IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANH THE DUONG, Defendant and Appellant.	No. S114228 (Los Angeles County Sup. Ct. No. BA240170)

APPELLANT DUONG'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County
Hon. Robert M. Martinez, Judge Presiding

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DEATH PENALTY

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INTRODUCTION

Duong does not reply to each of respondent's contentions, because many of the issues respondent raises are addressed in his opening brief. The claims are numbered in conformity with the opening brief and are not in consecutive order. Duong specifically adopts the arguments presented in his opening brief on each and every issue, whether or not discussed individually below. The failure to address any particular argument, subargument, or allegation made by respondent or to reassert any point made in Duong's opening brief is not a concession, abandonment, or waiver of that point, but rather reflects Duong's view that the issue was adequately presented in his opening brief. See, *People v. Hill*, 3 Cal.4th 959, 995, fn 3., overruled on other grounds by *Price v. Superior Court*, 25 Cal.4th 1046, 1071-1076. Because Duong's trial was replete with prejudicial constitutional error, his convictions and death sentence cannot stand.

ARGUMENT

II. THE TRIAL COURT'S FAILURE TO SUPPRESS FRUITS OF THE UNCONSTITUTIONAL SEIZURE AND SEARCH OF THE FORD EXPEDITION REQUIRES REVERSAL OF DUONG'S CONVICTIONS AND DEATH SENTENCE

A. The search and seizure of the Expedition did not meet the requirements for any exception to the warrant requirement.

Respondent accuses Duong of conflating searches incident to arrest with inventory searches. RB 77. Duong does not. Rather, Duong challenges the state's attempt to brand its unconstitutional warrantless search of the Ford Expedition as a properly conducted inventory search consistent with the community caretaking doctrine.

In focusing on inventory search procedures and the community caretaking exception to the warrant requirement, respondent dodges the key issue. "Because warrantless searches and seizures are *per se* unreasonable, the government bears the burden of showing that a warrantless search or seizure falls within an exception to the Fourth Amendment's warrant requirement." *U.S. v. Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012). Under the community caretaking exception to the warrant requirement, law enforcement "may impound vehicles that jeopardize both the public safety and the efficient movement of vehicular traffic." *South Dakota v. Opperman*, 428 U.S. 364 368–369 (1976). However, a "decision to impound a vehicle that is not consistent with the police's role as 'caretaker' of the streets may be unreasonable." *Miranda v. City of Cornelius*, 429 F.3d 858, 865 (9th Cir. 2005). The "decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment[.]" *Id.* at 864. This includes impoundments and inventory searches conducted pursuant to California Vehicle Code section 22651(h)(1). *U.S. v. Caseres*, 533 F.3d 1064, 1074 (9th Cir. 2008).

In particular, law enforcement may not hide behind the "community caretaking" doctrine when an inventory search is in fact a "subterfuge for criminal investigations."

Opperman, 428 U.S. at 370, n.5. Law enforcement may only exercise its discretion to impound a vehicle "on the basis of something other than suspicion of evidence of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

The Supreme Court's rationale for the community caretaking doctrine is that local law enforcement, unlike federal authorities, have "much more contact with vehicles related to the operation of vehicles themselves." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* Impoundment "'based solely on an arrestee's status as a driver, owner, or passenger is irrational and inconsistent with 'caretaking' functions.'" *Miranda,* 429 F3d. at 865, quoting *U.S. v. Duguay*, 93 F.3d 346, 352 (7th Cir.1996).

In *Dombrowski*, 413 U.S. at 443, police properly impounded and inventoried defendant's vehicle, because the car was disabled in a collision and was a nuisance along the highway. Dombrowski, who was under the influence and eventually comatose, was unable to arrange for removal and storage of the vehicle. *Id.* Moreover, Dombrowski had identified himself to police as a Chicago police officer whom arresting officers believed was required to carry his service revolver at all times, but whose gun was not in plain view. *Id.* at 435-436. Under these circumstances, police directed the car towed and searched for "elemental reasons of safety." *Id.* at 443.

Dombrowski illustrates by contrast why the impoundment and search in Duong's case were improper. Here, the Ford Expedition was not involved in an accident. It was not disabled. It was not a road hazard or a public nuisance. The owner of the lot did not complain about its presence. Had police been concerned that the vehicle or its contents were a threat to public safety, they would not have let it sit, unguarded, in a public parking lot for approximately six hours. 1:RT 171; 3:RT 376-377.

Respondent's argument that it was constitutionally acceptable to impound the Expedition because "police reasonably could have believed that it was subject to the danger of vandalism or theft," also fails. (RB 78). First, it rests on conjecture, unsupported by the record below, about what police might have believed. Because the prosecutor had every opportunity to elicit this information from the officers involved in the impoundment and search of the Expedition, but did not do so, the state failed to "meet its burden to show that the community caretaking exception applied." *U.S. v. Cervantes*, 703 F.3d at 1141-1142. Second, the Expedition was one of many vehicles parked in the 24 Hour Fitness Lot. No evidence suggested that anything about the appearance of the Expedition made it stand out from the other vehicles in the lot. If police had reason to believe the Expedition was in danger of vandalism or theft, they had equal reason to believe that every other vehicle in the lot was similarly vulnerable. Nevertheless, there was no mass impoundment of vehicles parked in the lot. Respondent highlights that law enforcement were working continually during the six hours between Duong's arrest and the impoundment of the Expedition. RB 79. This fact only underscores law enforcement's lack of concern about any danger to it or any hazard it might have posed. The bottom line is that were police concerned that the Expedition were at risk, they could have searched for it, secured it, and requested a warrant to search it just as they did for Duong's residence.

Respondent also contends that the Ford Expedition was in the custody of law enforcement from the time of Duong's arrest until the time of its impoundment. RB 79. This assertion is baseless. In *Dombrowski*, "police had exercised a form of custody or control" over defendants car by having it immediately towed. 413 U.S. at 442-443. Here, while police did have custody over the key to the Ford Expedition, they did not take custody or control over the actual SUV for about six hours. The Expedition was

registered to Timothy Mukasa[1]. 1:RT 176. Nothing in the record indicates that Timothy and/or others did not have keys to the Expedition. As long as law enforcement did not locate and secure the vehicle, nothing stood in the way of another party driving the Expedition away from the lot in the hours before Harris began his search of the parking lot.

Respondent further claims that the Ford Expedition was impounded "*at the time of his arrest.*" RB 77, emphasis added. This bizarre assertion flies in the face of the record. Duong was arrested between 4:45 and 5pm. 1:RT 147-148, 3:RT 358. According to his own report, Officer Harris did not search for and impound the Expedition until approximately 11pm that evening. 1:RT 171.

Critically, had Duong not been arrested, police would have had absolutely no reason to remove the SUV from the parking lot. Indeed, they would not have known it was there. Police only found the Ford Expedition after removing a Ford key from a bag found near Duong at the time of his arrest and inserting it into the keyhole of every Ford in the parking lot. They did so for one reason only: because they were investigating Duong for murder, a motive expressly prohibited by the Supreme Court's Fourth Amendment jurisprudence.

Because the warrantless impoundment and search of the Ford Expedition do not meet the constitutional requirements for an inventory search under the community caretaking doctrine, the analysis must be whether this was a valid search incident to arrest. For the reasons outlined in Duong's opening brief, it was not.

B. The violation of Duong's Fourth Amendment rights requires reversal

Respondent urges that because there was ample evidence to convict Duong of the International Club Shootings that the admission of the Colt .45 Springfield model 1911

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[1] Referred to hereafter as "Timothy" to avoid confusion with Edward Mukasa who was arrested the same night as Duong.

retrieved from the Expedition which bore no relation to the charged crimes could not have prejudiced Duong. Respondent is wrong for a number of reasons, including those set forth in Duong's opening brief. The government argues that there was plenty of evidence to support a claim of premeditation and deliberation. However, intent was the central issue at guilt phase and the introduction of the gun seized from the expedition made it far less likely that the jury could impartially consider evidence that Duong killed in a heat of passion or in defense of a third party.

Critically, this is a death penalty case. The same jury that decided Duong's guilt would also sentence him to death. While the gun was not relevant to Duong's guilt, the jury may have found it relevant to whether Duong posed a future danger.

As reflected in California Penal Code section 12022, mere possession of a gun poses a danger to society. *People v. Bland,* 10 Cal.4th 991, 997 (1995). Thus, gun ownership is relevant to whether a defendant poses a future danger. See, e.g., *People v. Gonzales*, 208 Cal.App.3d 1170, 1172 (1989 Dist. 4). But, while evidence of future dangerousness is not "relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt," it may be considered during the penalty phase in a death penalty case. *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994). In California, although expert evidence of future dangerousness is inadmissible, a prosecutor may argue future dangerousness based on a defendant's conduct. *People v. Thomas*, 52 Cal.4th 336, 364 (2011).

Using the gun seized from the Expedition – evidence of Duong's dangerousness that would "weigh too much with the jury and to so overpersuade them as to prejudge," *Old Chief v. U.S.*, 519 U.S. 172, 181 (1997) – the prosecutor in effect invited the jury to make its penalty determination before the penalty phase ever began and may have swayed jurors who were strongly affected by evidence of dangerousness to convict Duong of first degree capital murder in order to proceed to penalty phase. Respondent cannot demonstrate beyond a reasonable doubt that not a single juror accepted the prosecutor's

invitation to choose death without hearing a shred of penalty phase evidence or to convict in order to necessitate a sentencing proceeding. *Chapman v. California*, 386 U.S. 18, 24 (1968).

Under respondent's view of the law, the Fourth Amendment places virtually no limits on the power of law enforcement to search and seize a vehicle and then use its gains to convict a defendant and sentence him to death. It is a frightening vision, which Duong urges this Court to reject. Duong's convictions and death sentence must be reversed.

III. DUONG'S INVALID WAIVER OF HIS RIGHT TO TESTIFY REQUIRES REVERSAL

A. The trial court misled Duong about the legal consequences of not testifying

The state never responds to Duong's claim. The issue here is that the trial court affirmatively misled Duong as to the consequences of his waiver of his right to testify. The requirement that a waiver, whether express or implicit, be "knowing, informed, and intelligent . . . implies an understanding of the consequences of the decision" not to testify. *Ouber v. Guarino*, 293 F.3d 19, 31 (1st Cir. 2002). On this record where the trial court opined that if he made "an erroneous ruling" to admit the uncharged homicides, he might "create an issue on appeal that the defendant didn't exercise his right to testify because of the erroneous ruling," 10 RT 1637-1638, and remained silent when the prosecutor disagreed there is no reason to believe Duong understood the consequences of his choice especially where defense counsel never explained his own view of the law.[2] 8:RT 1240-1241, 1245-1246, 1252-1254; 10:RT 1552-1553, 1637-1638. In any case,

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[2] Respondent notes that Duong does not raise an ineffective assistance of counsel claim regarding his invalid waiver. RB 95-96. The issue of whether counsel's deficient performance, which involves evidence outside the record on appeal, affected Duong's rights is an issue more appropriately raised in a petition for habeas corpus. See, *In re Harris*, 5 Cal.4th 813, 828, n.7 (1993).

regardless of what the prosecutor or defense counsel believed the law to be, it is the job of the trial court alone to determine legal questions. Cal. Evid. Code § 310(a); Cal. Penal Code § 1126; *People v. Blacksher*, 52 Cal.4th 798, 835 (2011). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 609 (2002). Correspondingly, "litigants generally are not required, on pain of forfeiting valuable rights" to correct the trial court. *People v. Braxton*, 34 Cal.4th 798, 814 (2004). Duong's understanding of his rights can only be understood in light of the judge's role in presiding over his trial. Thus, despite respondent's contention that Duong and his counsel were aware of the consequences of his not testifying, RB 95, the record, in which the trial court incorrectly stated those consequences, strongly suggests the opposite. Particularly because the issue of unadjudicated homicides was central to Duong's decision not to testify, 11:RT 1685, the trial court failed in its "responsibility to ensure that the weight of judicial authority does not unduly influence a defendant's exercise of a right, particularly a personal and fundamental right grounded in the Constitution." *Arthur v. U.S.*, 986 A.2d 398, 407 (D.C. Cir. 2009).

B. The waiver of the right to testify must be knowing, intelligent, and voluntary

Respondent also makes the astonishing assertion that "because appellant was not required to expressly waive his right to testify, there could *certainly* be no requirement . . . that such a waiver be 'knowing, intelligent, and voluntary.'" RB 93 (emphasis added). Federal courts nationwide reject respondent's view. *U.S. v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *U.S. v. Gillenwater*, 717 F.3d 1070, 1077 (9th Cir. 2013); *U.S. v. Johnson*, 820 F.2d 1065, 1075 (9th Cir.1987); *U.S. v. Pino-Noriega,* 189 F.3d 1089, 1094 (9th Cir. 1999); *U.S. v. Aileman*, 710 F.Supp.2d 960, 968 (N.D. Cal. 2008); *McElvain v. Lewis,* 283 F.Supp.2d 1104 (C.D. Cal. 2003); *U.S. v. Hung Thien Ly,* 646 F.3d 1307, 1312-1314 (11th Cir. 2011); *U.S. v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1993), citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *U.S. v. Johnson,* 54 F.Supp.2d 1200, 1205 (D. Kan.

1999); *U.S. v. Ward*, 598 F.3d 1054, 1059 (8th Cir. 2010); *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir 1993); *Starkweather v. Smith*, 574 F.3d 399, 402-403 (7th Cir. 2009); *U.S. v. Manjarrez*, 258 F.3d 618, 623-624 (7th Cir. 2001); *U.S. v. Anderson*, 695 F.3d 390, 396 (6th Cir. 2012); *Rayborn v. U.S.*, 489 Fed.Appx. 871, 880 (6th Cir. 2012); *U.S. v. Hover*, 293 F.3d 930, 934 (6th Cir. 2002); *U.S. v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000); *Bower v. Quarterman*, 497 F.3d 459, 473 (5th Cir. 2007); *U.S. v. Mullins*, 315 F.3d 449, 452 (5th Cir. 2002); *Baires v. U.S.*, 707 F.Supp.2d 656, 666 (E.D. Vir. 2010); *U.S. v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998); *U.S. v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995); *Chang v. U.S.*, 250 F.3d 79, 83-86 (2d Cir. 2001); *Brown v. Artuz*, 124 F.3d 73, 78 (2d Cir. 1997); *DeLuca v. Lord*, 858 F.Supp. 1330, 1354 (S.D.N.Y 1994); *Garuti v. Roden*, 733 F.3d 18, 28 (1st Cir. 2013); *Rosenthal v. O'Brien*, 713 F.3d 676, 687 (1st Cir. 2013); *Lema v. U.S.*, 987 F.2d 48, 52 (1st Cir. 1993); *Arthur v. U.S.*, 986 A.2d at 406.

Respondent's argument is plainly wrong. The relinquishment of the personal and fundamental right to testify must be knowing, intelligent and voluntary in any criminal case. U.S. Const. Amends. V, VI, XIV. And, because this is a death penalty case, the Fifth Amendment also protects Duong "from being made the "'deluded instrument'" of his own execution," which is precisely the error here. *Estelle v. Smith*, 451 U.S. 454, 462 (1981), quoting, *Culombe v. Connecticut*, 367 U.S. 568, 581, (1961), quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824); U.S. Const. Amends. VIII, XIV.

C. The error requires reversal

Respondent urges this Court in assessing prejudice at the guilt phase, to apply harmless error analysis to Duong's invalid waiver of his right to testify. Critically, the state elected not to argue that this issue was harmless as to penalty. Duong does not yet have the benefit of this Court's opinion in *People v. Grimes*, No. S076339, reh'g granted, but urges this Court to find that the state can forfeit the harmless error issue by failing to timely brief it and that it did so in this case. In any event, the state cannot meet its burden to prove harmlessness by remaining silent. If this Court accepts respondent's

view that the error was harmless at guilt phase, it must treat the harm, which rendered the penalty phase an "unreliable vehicle" for determining whether Duong should live or die, as structural error, because a penalty retrial cannot remedy it. *Neder v. U.S.*, 527 U.S. 1, 2 (1999); U.S. Const. Amends. VIII, XIV. As explained below, without a new guilt phase, the harm to Duong at penalty from the denial of his fundamental right to testify at the guilt phase, is incurable. This Court must therefore either reverse Duong's death sentence and order that he be resentenced to life in prison without parole, or it must grant a new guilt phase to cure the penalty phase error.

When a defendant's constitutional rights are violated, the beneficiary of the error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. at 24. Duong urges that not only has respondent failed to meet its burden, but that this Court should find it has waived the harmlessness issue as to penalty entirely. But, even had the state briefed the issue, the violation of Duong's rights to a reliable penalty determination, to present a defense, and to due process requires reversal and a meaningful remedy.

While the error here occurred at the guilt phase, it cannot be said beyond a reasonable doubt that it did not contribute to Duong's death sentence. "Evidence that is material to guilt will often be material for sentencing purposes as well[.]" *Cone v. Bell*, 556 U.S. 449, 473-476 (2009). Thus, juries may consider defenses presented at the guilt phase during the penalty phase. See *Oregon v. Guzek*, 546 U.S. 517, 526-527 (2006). Even when guilt phase evidence or error does not affect a defendant's convictions it may compel reversal at penalty. *Cone v. Bell*, 556 U.S. at 473-476; *Brady v. Maryland*, 373 U.S. 83, 88-90 (1963). Such evidence may be relevant to a jury's penalty determination because it both explicates the circumstances of the crime and extenuates the gravity of the crime. Penal Code § 190.3 (a), (k).

Had Duong testified at guilt phase, the jury would have had the opportunity to consider his manner, demeanor, and mental state during the homicides – which the

prosecutor opined would help Duong's case – when he had no felony convictions and was still entitled to the presumption of innocence. *Delo v. Lashley*, 507 U.S. 272, 278 (1998); *U.S. v. Gooch*, 506 F.3d 1156, 1161 (9th Cir. 2007); *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2004). Because the trial court instructed the jury on both the presumption of innocence and on its right to consider felony convictions in its assessment of a witness's believability, Duong's guilt phase testimony would surely have had a greater impact than had he testified at penalty phase. CALJIC 2.20, 2.23, 2.90; 11:RT 1647; 12:RT 1886-1887, 1894-1895; 17:RT 2851-2852, 2854. Duong's silence left the jury with no sense of his personhood and no explanation of his behavior. This prejudiced him at penalty phase, because even though the trial court instructed the jury not to hold Duong's guilt phase silence against him, "No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation." *Carter v. Kentucky*, 450 U.S. 288, 303 (1981). Because Duong's testimony at any penalty retrial would lack the heightened credibility that Duong's testimony would have at a guilt phase, a penalty retrial cannot cure the harm.

Respondent mistakenly pins its argument that the error was harmless at Duong's guilt phase to *People v. Allen*, 44 Cal. 4th 843, 863-874 (2008), which is legally and factually remote from Duong's case. The harm of the error must be understood in terms of the stakes facing the defendant. This is a criminal proceeding. *Allen*, in contrast, was a non-punitive sexually violent predator commitment proceeding in which different rules apply. *Id.* at 848. The trial judge in that case deferred to counsel's decision that Allen should not testify. *Id.* This Court held that in non-criminal civil commitment proceedings, federal due process requires that the choice about whether to testify lies with defendant, even though the fifth and sixth amendment rights to testify and present a defense that protect criminal defendants do not so require. *Id.* at 869-870. While Allen was facing a two year non-punitive commitment, Duong was facing the loss of his life. Duong is entitled to the greater constitutional protections and a higher level of scrutiny to

which all criminal defendants are entitled under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the federal constitution. *U.S. v. Ward*, 448 U.S. 242, 251 (1980); *Dolan v. U.S.*, 560 U.S. 605, 626 (2010) (Roberts, C.J., dissenting) (procedural protections are of "heightened importance" for criminal defendants). Because this is a death penalty case, Duong is also protected by the Eighth Amendment and entitled to an even greater level of scrutiny than would apply in a non-capital criminal proceeding. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

Allen is also factually different from this case. In *Allen*, the jury's job was to determine whether defendant was a sexually violent predator under the Sexually Violent Predator Act, California Welfare and Institutions Code, sections 6600 et seq. *Id.* at 848. The only issue at trial was whether Allen was likely to reoffend and was a continuing danger to society. *Id.* at 857-859. Allen sought to introduce irrelevant testimony regarding the underlying charges and failed to address whether he continued to be a sexually violent predator or if he could be safely released. *Id.* at 856-858, 870-874.

Here, Duong proposed testimony that went to the heart of the charges against him: whether he had the specific intent to commit the charged crimes. Regardless of whether the jury would have accepted Duong's explanation, it had the right to hear information of which only he had personal knowledge. And, as explained above, even if Duong's testimony did not change the outcome at the guilt phase, respondent cannot demonstrate beyond a reasonable doubt that Duong's material, relevant explanation of his mental state during the guilt phase of his trial would not have swayed a reasonable juror to choose life. *Chapman v. California*, 386 U.S. at 24.

While remanding this case for a new penalty phase would be futile, this Court has two viable options for remedying the harm: It can grant Duong a new guilt phase at which he would have the opportunity to testify with the presumption of innocence attached or it can reverse the penalty phase and order him resentenced to life in prison without the possibility of parole. In either case, reversal is required.

IV. THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF DAVID POSEY, M.D., WAS AN ABUSE OF DISCRETION AND VIOLATED DUONG'S RIGHT TO PRESENT A DEFENSE

A. The trial court erred in applying Penal Code section 29 which was inapplicable to Dr. Posey's testimony

Yet again respondent ignores Duong's argument. Simply put, when it excluded Dr. Posey's testimony, the trial court got the law wrong. Section 29 on which the trial court relied applies to experts "testifying about a defendant's mental illness, mental disorder, or mental defect." The statute has no bearing on the propriety or relevance of testimony about forensic pathology or injury pattern analysis even when such testimony relates to intent. AOB 70-73.

The trial court and respondent also rely on *People v. Coddington*, 23 Cal.4th 529, 582 (2000), and *People v. McCowan*, 182 Cal.App. 3d 1, 11-15 (1986), neither of which have any bearing on Duong's claim. In *Coddington*, defendant sought to have a psychiatrist testify about his "'diminished actuality,'" i.e., whether his mental defect affected his capacity to commit the charged killings. *People v. Coddington*, 23 Cal.4th at 582. This kind of mental health evidence is explicitly prohibited by section 29. Duong never sought to introduce mental health evidence. He never raised the issue of capacity to form intent.

In *McCowan*, the trial court prohibited defense psychiatrist, Dr. Galioni from testifying as to whether defendant had the capacity to form the intent to commit the crime or whether he actually formed the specific intent required to commit the crime. The court of appeal explained that "the statute does not forbid an expert from stating his opinion about the accused's mental state. Dr. Galioni stated his opinion that, as a result of defendant's mental disorder, he was out of control when he committed the offenses. Section 29 precluded Dr. Galioni only from testifying whether defendant had one of the mental states required for the offenses-for example, malice aforethought. That ultimate determination must be made by the trier of fact." *People v. McCowan*, 182 Cal.App. 3d

at 14. Like *Coddington*, *McCowan* is solely concerned with mental health and capacity evidence. Neither case has any bearing on the issue here.

Dr. Posey had nothing to say about Duong's inability to form any mental state and indeed would not have testified as to whether Duong had or lacked the requisite specific intent to commit any particular form of criminal homicide. Rather, his expert evaluation was that the *physical* evidence made it less likely that Duong in fact intended to kill three of the victims.

The trial court's ruling based on its misunderstanding of the law cannot stand.

B. Respondent distorts the record in arguing that Posey's proposed testimony was based on a new scientific technique

The state mockingly argues that Posey's proferred testimony should have been excluded under *People v. Kelly*, 17 Cal.3d 24 (1976), because it was based on a new scientific technique it refers to as "firearm discharge intentionality." RB 115. Neither Posey nor Duong used this term in describing Posey's expertise in injury pattern analysis. Thus, in the absence of a legitimate argument that Posey's evidence was novel, respondent gives a new name to accepted techniques. Notwithstanding respondent's attempt to denigrate Dr. Posey, forensic pathologists and other non-mental health experts have frequently testified as to the relationship between physical evidence and a defendant's mental workings. AOB 70-73. If the state cannot appropriately respond to Duong's claims, it should remain silent.

C. The trial court prohibited Duong from doing exactly what the prosecution did

Respondent contends that Dr. Posey was correctly precluded from discussing whether the forensic evidence supported his opinion that Duong intended to shoot Tram but not the other victims, RB 102-111, yet fails to explain why it was proper for the prosecution's expert, Patricia Fant, to opine that Duong "aimed" at all of the victims. 7:RT 1135. The Sixth and Fourteenth Amendments prohibit the arbitrary disqualification of defense testimony "on the basis of a priori categories that presume them unworthy of

belief" when such witnesses are permitted to provide the same kind of testimony for the prosecution. *Washington v. Texas*, 388 U.S. 14, 22 (1967). When, as here, such exclusion also injects arbitrariness into the penalty phase of a death penalty case by withholding mitigating evidence from the jury it also violates the Eighth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

D. The error requires reversal

Respondent urges that the unconstitutional exclusion of Dr. Posey's testimony is harmless based on the doctrine of transferred intent. RB 119-120. This argument is waived because, although the prosecutor discussed the issue of transferred intent during discussions of Posey's testimony, he later explicitly agreed with Duong that neither side would proceed on a transferred intent theory. 12:RT 1873-1875. Accordingly the trial court did not instruct the jury on transferred intent. 12:RT 1874. The state cannot now rest its case on an issue it strategically cast off at trial.

The state repeatedly sidesteps the very real consequences to Duong of the violation of his constitutional rights. Posey's testimony in combination with Duong's testimony, the refused CALJIC 2.83, and International Club permit hearing records[3] would have supported a jury finding that he killed Tram in defense of a third party which would have changed the entire picture before the jury. But even if the jury had still convicted Duong of the first degree murder of Tram, Dr. Posey's testimony could easily have persuaded it that the other three deaths were accidental. Penal Code section 190.3(a) (3) makes a defendant eligible for the death penalty if "defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." Thus had the jury found that Duong only intended to fire the shots that killed Tram, the jury could not have found the multiple murder special circumstance which was the sole basis of Duong's death eligibility. And, if the jury had been able to consider and find justifiable

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[3] Claims III, V, VII, IX are incorporated by reference herein.

killing in defense of himself or a third party, he would have been insulated from criminal liability for inadvertently killing innocent bystanders. *People v. Mathews*, 91 Cal.App.3d 1018, 1024 (1979 Dist. 3). Thus, Duong is entitled to a new guilt phase, or to have the multiple murder special circumstance stricken.

Once again, respondent elected not to address the prejudice to Duong at penalty phase[4]. In any case, the state has not met its burden to prove that the error was harmless beyond a reasonable doubt with regard to penalty. *Chapman*, 386 U.S. at 24. The sentencer in a death penalty case must be permitted to consider all relevant mitigating evidence that defendant proffers, including the circumstances of the offense. *Smith v. Spisak*, 558 U.S. 139, 144 (2000). The defendant's mental state at the time of the homicides, even if it does not excuse his behavior, is relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 109-110 (1982). Thus *any* evidence that Duong intended to kill only one person, and not four, would undeniably have some effect on the penalty phase outcome. Even if Duong's proferred defense would not have changed the verdicts at the guilt phase, it cannot be said beyond a reasonable doubt that it would not have affected the outcome at penalty. The death verdict must be reversed.

V. THE TRIAL COURT DEPRIVED DUONG OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN IT ERRONEOUSLY RULED THAT THE PROSECUTOR COULD INTRODUCE MINIMALLY PROBATIVE, BUT HIGHLY INFLAMMATORY PROPENSITY EVIDENCE IF DUONG TESTIFIED ON HIS OWN BEHALF

A. This Court should not bar Duong from raising this claim

Arguing that this Court should bar Duong from challenging the trial court's ruling on the admission of uncharged criminal conduct under *Luce v. U.S.*, 469 U.S. 38 (1984),

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[4] Duong's request in Claim III(C) that when this Court reconsiders *People v. Grimes*, No. S076339, reh'g granted, that it find that state forfeits the issue of harmlessness by failing to timely brief it and that it has done so in this case is incorporated by reference herein.

respondent once again contends that there is no requirement that the waiver of the right to testify be knowing, intelligent, and voluntary. RB 131. As amply demonstrated in Claim III(B) above, respondent's view is meritless.[5]

In addition, respondent's attempt to distinguish Duong's reliance on the trial court's misstatement of law from the gross unfairness contemplated in *People v. Collins*, 42 Cal.3d 388-389 (1986), quoting *U.S. v. Givens*, 767 F.2d 574, 578 (9 Cir. 1985), fails. The crux of *Collins* is that fundamental fairness requires that courts not apply the *Luce* rule to a defendant who relies on legitimate legal authority in making a decision about whether to testify. *Id.* Arguing that Duong suffered no such unfairness, respondent states that "the trial court certainly never told [Duong] that he could appeal the court's decision even if he did not testify." RB 132. In fact, as explained in Claim IIIA above and in Duong's opening brief, the trial court told Duong exactly that. 10 RT 1637-1638; AOB 47, 83. Respondent goes so far as to omit the trial court's statements to Duong in recounting the proceedings surrounding the trial court's ruling. RB 122-123. However, the state cannot wash away the trial court's erroneous statement of law by pretending it did not happen.

Respondent also conflates the roles of prosecutor and judge in arguing that because the prosecutor correctly stated that Duong would not be able to appeal the trial court's decision to admit uncharged criminal conduct if he did not testify, that Duong suffered no gross unfairness. RB 132. This novel idea, that Duong should rely on the prosecutor who was seeking multiple convictions and death sentences against him rather than relying on the trial court whose responsibility it was to correctly state and apply the law, *Walton v. Arizona*, 497 U.S. at 653, is at odds with basic principles of our adversary system. See Claim III(A) above.

Should Duong prevail on claim III, he must also prevail in removing the *Luce* bar

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[5] Claim III as argued in Duong's opening brief and herein is incorporated by reference.

to raising the instant claim, a point that respondent does not contest.

B. Duong is entitled to a new penalty phase

Once again, respondent has chosen not to argue that the error, which denied Duong a reliable penalty determination, was harmless as to his death sentence[6].

IX. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF THE INTERNATIONAL CLUB PERMIT HEARING RECORDS DEPRIVED DUONG OF HIS RIGHTS TO CONFRONT WITNESSES AGAINST HIM AND TO PRESENT A DEFENSE

A. The Proffered Evidence Was Both Relevant and Admissible

Respondent presents a number of faulty arguments, many of which are addressed both legally and factually in Duong's opening brief. A few points do merit additional attention.

Respondent contends that evidence from the International Club permit hearings "had no bearing whatsoever on appellant's intent to kill." RB 176. However, Duong's intent to kill Tram was not in dispute. What was at issue was Duong's state of mind. Evidence that Bui, who was charged with maintaining security, instead courted menacing, armed patrons, including Tram, bore directly on Duong's fears and beliefs, even if unreasonable, that he or others were in danger. The proferred evidence, which would have "provided the jury with background information to help it understand the circumstances surrounding the shooting[,]" *People v. Edwards*, 54 Cal.3d 787, 818 (1991), was essential for the jury to have a clear and complete picture of the scene. Respondent's contention that the violent history and character of the International Club, and the utter failure of any responsible party to protect against violence, had no bearing on Duong's perception of whether he needed to act in defense of himself or another is simply incorrect. RB 176.

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[6] Duong's request in Claim III(C) that when this Court reconsiders *People v. Grimes*, No. S076339, reh'g granted, that it find that state forfeits the issue of harmlessness by failing to timely brief it and that it has done so in this case is incorporated by reference herein.

Duong did not commit these homicides in a church or a supermarket or a school: he committed them at the International Club, a breeding ground for violence and gang activity.

Paradoxically, the state argues that the evidence of the International Club's unmitigated atmosphere of violence was properly excluded because it would have required an "undue consumption of time." RB 170, 177; 3:RT 381, 442. If anything, the extensiveness of the proferred evidence favors the conclusion that this evidence was a reliable barometer of the setting in which the homicides occurred.

Having prevented Duong's jury from considering this critical information, the trial court refused to instruct on an imperfect defense theory based on self defense or defense of a third party, opining that "we do not have the benefit of having evidence dealing with this defendant's perception of actual or apparent danger." 11:RT 1823-1824. But, critically, the only reason why judge and jury did not have the benefit of this information was that the trial court denied Duong the opportunity to present this evidence which would have demonstrated his perception of danger.

Citing no authority, respondent points to the prosecutor's and trial court's statements, also devoid of authority, that Duong's proffer was inadmissible hearsay. RB 177. Duong objects to respondent's reliance on the prosecutor, an adversary party in this case, as legal authority. Neither the prosecutor, nor the trial court, nor respondent cited any statute, caselaw or other provision to support the state's erroneous hearsay claim. As Duong explained in detail in the AOB, the the six page 1997 document, marked Defense Exhibit A (402 hearing), that set forth actions International Club owners John Bui and Earl Nguyen had to complete for the City of El Monte to renew its business license, was admissible both as a business record within the meaning of Evidence Code section 1270 and because it was made by and within the scope of the reporting duty of a public employee under Evidence Code section 1280. Haidet's testimony was admissible as that of an expert to assist the jury in understanding matters outside common experience,

Evidence Code 801(a), and independently admissible as business records and records of public employees. Cal. Evid. Code §§ 1270, 1271, 1280. Service calls to law enforcement were also admissible because they were not admitted for their truth, but rather to explain the widely held perception by people, including police, that the International Club was dangerous– a perception directly relevant to the reasonableness of Duong's own fears about Tram. AOB 136-137.

B. Duong Was Entitled to Confront Key Prosecution Witness John Bui

Respondent also argues that to justify introducing this critical impeachment evidence, Duong should have offered evidence of an account of events other than Bui's. Respondent is incorrect. If Bui's version of events had been the sole account the jury heard, this impeachment evidence would be all the more critical because jurors would only have before them the prosecutor's word that its central witness was an upstanding businessman who did his best to follow the rules and was helpless in the face of unfortunate circumstances. Under those circumstances, Duong's proffered evidence would have given them a far clearer picture of Bui's behavior and of his motives to distort the truth and would have forced the prosecutor to address these issues in closing argument. In other words, the evidence would have "helped place the testimony of prosecution witnesses in context and assisted the jury in assessing their credibility." *People v. Box*, 23 Cal.4th 1153, 1202 (2000), disapproved on other grounds by *People v. Martinez*, 47 Cal.4th 911, 948 fn. 10 (2010).

But, assuming this Court accepts respondent's view that Duong had to demonstrate that the jury heard contradictory evidence before the trial court admitted the permit hearing evidence, such contradictions were, as explained in great detail in Duong's opening brief, in ample supply in the testimonies of Joey Minh Hoa Truong, Khiet Diep, and star prosecution witness Thi Van Le. Their testimonies included very different accounts about whether and what kind of altercation occurred between Duong and Tram before the shootings and the extent of Bui's involvement – information that bore directly on Duong's

state of mind. 6:RT 912, 915-921, 926, 929, 945, 948-950, 956, 958-966; 7:RT 988-991; 9:RT 1432-1434, 1455-1459, 1460, 1449-1452; 10:RT 1476-1477, 1481-1482, 1485-1488, 1493, 1495-1496, 1518-1523, 1526-1527, 1556-1558, 1599, 1616. Moreover, Bui himself gave inconsistent information about a number of crucial matters, including, among other things, whether he could identify about the International Club's security history, the extent to which International Club was a gang hangout, his own responsibility for maintaining security, and whether Tram was acting unusually or whether his "packing" a weapon was normal behavior at the International Club. 6:RT 965; 7:RT 1054, 1083-1086, 1089, 1095-1098, 1108-1109; AOB 8-9. Importantly, while the prosecutor was able to impeach both Truong and Diep, the trial court's exclusion of Duong's proferred evidence substantially weakened his ability to impeach Bui, tipping the scales toward the prosecution.

C. The error requires reversal

Because this is a death penalty case, this misleading omission of evidence which violated the Sixth, Eighth, and Fourteenth amendments infected both the guilt and penalty phases of Duong's trial. At the guilt phase it closed the door to powerful defenses that Duong acted in defense of himself or another. In light of the gratuitous gang evidence the trial court permitted the prosecutor to present, the trial court's erasure of International Club's gang-tainted history was all the more prejudicial.

Respondent did not brief the issue of harmlessness at penalty[7]. Even if this Court finds that the denial of Duong's constitutional rights was harmless as to his guilt, it is clear that excluding the permit hearing evidence and the defenses it would have allowed Duong to put forward impeded the jury's consideration of Duong's mental state which was directly relevant to both his character and to the circumstances of the crime. *Smith v. Spisak*, 558 U.S. at 144; *Eddings v. Oklahoma*, 455 U.S. at 109-110. The state cannot

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[7] Duong's request in Claim III(C) that when this Court reconsiders the issue of forfeiture and find that the state has forfeited the issue of harmlessness as to penalty is incorporated by reference herein.

demonstrate that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24. Duong's convictions and death sentences must be reversed.

X. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING THE PENALTY PHASE CLOSING ARGUMENT WHICH VIOLATED APPELLANT'S RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION

Respondent comments on several points that Duong addresssed in his opening brief. Only two of these issues merit additional comment, as the rest are already fully addressed in Duong's opening brief.

Relying on *People v. Adcox*, 47 Cal.3d 207, 259 (1988), respondent argues that the prosecutor's comments urging the jurors not to "take the easy way out" because they would later look in the mirror and know they had done the wrong thing was not misconduct. RB 184; 17:RT 2898-2899. Respondent's reliance on *Adcox* is misplaced.

In *Adcox*, the prosecutor "urged the jury not to decide defendant's fate based on untethered compassion for him or his mother alone, without following their lawful obligation to consider the evidence." *Id.* at 259. Here, the prosecutor's argument had nothing to do with the jury's sense of compassion, but rather the fear that if they chose life they would be haunted by their decision whereas if they chose death they would always know they had "done the right thing." 17:RT 2899. Jurors' anxieties about their future emotions was not a proper basis for imposing the death penalty and violated Duong's right to a reliable penalty determination. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); U.S. Const. Amends. VIII, XIV.

Because an admonition would not have calmed the turmoil the prosecutor instilled in the jurors, this claim is cognizable on appeal even in the absence of trial counsel's objection. *People v. Harrison*, 35 Cal.4th 208, 243 (2008).

As for the prosecutor's misstatement of facts regarding Duong's remorse about the crimes, respondent argues:

> While Chen testified that appellant was upset when he learned that Cambosa was killed (15RT 2681), his actions here speak far louder, and they demonstrate, as the prosecutor argued to the jury, that the appellant lacked remorse for his actions. Accordingly, there was no misconduct here. RB 187.

The state misses the point. The prosecutor told the jury that Duong had "not shown one tear drop of remorse." 17:RT 2904. The prosecutor was free to ask the jury to infer from the evidence that Duong was not remorseful. However, the Eighth and Fourteenth amendments prohibited him from stating that there was no evidence of remorse when the prosecutor was privy to powerful evidence, including that of Duong's suicide attempt, and his request that the trial court simply impose a death sentence, that Duong was indeed remorseful. Regardless of trial counsel's failure to object, the prosecutor's misstatements entitle Duong to a new penalty phase.

XI. THE VICTIM IMPACT TESTIMONY IN THIS CASE EXCEEDED THE SCOPE OF ADMISSIBLE EVIDENCE UNDER *PAYNE* IN VIOLATION OF DUONG'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This issue is fully addressed in Duong's opening brief, but Duong replies here to some of respondent's errors and misstatements. Respondent contends that any harm caused by Mach Dang's statement that "I thank you God for getting this defendant here because he is not able to kill another person," 16:RT 2777-2778, was harmless because the prosecutor admonished Mr. Dang and dismissed him from the stand. RB 198. Following Mr. Dang's inflammatory and irrelevant statement, the following took place:

> Mr. Meastas: Can I object, your honor. There is no question pending.
>
> Mr. Monaghan: Mr. Dang.
>
> The Court: Do you have any more questions?
>
> Mr. Monaghan: No. I have no questions. Thank you for your time, sir.

16:RT 2777-2778. No admonishment took place. Period. The prosecutor moved on because had completed his examination. Respondent once again erroneously cloaks the

prosecutor with the authority of the trial court. See claims III(A), V(A), IX(A), above. Even if the prosecutor had admonished the witness– which he certainly did not– in the absence of any curative measures from the trial court, the jury was left to use Mr. Dang's testimony as evidence in aggravation. Respondent dismisses the seriousness of Mr. Dang's outburst, noting that it was brief. Regardless of whether respondent takes error during a proceeding at which a defendant's life is at stake, the law does. In any case, brevity did not vitiate the impact of this grieving father's statement. Even a short outburst may require some curative action by a trial court. See *People v. Alexander*, 49 Cal.4th 846, 914 (2010). When a witness makes an emotional and inadmissible statement, a trial court can mitigate the prejudice by admonishing the witness, admonishing the jury, and, if necessary questioning jurors to ensure that they were not prejudiced by the witness's improper remarks. See, e.g., *People v. Alexander*, 49 Cal.4th at 914-915; *People v. Cox*, 30 Cal.4th 916, 960-961 (2003); *People v. Seiterle*, 59 Cal.2d 703, 710 (1963); *People v. Martin*, 150 Cal.App.3d 148, 162-163, (1983 Dist. 4); *U.S. v. English*, 92 F.3d 909, 912 (1996). The trial court in Duong's case could have, but did not cure the harm. Respondent cannot prove beyond a reasonable doubt that Mr. Dang's outburst was harmless. *Chapman v. California*, 386 U.S. at 24.

CONCLUSION

For the foregoing reasons, Duong's convictions and death judgement must be reversed.

DATED: April 20, 2015

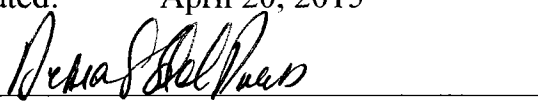
Debra S. Sabah Press
Attorney for Appellant Duong

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, DEBRA S. SABAH PRESS represent appellant Duong in this automatic appeal. I conducted a word count of this brief using my computer software.

On the basis of that computer-generated word count, I certify that this brief is 9608 words in length.

Dated: April 20, 2015



DEBRA S. SABAH PRESS
Attorney for Appellant Duong

DECLARATION OF SERVICE

Re: *People v. Duong* No. S114228

I, DEBRA S. SABAH PRESS declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442A Walnut Street #311; Berkeley, CA 94709-1405. I served a true copy of the attached

APPELLANT DUONG'S REPLY BRIEF

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

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Honorable Robert Martinez
C/O Office of the Clerk
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Pomona, CA 91766

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 20, 2015 at Berkeley, California.

DEBRA S. SABAH PRESS

DECLARATION OF SERVICE

Re: *People v. Duong* No. S114228

I, DEBRA S. SABAH PRESS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442A Walnut Street #311; Berkeley, CA 94709-1405. Iwill serve a true copy of the attached:

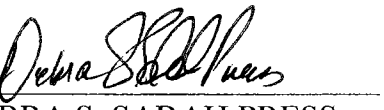
APPELLANT DUONG'S REPLY BRIEF

on the following, in person at San Quentin, California, on April 27, 2015:

Anh The Duong
P.O. Box T-84491
San Quentin, CA 94974

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

Executed on April 20, 2015 at Berkeley, California.



DEBRA S. SABAH PRESS