IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CAPITAL CASE**
	Case No: S113653
Plaintiff-Respondent,	
vs.	[Santa Barbara County Superior Court Case No. 1014465]
RYAN JAMES HOYT,	
Defendant-Appellant.	

APPELLANT RYAN HOYT'S REPLY BRIEF

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA

HONORABLE WILLIAM GORDON, JUDGE

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DEATH PENALTY

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JURISDICTIONAL CLAIM

1. THE SUPERIOR COURT LACKED SUBJECT MATTER JURISDICTION

A. Introduction

Whose woods these are I think I know.

His house is in the village though;

He will not see me stopping here

To watch his woods fill up with snow.

- Robert Frost,

"Stopping by Woods on a Snowy Evening," 1923.

If Respondent were poetically inclined, he could do no better than Robert Frost's classic. The trial evidence in this case, specifically Appellant's statement to the police, showed that he participated in the murder of Nicholas Markowitz in Los Padres National Forest, a woods he had never seen before, a place he did not know. He did not go there to evade state jurisdiction. Indeed, the issue did not surface until this appeal. Yet here it is. And this Court has no greater duty than to determine that it lacks jurisdiction, and to decline to exercise it.

"Whose woods these are I think I know." Respondent concedes that the victim was killed in Los Padres National Forest.[1] (RB at 38.) "His house is in the village though." Respondent concedes that fundamental

[1] For simplicity sake, the parcel of land is referred to herein as Los Padres National Forest, not the various iterations by which it has been known. (See e.g., AOB at 57-58.)

jurisdiction is reviewable on appeal, and is not waived by failure to raise it below. (Id., at p. 40, n.12.) Yet, Respondent contends that the sovereignty of the federal government is not offended by the state exercise of concurrent jurisdiction to try and convict and execute Appellant for a murder in those woods. Not so.

Appellant's claim is novel, though its basis is as old as the State that tried him. The claim is meritorious, though it lacks precedent. That it is new to these proceedings reflects on the proceedings below, rather than on it.

All public lands in California belonging to the Mexican government became public lands of the United States upon the signing of the Treaty of Guadalupe Hidalgo in 1848. (Phelan v. Poyoreno (1887) 74 Cal. 448; 4 Witkin, Summary of Cal. Law (9th ed. 1987); Real Property, § 4, p. 218.) By its plain terms, the California Statehood Act reserved full title and right in the public lands to the United States, and prohibited the State of California from interfering, impairing or questioning federal sovereign rights. (31 Cong. Ch. 50, September 9, 1850, 9 Stat. 452, chap. L, §3. (hereafter "Section 3"). Respondent's contention that state jurisdiction is "presumed" (RB at 38) flaunts Section 3, the argument bolstered only by the silence of prior case law on a point that has seldom, if ever, arisen from the remote reaches of national forest lands. "[Judicial] duty is not less fitly performed by declining un-granted jurisdiction than in exercising firmly

that which the Constitution and the laws confer." Ex parte McCaardle (1868) 7 Wall. (U.S.) 506, 515.

B. Respondent's Implied "Implied Waiver" Theory is Mistaken

Respondent cites two cases, In re Carmen (1957) 48 Cal. 2d 851, 855 and People v. Crusilla (1999) 77 Cal. App. 4th 141, 150, for the proposition that this Court is bound by a conclusive "presumption" of subject matter jurisdiction because Appellant "forfeited his right to develop a factual record" by failing to raise the issue at trial. (RB at 40 & n.12.) Respondent is wrong; neither case supports its "implied waiver" theory.

According to Respondent, Collins, Carmen, and Crusilla hold that there is a presumption of state jurisdiction unless appellant can point to facts establishing exclusive federal jurisdiction. Respondent maintains that the presumption prevails because appellant did not establish facts showing exclusive federal jurisdiction. Respondent is mistaken. In fact, the presumption is inapplicable here, because the trial record does contain the one fact necessary to establish exclusive federal jurisdiction – the site of the murder in Los Padres national forest. Crusilla actually supports appellant's position in that it took judicial notice of the treaties and legislation which provides the remaining support for appellant's position.

In re Carmen is a habeas case. It held that a habeas petitioner cannot collaterally attack a final judgment of conviction by reference to jurisdictional facts outside the trial record. (48 Cal. 2d at 853-854.) The

judgment in this case is not final, and it would be an unwarranted extension of In re Carmen to bar jurisdictional claims on automatic appeal. More importantly, the sole fact necessary to establish exclusive federal jurisdiction in this case is in the trial court record. Indeed, the federal status of the murder site (Lizard's Mouth) in Los Padres National Forest is both apparent on the face of the trial record (3 CT 757, 764), and conceded by Respondent. (RB at 38, 44 n.17.) Thus, even if In re Carmen were applicable, it would not bar consideration of this claim. (Carmen, supra, 48 Cal.2d at p. 852 [on trial record, killing was committed in Madera County, not designated federal Indian territory; appellate review encompassed facially-apparent jurisdictional facts.].)

People v. Crusilla, a Fourth Appellate District case, concerned the status of an INS inspection booth in San Ysidro County, located 125 yards from the United States-Mexican border. (77 Cal.App.4th at p. 150.) It is one of a trio of cases that involve the concurrent jurisdictional status of border-crossing areas. (See e.g., People v. Allen (1959) 172 Cal. App. 2d 520 [highway or state road between Mexico and United States inspection area]; People v. Mendoza (1967) 251 Cal. App. 2d 835 [same].) Crusilla used the term "presumption" only in the context of "taking the last question first," namely what showing had the appellant made (below and on appeal) in support of his jurisdictional claim. (77 Cal. App. 4th at p. 146.) Respondent's reliance on that term is misleading, because Crusilla went on

to conduct an independent appellate review of those facts, to take judicial notice of relevant materials, and to address anew the questions of law. (Id., at pp. 147-150.) The bottom line is that Los Padres National Forest has a more ancient federal pedigree than the San Ysidro border crossings, and the jurisdictional issues, while virginal, are neither ambiguous nor silent like the state cession of land to the United States for Customs buildings. (Cf. Crusilla, 77 Cal. App. 4th at 149-150 [no expression of federal jurisdiction that would "oust" the state of its jurisdiction].)

As argued infra, Los Padres National Forest falls within the category of public lands retained by the United States at the time of California's admission to statehood, over which the United States has always exercised exclusive jurisdiction. San Ysidro Border Inspection Buildings fall within the category of state-owned land which was ceded to the United States subject to a different set of rules regarding cession of concurrent or exclusive jurisdiction. (Crusilla, supra, at p. 148.) The cases are not comparable.

More fundamentally, territorial jurisdiction necessarily requires this Court to pass upon questions of law, and in turn, "underlying questions of fact." (People v. Betts (2005) 34 Cal. 4th 1039, 1048; cf. People v. Allen (1959) 105 Cal. 504 [describing inquiry as "question of fact."].) In this case, federal ownership of the murder situ is beyond dispute, and is not waived by Appellant's failure to raise it below. In taking up the question of

whether jurisdiction is exclusively federal, this Court reviews the trial court's assumption of jurisdiction for substantial evidence of any fact, and its legal determination de novo. (Betts, supra, 34 Cal. 4th at p. 1055.) Betts's holding that territorial jurisdiction is not an element of the crime under state law should not blinder this Court to the treaty and legislative history of the United States. Respondent is mistaken: Appellant's claim is fully cognizable on appeal, and his showing is sufficient to carry the day.[2]

C. Respondent Ignores the Constitution and Laws of the United States

The Constitution (art. VI, §3, cl. 2, Property Clause) and laws (9 Stat. 922, art. V (1848 Treaty of Guadalupe Hidalgo; 9 Stat. 452, chap. L, §3 (1850 Act for Admission of California into Union) of the United States operate to vest exclusive jurisdiction over a crime committed in the Los Padres National Forest in the Courts of the United States. (See AOB 53-55.)

Respondent argues that the 1850 Act contained "no reservation of rights in the federal government." (RB at 41.) Respondent is wrong. Section 3, Chapter L of the Act (31 Cong. Ch. 50, September 9, 1850, 9 Stat. 452).provides, as an "express condition" of admission, that California shall never "interfere," "impair," or "question" the title or the primary

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[2] Respondent's assertion that Appellant "forfeited the right to develop a factual record" (RB at 40 n.12) conflates collateral and direct review. Appellant had no incentive to sandbag this issue by waiting to litigate it until the appeal; if he prevails, he is still subject to federal prosecution for the crime.

disposal of the public lands within its limits which belong to the United States. It is clear, in historical context, that Section 3 of the Statehood Act manifests Congresses' concern that it, and not the incipient State of California, control and have the primary benefit from the gold on the public lands of California. (See e.g., H.W. Brands, The Age of Gold; The California Gold Rush and The New American Dream (2002) at pp. 231-232.) Respondent's brief is conspicuously silent on the meaning of the "express condition" of Section 3 as it relates to public forest land, continuously held by the United States. Respondent's brief is conspicuously absent any reference to when, or how, title to Los Padres National Forest silently passed to the State of California. Absent some direction from the federal sovereign, the Superior Court lacked jurisdiction to exercise criminal jurisdiction in contravention of the federal sovereign's right and title to its public land.

Respondent's reliance upon an ipse dixit in Martin v. Clinton Construction Co. (1940) 41 Cal. App. 2d 35, 46, is misplaced. Appellant does not hold Martin's age against it; after all, Appellant asks this Court to consider anew legal propositions and facts which are far older. (No other case has raised these issues in regard to Los Padres National Forest.) Martin was a tort case by a worker injured during construction of the Bay Bridge over Yerba Buena Island. In one breath, Martin recounts that "Yerba Buena Island was ceded to the United States by the Mexican

Republic, July 4, 1848. It is a naval reserve and has been since 1850." (Id., at p. 39.) But, in the next, Martin asserts that "that statute [the 1850 Act for Admission] contains no reservation of rights in the federal government" [the phrase quoted by Respondent, RB at 41] before finding exclusive jurisdiction in the federal government under an 1897 California cession by statute. (Id., at pp. 46-48.) Martin is a thin-reed for Respondent, indeed, both because its reading of the 1850 Act is dicta, and because it would mean that the United States held a naval reserve on Yerba Buena Island for 47 years without title.

The legislative history of the 31st Congress which voted to admit California as a State resolves any legitimate doubt that Congress intended to reserve exclusive jurisdiction for its public lands. For example, the Report of the Senate Committee on Public Lands explains:

> That portion of the public domain not acquired by cession from the States, was ceded to this government by treaty with foreign nations. The cessions by France, Spain, and Mexico have extended our territorial limits from the Atlantic to the Pacific. The treaties of cession confer the ownership of the soil, as well as jurisdiction, on the government of the United States, in language too explicit to admit a doubt.

(Report of Senate Committee on Public Lands to accompany S. Bills Nos. 8, 35, and 85, 31st Congress, at 2, emphases supplied.)

In addition, the California Constitutional Convention passed an Ordinance to submit six propositions to the Congress on the disposition of the public lands in the State, which "shall be obligatory on this State [of

California]. (31st Congress, 1st Session, Misc. No. 105, Ordinance, April 22, 1850.) These propositions seek the grant of specific sections of the public lands by the United States to the State of California for its establishment of schools and a university, of a seat of government, and for purposes of defraying the expenses of state government. These were limited requests. Respondent's assertion that California acquired the public forest land from the United States as an inherent attribute of its state sovereignty upon admission to the Union, finds no support in the text or legislative history of the Act for Admission. For this reason, Respondent's attempt to cast this case under the concurrent state/federal jurisdiction rule of Ft. Leavenworth R. Co. v. Lowe (1885) 114 U.S. 525, 542 falls short.

D. Respondent Misconstrues the Effect of the 1891 California Cession Act

Appellant argues that the 1891 California Cession Act (Stats. 1891, ch. 181, §§1 & 2) confirmed the status quo ante in regard to Los Padres National Forest; exclusive jurisdiction resided in the United States as owner of "such piece or parcel of land as may have been [] ceded [] to [it.]" (Ibid.) The reservation of state right to the "administration of the criminal laws of this State and the service of civil process thereon" has been consistently interpreted to mean "the right to serve criminal and civil process," e.g., to prevent national reserves from becoming enclaves for fugitives, lest the exception (state jurisdiction to execute warrants) swallow the rule (exclusive federal jurisdiction). Respondent's bald assertion that California

"retained" jurisdiction to enforce its substantive criminal law over Los Padres National Forest (RB at 42 n.13), fails to address the original federal acquisition of that public land from Mexico, its retention at the time of statehood, and the terms of the 1891 Cession Act.

The final bone of contention concerns 16 U.S.C. §480 (1897), which Respondent contends was a congressional acquiescence in state reservation of criminal jurisdiction in the national forests. (RB at 43.) Respondent is wrong. Section 480 did not purport to effect a change in the status quo. Prior to 1940, exclusive jurisdiction was presumed for federal public lands. (See 40 U.S.C. §255; cf. People v. Brown (1945) 69 Cal. App. 2d 602 [affirming jurisdiction over crime committed at military installation in Kern County, where the record did not show under what tenure the United States was holding or using the land, or whether it was acquired before 1940; district attorney presented a list of installations upon which federal government asserted exclusive jurisdiction, and Kern County site was not included].)

Moreover, the "national park"/"national forest" distinction which Respondent urges as a basis for discounting Collins v. Yosemite Park & Curry Co. (1938) 304 U.S. 518, has no pedigree in that case, or any other. Collins is "controlling" in this sense: meaningful jurisdictional analysis there, and here, flows from a faithful chronology of the land itself, which sovereign owned it, and whether it asserted exclusive jurisdiction. In both

cases, the answer is that exclusive jurisdiction resides in the courts of the United States courts. (See also People v. Mouse (1928) 203 Cal. 782 [reversing felony convictions where court faithfully determined that California had ceded exclusive jurisdiction to the United States by statute].)

E. Respondent Erroneously Finds a "Series of Crimes on State Land"

Exclusive federal jurisdiction over the murder site does not end the inquiry. As Respondent rightly points out, Penal Code §27(a)(1) generally permits the punishment of a defendant under California law for any crime committed "in whole or in part" in the state. (RB 45, n.18; see e.g., Betts, 34 Cal. 4th at 1055-1056 [finding substantial evidence in trial record to support inference that defendant possessed "criminal intent" when he committed acts which were "more than de minimus" within the state to further that same intent]; People v. Mendoza (1967) 251 Cal. App. 2d 835, 840 [affirming gun possession conviction where substantial evidence showed that defendant traversed state-owned highway across Mexican border]; People v. Baker (1964) 231 Cal. App. 2d 301, 306 [affirming kidnap conviction where substantial evidence showed that "much of the continuing offense occurred throughout Los Angeles County, outside the port area].)

Only recently, in People v. Thomas (2012) 53 Cal. 4th 1276, 1284-1285, this Court held that venue (a term "synonymous" with territorial jurisdiction) was proper for prosecution of a defendant in Madera County,

where the defendant had committed "preparatory acts" in that County, and his criminal actions in Fresno County also had effects in Madera County which were "requisite to . . . the achievement of [his] unlawful purpose." Specifically, the defendant possessed cocaine for sale and a firearm in a Fresno County storage locker as part of a larger plan to sell drugs in Madera County; he obtained an apartment in Madera County in which cash was found hidden in a clothes-dryer, two cell phones, and a pager. (Id., at p. 1286.) Madera was thus the defendant's "base of operations," and he participated in gang activities and sold drugs there. (Id., at p. 1287.)

The trial evidence showed that Appellant told police that he drove to Santa Barbara to clear his debt to Jesse Hollywood by killing the victim; and he accompanied the victim, along with one of his original kidnappers (Jesse Rugge) and a second who had joined the kidnapping two days earlier (Graham Pressley) to the remote Lizard's Mouth trailhead in Los Padres National Forest for that express purpose. Respondent's argument is confined to a footnote, in which he vaguely asserts that "Appellant's participation in the series of crimes that culminated in the murder began on state land." (RB at 45, n.18, emphases supplied.) But, this contention conceals the fact that, drawing every inference in favor the state, Appellant's "participation" was confined to a single crime (murder), not a "series of crimes," i.e., a prolonged kidnap of which he had neither knowledge nor intent. Appellant was charged with kidnap-murder. Yet, to

the extent his "participation" in acts on state land (Lemon Tree Hotel) was "preparatory" to any crime, it was to a non-capital theory of premeditated murder. Were Respondent to spell this out precisely, he would have to concede Appellant's claim that his kidnap-murder special circumstance was invalid under the Green rule. (See Claim 10, *infra*.)

Accordingly, this Court should reverse Appellant's convictions and death sentence, and discharge him with no judgment in his favor. (Betts, *supra*, 34 Cal. 4th at p. 1050.) Remand for fact-finding by the Superior Court would be a suitable alternative should this Court find that the historical facts regarding exclusive jurisdiction are indeterminate, and the record would benefit from an adversarial hearing.

JURY SELECTION CLAIMS

2. THE SUPERIOR COURT ERRED BY PREVENTING VOIR DIRE OF JUROR BIAS

A. Introduction

The gist of the Claim is that the Superior Court precluded voir dire whether prospective jurors would automatically vote for the death penalty in a special circumstance case involving the kidnap-murder of a 15-year old victim, and failed to make a record adequate to this determination of qualified jurors.[3] (AOB at 60-83.) Although it is not in Respondent's brief,

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[3] Appellant also argued in his opening brief that Judge Gordon erred in denying sequestered voir dire (see AOB 62-63, 78), which respondent has addressed at RB 45-46. The gist of this claim is that the court

preliminarily, the question whether the Superior Court actually did preclude the line of questioning at issue must be addressed. Respondent opposes this claim on three grounds: 1) default by failure to object under People v. Fuiava (2012) 53 Cal. 4th 622, 653 (RB at 51-52); 2) the Superior Court's initial explanation of the case, followed by the questionnaire, adequately conveyed these facts to the venire (id., at p. 55); and 3) Appellant's proposed questions were "vague, speculative, and irrelevant," and impliedly did not pose the query that forms the basis for Appellant's claim. (Id., at p. 56.) On all three grounds, Respondent is mistaken.

B. Clarification of the Trial Record

i. Exclusion of Appellant's Proposed Q's 78, 79, 98, 120

On October 4, 2001, prior to jury selection, the prosecutor objected vaguely to the proposed defense questionnaire, stating: "I think there's some questions that shouldn't be there." (1 RT 232.) As quoted in the opening brief, this questionnaire contained four questions (nos. 78, 79, 98, and 120) intended to elicit bias stemming from a prospective juror's emotional response to a case involving the intentional kidnap-murder of a minor. (See AOB 63-64.) As also quoted in the AOB, during this discussion of voir dire procedures on October 4, Judge Gordon articulated the Witherspoon/Witt standard as follows:

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precluded voir dire sufficient to ferret out bias in order to protect appellant's right to a fair and impartial jury."

> And I think, also, that the death penalty issue, generally speaking, has to be considered in the abstract. I'm not going to get into situations where we're asking the jury to frame their responses in terms of specific trial evidence. I don't think that's appropriate. That's asking them to prejudge evidence, and I don't think you can do that.

(1 RT 234.) In remarks made immediately thereafter, which neither party has cited, Judge Gordon observed,

> Now, that's not to say that I think it's reasonable to determine, for example, how the jury might react in a particular case in which the victim was of a young age, like this, or in terms of the age of the defendant, I think that's legitimate, but what would you -- what about, what would you think, and then to give a recitation of the facts of the case of what happened, I don't think that's appropriate.

(1 RT 235.) The next appearance[4] of the jury questionnaire was on October 15, 2001, which marked its debut as the Court's fully-completed and mass-produced document ready for distribution to the panels of prospective jurors:

> Mr. Crouter: Today, perhaps we can deal with the issue of the jury questionnaire.
>
> Judge Gordon: "Well, I've got the questionnaire and it's done. [] Yes, there's 300 some of them floating around someplace. But I've got a copy for each of you.

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[4] After lunch on October 15, the Court asked the defense to re-submit its questionnaire, and the Court would then pick between that and its own version. (2 RT 248.) This remark might suggest the possibility that Appellant waived the issue on appeal by voluntarily striking Questions 78, 79, 98, or 120 from a resubmitted questionnaire. But the certified record does not support that conclusion. It contains only <u>one</u> version of the defense proposed questionnaire, which includes those four questions. (5 CT 1263, 1265, 1268.)

(2 RT 284-285.) This final version of the questionnaire distributed to the prospective jurors omitted defense questions 78, 79, 98, and 120, the only questions in the defense questionnaire which addressed the kidnap-murder allegations or the victim's youth. The record contains no explanation why the Court rejected these four defense questions .[5] (See 2 RT 284-285.)

ii. Reference to Kidnap-Murder of 15-Year Old Victim

On October 17, 2001, Judge Gordon addressed two panels of prospective jurors, one in the morning and the other in the afternoon, before they were given the questionnaires and proceedings adjourned for one week. Judge Gordon stated that the charges were alleged to have begun with the August 6, 2000 kidnap of 15-year old Nicholas Markowitz and his alleged murder on August 9. (2 RT 313-314, 325.) Each prospective juror heard this information only once, not "repeatedly" as Respondent implies (RB at 55), and that sole utterance came a full week before the live voir dire. Neither the word "kidnap" nor the youth of the victim were anywhere to be found in the written questionnaire.

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[5] After lunch on October 15, the Court asked the defense to re-submit its questionnaire with the crossed-out questions [a reference, apparently, to deletions by stipulation with the prosecutor], and the Court would then pick between that and its own version. (2 RT 248.) This remark might suggest the possibility that Appellant waived the issue on appeal by voluntarily striking Questions 78, 79, 98, or 120 from a resubmitted questionnaire. But the certified record does not support that conclusion. It contains only one version of the defense proposed questionnaire, which includes those four questions. (5 CT 1263, 1265, 1268.)

Respondent states that "[t]he questionnaire utilized by the Superior Court further asked prospective jurors whether they would always vote guilty as to first degree murder and true as to the special circumstance of kidnap murder, in order to guarantee a penalty phase. (9CT 2560.)" (RB at 55.) Respondent is mistaken. The questionnaire utilized by the Court nowhere defines what a "special circumstance" is, either generally or with reference to the Indictment in this case. (9 CT 2553-2700 [impaneled jurors]; 9 CTA 2400 [venire]) The terms "kidnap" and "kidnap murder" nowhere appear in the Court's questionnaire. (Ibid.) The questionnaire refers instead to "the" or "a" "special circumstance." (9 CT 2560.) Furthermore, the youthfulness of the victim nowhere appears in the Court's questionnaire.

C. The Superior Court's Rulings Did Effectively Exclude Questioning Regarding the Kidnap-Murder of a 15-year old Victim.

The clear import of Judge Gordon's October 4th commentary (1 RT 234-235) was that no questioning would be permitted regarding the specific special circumstance in the case. The second paragraph casts some ambiguity around the issue of whether the victim's youthfulness was similarly off-limits. "I'm not saying it's reasonable" suggests it's unreasonable, but the following "I think that's legitimate" muddies the water a bit. (Id., at p. 235.) Nonetheless, this comment, in combination with the later exclusion of defense questions on the subject of the kidnap-

murder of a young victim, could reasonably have been understood by appellant's attorneys , to exclude both lines of questioning. Nothing suggests that they were deliberately sandbagging to create an appellate issue. To the contrary, their stated concern was with the effect of pretrial publicity on the jurors' prejudgment of the death penalty.

In that regard, as the questionnaires were received, Judge Gordon recognized that most of the jurors had indicated in their questionnaires considerable media exposure to the case and that they tilted toward the prosecution as a result. (3 RT 365, 413, 648-649.) Judge Gordon indicated to counsel that he would, and he did, ask the panel generally whether they could be objective and decide the case based on the evidence. When he asked the question generally by a show of hands, and no hands were raised, the judge "assume[d] they can put all those impressions aside." Judge Gordon indicated that he would get into the specifics, only if someone raised an additional concern in response to the general voir dire; no one did. The import of Judge Gordon's refashioning of the questionnaire was that the Court would not entertain questioning whether a prospective juror could consider a life sentence in the case of a kidnap-murder of a 15-year old victim. Appellant's failure to revisit this issue again should not be construed as a waiver.[6]

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[6] A note of explanation is warranted on the following exchange, which occurred near the end of the afternoon on October 24, 2001, the eve of live

Take the case of juror 6619. In response to Question No. 43, that juror "agreed somewhat" that anyone who intentionally kills should always get the death penalty.[7] In voir dire, she explained that she would "need to know the facts. Is it self-defense?" The following exchange ensued:

> Mr. Crouter: All right. Can you think of any other situation, just using your imagination –
>
> The Court: Well, I don't want them to imagine. That's -- I think you can ask -- she said that she -- she would think that the death penalty wasn't appropriate in self-defense. And is that the only circumstance that you feel the death penalty should not be imposed in the case of intentional killing is self-defense?
>
> Juror 6619: No. There's [sic] automobile accidents.

(4 RT 691.) Judge Gordon's response – to cut short defense counsel's question – confirms that any inquiry of the juror's ability to consider a life

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voir dire:

> THE COURT: Any questions the lawyers want me to ask?
> MR. ZONEN: No.
> MR. CROUTER: I can think of none at this time, your Honor.

(2 RT 380). This exchange should not be interpreted as an invitation, much less carte blanche, for appellant's attorneys to re-visit the Court's rulings regarding the questionnaire. Rather, read in context, it was the wrap to a discussion of how to follow up with jurors who had disclosed (unbidden; the questionnaire was silent on this issue) previous dealings with the District Attorney's Office, and Judge Gordon's suggestion that the Court would follow up, or if it forgot to, the parties could. (Id., at p. 379.)

[7] The certified trial record contains an index, apparently prepared by the Superior Court Clerk, which correlates the seated trial jurors (by code-number) to their questionnaires (sequentially-numbered) by cite to the Clerk's Transcript. (See 8 CT A 2400.) Seated juror no. 1 was replaced by alternate juror no. 1 (Juror 1687) during trial, and seated juror no. 10 was replaced by alternate juror no. 2 (Juror 6619).

sentence for intentional murder would be limited to abstract questions void of any reference to the factual basis for the special circumstance allegation or the youth of the victim. The fact that the voir dire, both written and live, contains not a whisper of the actual charged special circumstance of kidnap-murder, or of the victim's youth, cannot be laid at Appellant's door.

D. Appellant Did Not Forfeit the Claim on Appeal

Respondent's reliance upon People v. Fuiava, supra, is misplaced. The defendant in Fuiava, a gang member, was charged with capital murder of a deputy county sheriff. Defendant argued on appeal that the trial court had failed to conduct an adequate voir dire of jurors' potential biases against the concepts of self-defense and defense of another in the context of a gang member shooting a police officer. Prior to voir dire, the trial court proposed to comment briefly that the jurors must follow the court's instructions on self-defense, to which defense counsel did not object. (Fuiava, supra, 53 Cal. 4th at p. 652.) Later, near the end of voir dire, at defense request, the trial court reiterated that it was very important that the jurors must follow its own instructions, rather than adhere to their own feelings of what constitutes self-defense. The trial court asked if jurors had any questions, and had a colloquy with three prospective jurors to confirm they agreed. Defense counsel did not object to this procedure, or offer any follow-up questions. (Id., at p. 653.) Additional questions were posed on biases toward gangs, and jurors were instructed not to prejudge the case

based on the defendant's association with gangs. (Id., at p. 655.) On that record, citing People v. Sanchez (1995) 12 Cal. 4th 1, 61-62, this Court found that the defendant's claim of failure to voir dire for specific bias was not preserved for appeal. (Ibid.)

Expansion of the Sanchez-waiver doctrine, as applied in Fuiava, to the facts here presented would be manifestly unfair. This is not a case in which Appellant merely suggested particular questions, and then silently stood by when the trial court suggested and subsequently took a different course. (Fuiava, supra, 53 Cal. 4th at p. 653.) Judge Gordon did not merely "suggest" a different course; he sailed it – by imposing a finalized questionnaire on the parties without defense counsel's concurrence. Further, Judge Gordon did not invite input to the general voir dire he conducted, or invite individual questioning on a "specific" case fact such as kidnap-murder; he excluded it, categorically, before voir dire began. When defense counsel attempted to revisit it (albeit obliquely) with Juror 6619, Judge Gordon cut him off. Unlike Fuiava, in which the trial court itself covered the specific area of concern both generally and with three prospective jurors, neither the terms "kidnap" or "kidnap-murder" were mentioned even once by court or by counsel during written and live voir dire, nor were any prospective jurors queried about the effect of the victim's youth on their ability to consider life-imprisonment for intentional murder.

In Turner v. Murray (1986) 476 U.S. 28, 37, a cross-racial murder case, the United States Supreme Court held that the defendant was entitled upon specific request to questioning of the venire on the issue of racial prejudice. A specific request for voir dire on jurors' fixed judgment on the issue of punishment for kidnap-murder was made by the proffer of defense proposed questions 78, 79, and 120. (5 CT 1263, 1268.) Any follow-up request to revisit the court's exclusion order would surely have been futile in light of the trial court's emphatic explanation that the death penalty issue "has to be considered in the abstract. I'm not going to get into situations where we're asking the jury to frame their responses in terms of specific trial evidence. I don't think that's appropriate." (1 RT 234.) As in People v. Cash (2002) 28 Cal. 4th 703, 722, "it seems clear from the record that the trial court's ruling extended to both portions of the voir dire."

Expansion of the Sanchez-waiver doctrine, as applied in Fuiava, to the facts presented here would be manifestly unfair for another reason. Fuiava is not a case about a defendant's right to particularized death-qualifying voir dire, grounded in Fifth and Sixth Amendment rights to due process and a fair and impartial jury. (See Wainwright v. Witt (1985) 469 U.S. 412, 424.) Cash and Kirkpatrick clarify that it is sufficient for a defendant to request specific voir dire on facts or circumstances likely to be present in the case that could cause some jurors invariably to vote for the death penalty. (See Cash, supra, 28 Cal. 4th at p. 721.) Such a request may

take the form of proposed written questions, or general voir dire, but the nature of the constitutional right at issue is such that it need not be reiterated in both, particularly where the Court has made a prohibitory ruling based on a misunderstanding of the law, as happened here. (Ibid.) Fuiava does not mention Cash or Kirkpatrick, or the standard of error those cases apply. Unlike Fuiava, this is not a case about mere potential bias toward a theory of the defense, which was largely covered, in which greater deference is owed to the trial court's observation of demeanor, and the full gamut of its voir dire. (See e.g., Fuiava, supra, 53 Cal.4th at p. 654 [right to voir dire is not a constitutional right in itself but a means to achieve an impartial jury].) Death-qualifying voir dire is different since it seeks to protect the defendant's constitutional right to an impartial jury which can fairly consider life imprisonment in light of facts or circumstances likely to be present in the trial evidence.

Cash is a paradigm of a clear-record issue. Defendant requested voir dire on whether jurors could consider life imprisonment in a case involving prior murders, both orally and by filed motion. (Cash, supra, 28 Cal. 4th at p. 719.) The trial court ruled definitively that no voir dire would be permitted on facts not expressly alleged in the Information, on the erroneous ground that it would have the jurors "prejudge the evidence." (Ibid.) But, this Court has never held that Cash sets the floor for how many times or ways a defendant must raise the issue in order to preserve it. The

essential "call-and-response" needed to preserve an issue is a proffer and a denial, as happened in this case: Appellant's attorneys proposed written questions on the kidnap-murder, and Appellant's attorney later sought to ask a prospective juror whether she could "imagine" any other situation in which an intentional murder should not be punished by the death penalty. (4 RT 691.) The trial court in Cash erroneously foreclosed a mirror-image of this question. (Cash, supra, 28 Cal. 4th at 719 [defense proposed to ask whether there were "any" aggravating circumstances which would cause a juror to vote invariably for the death penalty].)

Appellate review of trial rulings should not transform the trial and appeal into a game of "gotcha" in which rulings are framed, or viewed retrospectively, as more tentative than they actually were to the trial actors themselves at the time they were made and trial actors abided by them, since they were not phrased in the language of condition ("maybe," "let's see," "what if"). Otherwise, trial counsel is put in the untenable position of having to raise and renew every objection and every proffer at every turn ad nauseam, lest a meritorious objection be lost by a newfound theory of "necessary renewal." This Court has previously employed the doctrine of futility to avoid just such a parade of horribles.

E. The Prospective Jurors' Responses Do Not Reflect Any Genuine Consideration of the Issue

In Fuiava, the prospective jurors were aware of the basic facts of the case, that the defendant was accused of killing a police officer, and it was

reasonable to assume they had these particulars in mind when the trial court questioned them concerning their ability to follow any self-defense instructions the court might give them. Fuiava, 53 Cal. 4th at 655. Fuiava could point to no evidence of actual prejudice by any sitting juror or demonstrate that his "more focused" questions were "significantly more likely 'to expose strong attitudes antithetical to defendant's cause.'" (Id., at p. 655, quoting People v. Williams (1981) 29 Cal. 3d 392, 410.) By contrast, here, defendant's proposed questions were not merely "more focused;" they were differently-focused, raising the issue of prejudgment of the death penalty in a case involving a general fact or circumstance – kidnap-murder of a 15 year old victim – certain to be present in the trial evidence.

Respondent makes hay with the fact that the trial court did advise the venire, at the initial meeting to distribute questionnaires, that the case involved the kidnap of a 15-year old victim and his murder. (RB at 55.) Respondent argues that this general advisement, in combination with the Witherspoon/Witt questions, was sufficient to probe bias which could impair the prospective jurors' abilities to return a verdict of life without parole in a case involving the kidnap-murder special circumstance of a minor. (RB 55.) Respondent is wrong.

This one-sentence mention, and another to the effect that the special circumstance was kidnap-murder, occurred fully one-week before voir dire.

(2 RT 313-314.) Moreover, and more importantly, there was no connection made between this general advisement and the Witherspoon/Witt questions in the questionnaire. Respondent says that "[t]he questionnaire utilized by the Superior Court further asked prospective jurors whether they would always vote guilty as to first degree murder and true as to the special circumstance of kidnap murder, in order to guarantee a penalty phase" and "further specifically asked whether a juror would 'always' vote for death, no matter what other evidence might be presented." (RB 55.) That is not so. The questionnaire never defined the special circumstance as kidnap-murder. Thus, when the questionnaire asked if a juror would always vote for death if appellant were found guilty of intentional first degree murder and a special circumstance, a juror's response could provide no evidence of the juror's attitude toward the possibility of imposing a life sentence in a case where the defendant was convicted of a kidnap-murder special circumstance of a 15-year-old boy. It simply cannot be assumed that prospective jurors understood what a "special circumstance" was, or had the specific statutorily-defined legal term "kidnap-murder" in mind when they answered written questions.

Seven of twelve jurors answered one group question in voir dire, and were done. Most significantly, as detailed in the opening brief, the record is replete with instances in which seated jurors expressed that they would vote automatically for the death penalty for intentional murder, and no

follow-up in terms of the kidnap-murder special circumstance was permitted. (See AOB 66-73.)

F. Appellant's Excluded Questions Unveiled the "Elephant in the Room"

Respondent argues that Appellant's proposed questions were "vague, speculative, and irrelevant," and either were not narrow enough to pose the query that forms the basis for the claim on appeal, or were too broad and sought prejudgment of aggravation. (RB at 57.) Respondent is mistaken.

Appellant asked to inquire in proposed questions 79 and 120 whether prospective jurors could remain fair and impartial in a case of kidnap-murder (5 CT 1263, 1268), which certainly qualifies as the sort of inflammatory crime (due to its added element of coercion) that would (and presumably, did) cause some jurors on the panel invariably to vote for death. (Cash, supra, 28 Cal. 4th at p. 721 [canvassing cases endorsing particularized death-qualifying voir dire]; cf. People v. Virgil (2011) 51 Cal. 4th 1210, 1240 [affirming exclusion of hypothetical that included several key facts about defendant's alleged robbery-murder, including that the victim did not resist; was moved, then stabbed repeatedly and killed].) Unlike the Virgil case, defense attorneys did not seek to inject any specific facts beyond the victim's youth, including defense theories such as lapse in coercion. Rather, the defense sought instead to question jurors on their ability to consider the lesser penalty in light of the actual special

circumstance, kidnap-murder, rather than the generic "a" special circumstance. The trial court excluded this line of questioning, and its reason was both definitive - "[T]hat's asking them to prejudge evidence, and I don't think you can do that." (1 RT 234) – and contrary to law. The venire was not asked about the subject, even as the voir dire was ludicrously brisk. Seven of twelve jurors were asked one question: could they think of a reason to disqualify themselves. Four of the other five jurors had issues with automaticity of the death penalty for intentional murders, which certainly gave the excluded kidnap-murder questions urgency, potency, and given the end-result, poignancy. The death judgment should be reversed for empanelment of a new sentencing jury, with guarantees of impartiality consistent with governing law.

3. THE TRIAL COURT ERRED BY EXLUDING JUROR GONZALEZ

A. Introduction

This Court recently reaffirmed the principle that "[a] juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under [Wainwright v.] Witt (1985) 469 U.S. 412, 424, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (People v. Riccardi (2012) 54 Cal. 4th 758, 779 (citing People v. Stewart (2004) 33 Cal. 4th 425,

447); People v. Pearson (2012) 53 Cal. 4th 306, 330.) In his answers to all four death penalty-related questions in the questionnaire, and to the first three of four live questions, Juror Gonzalez clearly affirmed that he could and would follow the law even though he disagreed with it, could vote for guilt based solely on the evidence, and could vote for the death penalty in an appropriate case. (14 CT 3920-3925; 3 RT 423-424.) Yet, the trial court excluded him based on his nine-word puzzle of an answer to a fourth question - "no matter what I did, that would be a factor" (emphasis added), without any effort to clarify, much less any analysis. (3 RT 423-424.) Respondent suggests this is an easy case. (RB at 59.) It isn't.

Juror Gonzalez's nine-word answer was ambiguous; neither indefinite pronoun ("what" and "that") was clearly defined by the predicate question, or by one another. (3 RT 423.) Read in context, the most sensible take is that he would feel the moral burden of convicting a fellow human being, even as he could. But, certainly, that is not the only possible reading.

The issue on appeal is whether that nine-word puzzle, vel non, was sufficient to justify Juror Gonzalez's exclusion, when his more considered responses to the questionnaire and the preceding three questions in open court clearly qualified him for service, and when his responses suggested the possibility of invidious reasons for exclusion (Chicano background; opposition to the death penalty in the abstract; wizened experiences with

both police in East Los Angeles, and life prisoners in state custody). Respondent argues that the juror "maintained that he would consider (when deciding guilt) the potential penalty of death" and expressed a "firm intention to consider punishment in the guilt phase against the court's instructions." (RB at 57, 61, emphases added.) But, Gonzalez's nine-words cannot be stretched nearly far enough to bear that definitude. In fact, given the compound imprecise quality of the court's question, it is not clear what the answer meant. But, Gonzalez's answers to the clearly-elucidated questions in the questionnaire made it clear that he could and would follow the court's instructions both at guilt and penalty phases.

B. Respondent Mischaracterizes the Record to Skirt the Case Law

Respondent argues that Juror Gonzalez was "preoccupied with the issue of penalty" (RB at 59), which is a sideways effort to skirt the High Court's teaching (embraced by this Court) that "personal opposition to the death penalty is not itself disqualifying, since 'a prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.'" (Pearson, supra, 53 Cal. 4th at p. 331 (quoting People v. Kaurish (1990) 52 Cal. 3d 648, 699.) Respondent maintains that there were no "contrary statements" in this case. (RB at 60.) Yet, Respondent wholly ignores Juror Gonzalez's questionnaire responses

and his first three responses in open court,[8] even though all of his answers were "sufficiently clear" as to leave "no doubt" that he was willing and able to set aside his personal views and follow the law. (People v. Wilson (2008) 44 Cal. 4th 758, 790.)

C. This Case Is Governed by Riccardi and Stewart

The parties agree that the "substantial evidence" standard applies to this issue on appeal. (RB at 61.) This Court recently observed in Riccardi that it could not possibly resolve ambiguity in a juror's inconsistent questionnaire responses and that the trial court erred by failed to question the juror in open court. (Riccardi, supra, 54 Cal. 4th at p. 782.) When the trial court has observed a juror's "responses" in open court, this Court defers to the trial court's evaluation of juror demeanor, even in the absence of any explicit analysis. (People v. Williams (2013) 56 Cal.4th 165, 177-178 (citing Uttrecht v. Brown (2007) 551 U.S. 1, 7.) This case raises an important question for the guidance of trial courts as they encounter situations which require supplementation of questionnaire answers in open court: Is it sufficient to excuse a juror based on a single ambiguous response, when all his prior written and oral answers clearly qualify him for service? Under this Court's principles, the answer is "no."

In Stewart, this Court held that the use of "make it very difficult" language in the preface to a question made it impossible to determine

[8] These responses are summarized in appellant's opening brief at pages 85 through 88.

whether a juror's answer revealed that his or herr personal views would have actually prevented or substantially impaired the performance of his or her duties as a juror under the Witt standard. (Stewart, supra, 33 Cal. 4th at p. 442.) The trial court's "influence your view of the facts" language in his second to last question suffered from the same imprecision. (3 RT 423-424.)

Respondent argues that deference is owed the trial court's hypothetical finding that Juror Gonzalez's "preoccupation" with and "hostility" to penalty would render him unable to give the prosecution a fair hearing. (RB at 61.) In the absence of explicit analysis below, however, this Court does not defer to Respondent's hypothesis about the juror's true state of mind, particularly where it is so plainly contradicted by the juror's questionnaire responses. (Pearson, supra, 53 Cal. 4th at pp. 332-333.) Cases affirming exclusions based on the trial court's implicit evaluation of juror demeanor in open court have uniformly involved a more extensive overall record of voir dire, and in particular, an effort to clarify an ambiguous response, if it can be clarified. (See e.g., Williams, supra, 56 Cal.4th at pp. 177-182 [finding issue was "somewhat close" where juror "repeatedly expressed" extreme discomfort]; People v. Thomas (2011) 51 Cal. 4th 449, 464-471 [jurors themselves repeatedly expressed doubt].) While there is no talismanic formula for voir dire, in this case, one

ambiguous response to an imprecise question surely was not sufficient to excuse an otherwise clearly qualified juror.

D. Conclusion

The trial court's finding that Juror Gonzalez's views regarding the death penalty would prevent or substantially impair the performance of his duties as a juror is not supported by substantial evidence. By erroneously excluding Juror Gonzalez for cause, the trial court denied Appellant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. (Uttrecht, supra, 551 U.S. at pp. 6, 9.) Under compulsion of Gray v. Mississippi (1987) 481 U.S. 648, 672 (Powell, J., concurring), reversal of Appellant's penalty phase verdict is mandated, and remand to the trial court for the empanelment of a fair and impartial sentencing jury is required. (See e.g., Riccardi, supra, 54 Cal. 4th at p. 783.)

GUILT PHASE CLAIMS

4. THE TRIAL COURT ERRED BY DIRECTING A JURY VERDICT ON KIDNAP UNSUPPORTED BY THE EVIDENCE

A. Introduction

The jury convicted appellant of simple kidnap (Penal Code §207) on a theory which the prosecutor inserted into the case after the close of evidence. The indictment charged one continuous kidnap-for-ransom from

"August 6 through 9, 2000." (1 CT 22..) The evidence was uncontroverted that appellant did not meet the kidnap victim until late in the evening of August 8, and that the victim had at least four significant chances to leave before that, though the reasons why he chose to stay were contested. [9] (See AOB at pp. 121-127.)

Over defense objection, the prosecutor advanced a new theory in his rebuttal closing argument, not pleaded in the indictment, of a "second kidnap," committed on the evening of August 8, when the victim accepted a ride in appellant's borrowed car from the Lemon Tree motel, was driven to West Camino Cielo, and then led from the car – hands-bound and blindfolded – 60-to-80 yards up the trail to a pre-arranged gravesite. (10 RT 2137.) Significantly, the prosecutor amended the indictment against co-defendant Pressley to allege alternate theories of kidnap, which gave Pressley notice and opportunity to defend. (See AOB at 117-118.) Appellant had neither. Had it been provided, appellant could have rebutted the second kidnap theory by making the point that the lion's share of the movement which purportedly formed its basis was accomplished, not by force or fear, but by the subterfuge that they were all just going home to Los Angeles. The jury was not instructed that asportation by fraud cannot constitute simple kidnap, and that if the jury believed the victim willingly

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[9] The prosecutor argued that he wanted to assist his brother, a form of compulsion; appellant countered that the kidnap terminated once he was objectively free to leave.

got in the car, the only movement to be considered for totality of circumstances was the 60-to-80 yard trek up the trail; nor was the jury instructed to determine whether that asportation was incidental to the commission of the murder itself.

Moreover, the August 6-8 kidnap-for-ransom conspiracy, which led to the victim being at the Lemon Tree motel, was wholly irrelevant to the jury's determination of appellant's guilt of simple kidnap, and should have been stricken from jury consideration of the "second kidnap" theory. Although appellant first encountered the victim at a time and place chosen by one of his original captors (Jesse Rugge), appellant could not be derivatively liable for simple kidnap merely on the basis of the location of the pick-up, or that his motive for killing the victim was to conceal and cover up that earlier crime. (See AOB at pp. 124-127..) The jury was not told to focus on appellant's individual role, or that the target-offense for purposes of concealment to establish special circumstance kidnap-murder could not be a prior kidnap by other perpetrators, in which appellant had played no role; hence, that if the jury concluded that he had had no role in the August 6-8 kidnap, it had to focus solely on his role in transporting the victim from the Lemon Tree Hotel to the trailhead, and from the trailhead to the grave. Both these errors require reversal of the kidnap conviction and kidnap-murder special circumstance, and remand for retrial on these

issues before a properly-instructed jury considering properly-admitted evidence.

B. Respondent's "Waiver" Argument Conflates the Requirements for Contemporaneous Objection with the Motion-In-Limine Rule

Respondent argues that appellant's "unspecified objection" did not preserve his material variance claim on appeal. (RB at 66.) Respondent is mistaken. When the prosecutor first broached his "second kidnap theory," one defense attorney said "Object, Your Honor. There's one count only charged." (10 RT 2134.) The Court and prosecutor clearly understood that "one count only" referred to the inclusive language of Count One, which charged kidnap from "August 6 through August 9." (1 CT 22.) Although the phrase "material variance" was not uttered, the phrase "one count only" clearly meant material variance, as borne out by the ensuing discussion of counsel and ruling of the court.[10] The objection was both timely and sufficiently clear to preserve the claim.

Respondent argues that the issue was waived under the in limine motion rule, which provides that an in limine motion, without a contemporaneous objection at trial, is sufficient to preserve an objection for

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10 "'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had[.]'" (People v. Saunders, (1993) 5 Cal. 4th 580, 590, quoting People v. Walker (1991) 54 Cal.3d 1013, 1023.) Trial attorney's objection did just that. The contemporaneous objection rule does not require more.

appeal only when, inter alia, "a specific legal ground for exclusion is advanced and subsequently raised on appeal." People v. Letner and Tobin (2010) 50 Cal. 4th 99, 160. Here, by contrast, appellant made a contemporaneous objection. Cf. People v. Seaton, 26 Cal. 4th at 641 (waiver based on failure to make any objection; defendant received notice of new theory during jury selection); People v. Burnett (1999) 71 Cal. App. 4th 151, 178 (waiver based on counsel's failure to make any objection, not on failure to intone "material variance" or "constructive amendment").

Burnett was a case of felon-in-possession-of-firearm. The prosecutor told the jury for the first time in closing argument that the defendant could be convicted on the basis of either of two different guns, which was a different theory than originally charged, or presented at the preliminary hearing, and one for which defendant had not been given adequate notice. Id. at 175. Both the holding of Burnett, and the specificity of the objection, support appellant's claim. None of respondent's cases are remotely applicable to this set of facts. Burnett, Gil, Newlun, and Rubin all involved situations where no objection was made. In Powell, the issue of waiver was not even raised or discussed. Given the objection and discussion had in the record, it is clear that the trial court was fully aware of the issue, and the legal challenge.

It is true that both the in limine motion rule cited above, and the contemporaneous objection rule of Evid. Cod §§353-354 require that the

specific ground of the objection be stated. But, there is no particular form of objection required and the case law is clear that an objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. Moreover, appellate courts have the authority to address any legal issue on appeal despite the lack of objection so long as it does not involve the admission or exclusion of evidence. (People v. Williams (1998) 17 Cal.4th 148, 162.) As explained in Williams:

> "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. (Citation.) Indeed, it has the authority to do so. (Citation.) True, it is in fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (*id.*, § 354) of evidence. Such, of course, is not the case here. Therefore, it is free to act in the matter. (Citation.) Whether or not it should do so is entrusted to its discretion. (Citation.)" (Ibid.)

In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented.. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290 [objections to relevance, intrusiveness, and "demeaning" nature of medical test on defendant sought by prosecution deemed sufficient to preserve search-and-seizure, self-incrimination, and privacy claims].); *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [where prosecutor's statements had already informed court of

nature of "other crimes" evidence, defense counsel's "relevance" objection deemed sufficient to put court on notice to determine admissibility under Evid. Code § 1101 & § 352 standards for other offenses]; see also *People v. Clark* (1992) 3 Cal.4th 41, 123-124 [under totality of circumstances, counsel's relevance and Evid. Code § 352 objections deemed sufficient to raise Evid. Code § 1101 objection].

C. Respondent Ignores Uncontroverted Evidence that the Victim Voluntarily Accompanied Appellant Under False Pretenses, Rather than By Force or Fear, Until They Reached the Trailhead

Respondent posits that "[o]bviously, the taking of Nicholas Markowitz from the motel in Santa Barbara to his gravesite was an act of kidnapping." (RB at 68.) Not so. According to the evidence, the victim was told that appellant had come with a car to give them all a ride home to Los Angeles. There was no testimony or prior statement that the victim was taken by force or fear from the motel; indeed, the logic of the state's evidence confirms that appellant and accomplices Rugge and Pressley had every incentive to trick the victim into willingly and cooperatively leaving a public place, and remaining cooperative until he was off the public thoroughfare. The starting point for analysis of simple kidnap was the Lizard's Mouth trailhead, not the motel. From that point, the distance traversed was at most 60-to-80 yards.[11] "Asportation by fraud alone does

[11] That movement bears all the hallmarks of movement by force and fear, in that the victim was bound and blindfolded. The atmospherics of

not constitute general kidnapping in California." (People v. Davis (1995) 10 Cal.4th 463, 517, n.13; People v. Green (1980) 27 Cal.3d 1, 63-64 ["defendant tricked (victim) into believing she was simply being taken on a quick trip to her sister's house and back"], overruled on other grounds in People v. Martinez (1999) 20 Cal.4th 225, 239, and People v. Hall (1986) 41 Cal.3d 826, 834 n.3.) "This long-standing rule is premised on the language of Penal Code §207, which for general kidnapping . . . requires asportation by force or fear, but for other forms of kidnapping proscribes movement procured only by 'fraud,' 'entice[ment],' or 'false promises.'" (People v. Majors (2004) 33 Cal.4th 321, 327; People v. Guerrero (1943) 22 Cal.2d 183, 189 [the gravamen of the offense of kidnapping is "some form of compulsion"]; Penal Code §207(a)-(d).) The statutory requirement of §207, that to be "forcible," a taking must be accomplished through fear, refers to fear of "harm or injury from the accused." (Major, supra, 33 Cal. 4th at p. 334.)

Here, the jury was instructed as to the elements of simple kidnapping pursuant to CALJIC 9.50, that the kidnapping must have been accomplished by the use of force or fear. But, the jury was not instructed that it must discount from its analysis any asportation which was accomplished by fraud or deceit, i.e., the victim's car ride from the motel to

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Respondent's scene description – "cover of darkness," "secluded area of the forest," "along a rock-slope" – are irrelevant to the actual test of totality of the circumstances.

the trailhead. This issue only became relevant when the prosecutor injected his "second kidnap" theory during rebuttal argument, and appellant suffered substantial prejudice from the resulting material variance of proof from argument; indeed, it was that variance which led to his conviction.

Nor was the jury instructed to consider whether that final 60-to-80 yard movement was incidental to another felony, which was in fact its essential purpose, to kill the victim to conceal the initial kidnap. Green's holding, that conduct incidental to a murder (which was its purpose) does not qualify as a special circumstance, is still the law of this State. (See Claim X infra.)

In Gray v. Raines (9th Cir. 1981) 662 F.2d 569, the defendant was charged in the information with forcible rape. After the defendant put on a defense that the victim consented to the conduct, the prosecution was allowed to amend the information to allege statutory rape. In reversing the conviction, the court concluded that the defendant's due process rights were violated because he did not have notice of the specific charge of which he was convicted, and his substantial rights were prejudiced. The same is true here. After the defense rested and argued, the prosecutor argued a new "second-kidnap" theory of the case. The defense had no notice or opportunity to rebut the theory, by alerting the jury to two flaws in that theory: movement accomplished by fraud and merger doctrine.

Respondent suggests that the variance was immaterial because the dates involved were "reasonably near" to one another. (RB at 70.) Respondent is mistaken. United States v. Hinton (9th Cir. 2000) 222 F.3d 664, 672-673 was a prosecution under 18 U.S.C. §922(g)(1) (2) which makes it a crime for any felon "to ship or transport any firearm or ammunition in interstate or foreign commerce." The shipment date alleged in the indictment ("on or about August 14") was 18days later than the shipment date shown at trial, but the dates are "reasonably near" because shipping is a continuous offense, and the defendant knew precisely what charges he would need to defend against. (Id., at p. 673.)

Hinton is inapposite because, unlike movement through interstate commerce, kidnap does not inherently cover any dates within the span, when the indictment uses an adverb that connotes continuity, such as "through." Here, appellant defended against the continuity theory of "August 6 through 9," including the substantial evidence that the victim felt himself free to leave before appellant arrived on the scene late August 8. By rejecting the Penal Code §209 charge, the jury acquitted appellant of the "August 6 through 9" kidnap. .) The State does not cite any authorities for its contention that a kidnap inherently covers any dates within the span, when the indictment uses an adverb that connotes continuity. The indictment charged one kidnap, but the prosecutor argued two. (See 10 RT 2137.) Viewed as a "material variance," instructional error, or both, the

effect of this "bait-and-switch" was extremely prejudicial. Respondent's assertion that "the prosecutor's theory remained that only one kidnapping occurred" (RB at 70) cannot be squared with the prosecutor's rebuttal argument (See 10 RT 2136 [arguing theory of "independent" or "subsequent" kidnap].)

Again, by raising that theory only in closing rebuttal, the prosecutor took advantage of surprise and the last word. The elements of the §207 charge argued for the first time during the prosecution's rebuttal included fact-specific issues of movement not accomplished by fraud, and purpose independent of murder, which were not implicated by defense of the §209 charge. The variance was material, and requires reversal.

D. Co-Conspirators' Statements Prejudiced the Defense

Respondent mischaracterizes the issue of conspiracy evidence in this case. (See RB 71 ["Here, the conspiracy which appellant joined was ongoing when he took the victim to kill him at Lizard's Mouth."].) Appellant never joined the August 6 conspiracy of Hollywood, Rugge, Skidmore and Pressley to take and hold the victim pending instruction from Hollywood. (See AOB at pp. 121-126.) None of the evidence relating to that sequence of events, whether its object was "attained or defeated" (RB at 71), was properly admissible against appellant, because he acted separately to conceal the original crime. (Ibid..) The scope of the original conspiracy is a matter of the goals and understanding of the principals. In

this case, the prosecutor's case showed that the original kidnap-for-ransom conspiracy ended when appellant arrived on assignment to kill its victim. By acquitting appellant of the greater-included crime of kidnap for ransom or extortion (Penal Code §209) charged in Count 2 (10 RT 2227), the jury rejected the prosecutor's argument that when appellant joined that original conspiracy he joined its objective (abduction to enforce the debt) rather than a new and different objective (to silence the victim). The extensive testimony regarding Nick's abduction and captivity should not have been admitted, because the predicate requirement that appellant joined the conspiracy or acted in furtherance of its goals, was never demonstrated.

E. A Special Unanimity Instruction Was Required

Respondent mischaracterizes this claim as an attack on the trial judge's response to jury questions, rather than a challenge to the essential instructional lacunae. (RB at 74.) The waiver rule explicated in People v. Castaneda (2011) 51 Cal. 4th 1292, 1352 does not bar this claim on appeal, because of the trial court's sua sponte dual obligation to correctly answer questions and to adequately instruct on all issues the jury must decide.

Given the switch in focus by the prosecutor after the close of evidence, the defense objection, and the jury's evident confusion, the scenarios of compromise verdict, which Respondent lampoons as "frivolous," "oxymoronic," and "divorced from reality" (RB at 75-76), are hardly farfetched. No instruction informed the jury that they must unanimously

agree that all elements of the "second kidnap" were met and, if not, that the consequences of the "first kidnap" in terms of risk to the victim, or his very location, could not be imputed to appellant by some jurors, in order to reach a compromise verdict. In particular, these elements of the second kidnap theory were simply untenable: (1) the victim's movement from the motel to the trailhead was accomplished by fraud. (2) the 60-to-80-yard hike along the trail was too insubstantial a distance to meet the asportation element. (3) the essential purpose of this movement was murder, not kidnap. This was in fact a classic merger case. This Court should not ratify Respondent's mere assumption that all members of the jury convicted appellant on either a legitimate theory of kidnap, or even on the same theory of kidnap, as that crime was alleged in the charging document. Both kidnap-murder special circumstance as alleged in Count 1 and kidnap as alleged in Count 2 should be reversed and retried.

5. THE TRIAL COURT ERRED BY ADMITTING APPELLANT'S CONFESSION

A. Introduction

Having invoked his right to counsel upon arrest one day earlier, appellant spoke with his mother who demanded that he "spill his guts," and then requested to speak with a detective. (1 CT 2A 153; 9 CT 2539-2542.) Detective West read appellant his Miranda rights, and appellant stated that he understood those rights and wanted to talk. (1 CT 2A 155.)

Appellant moved to suppress his confession after the preliminary hearing (4 CT 982-983, 998-1005), and again before trial, as both coerced and involuntary, and taken in violation of the right to reassert Miranda rights.[12] (5 CT 1290.) His attorney argued that he was distraught from his mother's phone call; the detectives threatened him with the death penalty, disparaged his right to counsel, and ignored his right to cut-off questioning. (1 RT 173-178.)

During a brief pause in the lunch break, with the impaneled trial jury awaiting opening statements, the trial judge watched a portion of the interrogation [45-page transcript] (4 RT 724; 1 CT 2A 152-197) , and denied the motion. The gist of the trial court's ruling both at the preliminary hearing and again at trial was that: 1) the detectives' words did not amount to an actionable "threat"; and 2) appellant "didn't really want to stop talking because he didn't quit talking." (1 RT 202; 4 RT 726.) The Court agreed that appellant had reasserted his Miranda rights when he said, "All right. You guys I think I want to stop there. I think you guys got a pretty good picture," but made no ruling as to the admissibility of appellant's responses beyond that point in the interrogation.

During appellant's testimony, the trial court ruled that the ensuing portion of the confession could come into evidence, because 1) "whether

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[12] In his motion, appellant argued "totality of the circumstances" in regard to "psychological coercion," though he did not refer beyond the transcript. (4 CT 998.)

the statement is voluntary [] is really irrelevant on this point, it does impeach his testimony here"; though 2) it was merely "frosting on the cake." (8 RT 1692, 1694.)

Respondent makes six arguments to uphold the trial court's rulings against appellant's challenges on appeal (AOB at 134-184; RB 76-91): 1) the rule of "contextual review" bars any consideration of appellant's infirmities, or the context of the interrogation to the extent neither was argued to the trial court; 2) appellant's claim of invalid Miranda waiver is limited to the facts adduced by his trial testimony, and are meritless; 3) the detectives did not deceive appellant or threaten him with any adverse consequence if he refused to talk; 4) appellant's purported reassertions of his Miranda rights were equivocal and ambiguous; 5) the Siebert claim is waived by appellant's failure to present any evidence of a police practice or policy of deliberately violating Miranda; and 6) any error was harmless because the prosecution had other evidence of appellant's statements against interest -- Sheehan's testimony that appellant told him that "a problem in Santa Barbara [had been] taken care of." Respondent's arguments are misplaced. The Court should reverse the trial court's rulings, and appellant's conviction.

B. Respondent Misapplies the Concept of Contextual Review

Respondent argues that the rule of contextual review limits this Court's consideration of this issue on appeal to the interrogation transcript

itself, because that was the extent of the record before the trial court when it admitted the confession into evidence. (RB at 82.) Respondent would have this Court extend its objective search-and-seizure standards to the broader inquiry of voluntariness, which encompasses both objective and subjective elements. (See e.g., People v. Tully (2012) 54 Cal. 4th 952, 979.) This is inappropriate. Under this absolute rule of contextual review, appellant's native impairments (8 CT 2390-2393; 3 CTA 700-705)[13], and his specific vulnerability following his monitored phone call with his mother (8 RT 1619, 9 CT 2539-2543), would be off-limits in this appeal, because consideration of this evidence would purportedly "swallow the [contextual-review] rule." (RB at 82.)

Respondent is mistaken for four reasons. First, Appellant raises the same legal theories raised below, bolstered by reference to facts adduced later at trial. (Cf. Tully, supra, 54 Cal. 4th at p. 979 ["party cannot argue the court erred in failing to conduct an inquiry it was not asked to conduct."].) Second, Respondent ignores People v. Neal (2003) 31 Cal. 4th 63, 80 and People v. Sanchez (1969) 70 Cal. 2d 562, 573-74, cited in appellant's

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[13] This evidence was either admitted later at trial or submitted to the trial court, or considered by the same trial judge in connection with co-defendant Pressley. The expert in question, Dr. Chidekel, was the prosecution's neuropsychologist, and Respondent does not challenge her findings. Respondent's suggestion that Dr. Chidekel did not "directly address" appellant's waiver or decision to speak with detectives ignores the plain English of Dr. Chidekel's report and testimony. (Compare RB at 83-84 with 8 CT 2390-2393; 3 CTA 700-705.)

opening brief, which stand for the proposition that this Court reviews "the record in its entirety, including all the surrounding circumstances of the accused and details of the encounter." (See AOB at 137, 150 n.112, 158-159.) This Court must consider the "record in its entirety" which includes far more than the trial court's truncated review of the interrogation transcript, to determine whether its implied findings of fact are supported by "substantial evidence." (People v. Sauceda-Contreras (2012) 55 Cal. 4th 203, 217.)[14] The mixed questions of involuntariness, coercion, and unequivocal reassertion of Miranda rights are subject to independent review, regardless. Third, Respondent's argument is contradicted by its own citation to the corrected transcript rather than the original exhibit, which it conceded was inaccurate. (RB at 77-80.) Respondent's references to appellant's trial testimony also contradict its position. (Id., at pp. 83-84.) Finally, appellant's reference to evidence later adduced at his or at co-defendant's trial, the latter subject to principles of judicial estoppel, does not threaten to "swallow the rule." Rather, it enables this Court to consider the very evidence which was known to the detectives regarding appellant's emotional state, lack of education, lack of sleep, and recent admitted drug use, and/or known to the prosecution regarding his impairments. In truth, that is the context of appellant's encounter with the detectives.

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[14] The trial court proceedings on this issue are noteworthy for their brevity, and lack of consideration of actual testimony at any point from the percipient witnesses. Deference is due, but not carte blanche, under these unusual circumstances.

Accordingly, Respondent is mistaken that this Court is barred from considering appellant's native impairments and particular vulnerability following his monitored phone call with his mother in determining that his Miranda waiver was neither knowing nor voluntary. (See AOB at 135-140, 159-167.)

C. Respondent Ignores the Most Plausible Reading of the Effect of the Detectives' Misstatements of Law and Dire Consequences of Silence in the Context of Appellant's Circumstances

Respondent argues that the detectives did not deceive appellant or threaten him with any adverse consequence if he refused to talk. (RB at 85-86.) Respondent is mistaken. In truth, the detectives did not merely exhort appellant to tell the truth. They exploited the inherently coercive atmosphere of custodial interrogation with three critical deceptions and one significant threat which they used repeatedly to coerce appellant's statements. First, they threatened that appellant would receive the death penalty, if he chose to remain silent rather than confess his role to them. Second, they misstated that duress is a valid defense, indeed the only defense, to premeditated murder. Third, they insisted fatuously that once he met with counsel, he could not speak with police, because counsel's role is to "play games." Finally, they said that they could keep appellant's name out of court if they believed what he said. (See AOB at 140-146, 172-176.) Respondent ignores the references to the death penalty, which the detectives themselves brought up multiple times. That is a serious omission

from Respondent's brief, and one which obscures the seriousness of the error. Respondent's efforts to sugarcoat the detectives' other verbal maneuvers do not square with the reality of the encounter. Taken in context, the detectives' tactics were deceptive, and psychologically coercive, and the proximate cause of appellant's confession. (Cf. Tully, supra, 54 Cal. 4th at p. 986 [defendant's statements were "gratuitous and untethered" to any promise made by police].)

D. Respondent Ignores the Most Plausible Reading of Appellant's Repeated Requests to Stop the Interrogation

Respondent argues that appellant's purported reassertions of his Miranda rights were equivocal and ambiguous, and therefore ineffective to cut off questioning. (RB at 87-88.) Respondent is mistaken.

This Court recently reaffirmed that it applies an objective standard to post-waiver invocations, "identifying as ambiguous or equivocal those responses that "a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect might be invoking the right to counsel." (Saucida-Contreras, supra, 55 Cal.4th at 218,quoting Davis v. United States (1994) 512 U.S. 452, 459.) "A response that is reasonably open to more than one interpretation is ambiguous," and in the context of post-waiver invocation, no bar to further questioning. (Ibid.)

At the same time, the Davis clear invocation rule did not change the longstanding principle that "a defendant's words should be 'understood as ordinary people would understand them.'" (Sessoms v. Runnels (9th Cir.

2012) 691 F.3d 1054, 1062 (en banc),quoting Connecticut v. Barrett (1987) 479 U.S. 523, 529.) Here, as quoted below, appellant couched his request in a "polite manner, but his meaning was clear": he wanted to stop talking for the night. (See id., at p. 1063 [defendant framed request for counsel is question form, but backed it up with a second request.].) The trial court's ruling that appellant "didn't really want to stop talking because he didn't quit talking" is not entitled to any deference under this Court's independent review of mixed questions. The trial court applied an incorrect standard by focusing on appellant's subsequent response to further police questioning, rather than on the ordinary meaning of appellant's four requests to stop.

Appellant's statements were as follows: 1) "I can't do that. Do you guys mind if I go back to my cell and think about tonight and talk to you guys tomorrow because I know my arraignment is Monday." 2) "You guys know what happened. I think I'm going to stop there for now. Can I get more water, please?" 3) "Well, I'm talking now between now and tomorrow." 4) "All right. You guys I think I want to stop there. I think you guys got a pretty good picture." Although Respondent tries to backpedal from it (RB at 88), the prosecutor conceded, and the trial court agreed, that statement (4) effected a restoration of Miranda rights. There is no difference, in ordinary parlance, between "I think I'm going to stop there" and "I think I want to stop there." (See AOB at 167-171.) _To suggest otherwise blinks reality. Ordinary people would appreciate that appellant's

polite preface "do you mind," and his suggestion of hiatus "between now and tomorrow" were merely reflective of the power imbalance, not qualifications of the request that questioning cease.

E. Respondent Ignores the Inherently-Coercive Nature of Questioning Outside Miranda

Respondent argues that appellant forfeited his Siebert claim because he did not object with reference to Siebert itself, and did not present additional evidence of a policy or practice by detectives to intentionally violate Miranda. (RB at 89-90.) The argument is specious for two reasons. First, Missouri v. Siebert (2004) 542 U.S. 600, was decided two years after trial in this case. Appellant did object to any use of this portion of his confession, and its use was not limited by argument or instruction to impeachment. Second, "deliberate violations of Miranda are presumptively coercive" (Harris v. Kernan (9th Cir. 1999) 197 F.3d 1021, 1029), and no "policy or practice" evidence was necessary to make out the elements of deliberate violation in light of the transcript itself. (See AOB at 176-182.)

F. Respondent's Harmless Error Argument Ignores Fact and Law

Respondent argues that any error was harmless because the prosecution had other evidence of appellant's statements against interest in the form of accomplice Sheehan's testimony that appellant told him that "a problem in Santa Barbara [had been] taken care of." (RB at 90-91.) The

argument is patently wrong. A man's confession is "like no other evidence" (Arizona v. Fulminante (1991) 499 U.S. 279, 310), and operates as an evidentiary "bombshell." (People v. Cahill (1993) 5 Cal. 4th 478, 503.) Simply put, it was the only evidence that appellant was the actual killer. As such, that could never be considered "harmless" in a capital case. In fact, the prosecutor emphasized appellant's confession in both phases of trial as centerpiece evidence of his guilt and wantonness. (See AOB at 157, 183-184; 9 RT 2076; 10 RT 2159.) The errors described above cannot be considered harmless.

6. THE SUPERIOR COURT ERRONEOUSLY COMPELLED APPELLANT TO TESTIFY AS A FOUNDATION FOR HIS EXPERT'S TESTIMONY

A. Introduction

Appellant took the stand in his trial only after the trial court found that his testimony was a necessary prerequisite for his expert's testimony on false confessions. (See 7 RT 1510-1515; 11 RT 2556-2557.) The trial court erred in making that ruling. Appellant did not need to repudiate his confession in order for Dr. Kania to testify about Appellant's observed characteristics and about characteristics typical to those who make false confessions. (See AOB at 205-206.) To the contrary, appellant's testimony was totally immaterial to Dr. Kania's testimony. (See AOB at 205 ["As made clear by Dr. Kania, appellant's repudiation and claimed amnesia were *irrelevant* to the doctor's opinion . . . ."] (citing 7 RT 1504); 206

["Appellant's public repudiation of the confession did not contribute any necessary factual underpinning to Dr. Kania's independently-derived and carefully circumscribed opinions."].) By ruling that appellant's testimony was the only way to lay the foundation for Dr. Kania's testimony, the trial court put appellant in a position where he either had to forego his Fifth Amendment right against self-incrimination or his Sixth Amendment right to present a defense. Being placed into that fundamentally unfair dilemma violated Appellant's constitutional rights[15] and resulted in significant harm.

Respondent's retort to appellant's claim is off-the-mark. Respondent fails to meaningfully respond to the key issues in Appellant's claim, and instead urges upon the Court with a mix of conclusory and irrelevant arguments. Respondent ignores the authorities cited in the opening brief or dismisses them as "irrelevant" without explanation. (See, e.g., RB at 102-103 [declining to respond to certain cases because their facts are not precisely parallel to those of Appellant's case].) While ignoring cases that are applicable to Appellant's arguments, respondent discusses cases at length in order to combat arguments Appellant does not even raise in his opening brief. (See, e.g., RB at 98-101.) As explained below, respondent's arguments do not rebut this claim.

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[15] Namely, his Fifth Amendment right to remain silent, his Sixth Amendment right to counsel and to present a defense, and his right to due process.

B. Despite Its Argument to the Contrary, Respondent Acknowledges That Dr. Kania's Expert Testimony Required An Adequate Foundation, Which Had to Be Appellant's Testimony

Respondent acknowledges that the superior court required Appellant to testify in order for Dr. Kania to testify. Respondent states that the court "observed that proffered expert testimony requires an adequate foundation." (RB at 97 [citing 7 RT 1510-1515].) In the part of the record to which respondent cites, the only "adequate foundation" (RB at 97) the trial court speaks of is appellant's testimony. (See 7 RT 1510-1515.) Accordingly, Respondent acknowledges that the trial court found Appellant's testimony to be a necessary prerequisite to his expert's testimony. Respondent, however, rescinds that acknowledgment later on in its brief.

If there were any actual doubt about the trial court's ruling beforehand, the trial court expressed itself clearly when it revisited the issue in denying the new trial motion, in words that are conspicuously absent from respondent's brief: "I don't know how you can – you can assert a false confession issue unless the defendant is going to testify and repudiate the false confession. . . . The first step, the defendant had to repudiate the confession, so I think he was going to have to testify . . . . [I]n other words, he's got to testify, he's got to repudiate it . . . ." (11 RT 2556-2557.)

Despite the State's dispute that the trial court compelled appellant to lay the foundation through personal testimony, respondent's acknowledgement that the court "observed" that expert testimony required

a foundation, when examined in light of the facts of the record, leads to the conclusion that the court did in essence rule that appellant's testimony was required.

The State characterizes the quoted dialogue in the trial record as merely one in which the court observed that proffered expert testimony requires an adequate foundation. What the State fails to say, however, is that this foundation was obviously appellant's testimony and the court's remarks during the discussion were not merely "observations," but an implicit ruling that appellant would have to personally lay the foundation to support Dr. Kania's testimony. Given the Court and counsel's statements during this legal discussion, it was clear that the required foundation was appellant's testimony. (See e.g., RB at 92 [quoting trial judge comment that "I'm not going to let him testify as to circumstances, the things that he was told by [appellant]. [Appellant] can testify to those things and he can be asked questions about it."; RB at 94["And then to the extent that [appellant] has testified and he can be asked about. . . ."].) Implicit in those statements was a ruling that appellant's testimony would be required to support the expert's testimony.

Later, the State argues that at most, the court merely assumed that appellant would be testifying, but never stated that appellant's testimony was a prerequisite. (RB at 98.) However, by stating that Dr. Kania could not testify to certain things but could be asked about them if appellant

testified to them, thereby providing a foundation, the court, in essence, ruled that appellant's testimony was a prerequisite. Given this ruling, appellant's testimony was compelled because without his testimony, there would not have been an adequate foundation for his expert's testimony.

C. Respondent Dismisses Crane and Brooks by Failing to Recognize the Import of its Prior Acknowledgment that the Superior Court "Observed" that a Foundation Was Required

In attempting to dismiss the applicability of Crane v. Kentucky (1986) 476 U.S. 683, to this case, respondent hues to its mistaken line of argument that the trial court did not effectively determine that appellant needed to testify as a foundation for his expert. Respondent argues that Crane "does not apply in this case, as the court did not rule the false confession evidence was inadmissible unless appellant testified at trial." (RB at 99.) Respondent dismisses Brooks v. Tennessee (1972) 406 U.S. 605 in much the same way, concluding that it does not apply to this case because the trial court required Appellant to do nothing. (See RB at 102 [The record simply does not establish that appellant was 'forced' to do anything . . . ."].)

Respondent also argues that Crane is inapplicable because there was no exclusion of expert testimony here. (RB 101) As for Brooks, respondent characterizes Brooks' holding as "accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand" and attempts to distinguish

Brooks on basis that appellant was not excluded from the stand and was not forced to be the first witness in the defense case, or a witness at all. (RB at 102.)

As explained above, respondent's contention that the trial court never compelled appellant to testify in order to provide a foundation for his expert's testimony is belied by the record. Respondent's argument that there was no such ruling is contradicted by its recognition that the superior court "observed that proffered expert testimony requires an adequate foundation" (RB at 97), and its citation to the trial court's statements that Appellant's testimony necessarily supplied that foundation. (RB at 97 [citing 7 RT 1510-1515].)

D. Respondent Misconstrues the Gist of Appellant's Claim

Respondent argues extensively (see RB at 98-101) that a defendant does not have "the blanket right to call an expert to allege that the defendant's confession was false." (RB at 101.) Appellant never argues, however, that a defendant has such a "blanket right." Appellant instead argues that the trial court forced him into a situation where he was required to either testify or forego an essential element of his defense (namely, expert testimony regarding false confessions). (See, e.g., AOB at 204 ["[T]he Superior Court could not compel appellant to choose between waiving his right to self-incrimination (as he did) or foregoing *any* evidence of his psychological circumstances of his confession . . . ."].) Appellant's

claim does not, as respondent suggests, rely on the fact that the defense expert was not allowed to offer an opinion that appellant's confession had indeed been false. Yet, respondent spends a substantial portion of its response needlessly refuting that point.

In doing so, respondent discusses People v. Page (1991) 2 Cal.App.4th 161, at length. Respondent explains that the defense expert in Page "was allowed to testify as to the psychological factors that can lead to a false confession" (RB at 100), but "was not permitted to testify that certain psychological factors and characteristics of interrogation existed in the defendant's taped statements showing the confession to be unreliable." (RB at 99.) In other words, the expert could testify about characteristics common to people who make false confessions but was not allowed to offer his opinion that the defendant's confession was indeed false. Given that appellant is not challenging the trial court's exclusion of expert opinion testimony that appellant's confession was false, Page is irrelevant. Appellant's argument is that the trial court erroneously required him to testify in order to provide a foundation for his expert's testimony – a fact that makes this case wholly different from Page.

Respondent also relies on People v. Ramos (2004) 121 Cal.App.4th 1194, another case that misses the point. Ramos does not confront Appellant's claim – that he was erroneously forced to choose between self-incrimination or forego the presentation of a vital aspect of his defense.

Ramos merely supports respondent's assertion – which appellant is not contesting – that a defendant does not have a "blanket right to call an expert to allege that the defendant's confession was false." (RB at 101.)

E. Respondent Fails to Distinguish Lawson and Cuccia

Respondent fails to meaningfully address the authorities which support this claim. (See RB at 102-103.) Respondent acknowledges that Lawson reversed the defendant's conviction based in part on the trial court's exclusion of testimony from the defendant's sole witness, which thereby forced the defendant to testify (who was then impeached with his prior convictions). (RB 102-103; Lawson (2005) 131 Cal.App.4th 1242.) Yet, without any explanation, respondent merely concludes: "Those circumstances have no relevance here." (RB at 103.)

As explained in appellant's Opening Brief, Lawson, however, is highly relevant. (See AOB at 208-209.) In that case, the trial court prohibited the defendant's sole witness from testifying and thereby compelled the defendant to testify in order to introduce his version of events. (See Lawson, supra, 131 Cal.App.4th at p. 1244.) Lawson found that "the [trial] court abused its discretion by putting [the defendant's] right against self-incrimination on a collision course with his right to present a defense."[16] (Id. at 1246.)

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[16] Lawson so held, despite its finding that the trial court's exclusion of the defense witness's testimony was partially a consequence of misconduct by defense counsel. (See Lawson, supra, 131 Cal.App.4th at p. 1246.)

Appellant's case closely resembles Lawson. The trial court here found that appellant's testimony was a necessary prerequisite to Dr. Kania's testimony. (See 7 RT 1510-1515; 11 RT 2556-2557.) With that ruling, appellant was forced to make the same decision as the defendant in Lawson was forced to make: to choose between presenting a defense or asserting his Fifth Amendment right against self-incrimination. Like the case in Lawson, the trial court wrongfully placed appellant's "right against self-incrimination on a collision course with his right to present a defense." (Lawson, supra, 131 Cal.App.4th at p. 1246.) Respondent does not distinguish Lawson.

Respondent similarly dismisses People v. Cuccia (2002) 97 Cal.App.4th 785. (RB 103.) Respondent merely summarizes Cuccia s as holding that "the trial court violated the defendant's constitutional rights by requiring him to testify out of order or rest his case when a scheduled defense witness could not be located" and then argues: "That did not happen here." (Ibid.) With that sentence, Respondent ends its engagement with Cuccia.

Though two cases need not share an exact fact pattern in order to be relevant to one another, respondent offers no other explanation for why Cuccia is inapplicable to appellant's claim. . As argued in appellant's opening brief, Cuccia is highly relevant to this case. (See AOB at 209-210.) The trial court in Cuccia threatened to close the defense case closed

if the defendant did not take the stand when a defense witness failed to show up.[17] (Cuccia, supra, 97 Cal. App. 4th at pp. 790-791.) The court of appeal found that that the defendant had waived his Fifth Amendment right by taking the stand, but that "his waiver was coerced based on the trial court's threat to consider his case rested if he did not testify." (Id., at p. 791.) It ruled that the trial court's actions constituted an abuse of discretion.[18] (Id., at p. 792.)

The trial court's actions in appellant's case similarly amount to an abuse of discretion. Like the case in Cuccia, appellant's decision to take the stand was coerced; it was a result of trial court pressure requiring appellant to testify or forego presentation of a vital part of his defense. In both cases, the trial courts placed the defendants in an unconstitutional situation by requiring them to either testify or face serious injuries to the presentation of their defense. Respondent's refusal to acknowledge Cuccia's relevance to this claim does not lessen the case's impact. .

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[17] Notably, although defense counsel did not object when the trial court made this threat, Cuccia did not consider that relevant to its consideration of the claim. (See Cuccia, supra, 97 Cal.App.4th 785, 791.)

[18] Cuccia found that, though error, the admission of the defendant's compelled testimony was not sufficiently prejudicial on its own to require reversal because the defendant's testimony was ultimately necessary to assert key parts of his defense. (See id., at p. 792.) The court of appeal did find, however, that the cumulative effect of the admission of the compelled testimony and the trial court's failure to allow the defendant to take the stand again after it allowed the prosecution to reopen its rebuttal amounted to reversible error. (See id., at pp. 794-795.) Appellant's case is stronger than Cuccia's because appellant's testimony was not necessary to assert his defense and therefore, the trial court's ruling requiring him to testify was highly consequential. (See AOB at 209.)

In a footnote, respondent similarly dismisses several out-of-state cases discussed in appellant's opening brief as inconsequential. (RB at 103, n. 19.) Respondent treats the cases as it did Lawson and Cuccia: it curtly summarizes the holdings in both cases and simply argues that both cases are irrelevant because their facts do not exactly mirror the facts in Appellant's case. (Ibid. [again stating "That did not happen here."].)

These out-of-state cases however, are on point and lend weight to appellant's claim. In State v. Kido (2003) 76 P.3d 612, the Hawaii Court of Appeals held that the trial court committed reversible error by requiring the defendant to testify before another defense witness. (Id., at pp. 374-378.) One of the defense's witnesses was not yet available, and the defendant was the only other potential witness present. (Id., at p. 372.) The trial court instructed the defense to call the defendant before the other witness, a move that the court of appeals deemed to be constitutional error.[19] (Id., at pp. 372, 374.) The trial court in Appellant's case similarly instructed him to testify before his other witness, Dr. Kania. (See 7 RT 1510-1515.) According to the trial court, Dr. Kania would not be permitted to testify as a false confessions expert unless appellant first took the stand. (Ibid.)

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[19] In holding that the error required reversal, the Hawaii Court of Appeals highlighted that "[h]earing [the other witness's testimony] first would surely have enlightened Kido's decision whether to testify in his own defense . . . . Had the court allowed Garcia to testify first, perhaps Kido would then have been well advised to leave well enough alone." (Kido, supra, at p. 379.) Appellant, too, would have benefitted from the option of hearing Dr. Kania's testimony first and then "leav[ing] well enough alone." (Ibid.)

Consequently, the trial court put appellant – like the defendant in Kido – in a situation where he either had to testify or suffer the loss of significant defense evidence. Respondent ignores the two cases' similarities.

Respondent similarly ignores the similarities between this case and Childress v. State (1996) 467 S.E.2d 865, a case even more pertinent than Kido. Respondent merely argues that in that case, "the Georgia Supreme Court ruled that the trial court had impermissibly forced a defendant to choose between foregoing relevant evidence and testifying" and "appellant was not forced to make any such choice." (RB at 103, n. 19.) Respondent is wrong. Appellant was forced to make such a choice and Childress is right on point. The trial court in Childress ruled that the defendant needed to testify in order to lay a foundation for impeachment of a state witness. (Childress, supra, at pp. 434-435.) Like the case here, the trial court "forced [the defendant] to choose between forgoing admission of highly relevant evidence and testifying before he could assess whether his testimony was needed in light of the strength of the balance of his evidence." (Id., at p. 436.) The Georgia Supreme Court held that the defendant's testimony was not a necessary precursor for impeachment and that the trial court's ruling was "grave error." (Ibid.) Here, too, appellant's testimony was not a necessary precursor for Dr. Kania's testimony and the trial court's ruling was thus grave error. Respondent has failed to

meaningfully distinguish Childress, which provides strong support for appellant's claim. (See RB at 103, n.19.)

Consequently, there is no rebuttal to appellant's proffered argument that the trial court prohibited appellant from testifying about certain things but allowed the prosecution to ask questions on those very same topics.[20] (See AOB at 216-217 (citing 8 RT 1729; 9 RT 1872; 9 RT 1869).)

G. Respondent Fails to Address Trial Court's Asymmetrical Rulings Regarding Permissible Testimony on Direct and on Cross

Appellant argues that the trial court unfairly restricted his direct testimony while granting free range to the prosecution on cross. (See AOB 216-217.) Here, again, the State does not l respond to the argument in a meaningful way. It argues that the restrictions placed on appellant's testimony were fair (RB at 104-105), but the crux of appellant's argument is that if these limitations were to be applied to appellant's testimony, the same restrictions should have been placed on the prosecution's cross-examination of appellant. (See AOB 216-217.) As explained in the opening brief, appellant was precluded from explaining what he meant by any part of his confession on the basis that such an answer would be

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[20] For example, the trial court prohibited questions on direct about what appellant might have meant by parts of his confession, whether he would lie to protect Jesse Hollywood, and if someone had mentioned prior to his arrest that Nick Markowitz had been duct taped. (See AOB at 216-217 (citing 8 RT 1729; 9 RT 1872; 9 RT 1868).) Conversely, the trial court permitted the prosecution to ask appellant on cross-examination for his explanation of certain details from his confession, including why he would say he put duct tape on Nick Markowitz. (9 RT 1859, 1867.)

speculative and irrelevant in light of his amnesia claim, but the prosecution was permitted to cross-examine appellant about incriminatory details in the confession and whether he had any explanation for them. (See AOB 216,) This inconsistent treatment made no sense and is the basis of the claim here. Respondent, however, does not confront this inconsistency. It merely proclaims, with no factual discussion whatsoever, that "[c]ontrary to appellant's representation, there was no inconsistency in the manner in which the trial court allowed cross-examination on these subjects." (RB at 105.) Respondent does not explain why it was permissible to restrict appellant's testimony but not similarly restrict the State's cross-examination. (RB at 104-105.)

H. Respondent Fails to Confront Appellant's Argument That the Trial Court Curtailed Dr. Kania's Testimony

Respondent protests that appellant did not identify the specific rulings to which he objects and failed to include record citations. (See RB at 105.) It is true that the Rules of Court, Rule 8.204(a)(1)(C) requires that any reference to the record must be supported by a citation to the record, [21] and appellant apologizes to the Court and Respondent for his failure to

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[21] Unlike People v. Stanley (1995) 10 Cal.4th 764, 793, which held that failure to cite authorities in support of legal arguments may result in forfeiture of the arguments, failure to comply with Rule 8.204 does not result in forfeiture of arguments. Rather, the Court may order the brief returned for corrections and refilling, strike the brief with leave to file a new brief, or disregard the noncompliance. (Rules of Court, Rule 8.204(e).) [Roger: you might want to check citation form on that court rule, not sure if that is correct citation form] Stanley, notably, is silent on the requirement of citations to the record. (Stanley, supra, at p. 793.)

include record citations on page 217 of the opening brief where he detailed the restrictions imposed on Dr. Kania's testimony. However, respondent is incorrect in stating: "Appellant's Opening Brief does not identify any specific 'rulings' in the record [regarding the limitation of Dr. Kania's testimony], either in appellant's rendition of the 'facts' or in appellant's 'argument'[22] on the point." (RB at 105.) To the contrary, appellant discusses the trial court's rulings curtailing Dr. Kania's testimony in both the fact *and* argument sections of Claim VI. (See AOB at 190-191[("[T]he Superior Court made two essential rulings . . . ."]; 217 ["The Superior Court unfairly restricted Dr. Kania's direct testimony in the following respects: . . . ."].) Additionally, in the fact section, appellant cites to the page of the record where one ruling was made. (See AOB at 190-191 [citing 7 RT 1510].)

On the merits, Respondent fails to rebut appellant's claim that the trial court violated appellant's right to present a complete defense by unfairly curtailing Dr. Kania's testimony. Respondent responds by merely listing some of the points that Dr. Kania *was* able to testify to on the stand. (See RB 105-106.) Respondent argues that "Dr. Kania testified at length and provided a more than adequate context in which a jury could evaluate the reliability of his opinions." (Id., at 105.) However, respondent does not address the specific respects in which the trial court curtailed Dr. Kania's

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testimony. (See RB at 105-106.) As demonstrated in the opening brief, the court imposed substantial restrictions on the expert's testimony. Respondent's response, simply pointing out that Dr. Kania testified to a number of points, does not demonstrate that there were not material points which he was prevented from making. Even if this Court were to conclude that Dr. Kania provided "lengthy trial testimony" (RB at 105), that fact alone does not disprove that his testimony was curtailed in a meaningful way. (RB at 105.)

I. Respondent Offers No Support for Its Conclusory Dismissal of Appellant's Argument That the State's Expert Was Permitted to Offer His Opinion on Appellant's Reliability While the Appellant's Expert Was Not

Respondent emphasizes that Dr. Kania called appellant's amnesia claim "credible" and, in doing so, gave his expert opinion on appellant's credibility. (See RB at 106 (citing 9 RT 1914).) Appellant does not dispute that Dr. Kania gave that testimony. However, respondent then asserts that Dr. Kania was similarly allowed to testify to the credibility of appellant's false confession claim. (See RB at 106.) That is not so.

As Respondent points out, Dr. Kania testified that he was retained for evaluating the truth or falsity of appellant's confession and that appellant demonstrated characteristics consistent with general characteristics of people who make false confessions. (See RB at 106 (citing 9 RT 1892, 1911).) Dr. Kania did not, however, offer his opinion on the truthfulness of Appellant's confession or on the likelihood that

appellant gave a false confession; he never did so because the trial court ruled he could not. (See 7 RT 1512.) On the other hand, the State's expert witness, Dr. Glaser, *was* permitted to testify to his opinion concerning the likelihood that appellant would falsely confess. He testified that he identified nothing that made appellant likely to confess falsely. (See 9 RT 1942.) Respondent concludes that "there was no 'asymmetry'" (RB at 106) between what Dr. Kania was permitted to testify and what Dr. Glaser was permitted to testify, but fails to support that contention with any evaluation of Dr. Kania's testimony relative to Dr. Glaser's. Once again, Respondent dismisses this claim with a conclusory contention for which it has provided no support.

J. Respondent Fails to Explain Why Excluding Dr. Kania's Rebuttal Testimony Was Not Error

Respondent relies on the well-known rule that a trial court has broad discretion to admit or reject surrebuttal evidence, but fails to explain why the court's exclusion of Dr. Kania's rebuttal testimony constituted a proper exercise of discretion. (See RB at 106-107.)

Respondent contends that "Appellant neglects to mention . . . that the trial court specifically and repeatedly found that [] the proposed testimony was not proper surrebuttal . . . ." (RB at 107.) Not so. Appellant stated clearly in his opening brief: "[T]he Court observed that the defense was asking for leave to 're-open' its case, rather than rebuttal, and denied the request on this basis." (AOB at 220.) Contrary to respondent's claims,

appellant acknowledges the trial court's finding; he just disagrees with it. The trial court's refusal to let Dr. Kania take the stand again was error for multiple reasons,[23] all of which appellant discusses in his opening brief (see AOB at 220-221) and none to which Respondent gives a response. (See RB at 106-107.)

K. Contrary to Respondent's Assertions, Appellant's Claim Is Preserved for Appeal

Respondent asserts at various points in its brief that appellant's claim should not be considered because he did not raise certain objections at trial. (See, e.g., RB at 96, 103, 106 ["Appellant did not allege any such 'asymmetry' at trial and therefore should not be allowed to do so on appeal."].) Though Respondent is right that not all aspects of Appellant's claim were objected to at trial, that fact does not prevent this Court from considering his claim on appeal.

First and foremost, "[t]he general rule requiring objection in the trial court is subject to exception where fundamental error or gross irregularity is involved." (22B Cal.Jur.3d § 712.) "An objection is not necessary [] to

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[23] Namely, the prosecution did not disclose its experts' reports until *after* both appellant and Dr. Kania testified. As a result, Dr. Kania should have been permitted to testify again in order to respond to the State experts' methods and results. (See AOB at 220-221.) Dr. Kania should also have been permitted to testify in order to point out that one of the State expert's report indicated that appellant has low IQ, which "would have bolstered Dr. Kania's analysis of the possibility of false confession." (AOB at 220.) Lastly, the trial court should have permitted Dr. Kania's surrebuttal in order to respond to the State's anticipated argument that appellant had falsified his testimony. (See AOB at 220.)

preserve a claim that defendant's substantial rights have been violated." (People v. Espiritu (2011) 199 Cal.App.4th 718, 725.) If defense counsel fails to make an objection to constitutional error, the Court still has the responsibility to review the alleged error on appeal. (See, e.g., People v. Rodriguez (1943) 58 Cal.App.2d 415, 421 ["Counsel for the defense do not bear the entire burden of protecting the constitutional rights of their client. Where those have been invaded, as they appear to have been here, and the opportunity arises on appeal to undo the wrong, the court cannot allow itself to be hampered by the failure of counsel to register an objection."].) Here, appellant is alleging error in violation of his "right to due process, his Fifth Amendment right to remain silent, and his Sixth Amendment right to counsel and to present a defense." (AOB at 185.) These fundamental, constitutional violations demand review regardless of defense counsel's actions at trial. (See, e.g., Espritu, supra, at p. 725; Rodriguez, supra, at p. 421.)

Furthermore, "[a] party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts." (Phillips v. TLC Plumbing, Inc. (2009) 172 Cal.App.4th 1133, 1141.) Here, appellant and respondent agree to the trial court's statements. (See AOB at 188-190; RB at 92-95.) They disagree, however, about the legal implications of those statements. Accordingly, if this Court deems that appellant has raised a

novel claim, appellant did so appropriately. (See Phillips, supra, at p. 1141.)

Finally, even if this Court were to consider some aspects of appellant's claim waived, it has the discretion to review the claim nonetheless. (See, e.g., People v. Williams (1998) 17 Cal.4th 148, 161 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party."].) This is especially true when the parties have briefed an issue. (See In re C.T. (2002) 100 Cal.App.4th 101, 111 ["[E]ven if a waiver occurred, we may, at our discretion, hear issues the party has waived, particularly when the parties have already briefed them."].)[24]

L. Respondent Harmless Error Analysis Fails to Address the Harm Caused by the Trial Court's Erroneous Rulings

Respondent's harmless error analysis obscures the harm caused by the trial court's erroneous rulings. The error here is that the trial court erroneously put Appellant in a situation where he had to forfeit either his right against self-incrimination or his right to present a defense.. In arguing the lack of prejudice, respondent offers: "Appellant had the opportunity to dispute his admissions," "the jury had the opportunity to evaluate the false confession claim," and that "appellant presented *his version* of events to the jury." (RB at 108.) Contrary to respondent's argument, appellant is not

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[24] And In re C.T., supra, was a civil case. How much more so for a criminal – and capital – case.

contesting that he was able to "dispute his admissions," or to "present[] his version of events," or that the jury was able to "evaluate the false confession claim." (RB at 108.) Appellant is instead contesting being forced to personally "dispute his admissions" and "present[] his version of events" in order to present his expert testimony. (RB at 108.)

Respondent concludes its misguided argument by saying that appellant's claim of amnesia "was not predicated on any ruling of the trial court" and if that claim "'torpedoed' the defense, he has only himself to blame." (RB at 108.) Again, Respondent fails to address appellant's argument. Appellant never contended that the trial court forced him to claim that he had amnesia. He did assert, and still asserts, that the trial court's ruling forced him to either testify or forfeit crucial expert testimony. Had the trial court never put Appellant in such a fundamentally unfair position, the resulting "torpedoing" of his defense would never have occurred. Appellant therefore does not "ha[ve] only himself to blame" (RB at 108) – he has the trial court to blame. As appellant has previously argued, the trial court's ruling prejudiced appellant and necessitates a new trial. (See AOB at 221-223.)

7. THE TRIAL COURT ERRED BY ADMITTING INFORMATION OBTAINED FROM APPELLANT'S COURT-ORDERED PSYCHIATRIC EXAMINATIONS

A. Introduction

Appellant testified at trial to an alibi to the kidnap-murder, that his confession was false, and that he could not recall how he came to give it. His expert testified to the phenomenon of false confession and that appellant fit certain general characteristics for it. Whatever the jury might have made of that defense, or whether it provided reasonable doubt as to any element of kidnap-murder, we cannot know because the prosecutor had a powerful rebuttal up his sleeve: two experts, Drs. Chidekel and Glaser, who examined appellant under court order, and opined that he had no mental disease, no predisposition to false confession, and no impediment to seeing, hearing, or communicating.[25] (9 RT 1942, 1956, 1989.) They didn't stop there, adding on the basis of their own encounter with him, their expert opinions that during his confession, appellant keenly understood its content and that his responses were responsive and appropriate, albeit evasive. (Id. at 1950, 1974.) For good measure, the state's psychiatrist added that based

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[25] This testimony was at odds with Dr. Chidekel's report and Evid. Code §402 testimony in a co-defendant's separate trial, that appellant had significant cognitive impairments, evidence which was not provided to appellant's jury See AOB at 47-49, 331; Appellant's Motion for Judicial Notice and Application of Judicial Estoppel at 3-6 & Exh. "A" (Dr. Chidekel Testimony in People v. Pressley, Santa Barbara Case No. 1014465.)

on his clinical interactions, appellant's claim of amnesia was malingering and simply faked.[26] (Id. at 1948, 1952, 1975.)

Respondent concedes Verdin error[27], but argues lack of prejudice under the state law harmless error standard applied in People v. Clark (2011) 52 Cal. 4th 856, 940-941, claiming that appellant's "selective amnesia" claim was "inherently incredible," the prosecutor did not refer to the compelled examinations when challenging the amnesia claim during his closing argument, and appellant's trial testimony (denying any knowing involvement in the murder) could not be easily reconciled with his confession..[28] (RB at 115-118.) Respondent argues that, given appellant's mutually and antagonistic explanations, it is not reasonably probable that a result more favorable to appellant would have occurred if he had not been required to submit to the examinations. (Id,, at p. 118.) Finally, Respondent

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26 The prosecutor's scheduling of Dr. Glaser's evaluation to follow immediately after appellant had watched his confession played back in the courtroom rendered the inquiry into what he could or could not be "cued" to remember of it somewhat ridiculous.

27 Verdin v. Superior Court (2008) 43 Cal. 4th 1096.

28 Respondent's contention that the amnesia claim was inherently incredible is countered by Dr. Kania's uncontradicted testimony that, in his experience as a clinical psychologist, the phenomenon does exist. Respondent contention that appellant's trial testimony could not readily be reconciled with his confession is also a red herring. The point of Dr. Kania's testimony was to support appellant's position that his confession was false. Given that position, it mattered not whether one might think his confession and trial testimony could not be reconciled. Indeed, Respondent's argument points to prejudice, for it shows the damage from forcing appellant to submit to compelled examinations which the State then used to attack his false confession claim.

asserts that no federal constitutional error occurred here because appellant placed his mental state in issue, again citing Clark.[29] (Ibid.)

Because these issues were not resolved by Clark, and raise important questions to the administration of justice in this State, each is discussed at length below.

B. Fifth and Sixth Amendment Violations

Respondent argues that Clark resolved that "any [Verdin] error is "an error of state law only and thus subject to the Watson standard of prejudice."[30] (RB at 113.) Respondent is mistaken. Neither Clark nor Verdin purported to deal with the situation presented here; appellant tendered an expert to corroborate the existence of a sociological phenomenon (false confession) and a failure of recollection, rather than any mental condition that could or would negate specific intent. Even at that, appellant's expert, Dr. Kania, was precluded from offering his definitive opinion that appellant fit either rubric. (7 RT 1510-1515; 9 RT 1915).

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29 As discussed infra, respondent fails to address appellant's claim of Verdin error at penalty phase

30 Under the "Watson standard," prejudicial error is assessed by whether there is a "reasonable probability that the outcome of trial would have been more favorable to defendant had the court not ordered him to submit to examinations [by state experts]." (Clark, supra, 52 Cal. 4th at p. 940.) The higher "reasonable possibility" standard applies to penalty phase Verdin error. (Wallace, supra, 44 Cal. 4th at pp. 1087-1088.) Respondent argues that the Watson standard applies because what occurred here was merely a violation of the discovery statute. (See e.g., People v. Zambrano (2007) 41 Cal. 4th 1082, 1135 n.13.) The errors complained of are not so comparatively trivial.

As the Superior Court made clear, expert testimony of any sort bearing on issue or issues collateral to the element of specific intent was of questionable admissibility, at best. (See Penal Code §28(a) (evidence of mental disease is admissible solely on the issue of specific intent); People DeHoyos (2013) 57 Cal. 4th 79, 118 (evidence of sanity is irrelevant to guilt under §28(a)).) Thus, had Dr. Kania stopped at describing the general false confession profile, no compulsory examination could have been permitted. The issue presented on appeal is whether, by going one tiny step further, and suggesting that appellant could fit that profile because of his dependency, anxiety, stress and lack of sleep, Dr. Kania opened the floodgate to all that followed, even though his testimony did not establish either a mental condition at the time of the offense, or a defense to specific intent. No reported case, including Clark, has upheld compulsory psychiatric examination and testimony on such a slender reed.[31] (See Buchanan v. Kentucky (1987) 483 U.S. 402, 425 n.21 ["mental condition" defendant placed at issue was a defense of extreme emotional disturbance]; Clark, 52 Cal. 4th at 880 ["psychiatric evidence" defendant placed at issue were defenses of unconsciousness and diminished actuality].) And this case shows why.

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[31] The Superior Court erred by finding that appellant had tendered his mental state before trial based on the prosecutor's misrepresentation that voluntariness of the confession was at issue. By deferring that ruling until appellant's testimony, as the trial court did in Clark, the Superior Court could have clarified the scope of waiver, if any.

The defense expert testimony concerning appellant's mental condition touched on a narrow collateral issue, yet the scope of the implied "waiver" was global. Dr. Glaser conducted what he said was a "comprehensive" examination and testified without limitation to his findings. No such examination should have been ordered, or testimony permitted, because Dr. Kania's false confession testimony did not contest appellant's mental state at the time of the crime. Nor were appellant's counsel provided any notice of the scope of the implied waiver or the scope of the state experts' examinations. Appellant's Fifth and Sixth Amendments rights were violated by this course of events.

Waiver of the Fifth Amendment privilege against self-incrimination is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense.

In Clark, the defendant presented expert testimony to support guilt phase defenses of unconsciousness and diminished actuality due to brain dysfunction and seizure. (Clark, supra, 52 Cal. 4th at pp. 879, 883-885.) The trial court ordered the defendant to submit to mental evaluation by the prosecutor's experts only after defendant's testimony had tendered his specific mental conditions in issue as a guilt phase defense. (Id., at p. 938.) This Court observed that federal constitutional rights subject to Chapman

harmless error analysis[32] were not implicated by this set of facts. (Id., at pp. 940-941.) No blanket rule exempting all Verdin error from constitutional scrutiny was announced.

In Gibbs v. Frank (3rd Cir. 2004) 387 F.3d 268, the Third Circuit considered the constitutional scope of the Fifth Amendment waiver under such circumstances. Gibbs was tried for murder and offered expert testimony to support a diminished capacity defense, and the state called an expert witness to rebut. Gibbs's conviction and death sentence were reversed on other grounds. Gibbs decided to contest identity at his second trial, and did not raise a mental state defense. (Id., at p. 271.) The trial court permitted the state to call its expert as a witness to testify about inculpatory statements Gibbs made to him on the theory that Gibbs had waived his Fifth Amendment privilege by taking the stand at his first trial. On habeas, the Third Circuit found that Estelle v. Smith (1981) 451 U.S. 454, compelled reversal; the state court had compelled Gibbs to submit to psychiatric examination, and Gibbs never placed his mental state in issue at his retrial. (Id., at pp. 272-275.) Notably, the state offered the expert's

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[32] Under the "Chapman standard," error that violates a constitutional right requires reversal unless the state proves beyond a reasonable doubt that the error complained of . . . did not affect the outcome of the trial in light of the entire record, i.e., proves there is no reasonable possibility that the error affected the verdict. (Chapman v. California (1967) 386 U.S. 18; Satterwhite v. Texas (1988) 486 U.S. 249, 258 [reversing for erroneous admission of defendant's court-ordered psychiatric examination at penalty phase under Chapman standard].)

testimony against Gibbs for the truth of his admissions of fact, rather than to prove a psychological point.

Gibbs illuminates the fallacy in the Superior Court's rulings on this issue. The trial court compelled appellant's examinations on a waiver theory before it could assess the actual scope of the waiver. As in Gibbs, the prosecutor then offered "comprehensive" expert testimony, which he emphasized during his guilt phase closing to prove premeditation and deliberation, even though appellant did not raise a mental state defense. The prosecutor then used this expert testimony at penalty phase to show "bad character." This was a violation of appellant's Fifth Amendment privilege against self-incrimination and as argued, infra, the record does not permit the inference that the error did not affect the outcome beyond a reasonable doubt. (Chapman, supra, 386 U.S. 18.)

The admission of the compelled examination evidence, and argument thereon, also violated appellant's Sixth Amendment right to counsel. In Powell v. Texas (1989) 492 U.S. 680, 685 n.3 (per curiam), the United States Supreme Court reversed where evidence was taken in violation of the Sixth Amendment notice to counsel, because defendant's insanity defense did not open the door to the state's expert testimony on future dangerousness. Likewise, the record in this case contains no evidence that the prosecutor advised appellant's counsel of the scope of Drs. Glaser and Chidekel's "comprehensive" examinations and testing,

only the results shortly before they took the stand. This was a violation of appellant's Sixth Amendment right to the assistance of counsel and as argued infra, the record does not permit the inference that the error did not affect the outcome beyond a reasonable doubt. (Chapman, supra.)

In Kansas v. Cheever (2012 KS) 295 Kan. 229, cert. granted No. 12-609, the Kansas Supreme Court held that a Fifth Amendment waiver does not occur unless or until the defendant presents evidence at trial that he lacked the requisite criminal intent due to a mental disease. Cheever asserted a voluntary intoxication defense to a capital charge, and while being federally prosecuted, was ordered to undergo a psychiatric examination by the state's expert. Under Kansas law, voluntary intoxication was not evidence of a mental disease, and hence no waiver of the Fifth Amendment privilege permitted the court-ordered examination to be used against him at trial. (Id., at p. 251.) The error was not harmless under the Chapman standard, in part, because the state's expert had more impressive qualifications, and his testimony was extensive and devastating. (Id., at p. 256.)

Likewise in this case, Dr. Glaser was the only psychiatrist who testified, and Dr. Chidekel, the only neuropsychologist to testify. By training and qualifications, as well as by the "scientific authority" with which they clothed their testimony, they carried greater weight with the jury than Dr. Kania, a psychologist whose testimony was thoroughly

curtailed. (See Satterwhite v. Texas (1988) 486 U.S. 249, 264 [Marshall, J., concurring in part and concurring in the judgment].) Accordingly, the Superior Court's rulings compelling appellant to undergo adverse psychiatric examinations, and admitting adverse testimony by the state's experts at his capital murder trial violated his Fifth and Sixth Amendment rights.

C. Harmful Error

Because this error violated appellant's Fifth and Sixth Amendment rights, prejudice must be assessed under the Chapman standard. (Chapman v. California, supra, 386 U.S. 18.) Applying that standard, this Court should decline to find that the state experts' testimony and the prosecutor's argument did not affect the outcome at guilt or penalty phases beyond a reasonable doubt. Respondent does not address prejudice under the reasonable doubt Chapman standard, but insists that the acknowledged error is harmless under the Watson standard. In particular, respondent argues that appellant's confession was an "unequivocal admission of guilt" and his claim of amnesia was "unsupported by objective proof, the defense offered mutually exclusive and antagonistic explanations of appellant's behavior (one version asserted in confession and a second provided during appellant's trial testimony), and the prosecutor challenged appellant's claim of amnesia without reference to the compelled examinations." (RB at 115-118.)

These arguments are belied by the facts. First, appellant's confession was neither unequivocal nor complete. In fact, it bolstered asportation by fraud and insubstantial movement defenses to kidnap, called into question the quality of deliberation (an uncharged variant of first degree murder, but relevant to penalty), and suggested the availability of statutory mitigation, including dependency and substantial domination of another. In short, appellant's confession did not render either the determination of guilt or penalty a foregone conclusion. If it had, surely the prosecutor would not have compelled the examinations, introduced the testimony by his examining experts, or emphasized it to such a degree in closing arguments at both phases. (See e.g., 9 RT 2044, 2053, 2071, 2076-2079.)

Second, respondent's assertion that the prosecutor challenged appellant's claim of amnesia without reference to the experts' testimonies is incorrect. Respondent's brief proves the point. Its quotation from the record is replete with references to "the experts who testified" and their opinion that only a condition (brain trauma) which appellant did not have could cause amnesia; and with his experts' imprimatur, the emphatic "That's a man who does not suffer from mental illness." (RB at 116-117; 9 RT 2075-2078.)

Another portion of closing argument, which respondent chose to ignore, drives the point home. The prosecutor urged the jury to rely upon

his experts' conclusion based on their superior training and comprehensive interviews with appellant himself that there was "nothing – other than perhaps 'bad character' – that makes appellant more prone to amnesia or false confession." (9 RT 2078-2079.) Moreover, as conceded by respondent in post-trial briefing, Dr. Glaser's testimony "may have prompted" the jury to conclude that appellant lied on the stand.[33] (6 CT 1643.) Whether analyzed under Chapman's beyond a reasonable doubt standard or Watson's reasonable probability standard, the prosecutor's use of his experts' testimonies to attack and diminish appellant's guilt phase defense was prejudicial.

In Cheever, the Kansas Supreme Court could not conclude beyond a reasonable doubt that the state expert's testimony did not contribute to the verdict, although the legally admitted evidence was arguably sufficient to support the verdict in Cheever,. This too is so here.

Additionally, respondent ignores the issue of prejudice arising from the State's use of the compelled examination evidence at the penalty phase. Under Wallace, Verdin error at penalty is assessed under a "reasonable possibility" standard. As explained in the AOB, the prosecutor relied heavily on his experts' guilt phase testimony to rebut appellant's lay witness mitigation at penalty phase: The prosecutor argued that appellant had been examined "very carefully by a number of psychologists and one

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[33] Respondent is bound by this submission.

psychiatrist," and none of them found any evidence he had a mental disease or thought disorder, or that his judgment was in any way clouded whatsoever by a personality disorder so as to diminish his culpability for the murder. (11 RT 2340.) This line of argument was premised entirely on Dr. Glaser's compulsory examination, and clearly tilted the scales against a sentence of life without possibility of parole.

This was, certainly, a tragic case involving a teenage victim. But, it also involved a coterie of people with various degrees of responsibility, including a clear ringleader who held appellant under his thumb. Appellant had no criminal record, and though what he presented as mitigation was but the tip of the iceberg, it did establish that he had an unusual dependency on that ringleader. Viewed in context - a young defendant with no prior record of criminality and sympathetic factors of family neglect and abuse, and his own vulnerability - the prosecutor's reliance upon impermissible expert opinions of appellant's "bad character" did create a reasonable possibility of a different outcome at penalty phase under Wallace. As in Estelle, Powell, Gibbs and Cheever, the prosecutor used and argued information gleaned from compulsory examinations to obtain a verdict of guilt and death.

D. Appellant's Testimony

In Clark, the state's experts reviewed defendant's testimony which tracked the account he had given to them. This Court observed that the

experts would have reached the same conclusions had they not been permitted to interview Clark; hence, the error was harmless. In addition, the expert testimony was cumulative to lay witness testimony which undercut the defense experts' diagnoses. (Clark, supra, 52 Cal. 4th at p. 941.) Here, however, Drs. Glaser or Chidekel did not observe or review appellant's testimony or purport that it could or would have substituted in any way for the value of their "comprehensive" clinical interviews, testing, observations, and conclusions, all of which were adverse. Clark resolves that the choice whether to present affirmative mental state evidence and risk rebuttal or to forgo use of such evidence and retain the Fifth Amendment privilege is a constitutionally permissible one. But no case, in California or elsewhere, has gone so far as to countenance what happened here. "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege on matters reasonably related to the subject matter of his direct examination." (McGautha v. California (1971) 402 U.S. 183, 215 [citing cases].) But McGautha does not mean that, by testifying, appellant opened himself to compulsory examination by a state expert.[34]

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[34] Respondent cites purportedly "analogous" precedent in which this Court found that a witness had given inconsistent statements which included a failure to recall material facts. (RB at 117.) The cases are not remotely analogous, just the opposite. Here, appellant told Dr. Kania that he could not recall his police interview, and vehemently denied that a tape of it could exist, but Dr. Kania was precluded from sharing that prior consistent statement with the jury.

By tendering expert testimony on a collateral issue, appellant was exposed to rebuttal on the elements of the crime itself, and penalty, through the cruel expedient of forcing it from his own lips through compulsory psychiatric examination. Nor were counsel forewarned of this result at the time through notice of the scope of the examinations. This was constitutional error which cannot be trivialized as "harmless" under Chapman, Watson, or the "reasonable possibility" standard this Court applies to Verdin penalty error. Reversal of appellant's convictions and death sentence is warranted.[35]

8. THE STATE COMMITTED REVERSIBLE MISCONDUCT IN THE GUILT PHASE OF APPELLANT'S TRIAL

A. Introduction

During the guilt phase of appellant's trial, the State engaged in prejudicial, reversible misconduct, in violation of California state law and appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (See U.S. Const., 5th, 6th, 8th & 14th Amends.) The prosecutor argued facts not

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[35] To respondent's contention that a reversal and retrial would "accomplish nothing" because Drs. Glaser and Chidekel's examinations would be admissible under revised Penal Code §1054.3(b) [RB at 119 n.25], it is sufficient to note that appellant presented substantial evidence of brain defect and other mitigation in post-trial proceedings before the Superior Court, as the basis for a mens rea defense, and Dr. Chidekel's own sworn testimony in a co-defendant's case bore out that appellant had substantial impairment. In addition, appellant presumably would have the assistance of competent counsel, rather than a disbarred first year attorney, to try the case. Respondent's assurance that the result of a second proceeding would mirror the first is misplaced.

in evidence (see 9 RT 2059); made improper inferences from excluded evidence (see 9 RT 2061-2062, 2080; 10 RT 2149); vouched for a key witness' credibility (see 9 RT 2067-2068); and used that same witness' immunity grant as proof of appellant's guilt (see 9 RT 2068). These various instances of prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process"[36] (Darden v. Wainwright (1986) 477 U.S. 168, 181 (quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642)), and require a reversal of appellant's conviction.[37] (See AOB at 255-257 ["The closing argument of a prosecutor 'carr[ies] great weight'" . . . . Much of the misconduct occurred during the prosecutor's rebuttal argument, right before the jury began its guilt phase deliberations. . . . The trial court did nothing to minimize the resulting prejudice."] [citations omitted].)

B. Respondent Fails to Address the Exceptions to the General Rule Requiring Defense Counsel to Object to Instances of Prosecutorial Misconduct

Respondent argues that the claim should be rejected because appellant failed to object at trial. (RB at 120.) Not so. Multiple objections were raised to specific instances of prosecutorial misconduct. (See 9 RT

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[36] Alternatively, as appellant argues in his opening brief (see AOB at 255-256), the prosecution's misconduct violated California law because it involved the repeated "use of deceptive or reprehensible methods to attempt to persuade the jury." People v. Farnam (2002) 28 Cal.4th 107, 167.

[37] Though respondent asserts in the first paragraph of its reply, "any alleged misconduct was harmless," it offers no rebuttal to appellant's showing of prejudice. (See AOB at 255-257.)

2068 [objection to argument that Sheehan's immunity grant was proof of appellant's guilt); 10 RT 2144 (objection to argument that there was gunshot residue on three shovels); 10 RT 2149 (objection to argument that Dr. Kania failed to say appellant's confession was false].)

As to other instances of prosecutorial misconduct asserted for the first time on appeal, appellant relies upon applicable exceptions to the contemporaneous objection rule. (See AOB at 249-250.) Respondent does not address why those exceptions should not apply, in particular that admonition would not have cured the harm or would have been futile. (See People v. Hill (1998) 17 Cal.4th 800, 820, overruled on other grounds by Price v. Superior Court (2001) 25 Cal.4th 1046; see also AOB at 249-250 [citing, inter alia, trial court's failures to address defense request for Evid. Code §402 hearing, or particular objections to hearsay statements, and the State's "second kidnap" rebuttal].) Additionally, as argued infra, some of the prosecutor's arguments were facially improper in ways that an admonition would not have cured. (See AOB at 249.) Again, respondent does not address this argument.

C. Respondent Claims the State Did Not Argue Facts Outside the Record but Does Not Offer Any Support for That Claim

Respondent denies that the prosecutor argued facts outside of the record, but the facts belie that claim. During closing argument, the prosecutor argued that appellant "probably had something to do with taping and he certainly had something to do with the burial process[,] if not the

digging of the grave in the first place." (9 RT 2059.) This statement had no evidentiary foundation. (See AOB at 243-244, 250-251.) Respondent argues that there was evidence to support the prosecutor's inference. (RB at 121-122.) That contention is not well-founded because there is no citation in respondent's brief to admitted testimony that appellant was involved in duct taping the victim or digging the grave. (See RB at 121-123.)

Respondent claims, "Sheehan's testimony alone renders appellant's present contention moot" (RB at 122), but Sheehan's testimony was that appellant told him "they had picked [Nick] up from a hotel . . . . shot him and put him in a ditch" and used a bush to cover him. (6 RT 1306.) Sheehan's testimony does not permit the inference that appellant was involved in duct-taping the victim, or digging the grave beforehand. To the extent the prosecutor drew upon statements by another principal (Graham Pressley) which did not come into evidence, this was misconduct. (See People v. Ward (2005) 36 Cal.4th 186, 215 [prosecutor's individual beliefs or speculations are not adequate grounds for argument].) The prosecutor's argument that appellant "probably had something to do with taping and he certainly had something to do with the burial process[,] if not the digging of the grave in the first place" (9 RT 2059) was out of bounds, and prejudicial. (See AOB at 255-257.)

Respondent ignores another instance of prosecution argument of facts not in evidence, namely the assertion that gunshot residue had been found on three shovels. (10 RT 2143-2144.) The suggestion was made that since three shovels were used, appellant must have been the third party present. (See ibid.) Yet, there was no such testimony in regard to gunshot residue. Detective Galante testified only that shovels had been tested for gunshot residue, not the results. (See 7 RT 1424.) The argument was out of bounds, and prejudicial. (See AOB 243-244, 250-251, 255-257; accord People v. Bolton (1979) 23 Cal.3d 208, 213 [argument on facts outside the record "although worthless as a matter of law, can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence"] [citation omitted]. Respondent does not rebut this assertion.

D. Respondent Fails to Respond to Appellant's Claim That the Prosecutor Manipulated Inferences from Excluded Defense Evidence

The prosecution manipulated inferences from excluded defense evidence in three ways: 1) emphasizing that the defense expert never said appellant gave a false confession (see 10 RT 2149), even though the expert did not say so only because the trial court would not allow it (see 7 RT 1512); 2); 20 arguing that appellant falsified his testimony in order to fit what he knew going into trial (see 9 RT 2057, 2080), even though appellant had made prior consistent statements to Dr. Kania but the trial court would

not allow them to come in (see 9 RT 2000-2007); and 3) arguing Side "B" of appellant's confession as evidence of his guilt (see 9 RT 2061-2062), even though the trial court had ruled Side "B" could only be used as impeachment (see 8 RT 1690-1695). (See AOB at 244-247.) These various instances of prosecutorial misconduct amounted to reversible error. (See AOB at 255-257.)

Respondent fails to address two elements of appellant's claim: the Side "B" confession; and the assertion that appellant had falsified his testimony to fit trial facts. (See RB at 123-125.) As to the third element, the assertion that Dr. Kania did not opine that appellant's confession was false, respondent quotes from the trial record[38] and takes the position that the argument was accurate, and that "[i]t is not misconduct to argue what is, and what is not, contained in the record." (RB at 124.) Respondent ignores

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[38] Part of that dialogue included a comment by the trial court, after defense counsel objected to the State's statement regarding Dr. Kania's lack of an opinion, that it thought defense counsel had argued the same thing. (See 10 RT 2149-2150.) However, defense counsel did not argue the same thing. Defense counsel argued only that "[the State's expert] had nothing to say really about a false confession." (10 RT 2133.) The prosecution, on the other hand, repeatedly emphasized that the defense expert failed to say that appellant gave a false confession. (See 10 RT 2149 ("Understand what Dr. Kania did and didn't do. . . . Nobody, nobody testified, nobody testified that the appellant either did or did not make a false confession. Nobody testified to that. . . . I can challenge all of you right now, look in your notes as to the conversation or the testimony of Dr. Kania, and none of you will find anywhere in your notes quoted Dr. Kania saying he gave a false confession.").) The prosecutor knew that Dr. Kania was not permitted by the trial court to testify to his opinion that appellant's confession was false. (See 7 RT 1512.)

well-settled precedent that comment on certain aspects of the trial record, and what is absent from it, is improper. (See e.g. People v. Hardy (1992) 2 Cal.4th 86, 154 [improper to comment on a defendant's failure to testify].) Here, the prosecutor leveraged the trial court's exclusion order to argue an unfair inference in regard to Dr. Kania's opinions. This was improper.

Respondent argues that the trial court's admonition was adequate to cure any harm. (See RB at 124-125.) Not so. While the trial court did make its evidentiary ruling known to the jurors, (see 10 RT 2150 [telling the jury that neither expert was allowed "to give an opinion as to whether or not a false confession was given in this case"]), it did not instruct the jury to disregard the prosecutor's argument. (See 10 RT 2149-2150.)

Respondent cites People v. Burgener (2003) 29 Cal.4th 833, 874 and People v. Williams (2010) 49 Cal.4th 405, 469) for the proposition that "[i]n the absence of evidence to the contrary, we presume the jury heeded the admonition." (RB at 125.) However, in both cases, the trial court properly admonished the jury "to disregard, not to consider for any purpose, any testimony or reference to [the information at issue]." (Burgener, supra, at p. 875.) In People v. Williams, the trial court told the jury: "[It would] [b]e a violation of your duty as a juror to consider the [information at issue]." (Williams, supra, at p. 468.) By contrast, here, following the prosecutor's inappropriate statements, the trial court told the jury that he disallowed both parties' experts to "give an opinion as to

whether or not a false confession was given" (10 RT 2149), but he did not tell the jury not to consider the prosecutor's argument. (See 10 RT 2149.) It is a stretch to presume the jury understood the trial court's explanation as an instruction not to consider what the prosecutor had said.

E. Respondent Mistakenly Argues That the Prosecutor's Vouching for Sheehan's Credibility Was Not Misconduct

Respondent argues that the prosecutor did not commit misconduct when he vouched for Sheehan's credibility. The prosecutor told the jury: (1) Sheehan could not lie because he had been given immunity (see 9 RT 2067 ("The one thing you cannot do with a grant of immunity is lie.")); (2) Sheehan was more likely than other witnesses to tell the truth because he had been given immunity (see 9 RT 2068 ("So you actually have greater assurances that a witness with immunity will be as strictly truthful as they possibly can be, because they understand the consequence of lying.")); (3) Sheehan's grant of immunity was proof of appellant's guilt (see 9 RT 2068 ["[H]e would not have even needed a grant of immunity if Ryan Hoyt was innocent of this crime, because he would not have been harboring a fugitive. All he would have been doing was harboring a friend. So the fact that he even needs a grant of immunity is only to the extent that his friend, the defendant, is guilty of a crime . . . ."].)

Respondent argues that these arguments were "based on the facts in the record and reasonable inferences there from." (RB at 125.) Not so. While the fact of Sheehan's immunity was known to the jury, the contents

of the immunity agreement, e.g., what could or would happen to Sheehan if the prosecutor concluded that he lied under oath, was not in evidence. (AOB at 247, n.178; see also 7 RT 1383-1384.) Arguments regarding Sheehan's "special" obligation to tell the truth, to the extent this was implied to derive from an immunity contract, were therefore not "based on the facts in the record and reasonable inferences. (RB at 125). Respondent offers that "[i]t is not misconduct [] to ask the jury to believe the prosecution's version of events as drawn from the evidence" (RB at 126), but there was no evidentiary foundation for the prosecutor's guarantees of Sheehan's credibility. This is out of bounds under the Ward case cited by respondent. (See, e.g., RB at 126 ["[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record."] [citing People v. Ward, supra, 36 Cal.4th 186, 215].)

Second, even if the immunity agreement had been in evidence, it still would have been inappropriate for the prosecutor to make the statements he did. The prosecutor presented the State's grant of immunity to Sheehan as if it provided a way to certify he would be honest on the stand. (See 9 RT 2067 ("The one thing you cannot do with a grant of immunity is lie."), 2068 ("So you actually have greater assurances that a witness with immunity will be as strictly truthful as they possibly can be, because they understand the consequence of lying. All of that is made clear to them.").) In actuality,

the immunity grant provided the State with no such authority. The prosecutor "place[d] the prestige of [his] office behind [the immunized witness] by offering the impression that [he] ha[d] taken steps to assure [that witness's] truthfulness at trial." (People v. Ward, supra, 36 Cal.4th 186, 215.) Doing so is misconduct. (See, e.g., ibid.)

Finally, the prosecutor argued Sheehan's immunity as substantive proof of appellant's guilt (see 9 RT 2068), even though such argument is patently improper. See 9 RT 2068 ("[H]e would not have even needed a grant of immunity if Ryan Hoyt was innocent of this crime . . . . So the fact that he even needs a grant of immunity is only to the extent that his friend, the Defendant, is guilty of a crime . . . .").) The jurors knew nothing about the State's immunity-granting powers or the specific circumstances surrounding Sheehan's immunity; they knew nothing about why the State does or does not grant witnesses immunity. (See 9 RT 2068.) Most saliently, the jury was asked to find guilt based on the prosecutor's own unilateral action to confer immunity on his witness. This was out of bounds. See People v. Talle (1952) 111 Cal.App.2d 650, 677 ["The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige."].)

Respondent lists several cases in which "[c]laims of improperly bolstering witnesses' credibility by reference to their immunity agreements

have been rejected" (RB at 127), but all of these cases are distinguishable. In People v. Kennedy (2005) 36 Cal.4th 595, the prosecutor simply asked a witness if she had been "granted [immunity] by the prosecutor's office with the approval of the Court." (Kennedy, supra, at p. 622 (overruled on other grounds by People v. Williams, supra, 49 Cal.4th 405).) This Court held that the question was not misconduct. (Ibid.) In People v. Frye (1998) 18 Cal.4th 894, the prosecutor read the terms of a witness' immunity agreement to the jury. (Frye, supra, at pp. 971-972 (overruled on other grounds by People v. Doolin (2009) 45 Cal.4th 390).) This Court held that doing so was not misconduct. (Id. at 971.) Finally, in People v. Freeman (1994) 8 Cal.4th 450, the prosecutor asked a witness if the judge had granted her immunity and if the prosecution had requested that immunity. (Freeman, supra, at p. 489.) This Court held that the prosecutor's questions were not misconduct. (Ibid. ("[T]here was no misconduct. The questions merely informed the jury that [the witness] had received immunity for her testimony.").) Contrary to Kennedy, Frye, and Freeman, the prosecutor in appellant's case did not read the terms of Sheehan's immunity agreement or ask Sheehan if he had been granted immunity with the approval of the court. Instead, the prosecutor portrayed Sheehan's immunity as a guarantee of his veracity and as proof of appellant's guilt. (See 9 RT 2067-2068.) The prosecutor's argument was far more inflammatory than those at issue in the cases cited by respondent.

Respondent finally argues that the "trial court sustained the [defense] objection and admonished the jury to disregard the prosecutor's statement," and that "the jury is presumed to have followed the trial court's admonition."[39] (RB at 125.) The presumption should not apply here because the prosecutor's statements were "grossly improper and highly prejudicial" and could not be cured by the admonition given in this case. (Crabbe v. Rhoades (1929) 101 Cal.App. 503, 513). Sheehan was an essential state witness who gave the most damning testimony, that appellant had told him "a problem was taken care of" (6 RT 1292) and "they had shot [Nick] and put him in a ditch" and covered him with a bush. (6 RT 1306.) His testimony coves 131 transcript pages. (See 6 RT 1273-1356; 7 RT 1363-1411.) The prosecutor devoted seven pages of closing argument to Sheehan's testimony. (See 9 RT 2063-2069.) Consequently, the

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[39] Defense counsel did object to the prosecutor's statements equating Mr. Sheehan's immunity with proof of appellant's guilt. (See 9 RT 2068.) Counsel failed to object, however, to the prosecutor's earlier statements bolstering Sheehan's credibility. Counsel's failure to object does not forfeit appellant's claim in regards to those statements, as argued supra. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (People v. Hill (1998) 17 Cal. 4th 800, 820, overruled on other grounds by Price v. Superior Court, supra, 25 Cal.4th 1046.) In Appellant's case, the prosecutor argued to the jurors that Sheehan, a key witness, could not lie and assured them of his credibility. (See 9 RT 2067.) The prosecutor portrayed Sheehan's immunity grant as proof of his veracity and of appellant's guilt. No admonition would have erased that assertion from the jurors' minds. (See People v. Alvarado (2006) 141 Cal.App.4th 1577, 1586 [finding prejudicial misconduct even though defense counsel failed to request an admonition and to object in part because "it [was] too late for an admonition to un-ring the bell sounded by the prosecutor's improper attempt to bolster [the witness'] credibility"].)

prosecutor's misconduct prejudiced appellant. (See also AOB at 253, 255-257.)

This case resembles the facts of People v. Alvarado, supra, 141 Cal.App.4th 1577, in which the appellate court found reversible misconduct that was incurable by admonition. In Alvarado, the prosecutor implied that her decision to prosecute the defendant meant that he had committed the crime. (Alvarado, supra, at p. 1583 ["I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred. The defendant charged is the person who did it."].) The court held the prosecutor's comments to be misconduct, finding that "the only reasonable inference from th[o]se comments [was] that (1) the prosecutor would not have charged Alvarado unless he was guilty, (2) the jury should rely on the prosecutor's opinion and therefore convict him, and (3) the jurors should believe [the key prosecution witness] for the same reason." (Id. at 1585.) The court decided "that the misconduct was prejudicial and that an admonishment would not have cured the harm." (Ibid.) The situation in Alvarado closely fits this case. The prosecutor suggested that he would not have given Sheehan immunity if appellant were not guilty. (See 9 RT 2068.) As in Alvarado, the prosecutor's misconduct was prejudicial and could not be fixed by any admonition.

9. THE COURT ERRED BY FAILING TO INSTRUCT THE JURY ON CONSIDERATION OF ALL ACCOMPLICES OR IMMUNIZED WITNESS TESTIMONY

The facts and law of Claim 9 are fully joined by appellant's opening brief and respondent's brief, and submitted to this Court.

SPECIAL CIRCUMSTANCE CLAIM

10. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE "INDEPENDENT PURPOSE" ELEMENT OF THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE AND INSTRUCTIONAL ERROR PERMITTED THE JURY TO CIRCUMVENT THAT DEFECT IN PROOF

A. Introduction

Count 1 of the indictment charged appellant with special circumstance kidnap-murder pursuant to Penal Code §190.2(a)(17)(B). (1 CT 20.) Under People v. Green (1980) 27 Cal. 3d 1, 60-61, an element of that charge required that the kidnap be committed for an independent purpose apart from the murder. Although the Green rule of §190.2(a)(17)(B) had been purportedly eliminated by Proposition 18 four months before the crime, as replaced by §190.2(a)(17)(M), neither the grand jury that presented the charge, the prosecutor who tried it, nor the judge who oversaw it and instructed the jury, ever noted the change in law, or suggested that the charge should be amended.

In his AOB, appellant challenged the sufficiency of the record evidence on independent purpose under the Green rule, as well as

instructional error which permitted the jury to bootstrap the initial kidnap of which appellant was acquitted into a target offense for the special circumstance, rather than the movement of the victim to accomplish his murder. (See AOB 275-277.) After the opening brief was filed, this Court decided People v. Brents (2012) 53 Cal. 4th 599, which lent support to both aspects of appellant's claim. First, the evidence of independent purpose in Brents, which this Court held to be minimally sufficient, if weak, made the instant case an easy one for insufficient evidence. While Brents had boasted of an intention to kill, his actions were arguably consistent with indecision or a purpose to inflict fear on the victim. (Brents, supra, 54 Cal.4th at pp. 601, 618; see section B, infra.) By contrast, viewing the evidence in the light most favorable to the prosecution here, appellant and the other principals had acted out a paradigm of the Green rule, in which the victim's grave literally was dug before he arrived. Second, the instructional error in Brents confused the target offense of assault with kidnap, permitting conviction if the jury believed that the murder was committed to conceal the former. Here, too, the instructional error confused the target offense of the initial kidnap for ransom with the incidental movement to the grave, permitting conviction if the jury believed that the murder was committed to conceal the former crime, of which appellant was acquitted.

Respondent chooses not to fight either battle, arguing instead that as a matter of law, Proposition 18 moots the claim. (RB at 131-132.) Respondent is mistaken.

B. Under "Law of the Case" Principles, This Court Should Decide the Case on the Same Basis Upon Which It Was Tried

"Law of the case" doctrine applies to criminal cases and to decisions of intermediate appellate courts, and provides that, based upon reasons of policy and convenience, this Court generally does not inquire into the merits of earlier decisions. (People v. Durbin (1966) 64 Cal. 2d 474, 477; United Dredging Co. v. Industrial Acc. Com. (1930) 208 Cal. 705, 712.) Application of the rule is subject to the qualifications that "the point of law involved must have been necessary to the prior decision, the matter must have been actually presented and determined by the court, and application of the doctrine will not result in an unjust decision." (Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal.2d 227, 231; People v. Medina (1972) 6 Cal.3d 484, 491 n. 7.) In People v. Shuey (1975) 13 Cal. 3d 835, 841-843, this Court applied "law of the case" doctrine to hold the State to a concession of the prosecutor which, "once spoken and entered on the record, became stable and did not change throughout the progress of this case."

As in Shuey, Respondent should be held to the concession of the prosecutor in the entire conduct of the trial proceedings that the kidnap-murder special circumstance was governed by §190.2(a)(17)(B), not §190.2(a)(17)(M). This is not a request for "windfall" error in appellant's

favor, Lockhart v. Fretwell (1993) 506 U.S. 364, 371, but a request that the settled and basic expectations of the parties at trial be observed to avoid constitutional notice and fairness issues at this juncture which were far outside their contemplation. By its conduct at trial in pursuing the death penalty under §190.2(a)(17)(B), respondent has waived the application of §190.2(a)(17)(M) – an uncharged special circumstance – as a basis for upholding appellant's death sentence.[40]

C. The Evidence was Insufficient under the Green Rule

The prosecutor's theory and presentation were that appellant murdered the victim to cover up his boss Hollywood's earlier kidnap for ransom. (9 RT 2051-2052, 2070.) Viewed in the light most favorable to that theory, all the principals' actions were directed at murdering the victim where his body would not be found. In that respect, the case presents a paradigm of the Green rule in that the victim's grave was literally waiting for him in that remote site.

Respondent's failure to address these facts may be taken as a nod to the limits set in Brents, and a concession that, if Penal Code

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[40] Because the State did not assert §190.2(a)(17)(M) as a charge, or a basis for conviction at trial, appellant could not anticipate that respondent would turn to it fully as the basis for affirmance on appeal. This Court may consider appellant's "law of the case" reply argument because it is a legal rejoinder, not a new claim, and appellant had no good reason to raise it earlier. (Hibernia Savings and Loan Soc. v. Farnham (1908) 153 Cal. 578, 584; see also Varjabedian v. City of Madera (1977) 20 Cal.3d 285, 295, fn. 11 [defaulting reply claim where no good reason appears for its omission from opening brief, and appellant would not be unjustly affected by a refusal to consider it.].)

§190.2(a)(17)(B) applies on appeal, appellant's special circumstance must be reversed. No properly-instructed rational trier of fact could have found that this "second kidnap" (if it were a "kidnap") was not merely incidental to the murder, with the murder being the defendant's primary purpose. (People v. Navarette (2003) 30 Cal. 4th 458; Green, supra.)

In Brents, this Court essentially determined the outermost limit of sufficiency of the evidence in this context. There, the defendant "boasted" of the need to kill the victim, but did not follow through until after a 16-mile drive from one secluded area to another. (People v. Brents, supra, 53 Cal.4th at p. 618.) The jury may have inferred that the drive was borne of either "indecision" or a concurrent intent to inflict fear on the victim, i.e., an element of kidnap. (Id., at pp. 610, 618.) What the majority characterized as "weak" and "far from overwhelming" if "minimally sufficient" evidence, one dissenter limned as stretching the idea of deferential review of the jury's verdict to the point of "meaninglessness." (Id. at pp. 610-611, 614, 620.)

This case is firmly-situated beyond the vanishing point sighted in Brents. According to the prosecution's evidence, appellant agreed to commit a murder and, later that night acted out the murder in conformity with that agreement. Another principal dug the grave at a remote site. Appellant drove to Santa Barbara to pick up the gun and rendezvous with the abductors and victim. They drove to the remote burial site, and killed

him as he lay in his grave. The prosecutor did not argue any purpose other than murder, and no rational trier of fact could supply one other than concealment of Hollywood's prior crime.

D. Brents' Instructional Error Permitted Conviction on a Different Target Offense

Respondent also fails to address, and thereby concedes, the instructional error which marred this conviction in much the same way as the Brents case. (See RB at 131-132.) The prosecutor's theory and presentation was that appellant's primary motivation was to assist Hollywood in avoiding liability for Hollywood's earlier kidnap-for-ransom.[41] ((9 RT 2051-2052, 2070.) But, by failing to identify that only the August 8-9 movement of the victim from the Lemon Tree Hotel to the Lizard's Mouth trailhead could serve as the target-offense for purposes of the special circumstance, the jury instruction permitted conviction on this flawed theory; the murder was not in furtherance of concealment of appellant's kidnap, but of Hollywood's.[42] (See AOB at 276-277.)

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41 Appellant was acquitted of the §209(a) charged in Count 2 by the jury's return of a verdict of guilt on the lesser included crime of simple kidnap. (10 RT 2225.)

42 As explained in Claim 4 of the opening brief, although the prosecutor charged, and attempted to prove, there was one continuous kidnap, during rebuttal argument he switched course to argue a second theory of kidnap, August 8-9, from the Lemon Tree Hotel to the Lizard's Mouth trailhead, But, the jury instructions did not differentiate between the two separate crimes, or their consequences. (See AOB at pp. 106-110, 129-133.)

In Brents, this Court held that the trial court erred in altering CALJIC No. 8.81.17 to require a finding that the murder was committed to "carry out or advance the commission of" the assault on [the victim], rather than her kidnap, and that the error was prejudicial. (People v. Brents, supra, 53 cal.4th at pp. 612-613.) An instructional error regarding an element of a special circumstance requires reversal unless the error was harmless beyond a reasonable doubt. (People v. Bolden (2002) 29 Cal. 4th 515, 560.)

Here, the jury instruction stated in relevant part:

> To find that the special circumstance [] is true, it must be proved: one, the murder was committed while the defendant was engaged in the commission of a kidnapping; or, two, the murder was committed in order to carry out or advance the commission of the crime of kidnap, or to facilitate the escape therefrom, or to avoid detection.

(10 RT 2193-2194, emphases supplied.) Here, the elements were phrased disjunctively, rather than conjunctively, as the pattern instruction requires. And, as in Brents, the jury instruction suffered from another critical defect. The target crime of "kidnap" was ambiguous and could have referred to either of two separate kidnaps which the prosecutor contended were shown. While the jury acquitted appellant of the first kidnap, the instruction permitted it to convict appellant of the special circumstance if he committed the murder to conceal Hollywood's involvement in that separate crime. Indeed, this was the only rational explanation by which the jury could have found appellant guilty. The jury instruction did not focus the jury on the requirement that the murder be committed in furtherance of, and not be

merely incidental to, the same target crime of kidnap of which appellant was convicted. (See Brents, supra, 53 Cal. 4th at 613 [defining prejudice as possibility that the jury convicted defendant of special circumstance murder to avoid detection of a crime other than the predicate kidnap].) Given the weakness of the evidence on independent purpose, failure to define or limit the ambiguous phrase "crime of kidnap" was prejudicial instructional error. The critical distinction between appellant's role in the second kidnap, and Hollywood's motivation for murder to conceal his role in the first kidnap, was not presented to the jury in any instruction, and this Court cannot be sure that the jury ever found that the second kidnapping was not merely incidental to the murder, as required by Green, supra, 27 Cal. 3d at 61-62.

E. Respondent Fails to Rebut Appellant's Applied Challenge to Section 190.2(a)(17)(M) as Void for Vagueness

A criminal statute is void for vagueness if it is "not sufficiently clear to provide guidance to citizens concerning how they can avoid violating it and to provide authorities with principles governing enforcement." (United States v. Zhi Yong Guo (9th Cir. Cal. 2011) 634 F.3d 1119, 1121, quoting United States v. Jae Gab Kim (9th Cir. 2006) 449 F.3d 933, 942.) Vagueness challenges are rooted in the due process clause of section 15 of article I of the California Constitution. (People v. Toledo (2001) 26 Cal. 4th 221, 228.) The challenge is reviewed de novo. (United States v. Purdy (9th Cir. 2001) 264 F.3d 809, 811.)

The test is whether §190.2(a)(17)(M) adequately provides for principled enforcement by making clear what conduct of the appellant violates the statutory scheme. (City of Chicago v. Morales (1999) 527 U.S. 41, 56.) Merger doctrine historically barred punishment for aggravated murder based on conduct which was integral to the murder, and met the elements of a lesser included offense. (See People v. Wilson (1969) 1 Cal. 3d 431, 439-442 [judicially created merger rule in case of burglary-murder special circumstance], overruled by People v. Farley (2009) 46 Cal. 4th 1053, 1120 [applied prospectively for ex post facto purposes]; People v. Ireland (1969) 70 Cal. 2d 522 [felony-murder merger rule].) As applied to the facts of this case, §190.2(a)(17)(M) would violate the merger rule because the conduct was integral to the murder, and met the elements of the target offense of kidnap, if only incidentally. As argued in the AOB, §190.2(a)(17)(M) would render eligible for the death penalty nearly all murders, which by definition encompass a coercive interaction between killer and victim, and a movement of the two in tandem. (See AOB 280.) Respondent has offered no argument to rebut this argument. (See RB at 131-132.)

F. Conclusion

This Court should reverse the special circumstance conviction for insufficient evidence and instructional error under §190.2(a)(17)(B), which was the charge at trial. Respondent waived application of Proposition 18

by failing to amend the charge or object to the instructions at trial. Alternately, the revised special circumstance, §190.2(a)(17)(M), is void for vagueness as applied to the facts of this case, and should not be used to "save" appellant's conviction and death sentence. Double jeopardy bars his retrial on that charge.

PENALTY PHASE CLAIMS

11. THE STATE COMMITTED REVERSIBLE MISCONDUCT IN THE PENALTY PHASE OF APPELLANT'S TRIAL

A. Introduction

During the penalty phase of Appellant's trial, the State engaged in prejudicial, reversible misconduct, in violation of California state law and of Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (See U.S. Const., 5th, 6th, 8th & 14th Amends.) The prosecutor urged the jurors to consider factor (k) mitigation evidence as evidence of aggravation (see 11 RT 2346-2348); argued that prison conditions were insufficiently punitive (see 11 RT 2351-2353); argued facts not in evidence (see 11 RT 2349); argued Appellant's age was aggravating as compared to the minor co-defendant (see 11 RT 2344); and told the jury that he represented Nick Markowitz's family and indicated that the family would not be satisfied by a sentence less than death (see 11 RT 2353, 2354). These numerous instances of prosecutorial misconduct "so infected the trial with unfairness

as to make the resulting conviction a denial of due process"[43] (Darden v. Wainwright (1986) 477 U.S. 168, 181 [quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642]), and require a reversal of Appellant's conviction.[44] (See AOB at 293-294.)

Respondent's reply offers a weak rebuttal to parts of Appellant's claim, and no rebuttal whatsoever to other parts.[45] (See RB at 132-143.) Respondent trivializes and frequently mischaracterizes the prosecutor's arguments in order to belittle the harm that they caused. Respondent also ignores whole parts of Appellant's claim; such silence strongly suggests concession to those unanswered portions of Appellant's claim. (See 5 Cal.Jur.3d App. Rev. § 610 ["A contention raised in the appellant's brief to which respondent makes no reply in its brief will be deemed submitted on the appellant's brief, and the sole issues are those tendered in that brief."] [citing County of Butte v. Bach (1985) 172 Cal.App.3d 848, 867].)

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[43] Additionally, as Appellant argued in his opening brief (see AOB at 294), the prosecution's misconduct violated California law because it involved the repeated "use of deceptive or reprehensible methods to attempt to persuade the jury." (People v. Farnam (2002) 28 Cal.4th 107, 167.)

[45] Though respondent asserts in the first paragraph of its reply, "any alleged misconduct was harmless," it offers little support for that conclusion to rebut appellant's earlier showing of prejudice. (See AOB at 255-257.) Respondent's theory that any rational juror would focus on the defenseless of the victim at the moment of death would excuse all of the prosecutor's exceeding the bounds of proper argument, as it related to the conditions of confinement, and converting factor (k) mitigation to aggravation,

B. Respondent Does Not Meaningfully Address Appellant's Claim Regarding the Prosecutor's Conversion of Mitigating Factor (K) Evidence Into Aggravation

The prosecutor committed prejudicial misconduct when he urged the jury to consider factor (k) mitigation evidence of Appellant's family background and dysfunction, his brother's criminal conviction, and his sister's heroin addiction as aggravating evidence. (See 11 RT 2346-2348.) Evidence offered by the defense in support of factor (k) can only be used in mitigation. (People v. Boyd (1985) 38 Cal.3d 762, 775-776 [Evidence of a defendant's background and character is admissible under 190.3, factor (k), only to extenuate the gravity of a crime, and it is improper for the prosecutor to urge that such evidence should be considered in aggravation].)[46] As this Court explained in People v. Edelbacher (1989) 47 Cal.3d 983: "The prosecution may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidents or character traits on which the defendant seeks to rely, and may argue that this mitigating factor is inapplicable, *but factor (k) evidence may not be used affirmatively as a circumstance in aggravation.*" (Id., at p. 1033 [emphasis added] [citations omitted].) Here, as in

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46 In his opening brief, appellant characterized this error as Davenport error, which concerns prosecution argument that the absence of mitigating factors constitutes aggravation. (See People v. Davenport (1985) 41 Cal.3d 247, 288-290.) Here, however, the prosecutor improperly converted appellant's mitigating evidence into aggravating evidence and thus the error is properly characterized as Boyd/Edelbacher error, not Davenport error.

Edelbacher, "the prosecutor acted improperly in urging the jury to view defendant's background as an aggravating factor." (Ibid.)

Respondent argues that "[w]here the prosecutor's argument that the absence of a particular mitigating factor should be considered as aggravating was brief and unobjected to, it can be found to be neither misconduct nor prejudicial" and "[s]uch is the case here." (RB at 135.) Respondent is wrong. The prosecution did not merely argue that the absence of a particular mitigating factor should be considered as aggravating. It told the jurors that appellant's mitigating evidence was, in fact, aggravating evidence. The error in this case is, by far, the more serious of the two. Respondent's argument has no applicability here. Argument that the absence of a mitigating factor constitutes aggravation artificially inflates the factors in aggravation, whereas argument converting defense mitigating evidence into aggravation not only artificially inflates, but also urges the jury to disregard a defendant's mitigating evidence, which violates the Eighth Amendment. Davenport error artificially inflates the factors in aggravation, whereas Boyd/Edelbacher error not only artificially inflates, but also urges the jury to disregard a defendant's mitigating evidence which violates the Eighth Amendment. (See People v. Boyd (1985) 38 Cal.3d 762, 775 [quoting Lockett v. Ohio (1978) 438 U.S. 586, 604]; Eddings v. Oklahoma (1982) 455 U.S. 104, 110 [a sentencing jury may "not be precluded from considering as a mitigating factor, any

aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."].)

To support its assertion that the prosecutor's argument here was appropriate, Respondent relies upon the case of People v. Hamilton (2009) 45 Cal.4th 863, 952-953. (See RB at 135-136.) Hamilton, however, is far different from Appellant's case and provides no support for Respondent's claim. In Hamilton, the defendant offered evidence of his artistic talents as mitigation and the prosecutor then asked the defendant on cross-examination if his sketches were "basically sketches of heads of women? . . . Portraits?" (Hamilton, supra, at p. 952.) On appeal, Hamilton argued that "the prosecutor's questions improperly suggested to the jury that evidence of defendant's artistic talents he had offered in mitigation actually revealed an underlying morbid fascination with women's heads. . . . [and] the prosecutor thereby improperly turned evidence in mitigation into evidence in aggravation." (Ibid.) This Court rejected the claim as meritless. (Id., at p. 953.)

In Hamilton, the prosecutor never argued that the defendant's evidence in mitigation was, in fact, aggravating and the suggestion on appeal that the prosecutor's questions improperly implied such was more than a stretch, as this Court recognized. Here, on the other hand, the prosecutor blatantly told the jurors that appellant's mitigating evidence

was instead aggravating and should be considered as aggravation. First, the prosecutor argued that all of the evidence offered in mitigation should actually be viewed as strikes against Appellant. (See 11 RT 2346-2347 ["Now, when you look at that and you look at that alone that is irrefutable evidence that this was a dysfunctional home, that they batted zero with the accomplishments of all three of the children in this family. . . . Are they telling us, effectively . . . . [t]hat he lacks the ability at this point to be compassionate toward another person. . . . that the consequence of this childhood has created somebody who really lacks any notion of empathy at all for other people. And aren't they really saying that that is in effect a violent person?"].) The prosecutor then took it a step further and explicitly argued that the evidence should not be considered as mitigation, but rather as aggravation. (See 11 RT 2348 ["[W]hy does that count as a matter in mitigation? Why should that not be considered by you as a factor in aggravation? . . . [H]ow is that a matter in mitigation as against any matter in aggravation? Something for you to consider during your deliberation."].)

Respondent attempts to fit this case within the parameters of the Hamilton decision by suggesting that the prosecutor could rightfully argue "an alternative inference" and "[w]hen considered in context, it is evident that the prosecutor was asserting that insofar as one might view the information about appellant's childhood was necessarily extenuating his crime, in fact his background did not necessarily constitute mitigating

evidence." (RB at 136.) As evidenced by the argument quotations referenced in the previous paragraph, the facts belie this claim. The prosecutor did more than assert that appellant's childhood evidence was not necessarily mitigating – he argued that it should be considered as aggravating. While the law permits him to argue that the evidence does not mitigate, it does not permit him to turn it into aggravation, as he did here.

Respondent's comparison of this case to People v. Sims (1993) 5 Cal.4th 405, fails for the same reason. Respondent claims: "As a practical matter, the prosecutor's argument in the present case was the equivalent of the argument approved in Sims." (RB at 137.) That is untrue. Whereas the prosecutor in Sims argued that evidence of the defendant's abusive childhood should have no mitigating effect (Sims, supra, at p. 464.); here, the prosecutor argued not only that the mitigation evidence should have no mitigating effect, but also that it should actually be considered as aggravating. (See 11 RT 2346-2348.) This makes a world of difference for while the prosecution may argue that mitigation is inapplicable, it cannot argue that it should be considered as aggravation.

Respondent further contends that, although "a prosecutor may not argue that the lack of mitigating evidence pertaining to the factors listed in Penal Code section 190.3 renders them aggravating in a given case," he or she can "argue[] that certain mitigating factors are not present in the case and that the circumstances of the crime serve as aggravation (as well as

disproving mitigation)." (RB at 136-137.) Appellant challenges what the prosecutor did in this case: arguing that the evidence offered in mitigation is, in fact, aggravating. The prosecutor took the defense's factor (k) mitigation evidence, manipulated it, and then urged the jury to view it as aggravation evidence. (See 11 RT 2346-2348.) That was misconduct. (See People v. Boyd, supra, 38 Cal.3d at pp. 775-776; People v. Edelbacher, supra, 4 Cal.3d at p. 1033.)

Respondent also relies on People v. Clark (1992) 3 Cal.4th 41, 168-169, a case where the prosecution argued that the lack of mitigating factors was aggravating (Davenport error), to support its claim that any error was harmless. (See RB at 138.) Based on Clark, Respondent argues that the prosecutor's misconduct was harmless error because "the jury was aware of the underlying facts and was properly instructed on the weighing process." (RB at 138.) This rule, which the Court has applied in Clark and other cases of Davenport error,[47] is inapplicable here where the prosecutor improperly converted mitigating evidence into aggravation. As explained in Clark, there is little risk that jurors will artificially inflate factors in aggravation when the prosecutor argues that the absence of a mitigating factor is aggravating, because "a reasonable jury would not assign substantial aggravating weight to the absence of unusual extenuating

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[47] See e.g., AOB at 289 [citing People v. Gonzalez (1990) 51 Cal.3d 1179, 1234; People v. Proctor (1992) 4 Cal.4th 499, 544-545; People v. Brown (1988) 46 Cal.3d 432, 454-456; People v.Montiel (1993) 5 Cal.4th 877, 937-938].

factors," the jury is aware of the underlying facts and is free to place whatever weight it wishes on the facts, and the jury is aware that the sentencing determination is not just a matter of adding up various categories or a mere mechanical weighing of factors on each side of an imaginary scale or a matter of counting. (Clark, supra, 3 Cal.4th at pp. 168-169; accord, People v. Gonzalez, supra, 51 Cal.3d at p. 1234; People v. Proctor, supra, 4 Cal.4th at pp. 544-545; People v. Brown, supra, 46 Cal.3d at pp. 454-456; People v.Montiel, supra, 5 Cal.4th at pp. 937-938 .)

The error here had much more serious consequences. As noted infra, it violated appellant's Eighth Amendment right by impeding the jury's full consideration of appellant's background and character as mitigating evidence (People v. Boyd, supra, 38 Cal.3d at p. 775; Lockett v. Ohio, supra, 438 U.S. at p. 604; Eddings v. Oklahoma, supra, 455 U.S. at p. 110; Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 260-261) and unlawfully bolstered the case for death. (See, e.g., Brown v. Sanders (2006) 546 U.S. 212, 221 ["The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty."].) Accordingly, the prosecutor's actions warrant reversal of Appellant's sentence.

C. Respondent Fails to Address Appellant's Factor (K) Misconduct Claim under Brown v. Sanders

Appellant argued in his opening brief that "the prosecution's argument on factor (k) artificially inflated the number of aggravating factors the jury weighed" (AOB at 286), but Respondent fails to address that contention.[48] Yet, Appellant's point is an important one, as evidenced by Brown v. Sanders, supra, 546 U.S. 212.

In Brown v. Sanders, the United States Supreme Court held that an invalidated sentencing factor requires reversal of a death sentence if the invalidated factor allowed for the jurors to consider certain facts as aggravating, and no valid sentencing factor would have permitted them to do the same. (Sanders, supra, at p. 220 ["An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."].) Such a situation requires reversal because "skewing [] could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty." (Id., at p. 221.)

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[48] "A contention raised in the appellant's brief to which respondent makes no reply in its brief will be deemed submitted on the appellant's brief, and the sole issues are those tendered in that brief." (5 Cal.Jur.3d App. Rev. § 610 [citing County of Butte, supra, 172 Cal.App.3d 848].)

The reasoning of Sanders applies here, too. In appellant's case, the prosecutor improperly characterized certain facts and circumstances – namely, evidence of Appellant's family life and childhood – as aggravation. (See 11 RT 2346-2348.) This evidence, under factor (k), was only permitted to be introduced and considered as evidence of mitigation. (People v. Edelbacher, supra, 47 Cal. 3d 983, 1033 ["Evidence of a defendant's character and background is admissible under factor (k) only to *extenuate* the gravity of the crime; it cannot be used as a factor in aggravation."].) No sentencing factor existed that would have allowed the jury to consider evidence of Appellant's family life and childhood as aggravation. Consequently, the prosecutor's argument that the factor (k) evidence was aggravating "add[ed] an improper element to the aggravation scale in the weighing process." (Brown v. Sanders, supra, 546 U.S. 212, 220.) When the prosecutor converted appellant's mitigation evidence into aggravation, he encouraged the jurors to give aggravating weight to facts that they were not actually permitted to consider as aggravating. According to Sanders, doing so is unconstitutional and requires reversal of the sentence. (See id., at p. 221 ["As we have explained, [] skewing will occur, and give rise to constitutional error, [] where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor."].)

D Respondent Dodges Appellant's Claim That the Prosecutor Improperly Embellished Facts Not in Evidence, By Exceeding the Proper Bounds of Inference to be Drawn from Record Facts

Respondent overreaches to suggest that the prosecutor's statements alleging appellant's participation in duct-taping Nick Markowitz and digging the grave were based on record evidence. (RB at 139 ["[T]he prosecutor's argument was based on evidence that appellant participated in all aspects of the murder."].) Respondent omits any citations to the record to support this argument. (See RB at 139.) And, there is no record evidence to support the allegation that Appellant "participated in all aspects of the murder" (RB at 139, emphasis supplied). As discussed in Claim VIII, supra, no evidence established that appellant was involved in duct-taping the victim or in digging the grave.[49]

Respondent's theory originates in Sheehan's testimony that appellant admitted "they" had picked up Nicholas from a motel and taken him to the site, "they" had shot him and put him in a ditch, and "they" had covered Nicholas's body with a bush. This testimony did not permit a reasonable inference that appellant conceded that he participated in these acts.

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[49] The prosecutor argued as follows during his penalty phase closing argument: "He and his confederates had to figure out how to dig a grave. Get shovels, get the tools of what they needed to commit this horrific crime, including duct tape. Transport their victim up to a desolate area of Santa Barbara, have a grave dug in advance of that." (11 RT 2342.) There was no evidence to support those allegations.

E. Respondent's Conclusory Response Fails to Disprove the Prejudice from the Prosecutor's Improper Statements Regarding the Conditions of Confinement

Conceding that conditions of confinement evidence is irrelevant to a jury's penalty determination (RB at 139 [quoting People v. Quartermain (1997) 16 Cal.4th 600, 632])), respondent dodges the consequence of the prosecutor's improper argument on this issue. Respondent ignores the prejudice analysis set forth at AOB page 291. Respondent argues that any error was "clearly harmless, as a rational juror necessarily would have arrived at the death penalty decision on the enormity of appellant's crime of murdering a defenseless child, and made the inevitable death penalty decision after weighing all of that evidence and arguments, and did not base a decision on a brief reference to life in prison." (RB at 140.)

Respondent's brief ignores the presence of some mitigating factors, which were either transparent from the facts or emerged from trial counsel's desultory presentation: appellant's lack of prior record and relative youth, anecdotal evidence of an abusive, dysfunctional childhood, anecdotal evidence of Hollywood's dominance. Respondent further claims that the prosecutor's misconduct was harmless because defense counsel effectively countered it in his closing argument. (RB at 140-141.) Defense counsel response regarding the quality of prison life could not, and did not negate the prejudice of the prosecutor's elaborate rumination on the cushiness of appellant's future surroundings if his life were spared,

particularly as the prosecutor coupled that rumination with highly emotionally-laden references to the future suffering of the victim's mother in the same contemplation. (See 11 RT 2351-2353 ["He'll have the opportunity to play basketball. . . . He can have visits with his family as regularly as they can see fit to come up and visit with him or talk to him. . . . He can read as much as he wants. . . . He can start with Dickens and he can end up with Tom Clancy if he wishes."].) Moreover, the prosecutor's words carried more weight than those of appellant's counsel. (See People v. Talle (1952) 111 Cal.App.2d 650, 677 ["Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige."]; accord, United States v. Young (1985) 470 U.S. 1, 18 ["[T]he prosecutor's opinion carries with it the imprimatur of the Government . . ."].) Consequently, as argued in the AOB, this misconduct was prejudicial. (See AOB at 293-294.)

F. Respondent Declines to Acknowledge the Impropriety of the Prosecutor's Argument Regarding the Desire of the Victim's Family that Justice Be Done.

In addressing this claim, Respondent focuses on a slight error in appellant's quotation of the prosecutor's argument in his opening brief.

(RB at 141-142.) Respondent is correct that appellate counsel mistakenly misquoted the prosecutor's words.[50] (See AOB at 292.)

Hower, Respondent's claim that "[t]he differences are significant" (RB at 142) is not correct. The two quotes, side-by-side, are:

"[S]hould the Markowitz family have to wonder if appellant is playing basketball or whether justice was done[?]" (AOB at 292 (appellate counsel's misquote).)	"Should the Markowitzs have to spend the balance of their days wondering if he's enjoying his basketball game at that moment, and wondering whether justice was really done in this particular case?" (11 RT 2353 (actual quote from the record).)

Respondent argues that the difference between the quotation in the opening brief and the correct quotation is significant in that "the literal quote was focused on the perception of the victim's family, and was not a statement regarding an objectively correct penalty decision." (RB at 142.) That assertion is nonsense and as the Court can see, there is no meaningful difference between the two quotations. Both versions of the argument contrast a sentence of LWOP (where appellant would be able to enjoy his game of basketball) with the imposition of justice (which, by default, could mean only a sentence of death) and imply that unless the jury sentences Appellant to death, the Markowitz family will wonder "whether justice was done." (Compare AOB at 292 with 11 RT 2353.) The implication of the prosecutor's argument is clear: the victim's family believes that justice in this case requires a sentence of death and that is what they want the jury to impose. (See 11 RT 2353.) This argument was patently improper and

violated the Eighth Amendment . (See, e.g., Payne v. Tennessee (1991) 501 U.S. 808, 830, fn.2 ["[T]he admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."].)

Respondent also claims: "The prosecutor merely noted the contrast between the opportunities available in a prison environment, as compared with the unrelenting agony faced by the survivors of a murdered child" (RB at 142) and, "The remark of the prosecutor was little more than a reminder of the evidence." (RB at 143) These assertions misstate the text and the effect of the prosecutor's closing. What the prosecutor told the jury was that a sentence of life in prison was a mild punishment that would not satisfy the desire of victim's family for retribution. (See 11 RT 2351-2353.)

Respondent concludes that "there is no plausible risk the jurors misunderstood their duty or were swayed by a one-sentence reference to prison basketball games." (RB at 143.) Again, Respondent grossly misrepresents the prosecutor's argument. Appellant is not concerned with a "one-sentence reference to prison basketball games" (Ibid.). Instead, the harm here was caused by the prosecutor's suggestion that any sentence less than death would leave the Markowitz family "wondering whether justice was really done in this particular case[.]" (11 RT 1153.) Respondent's

characterizations of the prosecutor's statements as innocuous do not make them so.

Respondent also ignores the fact that this argument was improper because it advocated for personal retribution for the Markowitz family. As argued in the opening brief, the prosecutor's argument crossed the line in exalting the Markowitz family's right of personal retaliation over community norms of justice. (See AOB at 292-293; 11 RT 2354 ["And to the extent that my words reflect also the thoughts of Jeff and Susan Markowitz and the Markowitz family, then it's been my honor to represent them as well."].) Our death penalty jurisprudence requires the prosecutor to represent the State of California, not the victim's family. (See Cal. Pen. Code § 684.) As argued in the AOB, it was prejudicial misconduct for the prosecutor to imply to the jury that Nick Markowitz's family wanted a death sentence, and to misrepresent them as a party to Appellant's prosecution. (See AOB at 292-294.) Respondent offers no response to this argument,[51]

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[51] "A contention raised in the appellant's brief to which respondent makes no reply in its brief will be deemed submitted on the appellant's brief, and the sole issues are those tendered in that brief." (5 Cal.Jur.3d App. Rev. § 610 [citing County of Butte v. Bach, supra, 172 Cal.App.3d 848].)

G. Respondent Argues that These Claims of Prosecutorial Misconduct During Penalty Phase Argument Have Been Defaulted For Failure to Object, But Fails to Address Appellant's Argument that Any Objections Would Have Been Futile and Admonitions Could Not Have Cured the Harm.

Throughout its reply, Respondent argues that these claims of prosecutorial misconduct during penalty phase argument have been defaulted because trial counsel failed to object. Nonetheless, as previously argued, defense counsel's failure to object should be excused because any objection would have been futile and admonitions could not have cured the harm. (See AOB at 285.) Respondent wholly fails to respond to this argument, apparently conceding its validity. (5 Cal.Jur.3d App. Rev. § 610 ["A contention raised in the appellant's brief to which respondent makes no reply in its brief will be deemed submitted on the appellant's brief, and the sole issues are those tendered in that brief."] [citing County of Butte, supra, 172 Cal.App.3d 848].)

H. Conclusion

For all these reasons, the prosecutor's misconduct was prejudicial and requires reversal of the judgment of death.

12. CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

The facts and law of Claim 12 are fully joined by appellant's opening brief and respondent's brief, and submitted to this Court.

ALL PHASES

13. THE COURT ERRED BY DENYING APPELLANT'S REQUESTS FOR COUNSEL'S STATE BAR RECORDS IN SUPPORT OF HIS NEW TRIAL MOTION

The facts and law of Claim 13 are fully joined by appellant's opening brief and respondent's brief, and submitted to this Court.

14. THE COURT ERRED BY DENYING APPELLANT'S MOTION FOR NEW TRIAL OR PENALTY WITHOUT DUE PROCESS

A. Introduction

Appellant raised significant grounds of attorney incompetence on the part of Cheri Owen as a basis for new trial on guilt and/or penalty.[52] This Court has not addressed the standards to be applied in this context since People v. Knoller (2007) 41 Cal. 4th 139. The issue is important, because the attorney misconduct in this case was scandalous, and impugned the verity of a capital case proceeding in this State. As argued in the opening brief and below, the Superior Court abused its discretion by denying the motion based on impermissible presumptions and incorrect standards of law. (See AOB 321-378.) Remand for reconsideration of the motion after a

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[52] Respondent claims that numerous arguments in appellant's claim are "defaulted" but, with the exception of the issue whether, in the context of his §1181 Fosselman motion appellant's prima facie showing warranted a hearing, omits to mention which ones, or why. (RB at 167-168.) With respect to the hearing issue, appellant previously referenced both the facts – his request for hearing and subpoenas duces testificandum to Owen – and the law. (AOB at 324, 344.)

hearing to consider the probability that the brain impairment evidence would have changed the result, and to compel and debunk Cheri Owen's account of her activities, is necessary as a matter of statute (Penal Code §1181), case law (People v. Fosselman (1983) 33 Cal.3d 572; People v. Dennis (1986) 177 Cal. App. 3d 863; People v. Stewart (1985) 171 Cal. App. 3d 388) and due process. (Wood v. Georgia (1981) 450 U.S. 261.)[53]

B. Respondent Ignores Well-Settled Precedent that Owen's "Deficient Performance" Was Prejudicial Per Se Or, Alternatively, Justified a Hearing

Respondent argues that this Court need not resolve whether Owen was deficient because appellant failed to establish prejudice. (RB at 172.) Respondent is mistaken. In the opening brief, Appellant showed structural error, or at the least, that a hearing was necessary to assess the prejudicial effect. (See AOB at 336-338.) Owen had been a lawyer for only nine months, with no murder or capital defense experience, and was unqualified for court appointment. (Id. at 327; see California Rules of Court, rule 4.117.) The usual presumption of competency afforded lawyers who meet state-mandated qualifications, should not apply, as a matter of common sense, since the condition precedent is absent.[54] Owen was under

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[53] See AOB at 336-338 (listing 18 issues of material controverted fact).

[54] See e.g., Rule of Court, rule 4.117. Although this rule is not "intended to be used as a standard by which to measure whether the defendant received effective assistance," its purpose in setting forth what it describes as "minimum qualifications" is to assure that a defendant

investigation of the State Bar, and had some form of cooperation agreement with the Los Angeles District Attorney; with charges pending, she resigned from the Bar prior to appellant's first sentencing-date, without noticing him or the Court.[55] (AOB at 322, 350.)

Respondent dodges that uncomfortable fact by alluding to People v. Milstein (Cal. App. 2d Dist. 2012) 211 Cal. 4th 1158, as "the" case in which Owen cooperated with the Los Angeles District Attorney, and suggesting that Milstein, and the agencies responsible for its prosecution, were "unrelated" to this case. (RB at 178 & fn. 32.) Since the reported decision in Milstein does not mention Owen by name, it may be inferred that Respondent possesses information about Owen that has not been disclosed

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receives adequate representation in a capital representation. As the rule states, "[t]hese minimum qualifications are designed to promote adequate representation in death penalty cases." Obviously, these qualifications were the minimum conditions which the Judicial Council had determined in 2000 must be met in order to afford competent representation in a death penalty prosecution.

Respondent protests that "appellant cites no authority for the proposition that trial counsel's level of experience is relevant to a claim of ineffective assistance of counsel" and argues that counsel's experience has no bearing on the question whether counsel provided deficient performance. (RB at 171.) Rule 4.117, however, demonstrates that the courts opine that a counsel's experience has much bearing on an attorney's ability to provide adequate representation in a capital prosecution, for it forbids appointment of counsel who do not possess the minimum amounts of experience set forth in the rule.

[55] The Superior Court appointed attorney Richard Crouter, who also had no capital experience, as Keenan counsel one week before trial. (AOB.at 327.) Respondent does not suggest that Crouter salvaged the representation, nor would the trial record support it.

to appellant or the Court. Given Owen's acknowledgement that she provided assistance to the Los Angeles County District Attorney's Office regarding other investigations, it is plausible to question whether Owen herself was implicated in Milstein's and her former employee Brent Carruth's scheme to offer worthless "early release" paid-legal services to California inmates who were not eligible for early release. Criminal misconduct during a criminal representation is surely relevant to a "divided loyalty" theory of conflict. (See e.g., United States v. De Falco (3d Cir. 1980) 644 F.2d 132, 137) The indictment charged Milstein and Carruth with conspiracy from August 3, 2000, to July 26, 2002. (Milstein, 211 Cal. 4th at p. 1163.) The dates themselves are relevant because they cover appellant's case. Cooperation with law enforcement during a criminal representation is surely relevant to the "pulled punches" theory of conflict. Appellant was entitled to a hearing to demonstrate Owen's conflict-of-interest arising from her role in a criminal fraud and/or cooperation with law enforcement. Respondent faults appellant for failing to provide a basis to conclude "that a more elaborate record would alter this conclusion." (RB at 178.) But, given Owen's evasions with the client and the Superior Court, and her non-cooperation in the post-trial setting, respondent would erect an insuperable bar to establishing actual prejudice from this conflict-of-interest.

Respondent concedes that Owen's literary and media rights agreement "was, undoubtedly, improper" but argues that appellant did not show any deleterious effect on his representation and the February 12, 2002 agreement post-dated Owen's resignation. (RB at 174-177.) But, there is no logical reason why the date of the agreement was its effective date because it would be invalid for lack of consideration; Owen had already resigned from the Bar. Also, Crouter's declaration of the advice-to-withdraw he would have given Owen only makes sense if the agreement was in effect during Owen's representation, and if so, structural error would be shown. (See AOB 324-325.) Given the seriousness of Owen's entering into such a contract with a capital client and good reasons to question whether the agreement was actually made before or during Owen's representation of appellant, the Superior Court should have, at a minimum, taken evidence to ascertain the effective date of the agreement, as well as its effect on the critical decisions to stipulate to venue, forego any investigation or mental disorder defenses, forego any challenge to the voluntariness of appellant's statement, fail to perfect the writ on the Danis issue, ill-advisedly present appellant's testimony, and forego any presentation of Dr. Chidekel or other expert testimony. The court thus erred by drawing an impermissible presumption that the agreement post-dated Owen's representation, without a hearing to ascertain the full story.

Similarly, Respondent argues that the Superior Court was correct to ignore well-founded allegations that Owen did not conduct any investigation of the case or client "because the police investigation was thorough,"[56] and that she diverted Penal Code §987.9 funds obtained for that purpose. (AOB at 327-329.) The Superior Court, like Respondent, ignored record evidence that Owen retained Dr. Kania, the defense expert, one week prior to trial, and that the referral was limited to the false confession issue. (See 1 RT 2A A-53; 9 RT 1893; 15 CTA Confidential 4218 [October 11, 2001 Penal Code §987.9 Order].) Consequently, the effect of those well-supported allegations was to demonstrate that Owen's chosen defense and penalty case were neither minimally informed, nor worthy of deference, and as discussed infra, a hearing on prejudice was warranted.

C. Respondent Ignores Fact and Law Appellant's Evidence of Brain Impairment Was Sufficient to Demonstrate Strickland Prejudice, or if not, Required a Hearing

Respondent argues that the Superior Court was correct to affirm Owen's false confession/alibi defense inconsistent with, and more viable than appellant's "far-fetched" claim of brain damage. (RB at 182-184.) Respondent is mistaken.

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[56] The Superior Court ignored this hearsay statement as a basis for careful inquiry of Owen at a hearing, relying instead on a spurious assumption that the chosen defense was preferable under the incorrect "outcome determinative" test and/or appellant's personal choice. (AOB at 341 fn. 232, 357-379.)

Respondent concedes that although Dr. Chidekel, the state's expert, "recognized and described appellant's cognitive deficits," her findings did not support a claim of brain damage. (Id., at p. 185-186.) And, the argument runs, no prejudice was shown because Owen did present lay witnesses to testify to appellant's chaotic home life, and "no juror needed an additional hired defense expert witness to put this uncontradicted portrait of abuse into context." (Id., at p. 193.) Respondent's citation to Dr. Chidekel's report is misleading because, while Dr. Chidekel "described" her findings to the lawyers in her written report, Dr. Chidekel's unbiased assessment of appellant's cognitive deficits was never shared with the trial jury. (See Appellant's Motion for Judicial Notice and Estoppel, Exh. "A" [Dr. Chidekel testimony in related case that appellant was so impaired he could not find his way on trail without help].) Appellant's penalty case focused exclusively on Penal Code §190.3(k) non-statutory mitigation. Nor, crucially, did the Superior Court consider Dr. Chidekel's findings in dismissing appellant's argument that a competent presentation would have let to reasonable probability of a more favorable result at guilt or penalty phases. Respondent's argument lampoons appellant's social history and childhood febrile seizure evidence, his EEG which was read as abnormal by Dr. Delio, a neutral radiologist, and defense expert psychiatrist Dr. Globus's encephalopathy opinion as "far-fetched" simply because these results were propounded by an expert paid by the defense, whom

respondent attempts to slur, and because one of the state's expert (Dr. Glaser) split hairs that the cognitive impairment evidence "did not preclude" appellant's "being aware of" consequences of his. (RB at 182 & n.33.) By labeling the brain damage claim as far-fetched, without any explanation why it was far-fetched, other than the reasons noted above, the State is resorting to hyperbole. Regardless of all else, Dr. Chidekel's unbiased testimony alone demonstrated the availability of compelling Penal Code §§190.3(a), (d), (g), & (h) mitigation evidence of extreme mental disturbance, impaired mental capacity, and its relationship to the substantial domination of co-defendant Hollywood. (AOB at 331.) This evidence, vel non, warranted a penalty retrial, or alternatively, a hearing to consider the EEG, neuropsychological test data, and expert testimony against the Strickland-prejudice test. Put simply, a trial at which one state expert agrees with the defense, while the other quibbles whether those findings "preclude" awareness of consequences is a far different trial than the one that took place, where no discussion of those issues was had at all.

The Superior Court drew an impermissible presumption that guilt or penalty strategies were chosen by appellant (11 RT 2554), in the absence of any evidence, and respondent does not defend that assertion. Yet, the Superior Court's presumption that appellant's brain impairment was inconsistent with and inferior to false confession/alibi theories was similarly unwarranted. (RB at p. 183.) For one thing, brain impairment

evidence would have supported a voluntariness challenge, even as it brought appellant within Dr. Glaser's diagnostic criteria for false confession. For another, while explaining appellant's vulnerability to Hollywood, this evidence would not undermine challenges to the kidnap-murder special circumstance, or to any failures of proof in the case-in-chief. The Superior Court denied the new trial motion based upon incorrect standards of Strickland law.

D. Conclusion

The short but benighted legal career of Cheri Owen has arisen in four other reported cases of our courts.[57] In two of these, the Attorney General agreed that Owen filed inadequate opening briefs, and criminal appeals were reinstated. (See In re Quach (Cal. App. 4th Dist. 2003) 2003 Cal. App. Unpub. LEXIS 3058; In re Caudillo (Cal. App. 4th Dist. 2003) 2003 Cal. App. Unpub. LEXIS 3073.) It is regrettable that the Attorney General aligns itself with Owen in this case, merely because her woeful antics resulted in a death verdict.

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[57] In a third, the defendant told prospective jurors that having been on the case six months, Owen "run out on me," leaving him with a replacement lawyer for only two days. The trial judge observed that the replacement lawyer had "done more discovery than previous counsel." (People v. Roberts (Cal. App. 2d Dist. 2001) 2001 Cal. App. Unpub. LEXIS 394.) In a fourth, the court of appeal took note of Owen's declaration that she "'did no work of any kind for several weeks' [due to] debilitating illness during the summer of 2000," even as it affirmed her default on a client's tort claim under Cal. Gov. Code §946.6. (Madera v. City of Long Beach (Cal. App. 2d Dist. 2002) 2002 Cal. App. Unpub. LEXIS 2126, **1-2, emphasis added.) Owen took appellant's case in the summer of 2000.

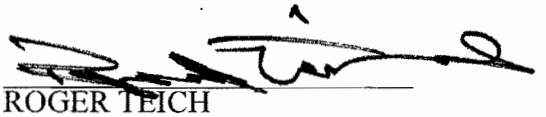
The representational facts in this case are, collectively, outrageous. Owen took an adverse interest in appellant's story rights, secretly cooperated with law enforcement to charge other attorneys with criminal fraud in which she was presumably involved, did no investigation of her client's mental health or history, and concealed all of this from the Court. In the process, she missed compelling "silver platter" mental state mitigation handed to her by the state's expert. All of this was aired in appellant's new trial motion. Reversal is warranted, or alternatively, remand for a redetermination of the motion under the correct standards of law after hearing the evidence.

CONCLUSION

For all the reasons stated above, appellant's convictions and sentence of death should be reversed.

Dated: September 20, 2013

Respectfully submitted,



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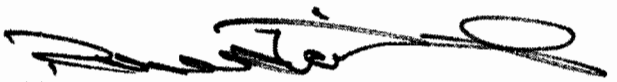
CERTIFICATION OF WORD COUNT

I, Roger Teich, certify that the Appellant's Reply Brief is approximately 34,213 words in length and uses a 13-point Times New Roman font.

Dated: September 20, 2013



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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 290 Nevada Street, San Francisco, CA 94110.

On September 20, 2013, I served a true and correct copy of the document described as APPELLANT RYAN HOYT'S REPLY BRIEF ON APPEAL on the following interested parties or counsel for interested parties in this action.

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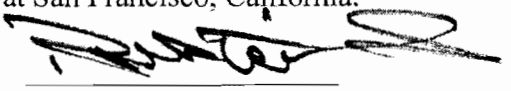

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