Court's position is not binding on this Court, the decision in *Irby* provides a significant and legitimate reason why this Court should revisit this issue since there now exists a split in how two states view an important constitutional right.

The United States Supreme Court has established several fundamental points regarding a defendant's right to be present at her trial. Under the Fourteenth Amendment, a criminal defendant has a due process right to be present at any stage of the trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and "to the extent that a fair and just hearing would be thwarted by his absence." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106, 108 [overruled in part on other grounds *Malloy v. Hogan* (1964) 378 U.S. 1, 17].) In addition, "[a] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would

contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) Finally, the United States Supreme Court has held that jury selection is a critical stage of trial at which a defendant has a constitutional right to be present. (*Gomez v. United States* (1989) 490 U.S. 858, 873.)

The highest court in Washington has found that a process that involves a juror's fitness to serve in a particular case, as opposed to whether a juror meets general qualifying criteria, is a part of jury selection that is a critical stage of a trial. (*Irby*, 246 P.3d at p. 800.) The *Irby* court specifically contrasted an excusal for cause from an excusal for hardship. (*Id.*) In doing so, the court analogized that the filling out of a jury questionnaire administered to determine the abilities of a potential juror to try that specific case is a form of jury voir dire. Therefore, decision-making on the basis of the jury questionnaire is also a part of voir dire, and voir dire is a critical stage of a trial at which a defendant is entitled to be present. (*Id.* at pp. 800-801.)

Although the denial of the right to be present is subject to harmless error analysis (*Rushen v. Spain* (1983) 464 U.S. 114, 117-119), respondent has not even attempted to show that the 54 jurors who were excused via email could not have sat on appellant's jury (*Irby*, 246 P.3d at p. 802). Indeed, respondent could not make this showing because no one knows why these jurors

were excused because the decision to excuse them was made in cyberspace and not in the courtroom.

Moreover, respondent dismisses out of hand that appellant's presence could possibly have any effect on what took place. (RB 66-67.) For example, respondent cites *People v. Johnson* (1993) 6 Cal.4th 1, 19, for the argument that it was "unduly speculative" that the defendant might have helped his attorney question a juror. (RB 67.) In that case, the issue was the defendant's presence at a hearing to determine whether the court should excuse a juror because the juror had exhibited unusual behavior during the trial, including smiling at the defendant. This Court found the issue speculative especially because both the defense attorney and the prosecutor had opted not to attend the hearing to avoid alienating the juror. (*Johnson*, 6 Cal.4th at pp. 16-19.) Significantly, respondent does not cite any case that says that the value of a defendant's presence during jury selection is too speculative to be prejudicial. Indeed, the United States Supreme Court has observed that the defense benefits from having the defendant present during voir dire because it is within the defendant's power to give counsel advice or suggestions. (*Snyder*, *supra*, 291 U.S. at p. 106.)

As appellant said in her opening brief, "a jury was being selected to sit in judgment of her and potentially determine whether she would live or die. It would be hard to imagine a more

compelling reason for appellant to be present for all decisions related to selecting those jurors who would hold her fate in their hands." (AOB 131.)

Appellant had a right under both the federal and state constitution as well as under state statute to be present for and to know why potential jurors who might sit in judgment of her were excused. The record reveals little about why 54 jurors were excused after they passed an initial hardship screening and filled out a lengthy questionnaire. Under these circumstances, the state cannot prove beyond a reasonable doubt that the removal of 54 potential jurors in appellant's absence did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, appellant is entitled to a new trial where she can be present for all of jury voir dire.

II.

THIS COURT SHOULD CONDEMN A PRACTICE OF EXCUSING JURORS VIA EMAIL STIPULATION DURING JURY SELECTION IN A CAPITAL CASE BECAUSE IT DEPRIVES A DEFENDANT OF ANY MEANINGFUL APPELLATE REVIEW OF THE BASES FOR THE EXCUSALS

Appellant has argued that the dismissal of 62 jurors (or 54 jurors as respondent maintains) via email without any discussion of the reasons for the dismissals violated Penal Code section 190.9, which requires that all proceedings in a capital case be conducted on the record with a court reporter present, and deprived her of any meaningful appellate review of the bases for the dismissals. (AOB 134-136.) Respondent contends that appellant has forfeited this claim because her attorney agreed to the process. (RB 68.)

Respondent has not pointed to any place in the record where counsel waived Penal Code section 190.9 or where counsel waived appellant's constitutional right to meaningful appellate review. In *People v. Rogers* (2006) 39 Cal.4th 826, 856-857, a case upon which respondent relies, the parties actually discussed Penal Code section 190.9 and how it would apply to an in-chambers discussion about hardship excusals, and they agreed that any informal discussions would be memorialized on the record after

the fact. And, indeed, that was what happened in *Rogers*. In contrast, as discussed in Argument I, above, counsel in this case agreed only to discuss hardship excusals outside of appellant's presence. Counsel did not agree that these discussions would take place off the record. (6RT 768.)

In addition, when the court session ended in this case where there had been a brief discussion about possible stipulations to excusals, the court set a next hearing date to discuss excusals. But, between the end of that session and the start of the scheduled hearing, the email agreements between the defense, the prosecution, and the court took place. (9RT 1429-1433.) Other than the eight hardship dismissals discussed in an earlier court session, the parties did not put on the record the reasons why they stipulated to dismissing the other 54 jurors. Hence, appellant is left with no way to examine whether those excusals were valid or biased or inappropriate. Although constitutional rights can be waived, that waiver must be knowing and intelligent (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 237-238), and a waiver of constitutional rights will not be presumed or lightly inferred. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Respondent argues that even if the claim is not forfeited, it has no merit. (RB 68-69.) First, respondent again submits that the number of jurors dismissed off the record is 54 not 62. (RB 68.) Appellant accepts the number as 54 not 62 because the actual

number is a significant amount of jurors regardless of which number is used.

Second, respondent argues that Penal Code section 190.9 doesn't apply in this situation because that statute relates to oral proceedings and email exchanges are not oral proceedings. Respondent also maintains that, to the extent the two sides discussed the excusal of jurors informally outside of court proceedings, those type of discussions are not "proceedings" within the meaning of 190.9. (RB 68-69.) Appellant disagrees.

Penal Code section 190.9, subdivision (a)(1), states, in relevant part:

> In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.

This Court views section 190.9, subdivision (a), as mandating "that all proceedings in a capital case be conducted on the record and reported." (*People v. Holt* (1997) 15 Cal.4th 619, 708.) "[T]rial courts should take care to avoid off-the-record discussions in capital cases." (*People v. Harris* (2008) 43 Cal.4th 1269, 1283.) The intent behind section 190.9 is "that death penalty cases be treated with greater protections to assure reliability." (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1323.) Thus, section 190.9 requires that a written record

of proceedings in capital cases be maintained.

Jury selection is an immensely important proceeding in a capital case. As technology changes and the use of other modes of communication such as emails and text messaging increases, this Court, and the Legislature, must adapt current procedures to this new technology to ensure that a capital defendant's rights are adequately protected.[2] The need for transparency in capital cases is no less significant when the court and counsel transact relevant trial business through email rather than in the courthouse. Accordingly, in accordance with the meaning and intent of Penal Code section 190.9, trial courts should not allow outside-of-court communication methods to substitute for on the record proceedings conducted in court.

Finally, respondent maintains that the record is adequate to determine the bases for excusing all 62 jurors. (RB 69.) Again, appellant disagrees. The email sent to the court on July 26, 2001, identified 62 jurors whom the two sides agreed should be dismissed for either hardship or cause. (3rd Supp.CT 114-115.) Fourteen of the names are followed by "hardship" in parentheses, leaving 48 jurors presumably excused for cause with no explanation for what constituted cause. (*Id.*) Respondent suggests that because the record includes the juror questionnaires the

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[2] Penal Code section 190.9 was enacted in 1984, long before email became a common mode of communication. (*Holt, supra*, 15 Cal.4th at p. 708 n.30.)

record is adequate for appellate review. (RB 69.) Imbedded within that contention are numerous unsubstantiated assumptions such as, that the basis for the excusal was the questionnaire, that a review of the questionnaire definitively reveals why both parties would want the juror excused, that both sides acted properly and without bias or ulterior motivations, and that all excused jurors actually merited being excused for cause. Because the record does not provide support for these assumptions, it is inadequate for meaningful appellate review.

This Court should not condone the practice of excusing jurors, ostensibly for cause, by email stipulation in a capital case. Given the current state of the record, appellant cannot determine whether any of the 48 unidentified excusals were erroneous dismissals for cause. Because the lack of a record precludes appellant from establishing that any of the jurors were wrongly dismissed because of their views concerning the death penalty, appellant is entitled to a new penalty phase determination.

III.

THE TRIAL COURT ERRED IN DISMISSING TWO JURORS FOR CAUSE OVER DEFENSE OBJECTION WHEN BOTH JURORS SAID THEY COULD IMPOSE DEATH

Appellant has argued that the trial court erred in dismissing two prospective jurors --John Wurdeman and Douglas Spaulding- for cause, over defense objection, when both men said they could be fair and could impose death depending on what they learned at trial and neither one espoused a view of the death penalty that would prevent or substantially impair the performance of his duties as a juror. (AOB 137-151.)

Appellant and respondent agree on the correct standard to be applied: a prospective juror may be excused for cause in a capital case only if his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, as cited in AOB 145-146 & RB 70.) In accordance with this standard, this Court has said that if a juror is not substantially impaired, removal for cause is impermissible. (*People v. Pearson* (2012) 53 Cal.4th 306, 328.)

Appellant and respondent also substantially agree on their summary of the answers that the two prospective jurors gave on their questionnaire and in voir dire. (*See* AOB 137-145; RB 71-

75.) They disagree, however, on the application of the law to the their responses.

This Court reviews a ruling on a challenge for cause for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 50.) A review of the questionnaire answers and voir dire answers of both Wurdeman and Spaulding leaves no doubt that neither prospective juror met the strict standard for dismissal for cause. (*See* 17JQCT 5050-5071; 10RT 1507-1514, 1532-1533, 1592-1595, 1630-1633 [Wurdeman]; 15JQCT 4476-4497; 10RT 1640-1647, 1690-1695, 1700-1704, 1712-1713 [Spaulding].) This may be because the trial court utilized a different, and improper, standard: "Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability to be neutral on the question of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose." (10RT 1631.) *Witt*, however, does not require that a juror be neutral in his feelings about the death penalty; it simply requires that the juror be able to set his feelings aside in order to follow the law, a position both potential jurors embraced. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

A. Wurdeman Presented as a Fair and Thoughtful Juror

Respondent argues that the trial court properly excused Wurdeman because Wurdeman had concerns that sitting as a juror

might impair his marriage because his wife was adamantly opposed to the death penalty. (RB 76-77.) Wurdeman's concerns about his wife are irrelevant to this inquiry. The critical issue in assessing whether a potential juror should be excused for cause is whether the juror is impartial. (*Witt*, 469 U.S. at p. 423.) Wurdeman was clear both in his questionnaire and his voir dire answers that he could be a fair and impartial juror. (17JQCT 5063; 10RT 1508, 1510.) Even though Wurdeman thought his service as a juror on a capital case might affect his marriage, he marked that he would "be able to listen to all the evidence, as well as the judge's instructions on the law, and give honest consideration to both death and life without parole before reaching a decision." (17JQCT 5067.) And, while he expressed concerns about how sitting on a capital case might affect his relationship with his wife, Wurdeman unequivocally agreed that he would be able to forget about his wife's views while acting as a juror. (10RT 1513.) Significantly, although Wurdeman did note some concerns about his wife's views, he did not ask directly or even indirectly to be excused from jury service in this case and continued to maintain he could be a fair and impartial juror.

Equally important, the standard for excusal for cause is "whether the ***juror's views*** [on capital punishment] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Witt*, 469

U.S. at p. 424 [emphasis added].) Wurdeman's wife's views were irrelevant. Wurdeman never asserted that he would allow his wife's opposition to the death penalty to affect his duties if he were seated as a juror in this case. Thus, nothing about his wife's views or his concerns about the possible impact on his marriage warranted his excusal for cause under *Witt*.

Respondent contends that *People v. McKenzie* (2012) 54 Cal.4th 1302, 1339-1340, supports its argument that Wurdeman's concerns about his marriage warranted his excusal. (RB 76.) To the contrary, in *McKenzie*, the juror, who described mixed feelings about the death penalty, stated several times that she would personally feel really bad and be very unhappy if she had to make the decision about penalty. Thus, the juror was excused because of issues related to her own views of imposing a death sentence, not the views of any other person. In appellant's case, the prosecutor's motion to excuse Wurdeman was based solely on *Witt* and not any other basis for cause, and the trial court purported to be applying the *Witt* standard. (10RT 1630-1631.) *Witt* does not embrace a juror's concerns about his marriage.

In addressing this claim, respondent also makes two unsupported assumptions about Wurdeman. First, respondent repeats the trial court's belief that Wurdeman violated the court's admonition by discussing with his wife that he was a potential juror in a capital case. (RB 78.) That assumption is not

necessarily supported by the record. This was a high profile case in a relatively small county. The potential jurors were given a trial time estimate of several months. It would not take a rocket scientist for a potential juror's family member to figure out that the potential juror was being considered as a juror in this capital case. (6RT 836-837; 852-853.) Second, respondent assumes with absolutely no basis that Wurdeman's evolving thoughts about the death penalty between filling out the questionnaire and being questioned was due to discussing the death penalty with his wife as opposed to his simply being contemplative after being forced to confront and articulate his views on the death penalty while filling out his questionnaire. (RB 79-79.)

Respondent also contends that Wurdeman's reservations about imposing death in this case constituted cause for his excusal. (RB 77-79.) The totality of Wurdeman's responses do not provide substantial evidence that his views of the death penalty would substantially impair his performance as a juror. Wurdeman did express some reluctance to sentence a woman to death. On the other hand, he advocated a death sentence when children are the murder victims. Thus, he had conflicting views about two of the most critical aspects of this case. When asked directly by the prosecutor if he could impose death ***in this case*** with a female defendant, Wurdeman said that he could do so "if I heard enough factors that led me to think it was the right thing to do." He

clarified that he was talking about weighing aggravating factors against mitigating factors --the very essence of what a penalty phase juror in California is asked to do. (10RT 1594-1595.)

Witt does not require that Wurdeman be enthusiastic about sentencing a woman to death; it simply requires that he be able to set his feelings aside in order to follow the law. (*Lockhart v. McCree, supra,* 476 U.S. at p. 176.) That is what Wurdemen said he could and would do.

Far from being a biased juror, Wurdeman represented the prototype of a conscientious and thoughtful juror who should sit on a capital case. He personally believed strongly in the death penalty, thought it served as a deterrent, and tended to favor it when the murder victims were children. (17JQCT 5064-5065.) While he had some reservations about imposing a death sentence on a woman, he also recognized that death could be warranted for a woman. (17JQCT 5065.) Wurdeman took his task to heart and thought about his views on the death penalty between filling out his questionnaire and returning for voir dire. (10RT 1057-1058.) He discussed with the court and the attorneys his concerns about applying the death penalty both in the context of this case and in the context of his wife's opposition to the death penalty. He concluded that serving as a juror would be difficult but he could listen to the evidence, weigh the relevant factors in aggravation and mitigation, and vote for the appropriate sentence of either

death or life without the possibility of parole. (10RT 1508-1514, 1532-1533, 1592-1595.)

The record supports that Wurdeman would do exactly what a juror is supposed to do: "Conscientiously apply the law to the facts." (*Witt*, 469 U.S. at p. 423.) The trial court erred in granting the prosecution's motion to excuse Wurdeman for cause over defense objection when he was not substantially impaired in his ability to perform as a juror. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9; *People v. Stewart* (2004) 33 Cal.4th 425, 446.) The trial court's characterization of Wurdeman and its suppositions about Wurdeman are not supported by the record. (10RT 1631-1632.)

B. Spaulding Presented as a Fair and Thoughtful Juror

Respondent contends that the trial court properly excused Spaulding for cause because his "questionnaire reflected doubt and ambivalence about his ability to vote for the death penalty." (RB 85.) Respondent specifically references places in the questionnaire where Spaulding answered questions about the death penalty by placing a "?" in the yes or no answer slot. (RB 85-86.) Because Spaulding only used a "?" in six questions related to the death penalty and not in any of the dozens of other questions requiring a mark in a yes or no slot, one could reasonably assume that either Spaulding was unsure about the meaning of those specific questions or he was not completely decided in his answers.

Respondent cites *People v. McDowell* (2012) 54 Cal.4th 395, 417, to suggest that a question mark on an answer in a questionnaire is grounds for an excusal for cause. (RB 86.) In *McDowell*, the prospective juror circled "no" in response to whether she would always vote against death but then put a question mark by her answer. The juror then clarified during questioning that she really did not know if she could ever impose death. The juror also got "very angry" with the prosecutor during questioning about her views on the death penalty. (*McDowell*, 54 Cal.4th at pp. 417-418.) Thus, the juror in *McDowell* presented significant grounds for excusal beyond her questionnaire, grounds not present with Spaulding.

Respondent argues that Spaulding's responses to voir dire questioning supported that he would be substantially impaired in performing his duties as a juror. (RB 86-87.) Appellant disagrees. Spaulding actually clarified any ambiguities in his questionnaire to show that he could impose a death sentence. While Spaulding expressed a view that the death penalty was justified in cases where the defendant presented a future danger to society (10RT 1644), he never stated that he would only consider that basis and no other. To the contrary, despite Spaulding's reservations about the death penalty, he stated that he could put aside his personal beliefs and follow the law to weigh the aggravating and mitigating factors and impose a

sentence of death if the aggravating factors outweighed the mitigating ones. (10RT 1647.)

When the prosecutor, after explaining how the penalty phase worked, asked Spaulding directly: "In any case where you knew that the two options were life in prison without parole or the death penalty, could you ever see yourself coming down on the side of the death penalty?" Spaulding responded, "Certainly." (10RT 1691.) Spaulding then went on to explain that the decision about punishment really depended on what was presented about the case. (10RT 1692.) When the prosecutor tried to push Spaulding to be more definitive, Spaulding appropriately demurred because "the two options are going to be based on a whole bunch of stuff. We're talking six weeks. ... there might be stuff in there that would cause me to say yes, all right, it's -- it's -- the death penalty is there. But there --I don't know." (10RT 1693.)

Spaulding did say that imposing death would be "very difficult," but one would expect it to be a difficult decision for any juror.[3] (10RT 1693.) Indeed, it would be highly unfair to

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[3] Not surprisingly, this Court has recognized that sitting on a penalty phase is difficult:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. ... [H]owever, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled —indeed, duty bound— to sit on a

(continued...)

a defendant facing a death sentence to have a jury composed of jurors for whom it would be easy to impose death. California tasks jurors with deciding whether certain defendants should live or die with the expectation that it will be a difficult decision, and one that the twelve jurors will grapple with during deliberations after hearing both the evidence and the law governing their decision-making.

When asked the million dollar question of whether he could actually impose death on another human being, Spaulding answered with an unequivocal, "Yes." (10RT 1694.) When pressed whether he could impose death specifically on appellant, Spaulding appropriately responded that he did not have enough basis to answer that question and described the question as "too ethereal." (10RT 1694.)

Spaulding's questionnaire and voir dire responses revealed a an educated and contemplative man who did not offer opinions without knowing as much information as possible. Moreover, he acknowledged that his views of the death penalty were evolving as he started thinking more about it as a result of this case. (10RT 1693-1694.) Thus, Spaulding's initial uncertainty about being able to impose a death sentence, as expressed in his question

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[3](...continued)
capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Stewart, supra,* 33 Cal.4th at p. 446.)

mark answers in his questionnaire, was, by the time he was questioned later in the process, resolved in favor of being able to sit as a fair and unbiased juror and make the ultimate determination based on weighing the evidence.

Spaulding's excusal for cause was not justified. There was nothing in Spaulding's questionnaire or voir dire answers that supported that his views in opposition to the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Permitting the exclusion of a juror who can follow the law notwithstanding his own views of the death penalty would "stack the deck" against the capital defendant. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658 [quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 523].) By excusing Spaulding, the court violated appellant's right to an impartial jury.

C. The Trial Court's Erroneous Excusals for Cause Require a Reversal of Appellant's Death Sentence

In her opening brief, appellant argued that the erroneous dismissal of a juror for cause when the record does not support that the juror's decision-making was substantially impaired is reversible per se and not subject to harmless error analysis. In making that argument, appellant relied upon *Gray, supra,* 481 U.S. at pp. 667-668, *People v. Clark* (2011) 52 Cal.4th 856, 895, and *Pearson, supra,* 53 Cal.4th at p. 3313. (AOB 147, 150, 151.)

Respondent urges this Court to adopt a harmless error approach to erroneous excusals for cause. Respondent bases this suggestion on a concurring opinion in *People v. Riccardi* (2012) 54 Cal.4th 758, 840-846, which questions the underpinnings of the automatic reversal rule in *Gray*. (RB 88-90.) This Court cannot adopt respondent's suggestion. Unless the United States Supreme Court qualifies *Gray* or overrules it, it remains a binding precedent on this Court.

In *Gray*, as in appellant's case, a qualified prospective juror was erroneously excused for cause under the *Witt* standard and was no longer a part of the jury pool. Although the State in *Gray* argued it "would have excused" the prospective juror by peremptory challenge had she remained in the jury pool, the United States Supreme Court concluded it could not assume the improperly-excluded juror would eventually have been excluded. Similarly, this Court can only speculate about how the jury in this case might have been constituted had Wurdemen or Spaulding or both jurors not been wrongly excused. Such speculation cannot overcome the presumption of prejudice that attaches to an error impinging on the Sixth Amendment right to an impartial, representative cross-sectional jury. (*Gray*, 481 U.S. at pp. 664-665.) Thus, because Wurdeman and Spaulding were wrongly excused for cause, this Court must reverse appellant's death sentence.

IV.

RESPONDENT HAS FAILED TO PROVIDE ANY MEANINGFUL RESPONSE TO APPELLANT'S ARGUMENT THAT THE TRIAL COURT ERRED IN DENYING APPELLANT ACCESS TO THE RECORDS OF ANY INVESTIGATION CONDUCTED OF PROSPECTIVE JURORS BY THE PROSECUTION

Appellant has argued that the trial court erred in denying the defense access to certain information that the prosecution might have obtained in an investigation of potential jurors. (AOB 152-156.) Appellant specifically argued that the trial court was factually and legally incorrect in adopting the prosecution's position that Penal Code section 1054.6 protected the prosecution from having to turn over such information because it was work product. In fact, the defense sought particular information about prospective jurors (e.g. prior convictions, voting preferences, political affiliations, and information regarding prior jury service) that was not work product. (AOB 154-155, citing 3CT 564.) Appellant went on to explain why the requested information was not work product as that term is used in Penal Code section 1054.6 and former Code of Civil Procedure section 2018, subdivisions (b) and (c), and why those statutes did not supercede *People v. Murtishaw* (1981) 29 Cal.3d 733, 766-767, which gave the trial courts the discretionary power to require

the prosecution to turn over its investigatory reports on prospective jurors to level the playing field. (AOB 152-155.)

In response, respondent simply declares in one sentence, without any legal support, that the requested information was work product privileged under Penal Code section 1054.6 without any explanation for why the requested information about the potential jurors would be work product. (RB 91.)

In addition, respondent contends, again in one sentence, that any error was harmless because it would be speculative. (RB 91.) In making this conclusory assertion, respondent fails to acknowledge or address appellant's suggestion for assessing prejudice. Appellant explained that, under these circumstances, establishing prejudice would always be speculative because of the nature of the error: the defense was deprived of the very information necessary to demonstrate prejudice. Accordingly, appellant suggested that this Court remand this case so the trial court could review the prosecution's information regarding the prospective jurors in camera and provide the defense with any information that does not qualify as undiscoverable work product under former section 2018(c). Appellant could then make a showing that had the prospective juror information been available to her during voir dire, there is a reasonable probability that the outcome of the trial might have been different. (*See People v. Gaines* (2009) 46 Cal.4th 172, 176.)

ERRORS RELATED TO THE TRIAL

V.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN SHE FAILED TO MOVE TO SUPPRESS APPELLANT'S CLOTHING WHICH HAD BEEN UNLAWFULLY SEIZED BY LAW ENFORCEMENT WITHOUT A WARRANT

Appellant has argued that a Ventura County sheriff's deputy violated her Fourth Amendment rights when he seized her clothing from the hospital without a warrant. (AOB 158-165.) In raising this claim, appellant acknowledged that her trial attorney failed to file a motion to suppress this evidence. Thus, appellant presented this issue through a related claim that trial counsel provided ineffective assistance of counsel by failing to file a motion to suppress appellant's clothing. Appellant argued that had counsel filed such a motion, there is a reasonable probability that the clothing would have been suppressed and the outcome of her trial would have been different. (AOB 165-168.)

Respondent contends that this Court should not consider appellant's ineffective assistance of counsel claim on appeal because there is an insufficient record for the Court to assess the reasons for counsel's omission. (RB 93-94.) Although respondent tries to proffer possible strategic bases for counsel's failure to move to suppress appellant's clothing, those

speculations fall flat. For example, respondent suggests that counsel might have wanted to avoid having appellant testify at a pretrial suppression hearing for fear that her testimony might be used to impeach her trial testimony. (RB 94-95.) It is uncontroverted that appellant was unconscious and on her way to the operating room for emergency brain surgery when her clothing was seized. Appellant could not possibly have shed any light on the deputy's actions in seizing her clothing without a warrant. Thus, there is no basis for speculating that appellant's testimony would have been necessary at a hearing on a motion to suppress.

On the other hand, looming large over this issue, is the fact that trial counsel failed to challenge the seizure of appellant's clothing without a warrant when that clothing provided the basis for the most damning evidence against appellant. Despite respondent's efforts to manufacture reasons, there can be no reasonable tactical basis for counsel's failure to file a rudimentary motion to suppress in light of the evidence that no warrant was obtained. This Court can and should consider this issue on appeal. However, if this Court is not inclined to find trial counsel ineffective based on the appellate record alone, then appellate counsel requests that the Court simply state that the issue is more appropriately raised in a petition

for writ of habeas corpus.[4]

With respect to the merits of a motion to suppress, appellant explained in her opening brief why she would have prevailed on such a motion. Respondent, on the other hand, contends that appellant would have lost a motion to suppress. Significantly, a review of both appellant's opening brief and respondent's brief reveals no citations to any California case law. This suggests that the California courts have not addressed the issue of seizing clothing from a hospital patient without a warrant at least in a published decision. Consequently, both appellant and respondent have cited to and relied upon case law from other jurisdictions to make their arguments. Such case law, of course, is not binding on this Court.

Respondent claims that appellant had no reasonable expectation of privacy in her clothing because she testified at trial that she could not recall ever seeing the shirt she was found in.[5] (RB 94.) Appellant's memory of her clothing is irrelevant. The constitutionality of an officer's seizure of

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[4] Although appellant was sentenced to death almost 13 years ago, this Court has not yet appointed counsel to represent her in state habeas corpus proceedings.

[5] Respondent refers to a privacy interest. (RB 94-95.) The United States Supreme Court has explained: "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." (*Horton v. California* (1990) 496 U.S. 128, 133.) Thus, the issue is appellant's possessory interest in her clothing more than her privacy interest.

property cannot be determined after the fact based on the owner's subjective view or memory of the object. Moreover, the officer also seized appellant's underwear as well as her shorts, which appellant identified as her maternity shorts. (46RT 9306; 48RT 9637).

Under the circumstances, appellant retained her possessory interest in the clothing she was wearing. Appellant was shot in the head. At the time that appellant's clothing was seized, the deputy who seized her clothing did not know the circumstances under which appellant was shot. Although law enforcement believed appellant had shot her children, she had not yet been arrested. Had appellant been conscious, the deputy could not have taken her clothing without either her consent or a search warrant. That her clothing was removed by medical personnel while she was unconscious and in need of emergency neurosurgery did not extinguish her possessory interest in her clothing. This was not a situation where appellant knowingly left her clothing in a public environment where one might expect other people might access them. (*See e.g. People v. Juan* (1985) 175 Cal.App.3d 1064, 1069 [no reasonable expectation of privacy in a jacket left draped over a chair at an empty table in a restaurant].)

Respondent argues that the deputy was justified in seizing appellant's clothing under the "plain view" doctrine and under the "inevitable discovery" doctrine. (RB 95-96.) Appellant

disagrees. The plain view doctrine applies to the seizure of an item not listed on a warrant during a valid search pursuant to a search warrant. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1293-1294.) It is not clear from the record where exactly the deputy was when he seized the clothing, but, even assuming the deputy had a right to be in that area of the hospital, he was not conducting a search at the hospital. In addition, the "plain view" exception requires that the incriminating character of the object be "immediately apparent." (*Horton, supra,* 496 U.S. at p. 136; *Bradford,* 15 Cal.4th at p. 1295.) Thus, for example, a car might be in plain view but its probative value might not be known until its interior was microscopically examined. (*Horton,* 496 U.S. at p. 136 [discussing *Coolidge v. New Hampshire* (1971) 403 U.S. 443].) That same rationale applies in this case. Appellant had been shot in the head. Her clothing, even if it appeared to have blood on it, had no immediately apparent evidentiary value without submitting it to blood and DNA testing. In sum, the evidence does not support that the "plain view" exception applied to the deputy's seizure of appellant's clothes from the hospital.

Similarly, the "inevitable discovery" doctrine does not apply in this situation. This was not a case where appellant's clothing was hidden and the police found their location through illegal means when there were legal means to learn of the location. (*See e.g. People v. Robles* (2000) Cal.4th 789, 800.)

Rather, this situation is a straightforward failure of the police to obtain a search warrant before seizing the clothing. The Ninth Circuit has explained that the "inevitable discovery" exception does not apply to an unexplained failure to get a search warrant. (*United States v. Reilly* (9th Cir. 2000) 224 F.3d 986, 995; *see also United States v. Echegoyen* (9th Cir. 1986) 799 F.2d 1271, 1280 n.7 ["to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment"].) Likewise, in *Robles, supra*, a case which respondent cites (RB 96), this Court declined to apply the inevitable discovery doctrine to an illegal search and seizure of a car in a garage even though the police would have discovered the stolen car had they obtained a search warrant. This Court explained:

> [I]n the absence of exigent circumstances, a police officer is required to obtain a warrant to enter a residence even if contraband is clearly displayed in a window and the officer observes the contraband from a place in which he or she has a right to be. ... [T]he inevitable discovery doctrine would not serve to excuse a warrantless entry of a residence under the foregoing circumstances. (*Robles*, 23 Cal.4th at p. 801.)

Respondent attempts to distinguish *Commonwealth v. Silo* (Pa 1978) 389 A.2d 62, a case discussed by appellant in her opening brief, because *Silo* did not address the doctrines of plain view or inevitable discovery. (RB 97.) However, as appellant has

explained, those doctrines do not apply to the seizure of appellant's clothing so their absence from the *Silo* case is irrelevant. Instead, the similar circumstances between appellant's case and the *Silo* case dictate the same results: suppression of the clothing seized from the hospital without a warrant.

Lastly, respondent contends that appellant cannot establish prejudice from her attorney's failure to move to suppress the clothing because "the remaining evidence established a strong case of appellant's guilt." (RB 97.) Respondent has seriously understated the importance of the DNA from the blood found on appellant's shorts. The DNA evidence was the most critical part of the prosecution's case against appellant and was a central and repeated part of the prosecution's closing argument. (55RT 10805-10807, 10812-10813, 10816, 10826; 56RT 10881-10882; 57RT 11131-11132.) Without that evidence, it is reasonably probable, indeed highly probable, that the outcome of appellant's trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.)

VI.

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS APPELLANT MADE WHILE SHE WAS QUESTIONED IN THE INTENSIVE CARE UNIT FOLLOWING BRAIN SURGERY BECAUSE THE STATEMENTS WERE INVOLUNTARY AND WERE MADE WITHOUT APPELLANT HAVING RECEIVED OR WAIVED HER *MIRANDA* RIGHTS

Appellant has argued that the trial court erred in admitting statements she made in response to questioning by Detective Wade in her private hospital room shortly after she had brain surgery for a gunshot wound and while she had a badly fractured foot that had not yet been treated. (AOB 169-193.) Appellant specifically argued that the trial court erred in finding that she was not effectively "in custody" while Wade was questioning her and erred in finding that her statements were voluntary given her painful medical state and Wade's role in providing comfort and care to appellant while simultaneously interrogating her.

A. When Viewed Objectively, Appellant was In Custody When Wade was Questioning Her

Respondent argues that appellant was not "in custody" because: (1) any restraint on her movement was due to her medical condition and not law enforcement; (2) medical personnel treated appellant "throughout the interview;" and (3) Wade was not accusatory or threatening. (RB 105-106.) The second contention is not factually accurate. A review of the transcripts shows that

medical personnel were not present continuously throughout the three hours of tapes; they were present intermittently. Moreover, during the questioning that elicited the two statements at issue --that appellant might have fallen down the stairs and that she wrestled with a boy-- only appellant and Wade were present. (Exs. 1-A, 19, 22; 2-A, 18.)

Regarding respondent's first point, the fact that appellant could not walk away from Wade's questioning because of her medical condition and not because of law enforcement restraints does not establish that appellant was not "in custody." Appellant's presence in a hospital does not dispose of the custody issue because location is not determinative. (*See e.g. Orozco v. Texas* (1969) 394 U.S. 324, 325-327 [suspect interrogated on his bed in a boardinghouse was in custody under the circumstances].) "This Court's cases establish that, even if the police do not tell a suspect he is under arrest, do not handcuff him, do not lock him in a cell, and do not threaten him, he may nonetheless reasonably believe he is not free to leave the place of questioning—and thus be in custody for *Miranda* purposes." (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 675 [Breyer, J., dissenting, citing *Stansbury v. California* (1994) 511 U.S. 318, 325-326; *Berkemer v. McCarty* (1984) 468 U.S. 420, 440].)

The fact that appellant was medically unable to get out of

bed and leave if she wanted to, thus enabling Wade to question her without having to prevent her from leaving, did not give Wade free rein to avoid Mirandizing appellant. Severe medical injuries that render moot the issue of leaving cannot be used as a loophole through which law enforcement can evade *Miranda* in an effort to obtain incriminating information from an unsuspecting hospital patient. (*See e.g. Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 87 [a man being treated for knife wounds in an ambulance was in custody for *Miranda* purposes when a police officer asked him "what happened?" after he made a potentially incriminating statement to a treating EMT].)

Likewise, respondent's suggestion that Wade's nonthreatening demeanor precluded a finding of custody is irrelevant. The police can dominate a situation without being accusatory or threatening. As appellant noted in her opening brief, gentle trickery is no less coercive than harsh thuggery.

Respondent's focus on one or two aspects of what took place does not address the real issue: the test for determining custody is an objective one. (*Stansbury v. California* (1994) 511 U.S. 318, 325.) When the totality of the circumstances are considered, appellant was, objectively, in custody. While Wade was repeatedly questioning appellant, appellant was in a private hospital room recovering from brain surgery performed less than 24 hours earlier. She also had a broken foot, was experiencing agonizing

pain, and was encumbered by an array of medical equipment. Wade initiated contact with appellant and did so knowing that appellant was the only suspect in the death of her three children. Wade admitted she went to appellant's hospital room armed with a tape-recorder to obtain a statement from appellant. Appellant could not physically leave or otherwise distance herself from Wade's incessant questions. Wade continually cajoled appellant to just tell her what happened despite appellant being sleepy and in pain and repeatedly saying that she couldn't remember. Moreover, because of Wade's presence, appellant's nurse admitted withholding appellant's pain medication even though appellant was moaning and asking repeatedly for pain medication because the nurse was trying to assist Wade in obtaining whatever Wade needed from appellant. (Ex. 2-A, 9-11.)

In addition to Wade's constant presence in appellant's ICU room, appellant was surrounded by law enforcement from the moment she arrived at the hospital. While appellant was unconscious, law enforcement placed bags over her hands and feet, seized her clothing, took photos of her unclothed body, and stayed both in the operating room during appellant's surgery and in the post-operative area after surgery all without appellant's knowledge or consent.[6] Law enforcement also obtained a search warrant and

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[6] Respondent contends that none of these actions matter because appellant was unconscious and not aware that they were taking

(continued...)

seized appellant's blood and urine samples taken at the hospital. While appellant was in her ICU room, deputy Rivera was present in her room along with Wade and a prosecution-arranged psychologist. An assistant prosecutor stood just outside appellant's doorway. No one ever asked appellant if she wanted any of these law enforcement personnel in her room, and no one ever told appellant that she could refuse their presence.

In any other circumstances, the fact of appellant's custody would have been clear. That is, appellant was the only suspect in the death of her three children. Had appellant not been in need of emergency medical treatment, appellant would have been questioned in a custodial setting; the police would not have left her in a position where she was free to leave. That appellant could not leave for medical reasons should not free Wade from following legal and constitutional protocol.

The totality of the circumstances demonstrate that appellant was effectively in custody when Wade was questioning her. Accordingly, appellant should have been advised of her *Miranda* rights before the questioning. Because appellant was not advised of her rights and never knowingly and voluntarily waived her

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[6](...continued)
place. (RB 106 n.7.) People do not lose their Fourth Amendment rights because they are temporarily incapacitated. Custody is an objective test. If the indicia of custody exist, then appellant was "in custody." Law enforcement could not use appellant's medical condition to avoid providing the legal warnings mandated by being "in custody."

Fifth Amendment rights, appellant's pre-advisement statements should not have been admitted against her.

B. Wade's Actions in Appellant's ICU Room Rendered Appellant's Statements Involuntary

In addition to arguing that Wade should have Mirandized appellant, appellant also argued that her statements to Wade were involuntary under the circumstances. (AOB 188-191.) Respondent claims that appellant based her involuntariness argument primarily on *Mincey v. Arizona* (1978) 437 U.S. 385. Respondent then notes several differences between appellant's case and *Mincey* and concludes that appellant's statements were voluntary. (RB 106-108.) Respondent vastly minimizes appellant's argument which was based on a totality of the circumstances.

In attempting to distinguish *Mincey*, respondent relies heavily on the failure of the interrogating officers in *Mincey* to honor Mincey's request to end the questioning. (RB 108.) In actuality, the Court in *Mincey* focused as much on Mincey's weakened medical state as on the coercive tactics of the police. (*Mincey*, 437 U.S. at pp. 398-399.) Moreover, as appellant explained in her opening brief and discusses further below, gentle trickery such as Wade engaged in can be as coercive to an unsuspecting hospital patient as blatant brutality.

This Court examines the totality of the circumstances to determine whether statements were made voluntarily. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [citing *Moran v. Burbine*

(1986) 475 U.S. 412, 421].) Factors to consider include the presence of police coercion, the length of the interrogation, its location, the suspect's physical and mental health, and whether the police advised the suspect of her *Miranda* rights. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694.) This Court independently reviews the trial court's finding as to voluntariness. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

When the behavior of Wade is added to the circumstances detailed above, the only reasonable conclusion is that, regardless of appellant's custody status, any statements made by appellant to Wade were involuntary. To begin, Wade was wearing civilian clothing and not a sheriff's uniform. Although Wade introduced herself as being from the sheriff's department, she never told appellant she was detective or that she was conducting an investigation. Appellant, who was obviously in acute medical distress with a bullet wound to her head and a broken foot, was never told what Wade was doing in her room or that she could refuse to answer Wade's questions.

The transcripts of the three-hours Wade spent with appellant in appellant's ICU room show that appellant was in pain and sleepy for much of the time but was trying to be cooperative with everyone who interacted with her. Appellant was unmistakably medically impaired. She had no reason to assume that any questioning of her was anything other than medically necessary.

Indeed, given appellant's pain and her serious medical condition, she was, no doubt, eager to assist the myriad assortment of medical personnel coming into her hospital room in order to help herself medically.

Wade's solicitous behavior --acting as appellant's advocate and providing her with comfort measures-- took unfair advantage of appellant's medical situation.[7] Had appellant not been hospitalized, Wade's actions would not have blended in with the jumble of medically-related questioning and examining that was taking place simultaneously and would have alerted appellant that she was being interrogated. Appellant's likely confusion was exacerbated because Wade was wearing civilian clothing and not a sheriff's uniform. Given the totality of appellant's situation, including her serious medical condition, this Court should weigh heavily Wade's failure to inform appellant that she did not have to answer her questions in considering whether Wade took advantage of appellant's medical condition to elicit incriminating statements through subterfuge.

Respondent fails to acknowledge or address that coercion need not be aggressive and accusatory. (RB 109-110.) The United

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[7] Respondent acknowledges that Wade acted as appellant's personal aide and advocate but unconvincingly attempts to cast Wade's actions as signifying benevolent caring and not blatant manipulation. (RB 109.) Wade's own testimony that she was at the hospital to secure statements from appellant whom she suspected of shooting her three children to death defeats respondent's characterization.

States Supreme Court recognizes that subtle psychological persuasion by law enforcement, especially when applied to a person whose mental functioning is not at its best, can render a statement involuntary. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164.) "In many ways the subtle, friendly coercion that can be exerted on one who is helpless and seriously wounded in a hospital room is more effective than offers of leniency, in rendering one's statements involuntary." (*People v. Hooks* (Mich. 1982) 316 N.W.2d 245, 247.)

This form of coercion is heightened when law enforcement fails to advise a hospitalized suspect that she need not talk to the police. In *Miranda*, the Court explained that providing a warning about the right to remain silent makes a person "acutely aware ... that he is not in the presence of persons acting solely in his interest." (*Miranda v. Arizona* (1966) 384 U.S. 436, 469.) That warning was absolutely essential in appellant's case. As discussed above, Wade's failure to give appellant her *Miranda* warnings is a factor that supports that appellant's statements were not voluntary. Indeed, appellant's invocation of her *Miranda* rights as soon as they were given to her further supports that Wade took unfair advantage of appellant's situation. Once appellant learned that Wade was questioning her for legal reasons and not medical reasons, appellant exercised her constitutional right not to answer Wade's questions.

The cases upon which respondent relies to argue that Wade's actions weren't coercive are easily distinguishable. (RB 109-110.) None of them involve a detective in plain clothes asking questions of a post-operative patient in an ICU without alerting the patient to the reasons for the questioning while simultaneously providing medical support and comfort to the patient. In *People v. Carrington* (2009) 47 Cal.4th 145, 175, the defendant was being questioned about a murder at a police station. In *People v. Panah* (2005) 35 Cal.4th 395, 472, the defendant, who was brought to a hospital for a psychiatric and medical evaluation, knew he was being questioned by the police about the murder of a young girl, was given his *Miranda* rights, and expressly waived those rights. In *People v. Breaux* (1991) 1 Cal.4th 281, 301, although the defendant had been medicated with morphine after being treated for gunshot wounds, he had been placed under arrest, had been advised of his *Miranda* rights, had waived them in writing, and knew why he was being questioned. In *People v. Jackson* (1989) 49 Cal.3d 1170, 1188-1189, the hospitalized defendant was advised of and waived his *Miranda* rights and knew why he was being questioned. In *People v. Perdomo* (2007) 147 Cal.App.4th 605, 614 n.10, 618-619, the police advised the hospitalized defendant of his *Miranda* rights, and the defendant acknowledged them and waived them before answering questions.

Wade's subterfuge of acting as appellant's advocate and source of comfort without revealing her true intent to obtain appellant's statement about the shooting death of appellant's sons, coupled with appellant's serious medical condition and her ongoing medical treatment, rendered her statements to Wade involuntary. At the time of Wade's questioning, appellant had not been arrested, had not been notified in any fashion that anything was amiss, and had not been advised of her *Miranda* rights. Unlike every defendant in the cases cited by respondent, appellant had no reason to believe that Wade was questioning her for any law enforcement purpose. As soon as Wade advised appellant of her rights later on, appellant immediately invoked her rights indicating that she never voluntarily desired to answer questions from law enforcement. Under the circumstances of this case, the trial court erred in failing to find that appellant's hospital statements were the involuntary product of Wade's psychological coercion.

Respondent argues that even if the statements were involuntary, their admission was harmless because they did not directly implicate appellant in the shootings. (RB 110.) Appellant acknowledged in her opening brief that the statements were not directly inculpatory. (AOB 191.) But, appellant argued that the two statements were important because they enabled the prosecution to provide the jury with a possible explanation for

appellant's otherwise inexplicable injuries: bruises over much of her body, including her inner thighs, and a badly broken foot. The nature of those injuries suggested that appellant was beaten before being shot in the head. That possibility was incompatible with the prosecution's theory that appellant shot her children while she was home alone. Those injuries, however, were fully consistent with the defense that Xavier shot appellant and the children. By admitting appellant's statements that she might have fallen down the stairs and that she wrestled with a boy, the prosecution was able to provide the jury with an alternative explanation consistent with its theory of the shootings.

Respondent did not address the importance of these statements to the prosecution's case or the multiple times the prosecution referred to them in closing argument. (55RT 10786-10787, 10840-10841, 10853; 57RT 11155-11156.) Given the significance the prosecution attached to the statements, it cannot be said beyond a reasonable doubt that their erroneous admission did not contribute to the jury's guilty verdicts. (*Chapman*, 386 U.S. at p. 24.)

VII.

CALIFORNIA LAW AT THE TIME OF APPELLANT'S TRIAL PROVIDED SUFFICIENT LEGAL NOTICE THAT TRIAL COUNSEL SHOULD HAVE RAISED A TIMELY AND COMPREHENSIVE FOURTH AMENDMENT SUPPRESSION MOTION BASED ON LAW ENFORCEMENT'S CONTINUOUS VIOLATION OF APPELLANT'S RIGHT TO PRIVACY DURING THE FIRST 24-HOURS OF APPELLANT'S HOSPITALIZATION

Appellant has argued that her trial attorney provided ineffective assistance of counsel by failing to challenge the admission of evidence that was obtained by law enforcement through the repeated invasion of appellant's right to privacy at the hospital. (AOB 194-211.) Respondent, citing *New v. United States* (8th Cir. 2011) 652 F.3d 949, contends that counsel cannot be found ineffective because there is a split of authority regarding whether a patient in a hospital has a reasonable expectation of privacy. (RB 117.)

The Eighth Circuit held that an attorney was not ineffective for failing to raise a Fourth Amendment challenge because the right to privacy in a hospital is not clearly established and that court had never specifically addressed it. (*New*, 652 F.3d at p. 952-953.) That holding is irrelevant. The court in *New* noted that the defendant had not identified any controlling legal

authority supporting his Fourth Amendment argument or even portending that such an argument would have been successful. (*New*, 652 F.3d at p. 953.) That is not the situation in this case.[8]

At the time of appellant's trial, this Court, citing *People v. Brown* (1979) 88 Cal.App.3d 283, had declared, "the police may not intrude into a hospital room simply because hospital personnel routinely go in and out." (*People v. Cook* (1985) 41 Cal.3d 373, 381.) This Court had also described *Brown* as holding that a "patient's consent to presence of hospital employees does not waive expectation of privacy from police intrusion into hospital room." (*In re Deborah C.* (1981) 30 Cal.3d 125, 138 n.10.) In fact, the court in *New* cited *Brown* to show that there was a split between California (*Brown*) and New Jersey (*State v. Stott* (N.J. 2002) 794 A.2d 120, 127-128) finding a right to privacy and Michigan (*People v. Courts* (Mich 1994) 517 N.W.2d 785, 786) not finding a right to privacy. (*New*, 652 F.3d at p. 953.) Therefore, appellant had ample legal authority for moving to suppress the hospital-based evidence. Moreover, when counsel

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[8] Appellant questions the premise of *New*. The Fourth Amendment has existed for centuries and exists to protect a person's privacy and dignity from unwarranted intrusion by the state. (*Schmerber v. California* (1966) 384 U.S. 757, 767.) One would reasonably expect that these important constitutional protections would not suddenly end because a person undergoes emergency neurosurgery at a hospital. In fact, one would expect that those protections would be most needed at that vulnerable time.

finally raised a privacy issue mid-trial, she relied, in part, on *Brown*. Thus, counsel was aware of a legal basis for making the motion.

While *Brown* does not automatically dictate that appellant had a reasonable expectation of privacy in the hospital, it, along with the cases construing it, many of which are cited in appellant's opening brief, provided counsel with the legal underpinnings to argue that law enforcement violated appellant's right to privacy.[9] Given the number of intrusions made by law enforcement, given that the right to privacy in the hospital is a viable claim, and given that appellant was facing three murder charges and a death sentence, there can be no conceivable reason why counsel would not have raised a timely Fourth Amendment challenge to the intrusive law enforcement actions at the hospital which resulted in law enforcement obtaining significant evidence against appellant at the hospital.

Although respondent spends time explaining why *Brown* does not control this case, respondent's position is not responsive to

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[9] Respondent attacks appellant's reliance on *State v. Stott* (N.J. 2002) 794 A.2d 120, because appellant's trial was in 2001 and her attorney could not have anticipated that case from another jurisdiction. (RB 119-120.) Respondent misses the point. Appellant discussed *Stott* because *Stott* cites *Brown* and adopts the view of hospitals embraced by the *Brown* court. Appellant's attorney had *Brown* in hand and used it, albeit belatedly, to argue at trial about appellant's right to privacy. *Stott* supports that had counsel made a timely motion to suppress based on the invasion of appellant's privacy, there is a reasonable likelihood that she would have prevailed.

appellant's argument. (RB 118-119.) Appellant described in her opening brief the central premise of *Brown*: a patient in a hospital room retains some privacy rights with the degree of the rights depending on different variables.[10] (AOB 205-207.) In finding no Fourth Amendment violation in that case, the *Brown* court stressed that its finding was based on the unique facts of that case. (*Brown*, 88 Cal.App.3d at p. 292.) Appellant then explained why her case differed from the situation in *Brown* such that law enforcement did violate appellant's Fourth Amendment rights.

Appellant does not dispute that there are cases throughout the country supporting both sides of the issue of Fourth Amendment privacy rights for hospital patients. (RB 120-121) Uniform consensus, however, is not a prerequisite to prevailing on claims of ineffective assistance of counsel because those claims do not require certainty; they require only a reasonable probability of a different outcome. (*Strickland, supra*, 466 U.S. at pp. 688, 694; *In re Wilson* (1992) 3 Cal.4th 945, 950.) California case law, to the extent it existed at the time of appellant's trial, supported a finding of a Fourth Amendment violation. That courts in Michigan and Wisconsin might find

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[10] *See also Jones v. State* (Fla. 1994) 648 So.2d 669, 677, which held that although hospital rooms do not have the heightened expectation of privacy accorded to a house, a hospital patient still retains some expectation of privacy in her hospital room.

otherwise does not preclude a reasonable probability that had counsel filed a timely motion, the motion would have been granted.

With respect to Wade's continuing presence in appellant's ICU room with her tape-recorder after appellant invoked her *Miranda* rights, respondent claims that once appellant was advised of her *Miranda* rights she "was essentially in police custody." (RB 121 n. 121.) Respondent provides no legal support for this premise. Respondent cites *United States v. George* (9th Cir. 1993) 987 F.2d 1428, 1432, but, as respondent notes in her parenthetical, the defendant in *George* had been arrested prior to being admitted to the hospital. Appellant had not been arrested during the time Wade remained in her room. (30RT 6410.) Had appellant been at home and not confined to an ICU bed, Wade could not have remained in appellant's home with a tape-recorder after appellant invoked her rights. Appellant's injuries did not give Wade license to trample on appellant's rights.

More importantly, respondent cannot have it both ways. As Wade acknowledged, nothing changed in appellant's situation from before and after she was advised of her *Miranda* rights except that a prosecutor told Wade to Mirandize appellant. (30RT 6418.) So, either appellant was in custody all along and should have been given her *Miranda* rights at the beginning of Wade's questioning (see Argument VI), or appellant was not in custody

and Wade should not have been in appellant's private ICU room with a tape-recorder after appellant invoked.

Finally, respondent claims that even if appellant had prevailed on a suppression motion, the outcome of her trial would not have been different because there was additional prosecution evidence other than appellant's statement regarding Gabriel. (RB 121-122.) Respondent has minimized the scope of the suppression motion. As appellant detailed in her opening brief, the invasion of her privacy in the hospital was widespread: the police seized appellant's clothing from the backboard used to transport appellant to the hospital without a search warrant (Argument V); a deputy placed plastic bags over appellant's hands to preserve evidence before appellant went into surgery (15RT 2639, 2648; 39RT 7863); both a sheriff's department evidence technician and a deputy were present during appellant's surgery and took photographs of appellant which were introduced at trial (33RT 6839-6843; 34RT 6945-6952; 39RT 7855, 7858, 7867-7870); a deputy listened to appellant's interactions with her surgeon in the recovery room and then testified about what he saw and heard (39RT 7859-7860); this same deputy questioned appellant in the recovery room and testified about how she responded and her degree of comprehension (39RT 7872, 7877-7881); a psychologist who was hired by the prosecution sat in appellant's hospital room and listened to what appellant said, including appellant's

discussions with the medical staff treating her injuries, and then wrote down the observations she made about appellant which she later provided to law enforcement and which were used by the prosecution to defeat appellant's motion to suppress her pre-*Miranda* statements (30RT 6356-6400); and Wade tape-recorded appellant in her ICU room for three hours and then testified about statements made by appellant and appellant's mother inside appellant's room.

Had all of that evidence been suppressed, there is a reasonable probability that the outcome of the trial would have been different. (*Strickland, supra*, 466 U.S. at p. 688.)

VIII.

APPELLANT HAS ESTABLISHED THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENSE A SHORT CONTINUANCE TO BRING IN A WITNESS IT NEEDED FOR THE HEARING ON THE ADMISSION OF APPELLANT'S STATEMENTS FROM THE HOSPITAL

Appellant has argued that the trial court abused its discretion when it refused the defense a short continuance to obtain a critical witness, Deborah Anderson, needed for a hearing on the defense motion to suppress a statement made by appellant. (AOB 212-220.) Respondent contends that the trial court was justified in denying a continuance because counsel had not exercised due diligence in obtaining Anderson's presence. (RB 124-125.) To the contrary, counsel exercised due diligence under the circumstances.

Anderson's presence did not become necessary until the trial court refused to consider Nina Priebe's testimony about what Anderson told her. At that point, counsel's only option was to present the testimony directly through Anderson. Counsel explained why she could not locate Anderson to secure her presence that day --she only had access to Anderson at her job and Anderson had not been at work the previous two days. The prosecution could locate Anderson but refused to assist the defense.

Respondent also fails to recognize Anderson's significance. Respondent claims that Anderson's testimony was not material and was cumulative. (RB 125.) Not so. At the prosecution's request, the court struck Priebe's testimony that she did not go into appellant's room because Anderson told her that the police asked that hospital personnel not comfort appellant. (35RT 7116.) Because Priebe's testimony was struck, Anderson's proffered testimony that she did make that statement to Priebe would not be cumulative.

Anderson's expected testimony would also have been highly material. Even though Anderson was heard on tape saying that she withheld appellant's pain medication to assist Wade, the court found that Wade had not asked Anderson to do so. According to Priebe, however, Anderson told her the police requested that hospital personnel not provide comfort to appellant. That testimony would be highly probative since the court had previously stated that if it learned Wade did anything to interfere with appellant's medical treatment, it would have ruled differently on the custody/*Miranda* issue. (30RT 6429-6430.)

In arguing that appellant has not established an abuse of discretion, respondent ignores the context in which the requested continuance arose. This was a hearing on a motion to suppress that had been ongoing over the course of three days during times when the trial was not in session. A continuance would not have

delayed the trial itself. In fact, the jury had already heard the disputed evidence. The transcripts reflect that the trial court's denial of the continuance was prompted by the court's frustration with appellant's counsel and not for any trial-related reason.

The trial court's failure to grant the continuance was prejudicial in two respects. (RB 125-126.) First, had Anderson testified that law enforcement had interfered with appellant's treatment by barring a social worker from assisting appellant after appellant had invoked her *Miranda* rights, there is a strong likelihood that the court would have found that Wade's ongoing presence in appellant's room after the invocation violated appellant's Fourth Amendment rights.

Second, if, as a result, the court had suppressed appellant's question about Gabriel, there is a reasonable probability that the outcome of the trial would have been different. The prosecutor elaborated on this point several times during closing arguments, arguing that appellant's question about Gabriel showed she remembered what happened and knew what she had done. (55RT 10842-10843, 10854; 57RT 11159.) The prosecution treated appellant's question about Gabriel as the equivalent of a confession. Because the evidence against appellant was far from overwhelming, the denial of a continuance to provide evidence demonstrating that appellant's statements should have been

suppressed led to the erroneous admission of evidence that had a substantial effect on the jury's guilt verdicts. (*Chapman*, 386 U.S. at p. 24.)

IX.

THE TRIAL COURT MADE A SERIES OF EVIDENTIARY RULINGS THAT INDIVIDUALLY AND CUMULATIVELY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

A. The Trial Court Erred In Not At Least Reviewing Records From Xavier's Therapist In Camera

Appellant has argued that the trial court erred in refusing to review in camera Xavier's psychotherapy records to determine whether they contained evidence that would be useful to the defense in impeaching Xavier. Appellant acknowledged that this Court's ruling in *People v. Hammon* (1997) 15 Cal.4th 1117, foreclosed that argument. Nevertheless, appellant argued that *Hammon* was wrongly decided, explained how *Hammon*'s holding is inconsistent with United States Supreme Court law, showed that the position this Court has taken regarding the denial of pretrial discovery of a prosecution witness' mental health records is the minority position among the states, and argued that *Hammon* should be reconsidered. (AOB 222-232.) In response, respondent cites *Hammon* and fails to address the reasons appellant provided for reconsidering *Hammon*. (RB 128-129.)

Appellant reasserts all of the reasons explained in her

opening brief. California continues to be in the minority on this issue. (*N.G. v. Superior Court* (Alaska App. 2012) 291 P.3d 328, 337 ["A majority of the state courts that have addressed this issue have held that a criminal defendant, upon a preliminary showing that the records likely contain exculpatory evidence, is entitled to some form of pretrial discovery of a prosecution witness's mental health treatment records that would otherwise be subject to an 'absolute' privilege" --citing cases]; *see also State v. Johnson* (Md. App. 2014) 102 A.3d 295, 305-306 ["Of those that have reached the issue, the majority of state courts (and at least one legislature) agree that a victim's privilege may be subordinate to a criminal defendant's constitutional rights at trial" --citing cases); *State v. Thompson* (Iowa 2013) 836 N.W.2d 470, 479-490.)

Appellant also reasserts the reasons why she believes Xavier's therapy records were likely to yield information which could be used to impeach Xavier's testimony at trial: Xavier's credibility was the most critical issue at trial. Much of the prosecution's case turned on the jury believing Xavier's testimony portraying appellant as an angry and vindictive woman whom he caught siphoning money from his medical practice to give to her parents. The defense tried to show that these purported

financial shenanigans were a red herring to give Xavier a "reason" to fire appellant as his office manager so he could consummate an affair with an office employee. Since Xavier first had contact with his therapist on August 4, the same week he fired appellant, it is reasonably probable that Xavier discussed his motivation for the firing with his therapist. And, there is a high probability that what Xavier discussed with his therapist differed from what he testified to at trial.

For the reasons discussed here and in her opening brief, appellant asks this Court to reconsider its ruling in *Hammon* and then remand this case to the trial court for an in camera review of Xavier's therapy records from August 4, 1999 through November 22, 1999.

B. The Trial Court Abused Its Discretion in Admitting Four Autopsy Photos Depicting the Bloody Insides of the Children's Heads Because Their Extreme Gruesomeness Outweighed Any Probative Value

Appellant has argued that the trial court erred in admitting four vivid color photos (Exs. 40A, 42B and 44B&C) showing the bloody skulls of the three boys when the nature of the wounds was not at issue and the pictures themselves were particularly disturbing and likely to cause a visceral emotional reaction. (AOB 232-236.) Respondent contends that the admission

of these photographs was necessary to corroborate the testimony of the doctor who performed the autopsies. In making this assertion, respondent describes at length the graphic testimony of Dr. Frank as he described the nature of the gunshot wounds. (RB 129-134.) Respondent fails to explain why the gruesome photos were necessary in addition to the pathologist's detailed and graphic testimony. Likewise, respondent fails to explain why the photos needed to be shown to the jury three times. Respondent additionally fails to explain why the prejudicial nature of the photos of the bloody heads of the boys (especially 44B&C which show deep inside Christopher's skull) was outweighed by their minimally probative value.

Lastly, respondent claims that any error in admitting the photos was not prejudicial because the evidence against appellant was overwhelming. Although respondent makes this same claim in every issue in this case (and in virtually every criminal appeal in California), this hyperbole is not supported by the scant evidence supporting appellant's guilt in this case.

C. The Trial Court Repeatedly Interfered with the Defense Case by Sustaining the Prosecution's Objections Which Should Have Been Overruled and Overruling Defense Objections Which Should Have Been Sustained

Appellant has argued that the trial court made numerous

incorrect rulings that either allowed in evidence that should not have been admitted or which barred evidence which should have been admitted. (AOB 237-247.)

1. Allowing in Xavier's speculation about how much money appellant supposedly gave her parents

Twice the court allowed Xavier to testify that appellant paid her parents much more money than the prosecution presented in court even though there was no known basis for Xavier's purported knowledge. (20RT 3664; 26RT 4577-4578.) Respondent contends that Xavier had knowledge because he investigated his finances. (RB 135.)

There is no evidence in the record to support Xavier's opinion. The prosecution presented at trial the relevant checks that were either made out directly to appellant's parents or were allegedly for her parent's benefit. The prosecution supposedly obtained all of the checks written during the relevant time period from Xavier through his office manager. Nevertheless, the court then allowed Xavier to testify both that he did not believe the checks represented the full amount that appellant had given her parents and that he knew that appellant gave her parents much more than the amount represented by the checks. As the defense argued when it objected, there was no foundation for Xavier's

opinion. Instead, his testimony was unsubstantiated speculation. Claiming an opinion is based on a witness' knowledge when there is no basis for the witness to have that knowledge is error. Thus, the court erred in allowing this testimony. The erroneously admitted testimony unfairly and prejudicially bolstered the prosecution's theory that this case was about money -- specifically, appellant giving her parents lots of Xavier's money without his knowledge.

2. Not allowing the defense to get Xavier's inconsistencies before the jury

The defense believed that Xavier was untruthful in his testimony. To prove this to the jury, the defense attempted to cross-examine Xavier with inconsistencies between his prior statements and his trial testimony. One such inconsistency involved Xavier's continued sexual relationship with Laura Gillard after the boys were killed. (23RT 4260-4265.) The trial court sustained the prosecution's objection, stating that the inconsistencies were on a collateral issue. Respondent argues that ends the issue. (RB 137.)

Both the trial court and respondent miss the point. The purpose of the impeachment wasn't to establish the location where Xavier and Gillard had sex but rather to show that Xavier changed

the location from what he told the prosecution initially and what he testified to at trial after he learned that Gillard had told the prosecution a different location than he had told them. This was important because this case turned on Xavier's credibility. The court's ruling deprived the defense of an opportunity to show the jury that Xavier's credibility was suspect.

Similarly, the defense attempted to elicit through law enforcement that Xavier had told them in his initial interview that his therapist advised him to increase appellant's Prozac dosage. (42RT 8486-8488.) The defense wanted this in not for its truth but because it was inconsistent with Xavier's trial testimony and to show the jury that Xavier was trying to convince the police early on that a mental health professional had concurred in his assessment about appellant's depression. (22RT 3962-3969.)

Respondent contends that there was no inconsistency between what the defense wanted to elicit and what Xavier testified to. (RB 140-141.) Appellant disagrees. When asked whether he discussed Prozac with the sheriff's department when he was initially interviewed, Xavier replied, "To the best of my recollection, I mentioned to them that Cora had been started on Prozac by me." Xavier did not report having had any other

discussion about Prozac with the sheriff's department. (22RT 3969.) The defense wanted to establish through the detective that initially interviewed Xavier that Xavier told him that he increased appellant's Prozac dosage based on the advice of his psychologist. (42RT 8486.) Because that is additional Prozac-related information that Xavier discussed with the detective, it is inconsistent with Xavier's testimony that he only recalled saying he prescribed Prozac for appellant. The trial court erred in not allowing this impeachment.

Finally, the trial court erroneously sustained a series of hearsay objections when the defense was questioning appellant about the communications that she and Xavier had about Xavier seeing a divorce lawyer in August. The defense wanted to establish that appellant and Xavier discussed his going to see a divorce lawyer prior to the date of his appointment because that contradicted Xavier's testimony that he did not discuss his appointment with appellant until after the appointment when she found his papers from the appointment. The defense wanted to establish only that a prior conversation took place, not the specifics of the conversation. Indeed one question that the court sustained on hearsay grounds simply asked whether or not Xavier told appellant whether he kept the appointment, a question

requiring only a yes or no answer without details. After a series of erroneous rulings, the defense was finally able to elicit that based on communications from Xavier, appellant believed Xavier had not kept the appointment with the divorce lawyer. (46RT 9245-9250.)

Respondent contends that even if the trial court erred in its rulings, appellant was not harmed because the evidence eventually came in. (RB 142.) While the evidence did come in, it did so only after the court made the defense look like it was inept and was doing something wrong. That contributed to the overall unfairness of appellant's trial.

3. Allowing the prosecution to get before the jury that the defense hired an expert that did not testify at trial

Over defense objection on relevancy grounds, the court allowed the prosecution to elicit that its witness obtained appellant's underpants from a defense expert even though the defense expert was not testifying at trial. (36RT 7312, 7375-7378.) Respondent contends the testimony was proper because the trial court sustained the objection. (RB 138-139.) The court did sustain the objection to naming the expert and said the prosecution could elicit only that the underpants were available for inspection by the defense. (36RT 7377.) Despite that ruling,

the prosecution elicited not just that the underpants were available but that a defense expert actually accessed them. (36RT 7378.) That was unnecessary, irrelevant, and prejudicial because it left the jury with the impression that the defense had examined the underpants and not found anything that would benefit appellant.

4. Allowing Wade to testify to what Juanita believed appellant meant when she said she was sorry to Juanita in her hospital room

The trial court erred in allowing Detective Wade to testify to what Juanita said appellant meant when appellant told Juanita that she was sorry. Wade, who stayed in appellant's room while Juanita was visiting, heard Juanita ask appellant "Why did you do this?" and then say a prayer over appellant. Appellant said, "My babies. My babies. I'm sorry. I'm sorry."[11] (31RT 6519-6520.) The next day, Wade interviewed Juanita and asked her whether she knew what appellant was saying she was sorry for the previous day. Over defense objection based on hearsay and lack of foundation, the trial court allowed Wade to testify to Juanita's response which was Juanita's opinion about what appellant meant --that

[11] The trial court admitted this testimony from Wade to impeach Juanita who testified she couldn't recall this exchange. (31RT 6520.)

appellant was sorry for what happened to her babies. (31RT 6519-6523, 6533.) Because Juanita was speculating about what appellant was saying she was sorry for, Wade's testimony about Juanita's opinion should not have been admitted.

Respondent contends that Juanita was not offering her opinion but rather recounting what she heard appellant say. (RB 143-144.) That is not a reasonable conclusion for two reasons. First, Juanita's response came after being asked specifically by Wade what she thought appellant was saying she was sorry for. Second, Wade, who overheard the conversation, did not hear appellant say she was sorry for what happened to her babies. Certainly if the detective who was investigating the shooting death of three children heard appellant, their only suspect, say she was sorry for what happened to her babies, the detective would have noted it immediately and remembered it for the trial. When these two facts are considered together, the obvious conclusion is that Juanita conflated appellant saying "My babies" and "I'm sorry" and assumed appellant was saying she was sorry for what happened to her babies. But Juanita's opinion about what appellant was really saying was no more relevant nor non-speculative than the opinion of anyone else who heard Wade's testimony about what appellant said. The court should not have

allowed Wade to present Juanita's opinion.

5. Not allowing in that Xavier told Juanita in the garage that appellant shot the kids in the head

The trial court erred when it sustained the prosecution's objection on relevancy grounds to admitting Xavier's statement to Juanita in the garage the night of the shooting that appellant shot the kids in the head and wasn't messing around. The defense wanted the statement admitted for the non-hearsay purpose of showing that Xavier knew a fact about the shooting at a time when he otherwise had shown no indication that he knew what had transpired. The court agreed that it was being offered for a non-hearsay purpose but nevertheless ruled it was irrelevant.

Respondent contends that the trial court ruling was proper because it would have been readily apparent to "a layperson, let alone a medical doctor like Dr. Caro" that the children were shot in the head. (RB 145.) Appellant disagrees. Xavier, a medical doctor, told the 9-1-1 operator that appellant, who had been shot in the head, had overdosed or slit her wrists. Thus, neither Xavier's medical prowess nor the obviousness of gunshots to the head are apparent from the record. Moreover, there was no prejudice from allowing this evidence, and the defense articulated the relevancy of the testimony to its case. There was

no reasonable basis for the trial court to exclude the testimony.

D. The Trial Court Erred in Not Admitting as a Past Recollection Recorded a Statement that an Officer Wrote in His Police Report But Could No Longer Remember

Appellant has argued that the trial court erred in refusing to admit a statement in officer Tutino's report that he overheard Xavier tell Juanita in the garage that "Cora said she killed the kids." (17RT 3137; 49RT 9743, 9754, 9768, 9781; Special Exhibit 7.) By the time of trial, Tutino claimed not to remember hearing that statement and further claimed that although the report was, to the best of his knowledge, accurate, his memory was not refreshed by reading his report. The defense sought to admit the statement as a past recollection recorded under Evidence Code section 1237 not for its truth but to show that Xavier made the statement. The statement would impeach Xavier who testified that appellant did not speak that night.

Respondent does not address the admissibility of the statement but contends that even if an error occurred, it would not have led to a more favorable result. (RB 147-148.) First, respondent notes that the statement in question --"Cora told Xavier that she killed the kids"-- was only a paraphrase and not a direct quote. (RB 147.) Respondent does not explain why that matters. The statement was contained within a paragraph of

Tutino's report documenting what he overheard in the garage. Since appellant was not in the garage and since Juanita had not seen appellant since the shooting, that statement about what appellant purportedly said could only have come from Xavier.

Next respondent claims the statement is suspect because Tutino could not recall it and it was not on the audio tape from the garage. That the statement isn't heard on the tape is of no moment because much of that tape was inaudible. (*See e.g.* 25RT 4546-4551; 47RT 9431-9450, 49RT 9798.) Tutino's inability to recall the statement at trial two years later is irrelevant. He documented it in a report within hours of hearing it, and he never voiced any reason to believe his report about what he heard was incorrect. That Juanita was not asked about whether she remembered it, and that Xavier denied saying it, do not affect appellant's right to have the jury learn what Tutino documented Xavier as saying.

As appellant explained, the defense put on evidence that Xavier manipulated the crime scene and manufactured other evidence to make appellant look guilty. Establishing that Xavier reported to Juanita that appellant told him she killed the kids would be significant information for the jury to consider since appellant was, by all accounts, unconscious and not communicating

after she was shot. Had the jury heard this evidence in addition to the evidence of Xavier's other manipulations, including the planting of letters in appellant's closet and the stopping of the grandfather clock, there is a reasonable probability that at least one juror would have had a reasonable doubt about Xavier's credibility and appellant's guilt and the outcome of the trial would have been different.

X.

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A GRAPHIC COMPUTER ANIMATION DEPICTING THE PROSECUTION'S VIEW OF HOW THE SHOOTING OF MICHAEL AND CHRISTOPHER TOOK PLACE

Appellant has argued that under the circumstances of this case, which was essentially a who-done-it, the trial court abused its discretion when it admitted a graphic computer animation depicting the prosecution's view of how Michael and Christopher were shot and then allowed it to be played multiple times for the jury. (AOB 254-264.) Respondent contends that the computer animation was properly admitted because it illustrated the prosecution expert's opinion about how the shooter was positioned in order to get blood on the same locations that it was found on the shorts that appellant was wearing when the police arrived. (RB 152-153.)

Respondent is incorrect. Englert, the blood spatter witness, had no special knowledge about how the shooter stood. During cross-examination, Englert supplied the following testimony:

> Q. And the decision that you made as to the likely position of the shooter, there was only one spot the person could be; right?

A. To the left side of the boys, yes.

Q. And so when you say "To the left side of the boys," there was only one position that the body could be in in order to have that particular trajectory that's exhibited in triple -- CCCC?

A. No. That's not true. There's various positions one may be in that we'll never know, whether stooped over, whether leg on the bed, how close, no one will ever know that information.

Q. And did you attempt to position the model in all possible spots?

A. I positioned the model in the spot that the evidence dictated me to do. In other words, I didn't put the model at the foot of the bed. It wouldn't fit. I didn't put the model way back because then the gunshot distance doesn't fit. I didn't put the model over on the other side of the bed because it wouldn't fit. And certainly you can't get at the head of the bed because it's against the wall.

So you put the position -- it's a known -- it's a known fact you can never change that the shooter was on the left side of the bed. Where, how far to the left, how far to the right I don't know exactly other than it would be more to the left because there's less density of blood that matches the blood on Michael that goes in that direction back to where the shot came from. (36RT 7711-7712.)

Thus, the only "fact" Englert knew was the unremarkable fact that the shooter was on the left side of the bunk bed. A two-minute graphic computer animation was not necessary to illustrate that fact.

Respondent does not address appellant's argument about the trial court's failure to adequately weigh the prejudice of

showing the jury an animated bloody depiction of two young boys being shot in the head. Just because the technology exists to make a realistic computer animation that "illustrates" someone's opinion does not mean that the trial court should not weigh the necessity of presenting such evidence against the emotional impact of seeing a bloody depiction of the killing of two children. The repetition of the court's admonition about the role of the animation does not neutralize the visceral impact of a two-minute graphic animation that the jury was shown four times during the trial.

XI.

THE PROSECUTOR REPEATEDLY COMMITTED

MISCONDUCT DURING CLOSING ARGUMENTS

Appellant has argued that the prosecution committed misconduct by repeatedly exceeding the limits of proper argument in closing summations at both the guilt and penalty phases. (AOB 265-278.) Respondent repeatedly states that appellant forfeited much of this claim because counsel failed to object. (RB 155-167.) Appellant candidly acknowledged in her opening brief that trial counsel failed to object to some of the instances of misconduct in the prosecutor's closing arguments. Trial counsel, however, did object to many of the instances --some of which were sustained and some of which were overruled-- but none of which deterred the prosecutor from repeatedly engaging in improper argument. In such circumstances, at least one court has held: "When ... the misconduct is part of a pattern, when the misconduct is subtle and when multiple objections and requests for mistrial are made, we conclude it proper for a reviewing court to consider the cited misconduct in evaluating the pattern of impropriety." (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100.)

Appellant has also argued that if this Court finds that

appellant forfeited any part of her prosecutorial misconduct claim because counsel failed to object, then her trial counsel provided ineffective assistance of counsel for failing to raise a valid objection to each instance of misconduct. Respondent fails to address appellant's ineffective assistance of counsel argument. This Court has treated a failure to address an issue as a concession of that point. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 ["The People apparently concede as much; although they respond to each of defendant's other arguments, they simply ignored this point in their brief and at oral argument"].) Accordingly, this Court may assume that respondent has conceded that appellant's attorney provided ineffective assistance of counsel in failing to object to every instance of improper prosecutorial argument.

Appellant cited three instances were the prosecutor vouched for Xavier's truthfulness in the guilt phase when she said: (1) Xavier "testified truthfully" about firing appellant (55RT 10741); (2) Xavier was "honest when he testified" (55RT 10745-10746); and (3) Xavier answered appellant's questions "honestly" that night (55RT 10755). In response, respondent claims that these statements were not misconduct because they were based on

facts established by the record.[12] (RB 155.) Respondent is incorrect. No facts at trial established that Xavier was honest about anything. Xavier's honesty was for the jury to determine. By repeatedly vouching for Xavier's credibility and truthfulness, the prosecutor committed misconduct.

Appellant noted that the prosecutor improperly relied upon her purported observations of Xavier on the witness stand to describe how emotional yet stoic Xavier was while the tape of his first interview was being played. (AOB 268-269.) Respondent contends that the prosecutor's comments were based on her observations and were, therefore, proper. (RB 156.) To the contrary, if the prosecutor observed that Xavier was stifling sobs and crumpled over in pain, then she had an obligation to make those observations known on the record. Otherwise, the prosecutor made herself a witness by being the sole person in the courtroom to make those purported observations.

Appellant further noted that the prosecutor relied on facts

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[12] To support this argument, respondent cites *People v. Redd* (2010) 48 Cal.4th 691, 741. (RB 155.) In *Redd*, the prosecutor during closing argument praised the actions taken by a bystander and several police officer that resulted in the defendant being caught. In contrast to this case, however, the prosecutor did not describe any of the witnesses as truthful or honest. Here, since Xavier's credibility was a critical component of the prosecution's case, the prosecutor's vouching for Xavier's honesty was improper and constituted misconduct.

outside the record to try to explain why the lead investigator, Detective Lorenzen, was not called as a prosecution witness. (AOB 270.) Respondent claims that Lorenzen's testimony was not necessary in light of the testimony by other law enforcement officers and his absence was irrelevant. (RB 158.) Appellant disagrees. There was no evidence at trial that the lead investigator didn't really do any work or that he was lead investigator "in name only." (55RT 10838.) Respondent cites to page 8711 of the transcripts but nowhere on that page did Lorenzen testify that his duties were limited or that he was lead investigator in name only. Lorenzen's absence was important. The defense at trial was that law enforcement improperly focused on appellant without ever considering Xavier as a viable suspect. When the lead investigator in a triple murder fails to testify, it certainly raises a suspicion that the prosecution and/or Lorenzen had something to hide. The prosecutor attempted to blunt that argument by unfairly relying on facts not in evidence. This Court has cautioned that prosecutors may not "purport to rely on their outside experience or personal beliefs based on facts not in evidence when they argue to the jury." (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

The prosecutor also impugned the integrity of the defense

and defense counsel by arguing that the only task of defense counsel was to confuse just one juror and then imploring the jurors not to be the one juror that gets targeted by the defense confusion. (AOB 271-271.) Respondent contends that the prosecutor was properly arguing that there was no evidence to support the defense theories. (RB 159.) That, however, was not what the prosecutor said:

> The defense attorney just has to confuse one of you. That's all she has to do. That's the tactic that many defense attorneys employ. Confusion. Throw up smoke. Try and mislead jurors. And maybe, by chance, they'll get lucky and get one. ... I just ask that you not be the one that the defense is trying to target for confusion. (57RT 11103A, 11129.)

With regard to the prosecutor's closing argument at the penalty phase, appellant cited fifteen instances of improper argument some of which the defense objected to and some which were not objected to. (AOB 272-274.) Respondent makes various attempts to justify or minimize each individual instance of improper argument. (RB 159-167.) Appellant believes the arguments by the prosecutor speak for themselves and asks this Court to look at and consider the totality of the prosecutor's arguments. That is, the pervasive misconduct in the prosecutor's argument must be viewed for its cumulative effect, not parsed into individual isolated instances. Given the wide-ranging misconduct

and given that the evidence against appellant was not particularly strong and the reasons for sentencing appellant to death were not particularly compelling, the cumulative impact of the prosecutor's misconduct during closing arguments at both the guilt and penalty phases of the trial requires a reversal of appellant's convictions and penalty.

XII.

SEVERAL OF THE PROSECUTION'S PENALTY PHASE FACTOR (B) UNADJUDICATED CRIMINAL ACT INCIDENTS IN AGGRAVATION WERE TOO VAGUE AND NONSPECIFIC TO CONSTITUTE PROOF BEYOND A REASONABLE DOUBT THAT A CRIMINAL OFFENSE OCCURRED

Appellant has argued that the prosecution's "other crimes" evidence involving appellant's purported physical acts against Xavier offered in aggravation at the penalty phase was too vague and nonspecific to satisfy the heightened requirements of reliability required by the Eighth Amendment before a death sentence can be imposed and violated appellant's rights to due process and to confront and cross-examine witnesses against her. (AOB 279-289.) Respondent, citing *People v. Rundle* (2008) 43 Cal.4th 76, 182-185, a case discussed by appellant in her opening brief, contends that the incidents were not too vague and appellant had an opportunity to cross-examine Xavier and present a defense. (RB 172-174.)

Appellant has asked this Court to reconsider *Rundle* because this Court did not consider the harm from mixing vague incidents with more detailed incidents which makes it much more likely that

the jury will find the defendant responsible for all of the allegations presented against her. That is, the jury is likely to believe that if the defendant is responsible for some of the alleged bad acts, chances are she is responsible for all of the alleged bad acts, even ones with questionable evidence, just because she has been proven to be a person of bad character.

Moreover, by denying appellant a foundational hearing before the presentation of the evidence in aggravation and a sufficiency of the evidence motion after the presentation of evidence, the trial court violated appellant's right to due process and a reliable death verdict. Penal Code section 190.3 says that the jury "shall" take into account all the factors listed there. Thus, when factor (b) evidence is presented, the jury must consider it. This mandatory language, and the low, virtually nonexistent bar for admissibility of factor (b) evidence, effectively compels the jury to consider evidence that can be legally insufficient when it is deciding whether a defendant should die. When each juror is left to make his or her own assessment of a defendant's guilt of the factor (b) incident, due process demands greater, rather than lesser, gate-keeping by the trial court to ensure the fairness of the trial and the reliability of the penalty determination under the Eighth and

Fourteenth Amendments.

Respondent argues that any error was harmless because the incidents with Xavier were insignificant in comparison with the powerful aggravating evidence of the circumstances of the murder of three children. (RB 174.) That argument raises the question of why the prosecution bothered to present this vague and unsubstantiated evidence of relatively minor incidents. The prosecution must have believed that it had to cast appellant in the worst possible light to convince the jury that appellant was deserving of death. Thus, the prosecution's reliance on a black eye, a thrown battery and a tossed pizza must have had some relevance to the jury's verdict. Accordingly, the state cannot prove beyond a reasonable doubt that the prosecution's use of these vague allegations did not contribute to the jury's death determination. (*Chapman*, 386 U.S. at p. 24.)

JUROR MISCONDUCT AND RELATED ISSUES

XIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WHEN IT DISMISSED ONE OF TWO JURORS WHO BRIEFLY MENTIONED THE EMOTIONALISM OF DELIBERATIONS WHILE THEY TALKED TOGETHER IN THE COURT PARKING LOT DURING GUILT PHASE DELIBERATIONS

Appellant has made three inter-related arguments regarding the trial court's dismissal of Juror #9 during guilt phase deliberations while retaining Juror #11 after the two jurors had a brief discussion in the court parking lot after court ended on a Friday about emotions running high in the deliberation room. (AOB 290-326.) Specifically, appellant argued:

(1) the court erred in dismissing Juror #9 because what transpired was only a trivial violation of the court's standard admonishment not to discuss the case unless all 12 jurors were together and did not reveal a demonstrable reality that Juror #9 could not perform his duties as a juror or otherwise constitute good cause for his dismissal (AOB 290-313);

(2) if the actions of Juror #9 constituted good cause for his dismissal, then the trial court erred in not dismissing Juror

#11 also because the two jurors were equally culpable in having a very brief discussion about deliberations (AOB 313-317); and

(3) the trial court erred in not granting a new trial when a post-trial declaration by Juror #11 revealed that Juror #11 was not truthful when she was asked by the trial court during guilt phase deliberations about what took place between her and Juror #9 in the parking lot and, in fact, her actions were at least as culpable if not more culpable than Juror #9 and either both of them should have been dismissed or neither of them should have been dismissed (AOB 320-326).

A. Appellant Does Not Believe She Forfeited Any of These Arguments, But If This Court Disagrees, Then Any Forfeiture was a Result of Ineffective Assistance of Counsel by Appellant's Trial Counsel

In making these arguments, appellant acknowledged that her attorney had sought the dismissal of Juror #9 and not Juror #11. Appellant, however, argued that the trial court, not the attorneys, had the task of ruling on the issue of jury misconduct and ensuring appellant's right to a fair trial; therefore, trial counsel's actions do not bar this Court's review of the trial court's rulings regarding jury misconduct. (AOB 317-320.)

Respondent argues that appellant has forfeited her claim that the trial court abused its discretion in dismissing Juror

#9. (RB 184-185, 190.) Appellant disagrees. Forfeiture is the failure to make the timely assertion of a right. (*United States v. Olano* (1993) 507 U.S. 725, 733; *People v. Saunders* (1993) 5 Cal.4th 580, 590, n. 6.) No forfeiture occurred with respect to this issue. The defense believed that Juror #9 committed misconduct that warranted his dismissal from the jury and asked the court to rule on that request. The trial court considered the defense request, found that Juror #9 committed misconduct that warranted his removal from the jury, and dismissed him. On appeal, appellant argues that the trial court abused its discretion because the record does not support to a demonstrable reality that Juror #9 was unable to perform his duties as a juror.

This Court has explained that forfeiture exists because it would be unfair to rectify on appeal something which could have been corrected at trial if only the trial court had been alerted to the issue. (*In re Seaton* (2004) 35 Cal.4th 193, 198; *People v. Romero* (2008) 44 Cal.4th 386, 411.) Here, the trial court was alerted to the issue of jury misconduct. While defense counsel believed Juror #9 should be dismissed and was desirous of his dismissal, defense counsel did not have the final word. Rather, once the defense placed the issue squarely in the hands of the

court, the court was tasked with applying the law on jury misconduct to the situation involving Juror #9. The court did so. Appellant, having raised the issue of Juror #9's misconduct in the trial court and having given the trial court an opportunity to rule, is now entitled to argue on appeal that the trial court erred in its application of the law governing jury misconduct to the facts of this case.

This situation shares some similarity with *People v. Cabrera* (1989) 49 Cal.3d 291, 311 & n.8. There, the defendant challenged on appeal the trial court's failure to instruct the jury with a unanimity instruction. The prosecution had initially requested that instruction, but all of the parties, including the defense, believed the instruction was not relevant, and the trial court did not give it. This Court found no forfeiture of the issue, despite the failure of the defense to object, because the trial court had a sua sponte duty to give the instruction if the circumstances of the case required it. That is, the erroneous belief of the defense that the instruction did not apply, did not relieve the trial court of making a correct ruling on the jury instruction. Nor did it preclude the defendant from arguing on appeal that the trial court's ruling was incorrect. That same logic applies to this case.

If the beliefs of defense counsel (or the prosecutor for that matter) controlled criminal trials, there would be no need for a trial judge. At the end of the day, defendants rely on the trial court to protect their right to a fair trial. When a trial court considers a legal issue and makes a ruling and that ruling is legally wrong, than the defendant should not be barred from raising the error on appeal and receiving a ruling that reaches the merits of the claim especially in a case where the defendant has been sentenced to death.

Alternatively, appellant has argued that if this Court finds that the actions of her attorney forfeited her right to challenge the dismissal of Juror #9 and/or the retention of Juror #11, then trial counsel's actions constituted ineffective assistance of counsel. (AOB 317-320.) Notably, respondent fails to address appellant's ineffective assistance of counsel argument or appellant's argument that her agreement with what took place did not constitute a knowing and intelligent waiver of her right to a fair and impartial jury. (RB 184-185, 190.) This Court has treated a failure to address an issue as a concession of that point. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 ["The People apparently concede as much; although they respond to each of defendant's other arguments, they simply ignored this point in

their brief and at oral argument"].) Accordingly, this Court can assume that respondent concedes that appellant's attorney provided ineffective assistance of counsel in seeking Juror #9's removal and/or not seeking the removal of Juror #11.

Respondent cites *People v. Cunningham* (2001) 25 Cal.4th 926, 1029, for the proposition that appellant has forfeited her claim regarding the dismissal of Juror #9 because she sought his discharge. (RB 185.) In *Cunningham*, the court dismissed a juror during penalty phase deliberations because, believing deliberations were going to end sooner than they did, the juror had made a plane reservation to go visit her father who had suffered a stroke during trial and was dying. Counsel for both sides felt that the juror was preoccupied with her father's impending death, was not capable of performing her duties as a juror, and should be dismissed. The defendant concurred because he believed the juror was weak and would be influenced by the other jurors. (*Cunningham*, 25 Cal.4th at pp. 1028-1029.) On appeal, the defendant challenged the dismissal. While this Court did note in *Cunningham* that the defendant in that case had also sought the juror's dismissal and had, therefore, waived a challenge to the dismissal, this Court also examined the claim on the merits and found that the juror who had been dismissed had

demonstrated her inability to perform as a juror. (*Cunningham*, 25 Cal.4th at p. 1030.) In contrast, this Court's review of this claim in this case will surely establish that there was no demonstrable reality that Juror #9 could not perform his duties as a juror.

Respondent also cites several cases to support the assertion that appellant forfeited her claim that the trial court erred in not dismissing Juror #11 along with Juror #9. (RB 190 [citing *People v. Foster* (2010) 50 Cal.4th 1301; *People v. Lewis* (2009) 46 Cal.4th 1255; *People v. Stanley* (2006) 39 Cal.4th 913; *People v. Holloway* (2004) 33 Cal.4th 96].) In *Foster*, the defendant challenged on appeal the trial court's failure to remove a juror who had received a note on his car about being a juror and a juror who had been spoken to in the parking lot about being a juror. (*Foster*, 50 Cal.4th at pp. 1339-1341.) This Court found the claim forfeited because the defense had not sought further inquiry or objected to the trial court's decision. This Court also found no merit to the claim. (*Id.* at pp. 1341-1343.)

In *Stanley*, this Court found that the defendant waived his claim that the trial court erred in keeping on a juror who had read a newspaper article about the first day of trial because counsel had failed to object. Additionally, this Court found the

claim had no merit because the record established that the juror had not recalled much of what he read and had said he could be a fair juror. (*Stanley, supra,* 39 Cal.4th at pp. 950-951.)

Likewise, in *Holloway,* the defendant argued that the trial court erred in not dismissing a juror who had asked to see a photo of the murder victims in life because he was having dreams about them and then talked to several other jurors about what he had requested. (*Holloway,* 33 Cal.4th at pp. 123-124.) This Court found the claim forfeited because the defendant had not sought the juror's removal, but also found the claim to be without merit because there was substantial evidence that the juror could still serve as an impartial juror. (*Id.* at pp. 125-126.)

In *Lewis,* the defendant argued that the trial court should have dismissed a juror who discussed with her husband after the first day of guilt phase deliberations her frustration at the jury foreman's refusal to reveal the results of the jury poll. (*Lewis,* 46 Cal.4th at pp. 1305-1308.) Although this Court found the claim forfeited because the defendant had not objected or moved for a mistrial, this Court also found that the juror was properly retained because although discussing the case during trial with a non-juror was misconduct, there was no prejudice

established.[13] (*Id.* at p. 1309.)

Significantly, respondent does not cite any case where this Court found a claim regarding the improper dismissal of a juror or the improper retention of a juror to be meritorious yet still found the claim forfeited. This case presents that situation. To the extent the trial court's improper dismissal of Juror #9 or improper retention of Juror #11 is the fault of appellant's attorney, counsel's failure to make the proper objections to protect appellant's right to a fair and impartial jury and to ensure appropriate appellate review of what took place constituted ineffective assistance of counsel for the reasons set forth at pages 317-320 of the opening brief. (*In re Seaton, supra,* 34 Cal.4th at p. 200 ["This does not mean, however, that there is no recourse when a defendant's rights are violated at trial and defense counsel does not object. If counsel's omission falls 'below an object standard of reasonableness ... under prevailing professional norms' [citation omitted], the defendant

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[13] The *Lewis* case strongly supports appellant's argument regarding the improper dismissal of Juror #9 in appellant's case. While appellant acknowledges that Juror #9 committed misconduct, juror misconduct does not mandate automatic dismissal. Rather, the record must show to a demonstrable reality that the juror can no longer perform his duties. It is this demonstrable reality that was missing in *Lewis* and was also completely lacking in appellant's case.

may assert the error ... 'clothed in 'ineffective assistance of counsel' raiment [citation omitted]'"]; *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543 ["This is one of those rare cases in which the appellate record demonstrates on its face that counsel's assistance was not competent and that defendant was prejudiced by that incompetence"].)

This Court has the authority to consider this claim solely on the merits and appellant asks this Court to do so:

> Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to "prevent[]" or "correct[]" the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. ... Indeed, it has the authority to do so. ... Whether or not it should do so is entrusted to its discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161, n.6.)

B. <u>The Record Does Not Support a Demonstrable Reality That Juror #9 was Unable to Perform His Duties as a Juror</u>

The record does not support a demonstrable reality that Juror #9 was unable to perform his duties as a juror. Respondent claims otherwise, but even respondent's recitation of the evidence shows only that, at worst, Juror #9, after over two months of trial and during a conversation with Juror #11 outside

of court about other topics unrelated to the trial, may have initiated a sentence or two discussion about emotions running high in the deliberations room. (RB 186.) Respondent declares this "intentional misconduct" and claims that it shows a demonstrable reality that Juror #9 could not perform his duties as a juror. Despite this hyperbole, respondent fails to show just how this trivial violation of the court's admonition after months of testimony about the shooting death of three children and after four days of emotional deliberations demonstrates that Juror #9 could not perform his duties as a juror.

The cases respondent cites do not actually assist respondent with this argument. (RB 186, citing *People v. Nunez* (2013) 57 Cal.4th 1, 55 and *People v. Ledesma* (2006) 39 Cal.4th 641, 743.) In *Nunez*, the foreperson wrote a note during the penalty phase deliberations saying the jury was split 10-2 and one juror (#10) had discussed the case and her doubts with her mother and with a friend. (*Nunez*, 57 Cal.4th at p. 53.) The court questioned #10 who said that after the guilt phase deliberations she had "confided with her mother and her friend about issues related to the case." (*Id.*) The juror, who believed that the penalty phase deliberations had concluded, also admitted that she had revealed her penalty phase vote to her friend who then discussed her views

of the death penalty with the juror. The juror also told her mother that the case was done and told her mother she had things to work out. (*Id.* at pp. 53-54.) The court found misconduct on the juror's part and dismissed her. (*Id.* at p. 55.)

In finding that the record disclosed a demonstrable reality for removing the juror, this Court stated: "Juror No. 10 admitted telling her close friend that the jury would return a verdict the next morning, the nature of that verdict, and her unease with the verdict, thus violating the court's admonition not to discuss the case with anyone outside the jury room." (*Id.*) This Court further noted that the juror's friend had then expressed her views on the death penalty, "the very decision the juror had to make in the case." (*Id.*)

This contrasts sharply with what took place in appellant's case. Juror #9 briefly remarked about emotions running high in the deliberation room with a fellow jury. The two jurors did not discuss the evidence or the verdicts. While the actions of the juror in *Nunez* as well as the actions of Juror #9 and Juror #11 in appellant's case violated the trial court's admonition not to discuss the case and thus constituted acts of "misconduct," the standard for dismissing a juror is not simply that misconduct took place. A juror's inability to perform his duties must appear

in the record as a demonstrable reality. (*Ledesma, supra,* 39 Cal.4th at p. 743.) This Court has said that trivial violations of these admonitions that do not prejudice the parties do not require removal of a sitting juror. (*People v. Wilson* (2008) 44 Cal.4th 758, 839.) This Court has also said that a juror's comments about a pending trial which are made to a fellow juror are less serious than comments made to non-jurors. (*Id.* at p. 840.) Thus, the dismissal of the juror in *Nunez* was warranted on its facts while the dismissal of Juror #9 was not justified.

Respondent's reliance on *Ledesma, supra,* is equally misplaced. There, the trial court dismissed a juror during penalty phase deliberations after the juror admitted that he had recounted the case to his wife while trying to "straighten things out in his head" and "sort the facts out." The juror's wife told him he had a difficult decision to make and offered him some advice. The juror acknowledged that their discussion allowed him to think more clearly. (*Ledesma,* 39 Cal.4th at p. 742.) This Court found that substantial evidence supported the trial court's decision to dismiss the juror because the juror's actions constituted "serious and willful misconduct." (*Id.*) Again, like the juror in *Nunez,* the juror in *Ledesma* had an extended discussion with a non-juror about the ultimate decision that the

juror needed to make: whether the defendant should live or die. Juror #9 in this case, in contrast, had a very brief discussion with a fellow juror about the emotional tenor of the deliberation room. The situations differ significantly and exemplify the difference between a trivial act of misconduct and a serious act of misconduct warranting a juror's removal during the midst of deliberations.

Despite respondent's attempt to distinguish appellant's case from the situation in *People v. Wilson, supra,* respondent has offered no principled reason for distinguishing this case from *Wilson.* (RB 187-188.) In *Wilson,* the juror made a one or two sentence remark to a fellow juror that touched on his views about the evidence. (*Wilson,* 44 Cal.4th at pp. 836-838.) Respondent seems to find it significant that the juror's remarks in *Wilson* took place during the guilt phase trial itself as opposed to the deliberations. (RB 188.) That fact, however, had no apparent significance to this Court which found that the juror's remarks to the other juror did not justify his removal from the jury:

> Juror No. 5's solitary and fleeting comments to a fellow juror, made during a break early in the guilt phase portion of the trial, were a technical violation of both section 1122 and the court's admonition to the jury not to discuss the case. But the violation was a trivial one: one, possibly two sentences, spoken in rhetorical fashion and not in an

> obvious attempt to persuade anyone. Juror No. 1 averred that he did not respond, and none of the other jurors reported hearing the comments. (*Id.* at pp. 839-840.)

Similarly, Juror #11 told the court that Juror #9 simply thanked her for listening to him in deliberations and did not try to advocate for his position. (58RT 11271-11272.) On that record, there is no valid basis for distinguishing this case from *Wilson*. (*See also People v. Avila* (2009) 46 Cal.4th 680, 727 [a brief discussion during deliberations in violation of the court's admonition not discuss a defendant's failure to testify was technically misconduct but innocuous and non-prejudicial]; *People v. Majors* (1998) 18 Cal.4th 385, 422-425 [no misconduct where various jurors engaged in conversations about the case during the trial because the discussions focused on the process and not on the evidence or the outcome].)

"[T]he replacement of a juror during the course of deliberations can be justified only under extreme circumstances...." (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1376.) This Court recently explained that in reviewing whether good cause existed for a juror's removal, it looks at the trial court's actual basis for the juror's removal and asks whether the evidence upon which the trial court relied was sufficient to support that basis as grounds for dismissal.

(*People v. Duff* (2014) 58 Cal.4th 527, 560.) The demonstrable reality test is a more comprehensive and less deferential standard of review than the more typical abuse of discretion standard of review. (*People v. Debose* (2014) 59 Cal.4th 177, 201.)

In appellant's case, the trial court found that dismissing Juror #9 was warranted because he committed a "flagrant violation" of the court's admonition not to discuss the case with other jurors unless all 12 jurors were present. (58RT 11275.) The court then told Juror #9, incorrectly, that it believed it was required to excuse him for violating the court's order. (58RT 11276.) Thus, while evidence supports that Juror #9 violated the court's admonition, the evidence is sorely lacking that this insignificant violation was either "flagrant" or sufficient to support the removal of Juror #9. On the record before this Court, the trial court abused its discretion in dismissing Juror #9.[14]

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[14] Respondent faults appellant for noting in her opening brief that the post-trial declaration of Juror #11 supports that the conduct that the two jurors engaged in was not serious and willful misconduct. (RB 189.) The record without the declaration amply supports the trivial nature of what took place. Nevertheless, while Juror #11's post-trial declaration admitted that the two jurors talked a little more than Juror #11 admitted to when questioned by the court, it reaffirmed that the content of their brief discussion was the deliberative process and not the evidence or the verdicts. To the extent anything was said about the evidence, it was Juror #11 who said that "it had to be

(continued...)

Moreover, the trial court's abuse of discretion cannot be justified because appellant's trial attorney sought the dismissal of Juror #9. The trial court, irrespective of what the defense or the prosecution wanted, had a duty to protect appellant's right to a fair trial before a fair and impartial jury. Two wrongs do not make a right. Indeed, in this case, two wrongs, by both the trial court and appellant's counsel, require that appellant's convictions be reversed.[15]

C. If This Court Concludes That A Demonstrable Reality Showed that Juror #9's Dismissal was Warranted, Then The Trial Court Committed Reversible Error in Not Dismissing Juror #11 Also

Appellant has argued that if this Court finds that the trial

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[14](...continued)
an emotional night" (presumably talking about the night of the shootings) as a basis to explain why the deliberations were emotional. (12CT 2433, ¶¶ 7, 8.)

[15] There is simply no rational explanation for why trial counsel so vehemently wanted Juror #9 off the jury except for her unreasonable belief that he was the holdout jury preventing an acquittal. (11RT 11257-11258, 11260, 11274-11275, 11270; 10CT 1894.) While the prosecution case against appellant was not a strong one, there is not a reasonable possibility that the jury in this capital murder case involving the death of three young boys was going to unanimously vote to acquit appellant. At best, the defense had a reasonable chance to avoid a conviction through a hung jury. Counsel's decision to assume that Juror #9 was the holdout juror preventing an acquittal and then gamble with appellant's life by foisting upon the court an unsubstantiated position that Juror #9 was attempting to influence Juror #11 and then push for his removal from the jury while retaining Juror #11 was incompetent lawyering that violated appellant's Sixth Amendment right to the effective assistance of trial counsel.

court properly dismissed Juror #9, then the record equally supports that the court should have also dismissed Juror #11. Respondent claims that the trial court was justified in treating the two jurors differently because "the trial court reasonably found that it was Juror No. 9 who initiated the topic of the deliberations during the parking lot conversation, that Juror No. 11 did not affirmatively discuss the case during the conversation, and that Juror No. 11 "was kind of stuck and being nice." (RB 191.) Indeed, respondent characterizes what occurred as Juror #11 being "merely a passive recipient of Juror No. 9's unsolicited comments regarding the deliberations." (RB 191.)

There are a number of problems with respondent's account of what took place. First, it is based on an assumption that Juror #9 was untruthful and that Juror #11 was completely truthful mixed with in with a large dose of pure speculation. If Juror #11's account was completely true, then what took place was that during a discussion about movies and weekend plans, and after 56 days of trial and 4 days of emotional deliberations in the guilt phase of a capital trial involving the murder of three children, Juror #9 thanked Juror #11 for listening to him and understanding his perspective. Juror #9 did not advocate for any position and they spoke no further about anything related to the case. (58RT

11271-11272.) How could that one line of thanks, even if a technical violation of the trial court's admonition, possibly establish to a demonstrable reality that Juror #9 could not perform his duties as a juror. It doesn't. Under respondent's account of what took place, the trial court had no valid basis for dismissing either juror.

Second, respondent's account disregards, with no basis, everything that Juror #9 said. Juror #9 said there was a one or two line discussion between himself and Juror #11 regarding the emotions in deliberations. According to Juror #9, Juror #11 said appellant must have been emotional that night, and Juror #9 agreed.[16] Juror #9 could not recall who initiated the discussion, but said it might have been him. (58RT 11268-11271.) Thus, according to Juror #9, this brief discussion was a two-way interaction. That is, Juror #11 actively participated. She did not walk away or report the exchange to the court.

The trial court offered no valid explanation for why it

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[16] It is not clear from the record whether Juror #9 was referring to something said in the parking lot or something said in the deliberation room, and the point was never clarified by the court. Strictly for purposes of this argument, appellant is assuming Juror #9 was referring to the discussion between himself and Juror #11 in the parking lot. Obviously, if Juror #9 was referring to a discussion that took place in the deliberation room, than it has no relevance to whether there was jury misconduct in the parking lot.

rejected what Juror #9 said and adopted what Juror #11 said. Instead, the record reflects that the court, the prosecutor and appellant's counsel all misconstrued what was said and/or engaged in sheer speculation about what they believed took place. For example, the prosecutor said:

> But (juror #9), the way I heard this, seemed to indicate to the Court that he had made -- he may have brought up the issue of the defendant's emotional state of mind, which could be construed as discussing the case with individual jurors rather than in concert with the entire panel. (58RT 11274.)

That is not what Juror #9 said. Juror #9 was clear that he ***agreed*** with the statement about appellant being emotional; he did not say it. (58RT 11268 ["We were -- there was some personal stuff said, which made it difficult for deliberations to take place, and there was also a comment ... in regards to the emotional state, which sounds really bad, but it was -- in fact, the exact quote was in regards to the defendant. And it would have been 'she had to be emotional on that night.' And my response to that was that I agree"].) The record establishes that Juror #9 did not make the statement about appellant's emotions that night.

Appellant's counsel also misstated what Juror #9 said and then compounded that by engaging in utter speculation: "My position is that (juror #9) has knowingly and willingly violated

the specific orders of the Court and has attempted to engage another juror in discussions about the emotional state of Mrs. Caro. Apparently he's attempted to convince her of his position and she is not realizing that or, if she does realize that, it hasn't had any impact on her." (58RT 11273.)

Later, both the prosecutor and defense counsel agreed, wrongly, that Juror #9 never said that Juror #11 discussed appellant's emotional state. (58RT 11278-11279.) The record amply supports that if Juror #9 was referring to the discussion in the parking lot, then he said Juror #11 said it and he merely agreed with it. (58RT 11268.)

Appellant's counsel also unfairly hypothesized about what Juror #9 was doing: "My perception of what (juror #11) said is that ... she didn't really understand what (juror #9) was attempting to do, which is to gain support, further support for his position back in deliberations, and that she didn't offer any information about the case or discuss any of the facts of the case." (58RT 11279.) The court, with no basis for doing so, said, "I agree. I took (juror #11)'s comments to be it was (juror #9) who was the initiator of the conversation and (juror #11) was kind of stuck and being nice." (58RT 11279.)

Third, as discussed further below, both the prosecutor at

trial and respondent in its brief, premised their contention that Juror #11 should not have been excused on the fact that she did not participate in the discussion, she was merely a passive listener. At trial, the prosecutor specifically asked the court to make a finding that Juror #11 did not discuss the case because the prosecutor recognized that if there was a two-way discussion, Juror #11 would also be disqualified. (58RT 11278, 11279-11280.) In a post-trial filing, the prosecution presented a declaration from Juror #11 that contradicted what Juror #11 told the court and established that she, in fact, engaged in a two-way discussion with Juror #9. Thus, even if this Court were to find that Juror #9 was properly dismissed and Juror #11 was properly retained, the trial court erred when it refused to hold a hearing on and grant appellant's motion for a new trial based on misconduct by Juror #11.

D. The Trial Court Erred in Not Granting a New Trial Based on Jury Misconduct or at least Holding a Hearing on the Defense Claim of Jury Misconduct

In a post-trial declaration submitted by the prosecution, Juror #11 described, under the penalty of perjury, what took place in the parking lot between her and Juror #9:

> On the evening of the fourth day of deliberations, Juror #9 and I walked to our cars together in the parking lot. Juror #9

> brought up the topic of deliberations. He made comments about how difficult deliberations were, and that deliberations had gotten personal. He stated that the deliberations had become too emotional. I said something to the effect of "Well, it had to be an emotional night, so it's understandable that we're emotional in there."
>
> I did not say, "She had to be emotional that night." I did not make any reference to the defendant's mental state during that conversation.
>
> Neither Juror #9 nor I discussed e-mails, interviews of the defendant, or any other specific item of evidence related to the case during that conversation.
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> We discussed movies, as I had just seen "Jurassic Park 3." ... (12CT 2433.)

Appellant has argued that this declaration contradicts what Juror #11 said to the court, supports that the two jurors engaged in a two-way discussion about deliberations in violation of the court's admonishments, shows that Juror #11 was the juror who brought up the emotions the night of the shooting (as Juror #9 told the court), and confirms that if Juror #9 satisfied the legal criteria for removal from the jury than surely Juror #11 was equally, if not more so, subject to removal. (AOB 320-326.)

Respondent dismisses appellant's arguments claiming that appellant's new trial motion was premised on the post-trial declaration of Juror #9 and that Juror #11's declaration was a rebuttal to his declaration. (RB 193.) That is a red herring.

Appellant clearly and unequivocally raised the issue of Juror #11's declaration establishing her misconduct. Trial counsel argued to the court:

> I did request the Court excuse (Juror No. 9). (Juror No. 9) admitted misconduct. He admitted that he was talking about the facts of the case[17] and what occurred in deliberations outside in the parking lot. He -- the questions of Miss (Juror No. 11) caused I believe all of us to reasonably conclude that she was merely attempting to get away from Mr. (Juror No. 9) and was changing the topic and subject matter to discussion about the movies. That is erroneous. And obviously hindsight is 20/20.
>
> If we had an admission from Miss (Juror No. 11) that she was also talking about the defendant's state of mind or the state of mind at the Caro household or the fact that the jury deliberations were emotional because that is part and parcel of having emotional people involved in actions on the significant night in question, the defense would have moved to excuse (Juror No. 11) for cause. We falsely concluded that her participation in the conversation was just one of wanting to extricate herself. (67RT 12926-12927.)

The prosecutor objected and argued that Juror #11 "describes events exactly the way they were described in the court hearing." (67RT 12927.) The court agreed and faulted defense counsel for not asking more questions of Juror #11 at the time. (67RT 12927.) Counsel appropriately responded that at that time the defense

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[17] Counsel once again misstated the record. Juror #9 never admitted to discussing the facts of the case. His admission was to discussing the emotions in the deliberation room.

based its position on what Juror #11 represented to the court. (67RT 12928.)

The court then ruled, incorrectly, that Juror #11's declaration was consistent with her answers to the court:[18]

> And the Court does note that the affidavit submitted by Ms. (Juror No. 11) concerning that subject matter and what transpired in the parking lot is indeed consistent with what the Court heard on the date in question at the time it made its inquiry.
>
> And if we define misconduct as a juror talking about the case outside of the jury room with another juror as we do, the Court's of the opinion that the defense was well aware of Ms. (Juror No. 11's) involvement in that discussion with Mr. (Juror No. 9) that led to (Juror No. 9's) dismissal.
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> But no request was made by the defense or by the prosecution to have the Court dismiss Miss (Juror No. 11). In fact, it was just the -- the opposite. The parties were quick to say, "No, we don't want Ms. (Juror No. 11) dismissed." (67RT 12928-12929.)

A review of the record demonstrates that the court misapprehended the record when it ruled that Juror #11's answers and her declaration were consistent.

Juror #11 provided the following answers to the court:

THE COURT: All right. Did you discuss anything at all at that

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[18] Respondent also contends that Juror #11's declaration did not show that she was untruthful when she was questioned by the court. (RB 194.) As appellant demonstrates, the record proves otherwise.

time regarding your deliberations involving this case?

JUROR NO. 11: Sort of.

THE COURT: All right. And what does "sort of" mean?

JUROR NO. 11: Basically, he thanked me for taking the time to listen --

THE COURT: All right.

JUROR NO. 11: -- and to understand his perspective of things.

THE COURT: All right. And then in response to that did you discuss with him further about the deliberations?

JUROR NO. 11: I don't believe so.

THE COURT: Did you advocate that he do anything during the deliberations?

JUROR NO. 11: That he do anything?

THE COURT: Yes, uh-huh.

JUROR NO. 11: No.

THE COURT: And was that all of the conversation involving this case?

JUROR NO. 11: Yes. (58RT 11271-11272.)

In contrast, in her declaration, Juror #11 stated:

> Juror #9 brought up the topic of deliberations. He made comments about how difficult deliberations were, and that deliberations had gotten personal. He stated that the deliberations had become too emotional. I said something to the effect of "Well, it had to be an emotional night, so it's understandable that we're emotional in there." (12CT 2433.)

Thus, Juror #11's responses differed in at least three critical respects. First, Juror #11 explained in her declaration

that Juror #9 talked about emotions in the deliberation room --the very topic that Juror #9 told the court he had discussed. Juror #11 said nothing in her declaration about Juror #9 thanking her for listening to him, which was the trial court's speculative basis for believing that Juror #9 was trying to influence Juror #11. Second, Juror #11 admitted that, in fact, she contributed to the conversation, again consistent with what Juror #9 told the court.[19] Third, Juror #11 admitted that she was the person who turned the conversation from the process of deliberations to evidence about the night of the shootings.[20] Yet again consistent with what Juror #9 told the court.

Jury #11's declaration turns on its head all of the erroneous assumptions made by the trial court, the prosecution,

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[19] Respondent writes that Juror #11 told the court that "she did not engage Juror No. 9 in an extended discussion about the deliberations or the case." (RB 194.) That is not so. When the court asked Juror #11 "in response to that did you discuss with him further about the deliberations?," Juror #11 replied, "I don't believe so." (58RT 11272.) Juror #11 said she did not engage with Juror #9, period, not that she didn't engage in an extended discussion.

[20] Respondent terms Juror #11's interjection of evidence into the case "a brief, polite, and noncommittal reply to Juror No. 9's unsolicited complaints about the emotional nature of the deliberations." (RB 194.) The record speaks for itself. Respondent also deems Juror #11's remarks about the night of the shooting as "innocuous" since there were probably strong emotions the night of the shooting. (RB 195.) Juror #11's interjection of a comment about emotions on the night of the shooting while the jury was deliberating appellant's guilt was just as likely of an attempt at persuasion as Juror #9 thanking Juror #11 for listening to him in the deliberation room. (RB 195, n.14.)

and defense counsel when the trial court dismissed Juror #9. Juror #9 did not attempt to influence Juror #11 while she passively stood by and "was kind of stuck and being nice." (58RT 11280.) Juror #11 was an active participant. She did not stand mutely or tell Juror #9 that they should not be talking about the case or walk away or report what took place to the court. Juror #11 took none of these actions because she was an active participant in the parking lot discussion. In fact, Juror #11 compounded her misconduct by affirmatively misrepresenting to the court and the parties both her role in the parking lot discussion and the content of that discussion.

The court denied appellant's motion for a new trial based on misconduct by Juror #11, declaring that any misconduct on her part in the parking lot was not "inherently and substantially likely to have influenced Juror #11" or to have biased her against any party. (67RT 12929.) Not only did the trial court make that ruling based on a faulty factual conclusion, but there is no principled basis upon which to reconcile that ruling with the dismissal of Juror #9 in the virtually identical circumstance.

When reviewing a motion for a new trial based on jury misconduct, this Court "should accept the trial court's factual findings and credibility determinations ***if they are supported by substantial evidence***, but must exercise its independent judgment

to determine whether any misconduct was prejudicial." (*People v. Dykes* (2009) 46 Cal.4th 731, 809 [emphasis added].) If the parking lot discussion was significant enough to show that Juror #9 was unable to fulfill his duties as a juror, then the same is certainly true for Juror #11.

Curiously absent from anywhere in respondent's brief is any explanation for how Juror #9's actions were prejudicial. Indeed, while respondent justifies Juror #11's misconduct as not being prejudicial because her "brief comment did not advocate for a guilty verdict, nor did it specifically reference appellant's state of mind or any particular item of evidence," the same is true of Juror #9. (RB 194.) Nothing in either jurors' answers or declarations supports that Juror #9 did anything other than comment on the emotions running high in the deliberation room. There is not one scintilla of evidence that Juror #9 attempted to influence Juror #11 just as there is no evidence that Juror #11 tried to influence Juror #9. After all is said and done, two jurors in an emotionally draining trial that spanned over two months exchanged brief comments about the emotionalism in the deliberation room. While they both technically committed misconduct by engaging in the conversation, their comments were innocuous and harmed no one. In short, either Juror #9 should not have been dismissed or Juror #11 should have been dismissed based on the equivalent misconduct. Either way, appellant is entitled

to a new trial. (*Wilson, supra*, 44 Cal.4th at p. 841; *People v. Danks* (2004) 32 Cal.4th 269, 302.)

XIV.

THE TRIAL COURT VIOLATED STATE STATUTE AND DEPRIVED APPELLANT OF CRITICAL EVIDENCE WHEN IT AUTHORIZED THE POST-TRIAL BUT PRE-SENTENCING DESTRUCTION OF NOTES TAKEN BY THE JUROR WHO WAS DISMISSED DURING GUILT PHASE DELIBERATIONS

Appellant has argued that the trial court erred in authorizing its bailiff to shred the jury notebooks belonging to dismissed Juror #9 before appellant's trial ended. The defense, unaware that the notes had been destroyed, had sought the notes, with the authorization of Juror #9, in order to investigate possible jury misconduct. (AOB 327-330.) Respondent contends that the trial court's actions did not violate former Government Code section 68152 because the juror's notes did not qualify as a "court record." (RB 197-199.)

Appellant acknowledged in her opening brief that it is not clear whether juror notes fall within the legal ambit of "court records" that are permanently barred from destruction in capital cases. Nevertheless, appellant argued that Government Code section 68152, subdivision (e)(1)[21] reflects the importance of

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[21] Since the filing of appellant's opening brief, Government Code section 68152 has been revised and the section calling for the permanent retention of the records of cases where the defendant is sentenced to death has been renumbered to subsection (c)(1).

capital case proceedings and documents and should have put the trial court on notice that it would be inappropriate to destroy the notes of a dismissed juror in a capital case prior to the end of the trial. Juror #9 had requested his notes but had not yet made it to the courthouse to pick them up when they were shredded. The trial court's impending three week vacation did not justify destroying a document in an ongoing capital case. Surely the court could have found a safe spot to maintain the three notebooks in the courthouse if it was not willing to mail the notebooks to the juror.

Respondent suggests that the issue of whether the court erred in destroying the notebooks does not matter because the defense was not harmed because it was able to provide a 4-page declaration from Juror #9 as part of its new trial motion. (RB 199-200.) Respondent misses the point. The defense was investigating a wide-range of jury misconduct. Without reviewing the notebooks, appellant cannot say whether the notebooks would have shed additional light on possible jury misconduct or revealed new jury misconduct. Because the court's error deprived appellant of potentially valuable information that could have supported appellant's jury misconduct allegations, prejudice should be presumed. Appellant is entitled to a new trial before a jury free of any taint of misconduct.

XV.

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENSE TO CALL WITNESSES AT THE HEARING ON THE MOTION FOR A NEW TRIAL ESPECIALLY AFTER THE COURT CALLED ITS BAILIFF AS A WITNESS AT THE HEARING

At a hearing on appellant's motion for a new trial, the trial court barred the defense from presenting additional evidence, including testimony from a juror (Juror #3, the jury foreman) who was sitting in the courtroom during the hearing. In the motion for a new trial, the defense raised an issue related to Juror #9 having requested during guilt phase deliberations to see the photo of the car leaving the hospital parking lot projected on the wall but having been told by the bailiff that the jury could only have the evidence that was in the jury room. (AOB 331-338; 12CT 2325.)

In response to this claim, respondent makes several inaccurate statements. First, respondent states that the defense only requested to present the testimony of Juror #3. (RB 202, n.17.) That is only partially correct. Juror #3 was in the courtroom and readily available to testify. However, during the same hearing, the defense proffered information from Juror #2 and Juror #10 that its investigator had obtained in post-trial juror interviews. This information supported that Juror #9 had asked

the bailiff something about the photo of a car. (67RT 12951, 12954.)

Second, respondent faults the defense for the absence of anything related to the photo request made to the bailiff in Juror #3's declaration. (RB 202.) This argument ignores that the declaration of Juror #3 was submitted by the prosecution in response to the defense motion for a new trial. The defense had no control over what the prosecution included in Juror #3's declaration. Indeed, based on the absence of any response from the prosecution regarding Juror #9's allegation in his declaration, the defense reasonably assumed the issue was not contested. (67RT 12920-12921.)

In addition, respondent contends that the defense was at fault for not submitting a declaration from Juror #3. (RB 202, 203.) Significantly, respondent cites no authority for the proposition that the defense had to submit a declaration from Juror #3 to obtain a live hearing on the issue. The defense submitted a declaration from Juror #9 and the prosecution did not respond to it or otherwise contest what Juror #9 said. Instead, at the hearing on the defense motion, the court announced that it had spoken with its bailiff and the bailiff denied that any request was made. The court then offered the bailiff, who had not provided any declaration, as a witness. (67RT 12917-12918.) Once the bailiff testified that she did not recall such a request, the

defense sought to bolster Juror #9's declaration with the testimony of Juror #3, the jury foreman, who was present in court at the hearing and who could have testified that a request was made to the bailiff to view the photo on the wall.

The court, in a capital case where the defendant was about to be sentenced to death, inexplicably refused the defense request to put on evidence even though the court's bailiff had just testified at the court's request and even though the juror's testimony would only have taken a few minutes and required no continuance. Moreover, after making this inexplicable decision, the court proceeded to make a finding that no request was made of the bailiff notwithstanding the declaration of Juror #9 and the defense proffers about Juror #3, #2, and #10.

Next, respondent suggests that the court was entitled to credit his bailiff and reject the declaration of Juror #9. (RB 202.) That may be so if that was all the defense was offering.[22] But the defense had the jury foreman in court and was prepared to have him testify that Juror #9 had requested to view a photo of the car projected on the wall. Under those circumstances, the

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[22] The court's actions are even more questionable because the bailiff, contrary to her testimony, later said, while not under oath, that there had been a request for a VCR that would freeze-frame the video. (67RT 12593-12594.) Because that request is fairly similar to what Juror #9 said he requested, thus suggesting rather strongly that there was a previously undisclosed request made to the bailiff about the evidence related to the hospital car video, the court had an even stronger reason to hear the testimony of Juror #3.

trial court was not justified in accepting the testimony of his bailiff without listening to testimony that potentially impeached her testimony and supported the declaration of Juror #9.

Finally, respondent contends that any error was harmless because the bailiff's response to Juror #9's request had "no possible impact on the verdicts." (RB 203.) Appellant disagrees. A bailiff may not have an ex parte discussion about the availability of evidence with a deliberating juror. (*People v. York* (1969) 272 Cal.App.2d 463, 464; *Smith v. Shankman* (1962) 208 Cal.App.2d 177, 184.) That is error. It is prejudicial because had the parties been properly notified of the requested evidence, the defense could have requested that the jury be allowed to view the photos in their projected state as the juror requested. If Juror #9 was correct that the photo of Xavier's car had a sticker in the window that was absent from the photos of the car in the hospital parking lot, and Juror #9 was able to show that to his fellow jurors, there is a reasonable likelihood that at least one other juror would have had a reasonable doubt about appellant's guilt. That Juror #9 was later dismissed from the jury is irrelevant. Although jury deliberations begin anew when a juror substitutes in during deliberations, the jurors are not required, indeed could not be required, to flush from their minds a fact about the evidence gleaned from their earlier deliberations.

At a minimum, appellant is entitled to a remand for a hearing to be able to prove Juror #9's allegations and to put on

evidence showing that had Juror #9's evidentiary request been transmitted to the court and the attorneys and been granted, the outcome of the trial might have been different.

XVI.

APPELLANT URGES THIS COURT TO RECONSIDER ITS PRIOR CASE LAW ON THE VARIOUS ASPECTS OF CALIFORNIA'S DEATH PENALTY STATUTE WHICH VIOLATE THE UNITED STATES CONSTITUTION

Appellant has concisely argued that thirteen aspects of California's death penalty scheme violate the federal constitution. In doing so, consistent with this Court's directive in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant has acknowledged that these are claims which this Court has repeatedly rejected but which appellant is asking this Court to reconsider. (AOB 339-359.)

As to each of appellant's claims, respondent cites to one or more decisions by this Court to argue that this Court has already rejected the claim. (RB 204-206.) Because appellant has conceded that this Court has rejected these claims and has raised them with the hope that this Court might be willing to reconsider them and also to preserve them for federal habeas corpus review, appellant adopts by reference and incorporates each of the arguments made in her opening brief. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

XVII.

THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS AT APPELLANT'S TRIAL --AT BOTH THE GUILT PHASE AND THE PENALTY PHASE-- UNDERMINED THE RELIABILITY OF APPELLANT'S CONVICTIONS AND SENTENCES AND REQUIRES A REVERSAL

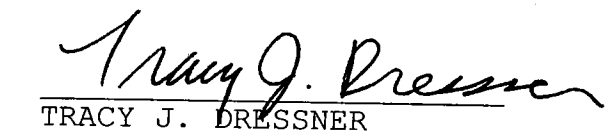
Appellant has argued that the cumulative effect of the myriad errors that occurred during her trial --including errors by the trial court, the prosecution, and her trial counsel-- undermined the fairness of her trial and the reliability of the jury verdicts in both the guilt and penalty phases. (AOB 360-362.) Respondent contends that appellant's trial had no errors, and if any errors occurred, they were harmless. (RB 207.) For the reasons set forth in this brief as well as in appellant's opening brief, appellant strongly disagrees with respondent's predictable, but erroneous, view of this case.

CONCLUSION

For all of the reasons set forth in this brief as well as appellant's opening brief, appellant respectfully urges the Court to reverse her convictions, special circumstance finding, and death sentence and order a new guilt and/or penalty phase trial.

Dated: May 12, 2015

Respectfully submitted,



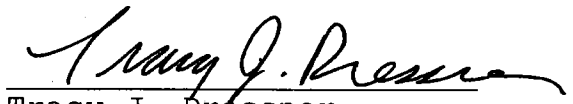
TRACY J. DRESSNER
Attorney for Appellant
Socorro Caro

CERTIFICATE OF COMPLIANCE

I certify pursuant to CA Rules of Court, Rule 8.630, subdivision (b)(1)(C), that this reply brief in a capital case contains 26,106 words according to my word processing program.

Dated: May 12, 2015

Respectfully submitted,



Tracy J. Dressner
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action.

My business address is 3115 Foothill Blvd, Suite M-172, La Crescenta, CA 91214.

On May 12, 2015, I served the foregoing document described as:

APPELLANT'S REPLY BRIEF

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

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Socorro Caro
(not served per attached declaration)

Clerk of the Court for delivery to
The Honorable Donald D. Coleman
Ventura County Superior Court
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Ventura, CA 93009

By MAIL I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Nyack, NY. I am a member of the Bar of the Supreme Court of California.

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

Executed on May 12, 2015, at Nyack, New York.

Tracy J. Dressner

TRACY J. DRESSNER

DECLARATION OF TRACY J. DRESSNER

I, TRACY J. DRESSNER, declare:

1. I am the attorney appointed on July 16, 2006, to represent appellant, Socorro Caro, on her automatic appeal from a judgment of death imposed by the Ventura County Superior Court.

2. As she did with her opening brief, Ms. Caro has asked me not to send her a copy of the reply brief. Instead, she has asked that I send a copy of the reply brief to a family member, and I will do so.

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

Executed this 12th day of May, 2015, at Nyack, NY

TRACY J. DRESSNER