IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA.	)	
Plaintiff and Respondent,	)	**Los Angeles County**
vs.	)	**Superior Court No.**
ANGELINA RODRIGUEZ,	)	**BA213120**
Defendant and Appellant	)	**Supreme Court No.**
	)	**S122123**
	)	
	)	
	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County
Honorable William Pounders, Judge Presiding

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. Appellant's decision not to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I. APPELLANT WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS, A FAIR TRIAL, A REPRESENTATIVE JURY, AND RELIABLE GUILT AND PENALTY DETERMINATIONS BY THE ERRONEOUS EXCUSAL OF JURORS NO. 2 AND 8 FOR CAUSE

Respondent disagrees with appellant's contention that the trial court's excusal of prospective Jurors nos. 2 and 8 violated her rights to a fair and impartial trial and to due process. (RB 47.) Because the voir dire of these jurors established that their position on the death penalty would neither prevent nor impair their ability to impose a sentence of death, respondent is wrong.

Juror No. 2

Appellant and respondent have both cited the applicable portions of Juror no. 2's voir dire. (AOB 78-80; RB 49-52.) Although Juror no. 2 expressed some reservation in applying the death penalty, the dialogue between this prospective juror and the court did not establish that the juror held such views on the death penalty which would prevent or substantially impair her ability to impose it in this case.

Respondent relies in part on *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 to support its argument that because Juror no. 2 gave conflicting answers the trial court properly granted the prosecution's challenge. (RB 54.) However, the answers given by the juror in *Harrison* demonstrate that in the instant case, Juror no. 2's answers were not such that the challenge should have been granted.

Several times during voir dire in *Harrison*, the prospective juror said she **could not** vote for the death penalty. Although she hedged her answer by stating that "maybe" she could not do so, by the end of voir dire, she stated: "I would find it very, very difficult [to vote for the death penalty], but I could probably do it. I mean, that's as

good as I can come." After the prosecutor challenged the juror for cause, the trial court noted that the juror was "quite uncomfortable" during questioning and that "the record may not reflect the physical manifestations of her anxiety." (*Id.*, at p. 227.) It was under these circumstances that that court's determination of the prospective juror's state of mind was binding. (*Ibid.*)

But in the instant case, while the juror expressed some reluctance, she responded that there were instances when the death penalty was appropriate; that she would not automatically vote for or against the death penalty; would not necessarily consider any type of crime necessarily deserving of the death penalty; would not disregard the weighing process in favor of or against the death penalty; and that although **in her opinion the death penalty was not used enough**, she would decide cases on a case by case basis. (RT 949-982.) As recognized by respondent, the juror noted examples of specific factors where the death penalty was appropriate. These factors included a violent defendant who had committed several murders, disrupted the judicial process, and never showed remorse. (RB 50-51; RT 1008-1009.) Prospective Juror no. 2 stated that she thought that the death penalty should be carried out more often. (RT 981.)

Moreover, unlike the prospective juror in *Harrison*, where the trial court removed the juror not because she had serious doubts about the death penalty, but because the trial court found that those doubts would substantially impair her ability to follow the

court's instructions (*Id.*, at p. 228), Juror no. 2 was removed because the trial court erroneously found that the juror would only vote for death in the most extreme of situations. Here the trial court specifically noted she would "perhaps" vote for the death of a defendant "who has killed 25 people." (RT 1038-1039.) As noted above, that was not the juror's response to the court's questions. Substantial evidence does not support the trial court's findings that prospective juror no. 2 held views concerning capital punishment that substantially impaired her ability to perform her duties.

Juror no. 8

The court's dismissal of Juror no. 8 also was not permissible. Again, appellant and respondent recite the dialogue between the juror and the parties. (AOB 81-82; RB 56-60.) As recognized by respondent, Juror no. 8 was challenged by the prosecutor because of the prosecutor concluded "[Juror no. 8] basically admitted that he can't be fair to police officers and he would not judge them by the same standards as any other witness" (RB 60; RT 1101), and because, again in the prosecutor's opinion, he had given conflicting answers to whether he would impose the death penalty. (RB 60.) Respondent concludes once more that based on *Harrison*, the court was permitted to dismiss the juror. (RB 61.) However, while prospective Juror no. 8 recognized that his emotions might come into play when deciding the appropriate penalty, he assured the court and the parties that he would judge all witnesses fairly and would "divorce" his emotions from the process. (RT 1090-1091.)

In the instant case, unlike the situations presented in *People v. Griffin* (2004) 33 Cal.4th 536, (cited by respondent RB 61-62) there is not substantial evidence to support the dismissal of juror no. 8. Although, similar to *Griffin*, the trial court, may have had the opportunity to observe the demeanor of this juror in order to "assess the degree of reluctance and apprehension expressed by [the] prospective juror in responding to questioning" (*id.*, at p. 560), appellant maintains that the trial court could not "reasonably find that the prospective juror's views on the death penalty would substantially impair [his] ability to perform the duties of a juror in accordance with the trial court's instructions." (*Ibid.*)

In *Griffin*, this Court noted that one of the prospective jurors indicated that she would not want to take responsibility for voting for the death penalty and, upon further questioning, stated and reiterated that she did not know whether she *ever* could vote to impose the death penalty, regardless of the state of the evidence in a case. Another prospective juror, although stating that she supported the death penalty generally, also stated she did not know whether she actually could vote to impose the death penalty--even in a case in which she had concluded that the defendant deserved the death penalty. (*Id.*, at p. 560.) In the instant case, by contrast, there was little conflict in the juror's views and he never stated he would not or could not impose the death penalty. Juror no. 8 merely responded that he had personal feelings which made him

uncomfortable with the death penalty and might gauge his belief as less than moderately in favor of its use. (RT 110)-1101.)

For all of the reasons argued above and in appellant's opening brief, dismissal of these jurors was reversible error.

II. IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, ACCESS TO COUNSEL, FAIR TRIAL, EQUAL PROTECTION AND TO A FAIR PENALTY DETERMINATION, APPELLANT WAS SUBJECTED TO UNLAWFUL AND INHUMANE CONDITIONS OF CONFINEMENT

AND

III. THE TRIAL COURT'S DENIAL 0F TELEPHONE ACCESS AND VISITS FROM HER DEFENSE COUNSEL, AND PERMITTING JAIL INTERFERENCE WITH CORRESPONDENCE AND LEGAL MATERIALS, DEPRIVED APPELLANT OF HER FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL, AND FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

As respondent combined its arguments under one section appellant will reply in the same fashion.

Respondent's contention can be fairly summed up as "She got what she deserved." However, the entire premise of respondent's argument, that appellant was somehow responsible for the deplorable treatment and conditions she was subjected to for nearly **three years** while awaiting trial, is faulty.

First, contrary to respondent's observation (RB 79-80), the record does not indicate that appellant was placed in Module 211 of Los Angeles County Twin Towers facility for disciplinary reasons. There was no evidence that appellant presented a discipline problem or was a danger to custodial personnel. At best, one might infer that

appellant's housing assignment was in some way associated with her solicitation charge. Nevertheless, appellant maintains that the punishment heaped on her for a crime which she had not been yet found guilty was not in proportion to the "need" if there was one, to protect witnesses. In any event, if the "punishment" for the solicitation charged was that her telephone access be restricted was appropriate -- which appellant certainly does not concede -- all other improper conditions of confinement were gratuitous, unnecessary, and aimed at breaking appellant's body and spirit.[1]

Respondent contends that the conditions of appellant's confinement did not so interfere with her ability to communicate with counsel or assist in her defense so as to constitute a violation of appellant's rights to due process or effective assistance of counsel. (RB 76.) This is not so. In her opening brief, appellant outlined the onerous conditions of confinement to which she was subjected in nearly 20 pages of briefing. (AOB 89-117.) For example, while housed in Module 211, appellant's contention that no provisions were made for colder weather were confirmed by trial counsel who obtained a court order that appellant be provided with thermal underwear. (CT 23.) Appellant's lack of phone access not only impacted her access to counsel, but resulted in appellant

[1] In this case, approximately two months after her arrest, in **April 2001**, the prosecution applied *ex parte*, i.e. without notice given to appellant and her attorney and without her or her attorney having an opportunity to be heard, for an order terminating appellant's telephone privileges. (Supp. CT 1-6.) Appellant's telephone privileges were not reinstated until **August 2003**. In the interim, besides having no telephone access to counsel, appellant had few if any face-to-face confidential visits with counsel. And yet, the court's only concern was voiced to appellant's attorney who the court lamented would be "burdened" by having to visit appellant at the jail. (RT 45.)

being cut off from family, including her 11 year old daughter. (CT 196.) Trial counsel agreed that appellant's mental state had been impacted to the degree that appellant was unable to adequately assist him in case preparation. (RT 498.) Subsequent court proceedings confirmed the restrictive and inhumane conditions appellant was subjected to in Module 211. (RT 484-487, 503-504, 514-519, 525-527, 530-550.) [2]

When the parties met approximately two months after appellant had first made the trial court aware of these issues, none, but appellant's request to use the law library, which the court denied, were addressed or even commented on by the court. (RT 66-89.)

Respondent addresses each of the three specific concerns raised by appellant which were at some point pretrial addressed by the court. These concerns were: (1)

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[2] Appellant documented additional abusive conditions which included: No outside windows, only one small inside window on the door which was, for some time, covered completely resulting in a totally enclosed cell (RT 516), no "face to face interviews" with defense counsel or family, no access to tape recorded conversations (discovery) without a court order (CT 17), no telephone privileges (Supp. CT 1-6), monitored visits without appellant's knowledge (RT 19), intensifying "mental torment" and "vicious and despicable" treatment (CT 205-206), exposure to tuberculosis and other contagious diseases (CT 207), one shower every six days (CT 207), no recreation time (CT 207), manipulation of medications (CT 207), being subjected to the sexual advances of male staff members while showering" (CT 207), 25% lighting (CT 208), temperature never over 60° (CT 208), being housed in a dirty and toxic smelling cell infested with mites, poisonous spiders and fleas (CT 208), being made to wear the same uniform and underpants for a week (CT 208), being made to wear the same thermals for four months (CT 208), being made to use same blankets for three to four months (CT 208), and no provisions made for the cold weather (CT 208)

appellant's access to counsel; (2) the tampering of legal mail; and (3) the lack of access to proper medical and mental health. (RB 76-79.)

Because they concern the particularly onerous constitutional violations visited on appellant as she tried to secure her right to counsel in the most serious of all criminal cases, a death penalty prosecution, appellant's complaints that she was denied access to counsel and secure legal mail are contained in a separate argument in appellant's opening brief. (AOB 119-124.) For the most part, respondent does not directly address the case law and factual assertions made in that claim, but merely concludes the court addressed appellant's concerns, concluding as did the trial court that due to her own criminal behavior (RB 77), interference with appellant's rights was permissible. (RB 78.) Here again, respondent is wrong.

Before this Court, appellant has fully documented the efforts she undertook to acquire limited telephone access both to find new retained counsel and to communicate with the counsel with whom she ultimately was forced to proceed to trial with in Argument III (AOB 119-124), Argument II (AOB 86-89), Argument IV, regarding the court's failure to discharge retained counsel (AOB 125-142), and Argument V, regarding the court's failure to grant her *Marsden* motion. (AOB 142-180.) Appellant also fully argued the case law supporting her requests for relief. For the most part, as indicated elsewhere in this Reply, respondent simply concludes that because, at the time the trial court addressed appellant's concerns (to the extent they were addressed), she faced a

charge of solicitation to dissuade a witness from testifying, the court was correct to deny appellant's requests for access to counsel. However, it is simply unreasonable that the trial court would curtail this most essential constitutional right simply because appellant faced a charge which involved the use of a telephone.

As argued in her opening brief, appellant's ability to confer with counsel was severely restricted for all but three months of her nearly 3 year stay in county jail. Additionally, appellant's right to counsel was infringed on by the trial court's denied telephone access to her investigator, the frequent denial, for long periods of time, of "face-to-face" access to her counsel and investigator and the denial of private, confidential and timely access to counsel through the legal mail which was, without cause or justification, interfered with by jail staff.

No showing that the above restrictions were necessary in order to provide for the reasonable security of the institution and/or for the reasonable protection of the public was made. There were no allegations that the jail staff feared for custodial officer safety. The only safety concern relied on by the court to restrict appellant's telephone access was appellant's attempted "intimidation" of Palmira Gorham which took place a month after appellant's arrest and 2 1/2 years before trial began.[3] (CT 218-219.)

[3] Appellant describes this as attempted because Palmira Gorham was not dissuaded from testifying and immediately reported appellant's telephone call to the district attorney.

Appellant maintains that it was the court's obligation to ensure appellant's rights were protected. [4] That if the Los Angeles County Jail was unable or unwilling to devise a method whereby appellant could contact her attorney, the court had the ability to fashion any number of orders to assist her in first seeking new retained counsel and later in ensuring she had access to her trial counsel. It is all the more evident the court was required to protect appellant's rights given the antagonistic attitude her attorneys expressed toward her and the constant efforts of the prosecutor to disrupt the attorney-client relationship by invading this arena with secret motions and direct input when the attorney-client matters were heard. (RT 102.)

Regarding the lack of proper medical and mental health care, appellant has fully argued the efforts she undertook to alleviate the torment and the neglect of both her

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[4] The California Code of Judicial Ethics requires that a judge:
"participate in establishing, maintaining, and enforcing high standards of conduct," and warns that the judge "shall personally observe those standards so that the integrity and independence of the judiciary will be preserved" (Canon 1), "respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Canon 2), "require order and decorum in proceedings before the judge." (Canon 3B(2)), "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."(Canon 3B(4)), "perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" (Canon 3B(5)), and "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel, or others." (Canon 3B(6)).

mental and physical health suffered at the hands of jail staff in Argument III, Argument II (AOB 86-124), and Argument VI (AOB 180-198) and Argument VIII (AOB 212-227) in her opening brief (AOB 86-124, 180-198, 212-227), and feels no need to reassert this wealth of evidence which, for the most part respondent does not address. Appellant notes, however, that in no way did the treatment she received from the court satisfy the obligation that appellant receive timely and proper care. For example, respondent praises the court for responding to trial counsel's contention that appellant's mental state had deteriorated thereby prompting the court's request for a mental status examine. However no such mental status examination was performed. (See Argument VI, AOB 180-198 re: denial of hearing re: competency to proceed to trial.) Also, respondent praises the court too for paying attention to appellant's complaints when it stated: "If [appellant] knows what she needs, we'll order that (RT 417; RB 79.) However, this same court derided appellant when she explained she was suffering serious mental issues by stating:

> Isn't this kind of a catch 22 with a person who says he or she need psychological help is the one who's to be examined? In other words, how -- the point is if you really needed psychological treatment, psychiatric help, I would think you'd be the last person to know about that. It would be somebody else that would say something is strange about the things you're saying or what you're doing, we need to see what kind of mental health you need. You're the one saying you need mental help. (RT 631.)

And this same judge, who, in the above passage, forcefully explained "his opinion" on how someone would present if mentally ill, in the next breath claims to know nothing of mental health:

> Beyond that whenever the doctors and the doctors are the ones that need to evaluate her both physically and mentally, this court does not have a medical degree or psychiatric degree, so I'm really not qualified to say what's happening is appropriate or inappropriate....(RT 494.)

As argued in her opening brief, throughout the proceedings what emerged was the picture of a woman who, over the course of three years of reprehensible treatment, predictably continued to decompensate mentally. (AOB 197.) Appellant maintains that placement of appellant in administrative segregation in a situation of sleep deprivation, physical and mental abuse, deliberate indifference to her welfare, and arbitrary deprivation of rights was intended to break appellant, or at least punish her for her alleged crimes. This housing assignment amounted to a sustained, low-intensity attack on appellant that deprived her of her ability to participate in her defense. What few sincere objections were rendered by her defense counsel were not adequately addressed by the trial court and ultimately the court came to blame appellant for the unconscionable situation in which she found herself.

Many of the conditions appellant suffered flowed from the unremitting hostility of custodial officers, who took it upon themselves to administer punishment to appellant while she was housed under their care. For example custodial officers

confirmed that appellant was housed in the most restrictive housing alternative, that appellant's cell had no windows which faced outside and that the one window which faced the jail interior was covered. (RT 514-517, 525-527.) Confirming perhaps the most inhumane treatment of appellant by jail staff, custodial officers were forced to confirm that appellant was in complete isolation because of the staff's practice of applying duct tape and/or a towel to block what little light and sound came through the bottom of appellant's cell door. (RT 524, 541-542.)

Additionally, interference with legal mail both to and from appellant and removal of legal materials from appellant's cell were undertaken without cause. These repeated violations of her privacy and of the confidentiality of her legal materials created a permanent unease within appellant. The trial court undertook no efforts to determine whether appellant's repeated complaints about interference with her legal rights occurred and if they did under what authority. The trial court undertook no efforts to remedy the interference with appellant's mail and legal materials.

The deleterious effects on appellant's mind and body from sexual-harassment, isolation, emotional abuse, ineffective medical treatment and arbitrary withholding of rights guaranteed by the state and federal constitution compromised her ability to assist in her own defense. (See Arguments II and III AOB 86-124.)

The effort to ameliorate appellant's treatment preoccupied both counsel and appellant at different times throughout the trial, and prevented them from concentrating on the task at hand, of preparing appellant's defense.

These conditions violated appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law, to assist in her own defense, the effective assistance of counsel, and the right to a reliable guilt and penalty determination. They undermined every aspect of appellant's defense, and ensured that her conviction was obtained at a fundamentally unfair proceeding.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DISCHARGE APPELLANT'S RETAINED ATTORNEY AT HER REQUEST

Respondent contends that "[t]here is nothing in the record to indicate that the trial court ever denied appellant's request to remove her retained counsel [Ward]," and for that reason, appellant's claim that the trial court committed reversible error when it failed to discharge Ward at her request must be rejected. (RB 81-88.) Respondent is being obtuse, because how else is this Court to interpret the trial court's refusal for months to grant appellant's request and its direct order to Ward to "continue to work on the case," in spite of appellant's direction for him to stop? (RT 46.) Here, contrary respondent's mischaracterization of the efforts of the trial court to accommodate appellant's demand to replace her retained counsel as "extraordinary," the trial court forced appellant to be represented by Ward for more than eight (8) months [December 14, 2011 - August 13, 2012 (RT 10-11, 96; CT 187)] after her first request to replace him.

Although during that period of time appellant appeared in the trial court on six occasions and both orally and in writing advised the court of her continued desire to replace Ward, rather than remove Ward, the court ordered him to continue to work on her case and delayed ruling on the matter. Moreover, in spite of appellant's written notice in January, 2002, that she wanted to use what remained of the retainer paid to Ward to pay for new counsel , over the next seven (7) months, Ward exhausted all of the funds appellant had paid to retain him, leaving appellant unable to exercise her constitutional right to retain counsel of her choosing. It was not until August 13, 2002, after Ward requested to be relieved that the court was persuaded to vacate his appointment. (RT 34, 45-46, 69, 74 [Ward: "I feel if they wanted to argue about [returning the retainer, they can go to civil court on a contract basis or they can go to the State Bar or whomever they want to...." CT 195, 220-228.)

Appellant and respondent agree on the applicable law (AOB at 125, RB at 86):

A defendant in a criminal case has a constitutional right to retain counsel of her choosing, and to discharge retained counsel as she sees fit. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) A trial court may deny a motion to discharge retained counsel **only** if "discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ibid.*) Respondent adds that under federal law, "a trial court has 'wide latitude in balancing the right to counsel of choice against the needs of fairness' and 'against the

demands of its calendar.'" (RB at p. 86 citing *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152.) However, respondent does not argue appellant's claim should be denied because either reason supported the trial court's actions in the instant case.

The record of appearances after appellant's first request to remove Ward demonstrates that the reasons employed to force appellant to continue to be represented by a retained attorney not of her choosing did not fall within that narrow justification of "significant prejudice to the defendant" or "disruption of the orderly processes of justice" sanctioned by the law.

On December 14, 2001, appellant advised the court that she was looking for new counsel. By this time, appellant had been represented by Ward for three (3) months. During that period of time appellant had not spoken to Ward by telephone and Ward had not arranged to visit with his client "face-to-face." (RT 14-17.) At this hearing, the prosecutor argued against appellant's use of a telephone for any purpose, including to seek new counsel. The trial court advised appellant it would not reinstate appellant's telephone privileges, even to contact new counsel. (RT 14-17.)

Because a criminal defendant has a constitutional right to hire counsel of his choice (*United States v. Ray* (9th Cir. 1984) 731 F.2d 1361, 1365),[5] in the instant case,

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[5] This right is qualified because it may be curtailed to serve a "compelling purpose." (*United States v. Lillie* (9th Cir. 1993) 989 F.2d 1054, 1055-1056.) An example of a compelling purpose exists when a delay in the proceedings and the prosecution's interest in the prompt and efficient administration of justice outweighs the defendant's need for new counsel to adequately defend himself. (*United States v. Kelm* (9th Cir.

even assuming the trial court was justified in not permitting appellant access to a telephone to contact new counsel, it was not permitted to entirely ignore appellant's Sixth Amendment right to counsel of choice. Although access to counsel would be more difficult than had appellant been permitted telephone access, neither the court nor trial counsel were entitled to abdicate their obligation to protect appellant's federal and state constitutional rights. [6]

Approximately two weeks later, appellant advised the court that lack of access to the telephone had seriously impacted her attempts to retain an attorney of her own choosing. Appellant sought the court's guidance on how to obtain appointed counsel should, after the next 30 days, her efforts to retain chosen counsel fail. (CT 193.)

On January 16, 2002, when the parties next met and appellant reasserted her desire to no longer be represented by Mr. Ward. [7] The court explicitly recognized that there was no procedural reason why appellant could not retain new counsel of her choosing, however, the court made no efforts to fashion a method by which that might be accomplished, advising appellant "it's up to you essentially...." (RT 34-36.)

The matter was put over for approximately two more months so that appellant

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1987) 827 F.2d 1319, 1322.) The court here expressly indicated there were no timeliness bars to removal of Ward. (RT 36.)

[6] Appellant intends to raise the issues of trial counsel's abdication of appellant in this regard in collateral proceedings before this Court.

[7] By this time the court was aware that appellant had notified Mr. Ward, in writing that he was fired and requested that portion of the retainer that was unused be returned to her for the purpose of retaining new counsel. (CT 193-195.)

could continue, by whatever means she had at her disposal, to retain counsel of her own choosing. On August 1, 2002, a week after the prosecutor announced its intention to seek the death penalty, Ward requested he be relieved. (CT 218, 220.)

As appellant explained in her opening brief, Ward prepared a formal motion to be relieved which he served on the prosecution. (AOB 135.)[8] In his motion, Ward expressly indicated that appellant was "unable to meet the financial obligations to counsel...." (CT 222.) On August 13, 2002, the court granted Ward's motion to be relieved. (RT 96.)

Here, the denial of the motion to discharge was structural error requiring reversal of the guilt and penalty phase judgments. The right to counsel is fundamental. "The right of one charged with crime to counsel may not be deemed fundamental in some countries, but it is in ours." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) "The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel ...." (*Bland v. California Department of Correction, supra* 20 F.3d 1469.)

Respondent cannot hide behind the lack of the specific words "your motion is denied" when the de facto result of the court's inaction in response to appellant's repeated oral and written requests over a period of more than eight (8) months to remove retained counsel Ward so that she could retain new counsel of her choosing, aggravated by the court's order that counsel continue to work on the case, thus

[8] In his motion, Ward divulged confidential attorney client communications, and disparaged appellant's character and conduct. (CT 220-228.)

completely exhausting the retainer paid, was to force appellant to proceed with a retained counsel, not of her choosing, in violation of her state and federal rights to counsel. Appellant is entitled to automatic reversal.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S *MARSDEN* MOTION FOR APPOINTMENT OF NEW COUNSEL

Respondent claims that "under the circumstances" the trial court "properly exercised its discretion in denying appellant's *Marsden*[9] motion." (RB 88.) Respondent is wrong.

In her opening brief, appellant argued that her motion should have been granted because (1) her attorney was not providing adequate representation *and* (2) because she and counsel Houchin had become embroiled in an irreconcilable conflict. (AOB 142-180.) Respondent addressed only the first ground and concluded that as appellant's complaints "largely amounted to a disagreement over trial tactics and generalized distrust in her attorney and whether he was prepared to go to trial" (RB 99), the trial court properly denied appellant's motion. (RB 100.) In the instant case, neither appellant nor the court addressed appellant's contention that she and her attorney had become embroiled in an irreconcilable conflict. [10] Appellant maintains that the trial

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[9] *People v. Marsden* (1973) 2 Cal.3d 118.

[10] Respondent contends that the court "denied appellant's motion because appellant failed to demonstrate ...that she and counsel had become embroiled in an irreconcilable conflict." (RB 100.) Respondent fails to cite to any portion of the record which indicates that court denied appellant's motion on that ground, and appellant has found no portion of the record supporting respondent's contention.

court should have granted appellant's motion on both grounds that Houchin was not providing adequate representation and that she and Houchin had become embroiled in an irreconcilable conflict.

A. Houchin's Failure to Provide Adequate Representation

1. The Court's Inquiry was Inadequate and Houchin did in fact provide ineffective assistance of counsel

Respondent argues that appellant's case is distinguishable from cases where this Court has found error because appellant had a full opportunity to state her concerns and the court discussed those concerns determining the extent and quality of trial counsel's work. (RB 99-100.) It is uncontested that appellant had an "opportunity" to voice her complaints at the *Mardsen* hearing. However, the trial court did not adequately conduct its inquiry *into the substance of appellant's claims.* Rather, the court based its finding on unsworn and unsupported statements of defense counsel -- statements which did not satisfy appellant's concerns and did not constitute a sufficient basis for denial of appellant's motion.

Appellant clearly articulated the areas of counsel's representation where she did not understand the decisions he had made, the tactics he had chosen, or the legal basis for his reliance on claiming he need not follow the suggestions or urgings she made.

The first area concerned counsel's choice of Dr. Vicary as a mental health expert. Appellant rightly noted Dr. Vicary was recently impeached by his actions in the

Menendez brother murder case, [11] and that although trial was a mere two months off, Dr. Vicary and appellant had not yet met. (CT 483.) Trial counsel told the court Vicary would rely on the report of Dr. Romanoff who had previously examined appellant but because of damaging information contained in his report, could not be used in the case. The court did not address the propriety of sharing a damaging report with a testifying expert. And, as might be expected by competent counsel, Dr, Vicary was impeached and forced to reveal extremely damaging statements of appellant's daughter which directly implicated appellant in her husband's murder. (See AOB 244-245.) Appellant was correct, too, that Vicary could not be properly prepared in so short of time. He was repeatedly impeached by his failure to independently verify the information given to him by appellant. Thus, Houchin's decision to use Vicary was damaging to appellant and did not constitute effective assistance of counsel. (See AOB Argument X 243-246 detailing Vicary's testimony regarding appellant's daughter's alleged statements to investigators, and the prosecutor's argument based upon it at (RT 3760-3761).)

Appellant expressed considerable doubt that Houchin was capable of handing the complexities of her case without assistance. She rightly noted that defendants facing capital charges are entitled to ancillary services. Appellant understood the need to have

[11] Lyle and Eric Menendez faced capital charges in Los Angeles County in 1996 where it was alleged that defense counsel convinced Dr. Vicary to alter his examination notes.

a defense team which included mental health specialists.[12] Without inquiring of defense counsel why he would not want to or did not need to expand the defense team to comport with ABA Guidelines i.e. seeking a tactical explanation for counsel's decision "to go it alone," the court announced to appellant that *in the court's opinion* two attorneys, a penalty phase investigator, and a mental health specialist were unnecessary. (RT 620.)

Appellant understood that her mental state was relevant at both the guilt and penalty phases of the trial. She expressed her (correct) belief that expert assistance regarding her state of mind could be introduced as to the specific intent element of the charges she faced. She also expressed her belief that although she "could" testify to her mental state, that "might not be the most effective way to explain it to the jury." (RT 630-631.) Without any evidence that trial counsel had undertaken the necessary investigation so as to make a tactical decision *not to* offer expert testimony on the issue of appellant's specific intent, the court concluded Houchin's decisions were made for tactical reasons. This is in spite of the fact that, as the court recognized, some of the most damaging evidence against appellant -- the video made by undercover officers--

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[12] 2003 ABA Guideline 4.1, entitled "The Defense Team and Supporting Services, which was in place at the time of appellant's jury trial, provided for a defense team that provided high quality legal representation, and which should consist of no fewer than qualified attorneys, an investigator, and a mitigation specialist and should have at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

would lead a reasonable jury to conclude appellant was "intelligent, charming, lucid, very persuasive" and that her mind was working "very well." (RT 631.) [13]

As noted above, Houchin did in fact fail to represent appellant adequately. His decision to use Vicary was disastrous. Vicary was ill prepared. He did not verify the information provided to him almost entirely by appellant and was impeached on that very shortcoming. Having been provided by Houchin with a prior doctor's report, Vicary offered some of the most damaging testimony against appellant -- that she intentionally enlisted the assistance of her 9 year old daughter to kill her husband. Vicary did not testify to the any aspect of appellant's mental state which might negate the specific intent element of the crimes with which she was charged.

Houchin also gave appellant erroneous information regarding presentation of mental health evidence. Appellant's mental state was relevant at both the guilt and penalty phases of trial. Yet, Houchin advised appellant that only could testify to her mental state. Houchin told the court: "She wishes that a doctor take the stand and in her place testify as to what it was that caused her to say and do those things which the court has been apprised of in different testimony, and also the videotape the court has also reviewed. Diminished capacity is no longer a defense. I've indicated to her that

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[13] Of course since appellant's specific intent was at issue, trial counsel's representation only appellant could offer evidence of her mental state was wrong. Moreover, any suggestion that only she could offer evidence of her mental state would FORCE appellant to take the stand and subject herself to cross examination against her or forgo offering evidence of her mental state all together.

certainly if there are some things going on in her head, she has every opportunity to take the stand and explain to the trier of fact why it is that she did the things that she did. She can get on the stand and she can contradict the truthfulness of different testimonies that we have heard here and what I anticipate will be other testimony after this trial begins." (RT 639.) But it is not legally correct that only appellant could offer such evidence. Moreover, Houchin's "advice" to appellant that only she could testify as to her mental state put appellant in the no win situation of either forgoing mental health testimony entirely or subjecting herself to cross examination.

B. Evidence of an Irreconcilable Conflict

1. The Court's Inquiry was Inadequate and the Parties had Become Embroiled in an Irreconcilable Conflict.

The trial court's inquiry into appellant's reasons for requesting new counsel was insufficient. In fact, it was nonexistent. As recognized by this Court, a trial court must "carefully inquire into defendant's reasons for requesting substitution of counsel." (*People v. Memro* (1995) 11 Cal.4th 786, 857, citing *People v. Fierro*, (1991) 1 Cal.4th 173, 206.) Because the trial court did not carefully inquire into appellant's request to substitute counsel, the court could not assess the extent of the breakdown in the attorney-client relationship. As noted above, at best, the trial court conducted a perfunctory inquiry of appellant's assertions of inadequate representation.

Moreover, contrary to respondent's claim, the court did improperly rely heavily on its own past personal experience with appellant's trial counsel. The court vouched

for Mr. Houchin and discounted appellant's very real concerns that she was not receiving adequate representation and that she and Houchin were embroiled in an irreconcilable conflict. The court relied, too, on its erroneous and unsupported conclusions that appellant was manipulating the legal system (a seed planted by the prosecution who had no right to be present or express any opinion regarding appellant's legal representation (RT 102)), that appellant "didn't like" the appointed public defender (who, in fact, was required to withdraw after declaring a legal conflict), "didn't like" her retained counsel (who appellant had no duty to retain whether she "liked" him or not), and caused Mr. Yamamoto, one of the "finest attorney's" he had ever seen to "for some reason" declare a conflict and withdraw, as grounds to deny the motion to substitute appointed counsel. (RT 643-646.)

Appellant clearly indicated to the court that there was a grave conflict between her and her appointed counsel Houchin. She requested a hearing based on "conflict." (CT 482.) She told the court that there had been a "complete breakdown of trust and conflicts of interest." (CT 483; RT 619.) She advised the court that the relationship had deteriorated to the point that they were "at each other's throat now." Appellant felt counsel was just pushing to get things over with. (RT 626-627.) Appellant told the court that the two were "butting heads." (RT 629.)

Contrary to the court's conclusion that appellant was determined not to get along with any attorney, appellant explained that for over two years, she had worked

with and attempted to place trust in Houchin. (RT 631.) Simply put, there was no working attorney-client relationship between appellant and Houchin. Appellant told the court she did not understand what he was doing, his approach, or why he was making the decision he was making. (RT 633.)

Although trial counsel admitted to there being difficulties between appellant and him (RT 639), the trial court failed to inquire into this ground for replacing counsel.

For the reasons stated above and in appellant's opening brief the *Marsden* motion should have been granted, and reversal is required.

VI. APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BY THE DENIAL OF ANY MEANINGFUL HEARING ON HER COMPETENCY TO PROCEED TO TRIAL

Respondent disagrees with appellant's contention that she was denied a meaningful hearing on her competency to proceed to trial. (RB 100-108.) Although respondent acknowledges that appellant's competency to proceed to trial was a recurring theme for more than a year and that the court did in fact order a psychiatric evaluation of appellant (RB 106-107), the gist of respondent's argument appears to be that although no actual competency hearing took place and no psychiatric report was forthcoming, the recitation by "the program director for women's health in the jail" that appellant had been receiving treatment for depression and anxiety once every three weeks, was somehow adequate to satisfy the statutory requirements of Penal Code

section 1368 and appellant's state and federal rights of due process to be competent to stand trial. (RB 107-108.) Respondent is very wrong.

Appellant and respondent agree that under federal law, the conviction of a defendant who is legally incompetent violates the federal constitution. This is so because the conviction of a person while legally incompetent is a violation of federal substantive due process and requires reversal. (*Pate v. Robinson* (1966) 383 U.S. 375, 378; *Medina v. California* (1992) 505 U.S. 437, 453; *People v. Pennington* (1967) 66 Cal.2d 508, 511.) In *Riggins v. Nevada* (1975) 504 .S. 127, 139-40, Justice Kennedy described the fundamental nature of the right of competency:

> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." (*Id.,* at pp. 139-40, conc.)

The parties agree too that under California law, criminal proceedings may not be maintained against a defendant who is mentally incompetent to stand trial. Under California law, a defendant is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code §1367.)

This statutory definition is compelled under the federal due process clause. In *Dusky v. United States* (1960) 362 U.S. 408, the Court stated that to be competent to

stand trial, the accused must (1) be rational; (2) have a sufficient ability to consult with counsel with a reasonable degree of rational understanding; and (3) have a rational and factual understanding of the proceedings. In *Drope v. Missouri* (1975) 420 U.S. 162, 171, the High Court added a fourth prong to the competency requirement: the accused must have the ability to assist counsel in preparing his defense. (See also *Medina v. California, supra,* 505 U.S. at 452 [the defendant's inability to assist counsel can be, in and of itself, probative evidence of incompetency].) (AOB 180-182; RB 104-106.)

In the instant case, appellant, defense counsel, and the court *each* expressed doubt as to appellant's mental state and its impact on her ability to stand trial. (CT 122, 412-413; RT 416-417.) Defense counsel's concerns, at the August 28, 2033 pretrial hearing, directly related to appellant's present ability to prepare for trial which was scheduled to begin in less than two (2) months:

> Well, my client, and I should say I have concerns after speaking with my client. I have seen certainly a change in her demeanor, and an onset of that has been within the last two weeks. This is certainly additional or different than what they believed they've been treating her for the last two years. (RT 416-417.)

Then:

> I'd like for someone to sit down and talk to her and see what her mental state is. I'm having a difficult time even when I go down to see her to keep her focused on things. Her emotional state is certainly not conducive to preparing for this trial. (RT 417.)

The next day, further discussions were had regarding appellant's mental condition. Defense counsel agreed with appellant's representations to the court that

she was not able to assist him in trial preparation. (RT 491, 498.) The court was compelled to and did in fact initiate competency proceedings. It specifically recognized that a psychiatric evaluation was required, requested one be performed and that a report be prepared for the court. (RT 494- 5; CT 442-443.)[14]

> [T]he doctors and the doctors are the ones that need to evaluate her both physically and mentally, this court does not have a medical degree or psychiatric degree, so I'm really not qualified to say what's happening is appropriate or inappropriate, and that's why we're talking about doing a better order. (RT 494.)

The court's minute order specified appellant receive a "psychiatric evaluation" and that a report be provided to the court by September 15, 2003. (CT 442-443.)

In spite of the court's order, as respondent must admit, no evaluation or report followed. Instead, on September 15, 2003, at a pretrial hearing concerning **appellant's conditions of confinement** (RT 503), internal jail staff advised the court of the counseling and prescriptions appellant was currently receiving. (RT 505-509; RB 107.)

In the instant case, both defense counsel and the court expressed doubts as to appellant's competency to stand trial. Defense counsel's primary concern was that appellant was unable to assist him in the preparation of her defense. In spite of the court's order that appellant undergo a "psychiatric evaluation" (CT 442-443), no evaluation was undertaken. Moreover, none of the testimony at the hearing on appellant's conditions of confinement addressed appellant's inability to assist her

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[14] Respondent erroneously refers to this discussion as "an in camera competency hearing." (RB 107.)

attorney in preparation for her capital trial. (See *People v. Superior Court* (Campbell) (1975) 51 Cal.App.3d 459 [The test of a Penal Code section 1368 proceeding is the *capacity* to cooperate....].) The testimony addressed only the medications appellant received and the frequency of visits by mental health personal. Moreover, the focus of the hearing was whether, due to the isolating aspects of appellant's housing assignment, whether it might be changed and whether appellant's access to counseling could be increased. (RT 505-513.)

Respondent contends that the nature and extent of appellant's participation in the proceedings demonstrated that she understood their purpose and did not provide substantial evidence of incompetency. Respondent is wrong. Foremost, the question of appellant's competency did not concern whether she understood the proceedings, but whether she had the capacity to assist her attorney. Additionally, as argued in her opening brief, appellant's mental deterioration was likely in part brought about by her conditions of confinement.

Despite the recognition by the court and counsel that a psychiatric evaluation and a hearing on appellants' competency was needed, none was ever held. The trial of a mentally incompetent defendant is a denial of due process and constitutes *per se* reversible error. *(Dusky* v. *United States* (1960) 362 U.S. 402; *James* v. *Singletary* (11thCir. 1992) 957 F.2d 1562, 1571.)

VII. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF IMPROPER DEMEANOR TESTIMONY

In her opening brief, appellant argued that the trial court improperly permitted various witnesses to offer their opinion as to appellant's demeanor. (AOB 198-212.) Respondent contends first, that due to trial counsel's failure to object to the opinion testimony of each witness, the argument has been waived, and that second, the testimony regarding appellant's demeanor was properly admitted. (RB 113-118.)

A. This Court Should Address Appellant's Claim on its Merits

Citing to a number of cases, respondent notes that this Court has held that a failure to object to the qualifications of a witness offering opinions based on a special skill, training, and experience at trial forfeits the issue on appeal. (RB 113 citing *People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Williams* (1997) 16 Cal.4th 153, 194-195; *People v. Roberts* (1992) 2 Cal.4th 271, 298.) However, respondent also notes that in *People v. Zamudio* (2008) 43 Cal.4th 327, this Court advised that while the defendant's failure to make a timely and specific object on the ground asserted on appeal does in fact make that ground not cognizable, no particular form of objection is required. Rather, the objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so that the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*Id.*, at p. 354, citing *People v. Partida* (2005) 37 Cal.4th 428, 435; RB 113-114.)

In *Partida*, the question before this Court was whether a trial objection on Evidence Code section 352 grounds preserved the appellate argument that admitting the evidence violated a defendant's federal due process rights and, if the argument was preserved, under what circumstances error of this nature violated due process. (*People v. Partida*, supra, 37 Cal.4th at p. 431.) In that case, the defendant objected to gang evidence at trial on the ground that it should have been excluded under Evidence Code section 352. He did not object at trial that admitting the evidence would violate his due process rights. (*Id.*, at 433.) This Court concluded that a trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial. A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process. *(Ibid.)*

In *People v. Zamudio*, the question before this Court concerned the defendant's ability to raise constitutional objections to the admission of prejudicial laboratory technician testimony on appeal when none of those constitutional objections had been raised below. (*People v. Zamudio*, supra, 43 Cal.4th at p. 353.) Recognizing that Zamudio's constitutional arguments were "cognizable only to the extent they [did] not involve facts or legal standards different from those defendant presented to the trial

court, citing *Partida*, this Court concluded that Zamudio could not argue on appeal that constitutional provisions required exclusion of the evidence for reasons other than those articulated in his argument at trial. (*Ibid.*)

In the instant case, defense counsel objected to the prosecutor's questions that ultimately led to Detective Steinwand's testimony regarding appellant's demeanor after she allegedly realized that law enforcement knew she had been lying about the circumstances of her husband's death (RT 229-231); objected to Officer Sharpe's testimony that appellant's demeanor was unusual and rehearsed (RT 1785); objected to Frank's sisters' testimony that appellant's demeanor was odd, indifferent and without emotion (RT 1816-1817, 1825, 1876-1881); objected to insurance agent Marracino's testimony that appellant's demeanor was odd and emotionless (RT 1864-1865); and objected to Sergeant Wisley's testimony that appellant's demeanor was odd and that appellant was more concerned about life insurance money than her loss (RT 1915-1917, 2029-2030.) On two occasions, defense counsel's objections on the grounds of speculation were sustained. (RT 231, 1825.)

Respondent argues that the above mentioned demeanor testimony was properly admitted. (RB 114-117.) This is not so. The demeanor testimony described above and in appellant's opening brief was irrelevant, without foundation and based on speculation. (AOB 204-209.) In each instance, the prosecutor sought to admit appellant's response to the circumstances of her husband's death and/or questions put

to her by law enforcement testimony to demonstrate appellant's character, guilty state of mind and malice toward her husband. However, none of the witnesses had any bases of knowledge to determine how, if in any way, appellant's responses, demeanor, or composure was indicative of some conclusion about her involvement in her husband's death. These witnesses simply did not know appellant and therefore had no basis to draw any relevant conclusion about her individual responses or demeanor. Given the fact that trial counsel objected on grounds of speculation and because both the lower court and the prosecutor understood that the objection was grounded in each of the witness's lack of ability or knowledge to draw conclusions on how appellant might respond in any given situation, the claim is not waived and admission of the evidence was error.

Respondent argues that even in the admission of the demeanor evidence was erroneous, the error was harmless. (RB 117-118.) Appellant disagrees. Evidence that several witnesses concluded appellant was cold, calculating and indifferent to her husband's death and suffering was relied on by the prosecutor to convince the jury to find appellant guilty of cold blooded first degree murder for financial gain and that she was deserving of the death penalty. (RT 3596, 2659-2600.) This error was not harmless beyond a reasonable doubt.

VIII. EVIDENCE OF JUDICIAL BIAS REQUIRES REVERSAL OF APPELLANT CONVICTIONS AND DEATH SENTENCE

Respondent contends that appellant's argument that evidence of judicial bias requires reversal should be rejected on two grounds, first, that the error has been waived and second that no judicial bias occurred. (RB 118-123.) Respondent is wrong.

Although this Court has held that a claim of judicial bias is waived if not made below, this Court has reached the merits of those claims even when waiver has been found. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.) For several reasons, the instant case is one which is appropriate to decide on the merits.

As a general rule, an appellate court will not reach an issue that was not raised in the trial court. (See *Doers* v. *Golden Gate Bridge ete. Dist.* (1979) 23 Ca1.3d 180, 184, fn. 1.) However, the rigidness of this general rule may inappropriately shield from correction miscarriages of justice and fundamental unfairness in trials. Firm adherence to the general rule can result in a "monstrous sacrifice of justice on the altar of a common law procedural tradition...." (Sunderland, *The Problem of Appellate Review* (1927) 5 Tex. L. Rev. 126, 141.) .

As alluded to in appellant's opening brief and as will be argued thoroughly in appellant's petition for a writ of habeas corpus, appellant's trial attorney was complicit in the trial court's actual bias and/or appearance of bias against appellant. It is unreasonable to expect trial counsel to have recognized the court's bias, much less

undertaken measures to remedy it. Waiver should not prevent this court from reaching the merits of appellant's claim.

Generally speaking, appellant and respondent agree on the applicable law. (AOB 213-214; RB 118-119.) A criminal defendant has a due process right to an impartial trial judge under both the state and federal constitutions. (See *People v. Rundle* (2008) 43 Cal.4th 1067, 1111.) These due process rights guarantee that a litigant shall proceed before an impartial and disinterested tribunal in order to preserve "both the appearance and reality of fairness." (*Marshall v. Jerico, Inc.* (1980) 446 U.S. 238, 242.)

In her opening brief, appellant cited to comments contained in pages upon pages of the appellate record which demonstrate the trial court's bias by its comments and lack of response to appellant's pleas to have the court intercede to protect her basic human and legal rights. (AOB 216-226.) For the most part, respondent ignores the court's actual comments and shifts the "blame" to appellant [RB: 120: "appellant appeared to be manipulating the legal system"; "appellant largely has herself to blame"; "appellant's endless complaints"], concluding appellant was completely at fault, and absolves the trial court of any wrongdoing. Both ignore the trial court's obligation to ensure appellant a fair trial.

As noted in Canon 1 of the Code of Judicial Ethics, "[a]n independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and

shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. Canon B (4) requires that a judge "be patient, dignified, and courteous to litigants..."with whom the judge deals in an official capacity. Even the appearance of bias is to be avoided. (See Canon B (5).)

The trial court's bias against appellant can be traced back to the first time appellant approached the court seeking to discharge her retained counsel and asking for telephone access so that she could contact new counsel. At this point appellant had not had telephone access for nearly 8 months.

Respondent contends that when appellant requested telephone access at that time, the court "simply advised appellant that the issue had already been decided, and that the position was not going to change...." (RB 120.) Although the court did in fact make this comment, that is not all it said, and what it said and how it ruled, as discussed below, demonstrate the complete lack of effort by the court to protect appellant's right to counsel.

Within two months of appellant's arrest, at the request of the prosecution at an *ex parte* hearing to which appellant was not a party, was not represented by counsel and which took place before a judge other than appellant's trial judge, that appellant's telephone privileges were terminated. (CT 189; Supp. CT 1-2; RT 192.) Nearly eight (8) months later (and nearly nine months after the alleged dissuading act took place), appellant advised the trial court she wanted to fire retained counsel and retain new

counsel. (RT 14-17; CT 33-34.) The record is clear that appellant had quietly accepted the punishment meted out for her alleged solicitation act until she desired to hire a new attorney. Even so, the trial court never permitted appellant or her counsel a hearing on the issue of reinstatement and worse, when appellant addressed the court, contrary to respondent's characterization that the court "simply advised" appellant it would not revisit appellant's concerns with counsel, the court launched into a personal attack which did not leave any room for an impartial discussion of the matter.

> The Court: I'm not going to jump in here and at your word decide that I'm going to change your housing and give you free access to the telephone. I mean it does take some level of intelligence to get to this point in life where you're sitting as a judge in Superior Court and you have the power of life and death over a defendant. I don't know how you think you're going to argue your way into something that's already been decided with regard to your housing and telephone access. It's amazing to me that you would assert that position, given the charge of against you of trying to dissuade witnesses in a case involving special circumstances of murder for financial gain and *torture murder*, I believe, is the other one. (RT 20-21.)

Respondent also incorrectly characterizes the court's treatment of appellant with regard to her attempts to fire retained counsel and find new counsel to retain as proper responses to appellant's attempts to manipulate the legal system. (RB 120.) In addition to the demeaning, belittling, hostile, and rude treatment of appellant at each instance where she attempted to discuss her constitutionally guaranteed right to counsel, the court relied on misconceptions, and wrongly permitted the prosecuting attorney to weigh in on appellant's right to counsel. (See AOB 217-220.) For example, appellant did

not "fire" the Office of the Public Defender, that office declared a conflict. (CT 182.) She had every right to discharge retained counsel Ward, and Yamamoto moved to withdraw, appellant did not move to have him discharged. Also, appellant was not charged with torture (RT 21), *multiple* appointed counsel did not ask to be relieved (RT 128), appellant was not housed in Module 211 because of the solicitation charge and she was never housed there because she was a disciplinary problem (RT 643-644.)

In addition, the trial court expressed its bias against appellant in numerous hearings on issues appellant rightly put before it for it. For example, the court did nothing to remedy the tampering with of appellant's legal mail, did little to remedy the horrendous conditions of appellant's confinement, did not remedy the lack of contact appellant had with her attorney, did not fairly hear her motion to fire retain counsel and went so far as to order the exhausting of her entire retainer, expressed the false opinion that two attorneys were never necessary in a death penalty case, did not follow through with orders that appellant receive a mental examination, and solicited the prosecutor's opinion on confidential matters. Most of appellant's concerns, while properly brought to the attention of the court, were not acknowledged or addressed at all. (See AOB 221-226.)

Not only was the trial court biased against appellant, but it showed bias in favor of the prosecution. For example, the court permitted the prosecutor's request for a post conviction hearing in order to preserve the convictions by permitting, without

authority, a post-*conviction and outside the presence of the jury*, production of additional testimonial evidence. (AOB 224-226; RT 3894-3896, 3935-3970.) Even respondent must concede that the court permitted the prosecution to "finish taking the evidence" on a circumstance in aggravation. Respondent cites no authority for the propriety of this unheard of impromptu extension of a jury trial. (RB 122-123.)

On appeal, this Court must assess whether any judicial misconduct or bias was so prejudicial that it deprived defendant of "'a fair, as opposed to a perfect, trial.' "(*People v. Snow* (2003) 30 Cal.4th 43, 78 quoting *United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.) Here, appellant did not request a perfect trial, only one which was fair and just and at which she was afforded her constitutional rights, including access to counsel, her right to confrontation, an unbiased judge and her right to have a jury decide the evidence by which the prosecution sought to use to execute her.

IX. APPELLANT WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS, TO A FAIR TRIAL AND TO HER RIGHT TO BE PRESENT THE TRIAL COURT'S ERROR IN CONDUCTING PROCEEDINGS IN APPELLANT'S ABSENCE

Respondent argues that appellant's rights were not violated by her absence from certain proceedings. In fact, respondent boldly asserts that appellant had "no right to be present at the proceedings in question." (RB 123-130.) Respondent is wrong.

Under the California Constitution (art. I, section 13) and as codified in Penal Code section 1043, a defendant at a felony trial must be "personally present at the trial." Penal Code section 1043 subd. (b) recognizes the special need to protect the right of

capital defendants to be personally present at trial. That code section states in pertinent part: "The absence of a defendant in a felony case, after trial has commenced in his presence shall to prevent continuing the trial to, and including, the return of the verdict in any of the following cases:....(2) any prosecution which *is not punishable by death* in which the defendant is voluntarily absent. (Pen. Code sec. 1043 subd.(b) emphasis added; (See, e.g., *People v. Robertson* (1989) 48 Cal.3d 18, 60.)

Likewise, under the federal Constitution, every defendant "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15 [accused entitled "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"].) The right to be present also constitutes an element of the rights to confrontation and due process guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. (See *Drope v. Missouri* (1975) 420 U.S. 162, 171 [trial of an incompetent defendant violates due process, as does a trial held "in absentia"]; *Taylor v. United States* (1973) 414 U.S. 17, 19 (per curiam) [right to be present at trial derives from right to testify and rights under the Confrontation Clause].)

The right to be present extends "to every stage of the trial, inclusive of the empanelling of the jury and the reception of the verdict and . . . [is] scarcely less important to the accused than the right to trial itself." (*Diaz v. United States* (1912) 223

U.S. 442, 455.) A "critical stage" is any "step of a criminal proceeding" that holds "significant consequences for the accused." (*Bell v. Cone* (2002) 535 U.S. 685, 695.)

If a defendant is denied his right to be present at any critical stage of the proceedings, reversal is automatic if the defendant's absence constitutes a "structural error" that permeates "[t]he entire conduct of the trial from beginning to end," or "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) The alternative to structural error is "trial error" which occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at 307-308.)

In *People v. Ochoa* (2001) 26 Cal.4th 398, this Court set forth the rule in different language, but describing the same substantive right, stating:

> A criminal defendant's federal constitutional right to be present at trial, largely rooted in the confrontation clause of the Sixth Amendment, also enjoys protection through the due process clause of the Fifth and Fourteenth Amendments whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, but not when presence would be useless, or the benefit but a shadow. (*Id.* at p. 433 [citations and interior quotation marks omitted].)

In the instant case, appellant was excluded from critical stages of the proceedings.

As argued in her opening brief, appellant was excluded from two hearings from during which discussions about her Sixth Amendment right to counsel was had. During both of these hearings, matters of her right to counsel, which would have "significant consequences" for appellant were discussed. Had appellant been permitted to be present and address the court she could have explained that as the trial date loomed, she had not had an adequate opportunity to assist her appointed counsel in the preparation of her defense. By this time, appellant had been denied access to counsel for more than two years.

Respondent contends that appellant had no right to be present because these hearings were merely continuations of hearing concerning "legal or procedural questions" and because defense counsel was present and "fully able to represent appellant's interests." (RB 128, 129.) Appellant begs to differ. These hearings concerned appellant's fundamental state and federal constitutional rights regarding access to counsel. The only reason these hearings were "continuations" of prior hearings was that appellant tenaciously fought for her rights in spite of the trial court's dismissive treatment of her efforts. Appellant's right to full access to the attorney appointed to represent her in capital proceedings is not some procedural or inconsequential legal matter. As for trial counsel's ability to represent appellant in her absence, as argued elsewhere, trial counsel showed little interest in developing and maintaining the type of attorney-client relationship necessary to successful

representation in a capital case. (See 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases: [Commentary: [C]ounsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress].) [15]

Appellant had a state and federally guaranteed right to counsel. Her unsuccessful efforts to exercise those rights were never properly addressed. Even more outrageous, out of her presence and with no real representation by her attorney of record, the prosecutor's speculated about what appellant might or might not do if permitted access to counsel. As a result, during these hearings, appellant was denied both effective representation *and* her own presence at this critical proceeding. (AOB 231.)

Appellant was also excluded from a later hearing at which witness Gwendolyn Hall was ordered to appear. In response to respondent claim that this proceeding was a

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[15] Guideline 10.5 A and C entitled "RELATIONSHIP WITH THE CLIENT" provide respectively that "A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client," and C. "Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as: 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it; 2. current or potential legal issues; 3. the development of a defense theory; 4. presentation of the defense case; 5. potential agreed-upon dispositions of the case; 6. litigation deadlines and the projected schedule of case-related events; and 7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists)."

"routine administrative matter" (RB 129), appellant makes two observations. First, by comparison to the routine ordering back of a witness, it is obvious that appellant's right to be present when her right to counsel was at issue, as argued above, was in fact a critical stage of the trial. Second, intentionally absenting appellant from these aspects of her case is yet another example which leads to the conclusion that by conduct of defense counsel, the prosecution and by order of the court, appellant was made to be a mere spectator to her capital trial.

No harmless error finding is permissible in this case because appellant was absented without her consent at proceedings which involved her right to a defense attorney. These hearings occurred a mere month or so before her capital jury trial began. This resulted in the denial of appellant's right to due process and to a fair trial, confrontation, and a reliable guilt and sentencing determination by an impartial jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 [plurality opinion]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 108 S.Ct.1981, 100 L.Ed.2d 575.)

X. APPELLANT'S 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES UNDER *Crawford v. Washington* WAS VIOLATED BY THE TRIAL COURT'S ADMISSION OF EVIDENCE

Appellant argues that her Sixth Amendment right to confront the witnesses against her was violated when the trial court admitted the handwritten notes and statements of Gwendolyn Hall and her daughter Autumn's statements about Gatorade. (AOB 233-257.) [16] Respondent disagrees with each of these arguments. (RB 130.) Respondent is wrong.

A. The Handwritten Notes and Recorded Statement of Gwendolyn Hall through the Testimony of Detective Steinwand

Instead of testimony by Gwendolyn Hall, through the testimony of law enforcement, taped interviews with law enforcement and documents allegedly authored by Hall, the prosecution introduced highly incriminating evidence which appellant had no ability to confront. (See AOB 237-241.) The gist of respondent's argument is that, although Gwendolyn Hall was properly declared an unavailable witness for her purported lack of memory regarding her interactions with appellant, she was nevertheless present and subject to cross examination. Respondent's argument is meritless and its conclusion that Hall's "presence" at trial was sufficient to satisfy appellant's right to confrontation must be rejected. (See RB 139-139.)

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[16] Appellant recognizes this Court has since resolved additional *Crawford* claims made by appellant in her opening brief, contrary to appellant's position.

Here, as recognized by respondent, Hall's interview with law enforcement (which respondent does not argue fails to satisfy that prong of *Crawford v. Washington* (2004) 541 U.S. 36, which requires the evidence admitted be "testimonial,") was provided to the jury at the guilt phase when the prosecution played the entire taped interview as narrated by and commented on by Detective Steinwand. Appellant had no opportunity to cross examine the declarant, Hall, about this evidence. Moreover, notes taken by Hall and given to law enforcement were introduced into evidence, again, with a running commentary by Steinwand. (RT 2244-2274, 2278-2292, 2252, 2254, 2256, 2257, 2260, 2246-2248, 2251-2252; RB 1354-136.)

At the penalty phase, Hall was not brought before the jury. At a pre-penalty phase evidentiary hearing Hall once again insisted she was unable to recall her interactions with appellant. (RT 3066-3074, 3098-3100.) In this instance the trial court found it unnecessary to have the witness brought before the jury at all. (RT 3099-3100.) Thus, at the penalty phase, Detective Steinwand was called upon once again to testify about appellant's statements to Hall, as recorded during the police interview with Hall. The recorded statements of Hall were, again, played for the jury. (RT 3118-3138.)

Respondent contends that the situation presented at appellant's trial is "virtually identical" to the contention considered and rejected by the Court of Appeal in *People v. Perez* (2000) 82 Cal.App.4th 760. (RB 138-139.) This Court should reject that contention. Foremost, Perez was decided years before *Crawford*, which, as recognized by

respondent, "transformed the Sixth Amendment jurisprudence...." (RB 137.) Moreover, as the United States Supreme Court in Crawford has made clear, a defendant's Sixth Amendment right of confrontation is violated by the admission of testimonial statements of a witness who was not subject to cross-examination at trial, unless the witness was unavailable to testify **and** the defendant had a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. 36 at p. 68 [124 S.Ct. 1354, 158 L.Ed.2d 177] .) Appellant had no opportunity, whatsoever, to cross examine Hall.

B. Autumn Fuller's Statements about Gatorade through the testimony of Dr. Vicary via the report of Dr. Romanoff

Respondent contends that the use of appellant's daughter Autumn's statements to law enforcement regarding a "special" bottle of Gatorade (the implication being the bottle containing antifreeze used by appellant to kill her husband) to cross examine appellant's penalty phase medical expert, Dr. Vicary, did not violate appellant's right to confrontation. (RB 139-141.) Again, it is not contested that Autumn herself did not testify before the jury (so as to be cross examined about her statement to police), or that her statement, made in the course of the investigation of appellant, was testimonial under *Crawford*. Rather, according to respondent, because Autumn was called by the defense to testify about another topic entirely appellant's right to confront Autumn on the topic of the Gatorade bottle was satisfied. (*Ibid.*) Again, respondent's contention must be rejected.

Although Autumn was called by the defense, as recognized by respondent, prior to her testimony and *prior to Vicary's testimony*, the prosecution assured the defense counsel and the court that she would *not* be examined about her "Gatorade" statement. (RT 3262-3263, 3266.) The sum and substance of Autumn's testimony was that she would like the jury not to execute her mother so that she could visit her in the future. (RT 3266.) The prosecutor then sandbagged appellant with the unexpected and extremely damaging testimony about the Gatorade after the prosecution had concluded its case in aggravation, Autumn had concluded her brief testimony and Dr. Vicary was called as part of appellant's presentation of mitigating evidence. (RT 3158-3162.)

Having been assured that the prosecution had no intention of using Autumn's Gatorade comments, appellant had no reason to, and therefore, no opportunity to cross examine her on this topic.

XI. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

The state contends that because there were no prejudicial errors in the guilt phase, there could be no harm in the penalty phase. (RB 148-150.) Appellant disagrees.

Appellant has proven that this Court should reverse her convictions because of substantial guilt phase errors. Those same errors poisoned appellant's penalty phase defense. Should this Court hold that the guilt phase errors were harmless as to the guilt

determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused appellant at the penalty phase.

As argued in her opening brief, in this case, the errors in the guilt phase were not harmless in the penalty phase. For example, life-leaning jurors were erroneously excused for cause; the conditions of appellant's confinement in jail -- which extended throughout her guilt and penalty phase trials -- were so adverse as to substantially impair appellant's ability to assist counsel in the preparation of her defense. Moreover, the effects of such confinement on appellant's mental health were affirmatively argued by the prosecutor in his plea to the jury to sentence appellant to death. The many interferences with appellant's constitutionally guaranteed right to counsel committed by the jail staff and the court impacted appellant at both the guilt and penalty phases; appellant was required to proceed through both the guilt and penalty phases of her trial with an attorney who did not adequately represent appellant and with whom there had been a complete dissolution of an attorney-client relationship. Finally, the court's failure to properly evaluate appellant's competency to proceed to trial extended throughout her guilt and penalty phases as did the court's obvious bias against appellant throughout her entire trial.

The errors above, which were committed in the guilt phases directly affected appellant's case in mitigation as well as the jury's assessment of the prosecution case so

that the errors affected the penalty phase as a whole. Thus, the penalty determination was not sufficiently reliable to form the basis for a death sentence.

For the reasons stated above and in appellant's opening brief, appellant maintains that even if the guilt phase errors were harmless as to the guilt determination, the prejudice of those errors requires reversal of appellant's death sentence.

XII. THE USE OF INADMISSIBLE EVIDENCE IN AGGRAVATION THAT APPELLANT -- EIGHT YEARS EARLIER – ALLEGEDLY MURDERED HER INFANT DAUGHTER VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

It is respondent's contention that the trial court did not err in admitting evidence of the death of appellant infant's daughter at the penalty phase. (RB 150-167.) For the reasons below and those argued in her opening brief, appellant maintains that when the trial court erroneously admitted evidence from which the jury could draw the unsupported, speculative, and highly prejudicial conclusion that appellant had murdered her infant daughter for financial gain. The erroneous admission of the evidence virtually ensured appellant would be sentenced to death.

In her opening brief, appellant outlined a number of specific errors related to the introduction of this evidence committed by the trial court. Respondent contends no errors were committed. Once again, respondent is wrong.

> 1. The court failed to hold an adequate *Phillips* hearing to determine whether there was sufficient evidence to find the essential elements of the crime of murder beyond a reasonable doubt, and

the evidence adduced at that truncated hearing was insufficient to establish the commission of that crime.

Respondent agrees that in *People v. Phillips* (1985) 44 CAl.3d 29, this Court noted that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under section 190.3, factor (b). (*Id.,* at p. 72, fn. 25; RB 153.) This is so, as argued by appellant in her opening brief, because aggravating evidence is limited to evidence that comes within one of the specified factors listed in Penal Code section 190.3 *and* for which there is sufficient evidence for the trier of fact to determine that the elements of the offense have been proved beyond a reasonable doubt. (*People* v. *Grant* (1988) 45 Cal.3d 829, 850.)

It is the trial court's responsibility to determine whether the evidence exists by which the jury can make such a finding of criminal activity which is beyond a reasonable doubt, before permitting the prosecution to present the other crimes evidence to the jury. *(People* v. *Boyd, supra,* 38 Cal.3d at p. 778.) This is so because when a jury is going to decide between life and death, the trial court must be *extremely* careful to ensure that every safeguard is observed to protect defendant's right to a full defense *(Gardner v. Florida* (1977) 430 U.S. 349,357, emphasis added), and the reasonable doubt standard is required to ensure such reliability. *(People* v. *Balderas* (1985) 41 Cal.3d 144, 205, n. 32; AOB 272-273.)

In passing on a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d, 557, 578.) However, the "substantial evidence" standard does not mean that *any* evidence will be sufficient to support a verdict. To be "substantial," evidence must be "reasonable, credible, and of solid value." (*Ibid*; *Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In the instant case the court ordered a *Phillips* hearing at which professor of aeronautics and applied mechanics, Dr. Wolfgang Knauss testified. (RT 560-596.) Respondent contends that the testimony of Dr. Knauss constituted "substantial evidence that appellant caused the death of her daughter by tampering with [a] pacifier." (RB 154.) This is simply not so.

As explained in appellant's opening brief, a week before jury selection began, California Institute of Technology professor, Wolfgang Knauss was called by the prosecutor to testify to what the court characterized as a pretrial hearing "to determine

the admissibility of the evidence with regard to the death of Ms. Rodriguez' child, and more specifically the structure of that pacifier that apparently caused the death." (RT 560.) Knauss was the only witness to testify at this hearing. Counsel stipulated, for the purpose of this hearing, that Knauss was an expert on the failure of viscous materials including rubber. (RT 560-562.)

Nine years earlier, as part of a civil suit appellant and her husband had initiated against Gerber for failure of the pacifier on which their child, Alicia, had allegedly chocked to death, Knauss examined the pacifier and took pictures but, *did not conduct any tests on it*. Knauss prepared an eight-page report on how he thought the pacifier may have failed. (RT 564.) Knauss testified that the physical condition of the pacifier was inconsistent with the scenario that a 13-month-old child with two teeth could have cut through the pacifier, based upon the appearance of the fracture surface. (RT 569-571.)

Knauss did not have a photograph which showed where the failure occurred. To the best of his recollection from nine (9) years earlier, it occurred within a millimeter or two of the place where the rubber emanated from his shield or was connected to the shield. This was the only scenario for failure of the pacifier which Knauss considered. (RT 572.)

Respondent's reliance on this Court's finding in *People v. Whisenhunt* (2008) 44 Cal.4th 174), is misplaced. (RB 153-154.) In *Whisenhunt*, at the guilt phase, the prosecution cross-examined the defendant about an incident in which he had physically

abused his niece by breaking her leg. At the penalty phase, pursuant to section 190.3, factor (b), the prosecutor sought to introduce evidence of this incident of child abuse by calling one of the doctors who had treated the niece. The trial court held a *Phillips* hearing during which the doctor testified that, although he had no recollection of the incident, based upon his records from that day, his opinion was that the niece's femur had been deliberately broken. The trial court ruled the prosecution had shown sufficient evidence that the issue could go before the jury. (*Id.*, at pp. 224-225.)

Unlike the controlling facts of *Whisenhunt*, in the instant case, at the time he had examined (but not tested) the pacifier Knauss found that rather than having been bitten and sucked off by an infant with two teeth, it was more likely that the pacifier had been damaged before the child had it in her mouth. (RT 575-578.) In response to the prosecutor's question at the *Phillips* hearing, Knauss testified that at the time, because he had no information on how the pacifier was damaged, he had no way of forming a conclusion other than it appeared as if the nipple had been run over by a hard object, such as a chair. (RT 579.) Clearly in an effort to offer Knauss a basis to form the opinion that appellant had intentionally damaged the pacifier and then knowingly gave it to her child to choke on, the prosecutor asked Knauss whether the damage could have been caused by the use of pliers. Knauss, having never examined any other pacifiers, never tested any pacifies and never seen plier damage to a pacifier speculated that the damage he saw on the pacifier Alicia choked on was "consistent" with such. This

opinion was based entirely on his examination of plier damage to an automobile tire. (RT 581-582.)

Thus, unlike the testimony of an examining doctor who no doubt was qualified to offer the opinion that a fractured leg appeared to have been deliberately injured, here, Knauss, an expert on tire-type rubber, who had never examined a pacifier other than this one, had not tested any, and was not qualified to offer an expert opinion on how it became damaged, offered evidence to the court that the pacifier was intentionally and maliciously run over or pulled with pliers so that it could be used as an instrument to murder a child.

There was not sufficient evidence for the trial court to permit this highly prejudicial and completely speculative evidence to appellant's penalty jury.

2. The Court Failed To Apply the Correct Legal Standard in Determining Whether Aggravating Evidence that Alicia's Death was a Homicide Should be Introduced at the Penalty Trial, and the Evidence Before the Court was Insufficient to find that the Jury Could Properly find Beyond a Reasonable Doubt that Alicia's Death was a Homicide

Respondent argues that the trial court "applied the proper standard of proof" in holding the evidence presented by Dr. Knauss at the hearing prior to the trial court concluding the death of appellant's daughter Alicia was admissible as a factor of aggravation. (RB 154.) However, no objective evaluation of Knauss's testimony could yield such a result.

As argued in appellant's opening brief, at the pretrial hearing, the trial court was

required to determine whether the prosecution's proposed evidence was substantial enough to support introduction of the factor in aggravation that appellant murdered her infant daughter at appellant's penalty phase. This was not the standard applied by the trial court and the evidence was not sufficient for then jury to have found beyond a reasonable doubt that appellant killed her daughter Alicia.

As argued in appellant's opening brief, a trial court must determine whether evidence exists by which a jury can make a finding that the elements of then offense have been proved beyond a reasonable doubt. (AOB 273; *People v. Grant* (1988) 45 Cal.3d 829, 850; *People v. Clair* (1992) 2 Cal.4th 629, 672-673.) Here, the trial court made no such determination. When litigating trial counsel's request that the court hold a hearing, counsel, apparently unsure of the burden of proof, nevertheless requested the court hold an evidentiary hearing to determine whether the evidence was sufficient to send the proposed aggravator to the jury. (RT 450-452.)

After Dr. Knauss's testimony, which was the only evidence offered at the hearing, the court appeared to employ a simple weighing of the evidence in order to determine whether, if admissible, it was not so prejudicial so as to be excluded.

> Court: I do find the evidence to be sufficient to submit to withstand a challenge under factor (b), I believe it is, of 190.3. The evidence is admissible, and the reason I reviewed this because as Mr. Houchin has indicated, it's potentially very emotional evidence, very prejudicial if it does not sustain challenge, and the initial challenges sufficient here to show that it should be submitted to a jury and let the jury evaluate. (RT 608.)

Appellant maintains that even if the evidence was properly before the jury, there was not sufficient evidence for the jury to find the aggravator that "appellant murdered" her daughter Alicia (RT 608), true beyond a reasonable doubt.

Appellant summarized the evidence offered on the aggravator in her opening brief. (AOB 279-294.) In her summary, appellant recognized the evidence respondent argues was sufficient for the jury to conclude appellant had murdered her daughter. (See too RB 155-157.) There was not sufficient evidence for the jury to have found appellant committed either first or second degree murder. Even assuming, given the dubious expertise of Dr. Knauss to render the expert opinion as to how that this particular pacifier could not have been chewed apart by Alicia and possibly might have been damaged by a chair rolling over it (RT 2958-2962, 2963, 2967), there was no evidence whatsoever that the pacifier became damaged because of some intentional and knowing manipulation by appellant.

Respondent relies on appellant's deposition statement that the pacifier on which Alicia choked was out of her possession for a matter of months; and that after it was returned to her, she checked it for safety purposes and cleaned it before giving it to her daughter to argue that, if these comments are to be believed, the only other scenario by which the pacifier failed – that Alicia chewed it or sucked it apart—had been disproven by expert testimony. (RB 157-158.) Even if this Court rejects appellant's argument that the trial court erred in admitting these statements which appellant made during a

deposition taken related to the wrongful death civil action, there is not sufficient evidence to attribute the failure of the pacifier to the intentional and malicious acts of appellant.

The errors of the trial court finding legally sufficient evidence to send the aggravator that appellant murdered her infant daughter and from which a jury might find that aggravator true was compounded by the trial court permitting Dr. Knauss to testify beyond the scope of his expertise, and the trial court abusing its discretion in precluding appellant's civil attorney from testifying to areas within his expertise. This accumulation of errors requires reversal.

Respondent contends that the trial court did not abuse its discretion in admitting Dr. Knauss's testimony and that Dr. Knauss's testimony did not exceed the scope of his expertise. (RB 161-162.) Respondent argues appellant has waived this claim on appeal. (RB 161.) However, trial counsel did object on various grounds and those objections were overruled. To object further would have been futile, particularly given the trial court's reliance on Knauss's "expertise" to permit the evidence to go to the jury after appellant's request, pre-penalty phase that it be excluded. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8, citing *People v. Sandoval* (1992) 87 Cal.App.4th 1425, 1433, fn. 1 [neither argument nor objection is required to preserve a point for appeal when it would have been futile because the trial court has already overruled an objection to similar evidence.].)

Respondent's second contention is that appellant's complaints concern the weight to be given Knauss's opinions rather than its admissibility. (RB 161-162.) Not so. Because Knauss did not have special skill, knowledge, and training and there was not a sufficient foundation for the view he expressed. Knauss was no expert regarding pacifiers, the failure of pacifiers nor child behavioral issues. Knauss was an expert on the rubber used in the manufacture of tires and the causes of tire failure. There was no showing that there was any similarity between tire and pacifier rubber or any correlation between a failure in one and a failure in the other.

Neither does respondent agree with appellant's contention that the trial court erred in not permitting appellant's civil attorney, Barry Novak, to offer the opinion that Gerber's settlement to appellant and her husband was "far from nuisance value." (RB 162-166; RT 2892-2893.) Respondent argues that because Novak had never been a defense attorney, he could "hardly be said to have sufficient knowledge" as to whether a $710,000 settlement by Gerber was more than nuisance value. (RB 165.) Not so. "Nuisance value" is a legal term of art commonly understood to describe the cost associated with resolving a frivolous cause of action and a quick settlement amount for a frivolous case. (Burton, *Burton's Legal Thesaurus 4thed.* (2007) McGraw-Hill Companies, Inc.) Barry Novak was an experienced product liability attorney representing plaintiffs in personal injury and death cases. It certainly would be expected that in the course of advising his clients, he would be knowledgeable about how much a

suit would be worth, and certainly whether an offer was reasonable to offset damages or merely an amount representative of whether the defense wanted to dispose of the case quickly and/or cheaply. Here, the jury should have been entitled to give what weight it deemed fit to Novak's opinion (CALJIC no. 2.80, 2.81, 2.82, 2.83; CT 981-982), particularly in light of the prosecutor's argument that the amount of the settlement represented nothing more to Gerber than the cost of doing business, i.e., nuisance value.

Here, the admission of a prior unadjudicated act of violence violated appellant's rights to a fair and impartial jury, a fair trial due process of law and a reliable sentencing proceeding and determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17.)

XIII. THE COURT ERRED IN ADMITTING EVIDENCE REGARDING APPELLANT'S COMMENTS ABOUT ERLINDA ALLEN AS PART OF THE PEOPLE'S CASE IN AGGRAVATION BECAUSE THOSE COMMENTS DID NOT CONSTITUTE THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OF VIOLENCE

Respondent disagrees with appellant's contention that the court erred in admitting evidence regarding appellant's comments to Gwendolyn Hall about Erlinda Allen as part of the people's case in aggravation. (RB 168-171.) According to respondent, it does not matter that Erlinda Allen was not a witness in the proceedings or that appellant's comments to Gwendolyn Hall about Allen did not amount to an express or implied threat to use force or violence. (RB 170-171.) Respondent's attempts

to skirt the requirements that only actual crimes may be offered as aggravation under Penal Code section 190.3(b) are unpersuasive.

As argued in her opening brief, "[t]he crime of solicitation consists of asking another to commit one of the crimes specified in Penal Code section 653f, with the intent that the crime be committed. The gist of the offense is the solicitation, and the offense is complete when the solicitation is made." (*People v. Cook* (1984) 151 Cal.App.3d 1142, 1145, internal citations omitted.) However here, appellant never solicited Gwendolyn Hall or any other person to assault or murder Allen. No evidence of any attempt was introduced and in none of the taped conversations between appellant and Hall does appellant solicit Hall to commit such an act nor does appellant tell Hall that she solicited another to do so. When Gwendolyn Hall was asked whether or not she had ever heard of appellant trying to solicit someone else to help her, Hall responded "I've never heard her tell nobody all -- nobody nothing." (CT 744.) Simply, there is no evidence whatsoever that appellant solicited Hall or any other individual to commit any kind of assault on Linda Allen.

Respondent is also wrong that it does not matter that Allen was not a witness in the proceedings. Penal Code section 190.3(b) requires an actual violation of a criminal statute. If Allen was not a witness, appellant could not have solicited someone to assault or murder a witness. The entirety of what appellant had done was nothing but

"tough talk" in a custodial environment which was conveyed to overzealous law enforcement by a snitch.

XIV. IT IS REASONABLY LIKELY THAT ONE OR MORE JURORS WERE MISLED INTO THINKING THAT, IF APPELLANT KILLED UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE THAT WAS LESS THAN EXTREME, SUCH DISTURBANCE WAS NOT A FACTOR IN MITIGATION

Without any substantive discussion of the cited case law cited by appellant in her opening brief respondent relies on prior case law of this Court and disagrees with appellant's claim that it is reasonably likely that one or more jurors were misled into thinking that, if appellant killed under the influence of mental or emotional disturbance that was less than extreme, such disturbance was not a factor in mitigation. (RB 171-173.)

Appellant Rodriguez briefed this issue extensively in her opening brief (AOB 331-339) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XV. THE COURT IMPROPERLY DENIED APPELLANT'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE UNDER PENAL CODE SECTION 190.4, SUBDIVISION (e), DEPRIVING APPELLANT OF DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF HER RIGHTS SECURED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Respondent disagrees with appellant's claim that because the trial court failed to make an independent on-the-record reweighing of the aggravating and mitigating factors, improperly minimized and ignored mitigating factors, gave undue weight to aggravating factors, and improperly considered matters not in the statutory list when

ruling on appellant's application for modification of the death sentence, appellant was deprived of due process of law and a fair and reliable penalty determination. (RB 174-178.) Respondent is wrong.

As argued in her opening brief, Section 190.4(e) requires the trial judge to independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in his independent judgment, the evidence supports the death verdict. He must state the reasons for his ruling on the record and provide a ruling adequate to assure thoughtful and effective appellate review of the reasons why he concluded the aggravating circumstances exceeded the mitigating circumstances. (*People v. Arias* (1996) 13 Cal.4th 92, 191-192; *People v. Bonillas* (1989) 48 Cal.3d 757, 801; *People v. Rodriguez* (1986) 42 Cal.3d 730, 794.) Such a record is necessary to ensure that sentences of death are not "wantonly" or "freakishly" imposed in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 206-207; *Proffitt v. Florida* (1976) 428 U.S. 242, 260; see *People v. Jackson* (1980) 28 Cal.3d 264, 316-317; *People v. Frierson* (1979) 25 Cal.3d 142, 178-180 (plurality opinion).)

> Because the judge must determine independently whether the death penalty is appropriate and, in so doing, weigh the evidence of aggravating and mitigating circumstances, the appellate court is provided with a sufficient record upon review. On the basis of the judge's written conclusions, the appellate court can determine whether the evidence supported the jury's finding of aggravated circumstances. If the judge and the appellate court conclude that the jury verdict is supported by the evidence, the danger that the jury acted under the influence of undue passion or prejudice is negligible. See *Gregg v. Georgia*, 428 U.S. at 195, 96 S.Ct. at 2935 (plurality opinion) (*Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195 -1196.)

Such a record is also necessary to ensure that equal protection demands are satisfied. (*People v. Medina* (1990) 51 Cal.3d 870, 910.) Furthermore, section 190.4, subdivision (e) is a state-created liberty interest. A trial court's failure to comply with its provisions deprives a capital defendant of the due process of law guaranteed by the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 345.)

In the instant case, the court recited *verbatim* aggravating and mitigating factors by reading from a previously prepared written statement. And while the practice of preparing tentative rulings may be "commonplace and not objectionable" (see *People v. Medina* (1995) 11 Cal.4th 694, 783), the record must be clear that the court gave due consideration to defense counsel's arguments. Here, that was not the case.

Other comments by the court support appellant's claim that the court came to the hearing with a fixed decision on imposing the death penalty, in spite of the evidence presented by defense counsel. The court completely ignored the persuasive trial evidence in mitigation that appellant had been a victim of sexual abuse by multiple victimizers, including having been a victim of incest. Respondent argues that defense counsel "made sure" to "highlight this point" during his argument for modification. (RB 178.) However, while trial counsel alluded to appellant's "unusual" background and "problems" with her paternal grandfather (RT 3976), he did not effectively advocate the long term abuse and betrayal of trust appellant suffered at the hands of multiple molesters, and the court minimized the evidence and may have disregarded the

molestation by her grandfather and another it entirely. [The court considered "evidence [that] *suggested* [appellant] was sexually molested...by a family member." (RB 4022; CT 1067.)

Respondent also contends that because it was not cited as an aggravating factor during the pronouncement of the ruling during the hearing or mentioned in the court's written order, the court did not improperly consider lack of remorse as a factor not presented to the penalty phase jury. (RB 177.) This contention too must be rejected. During the hearing on the motion, the court went so far as to interrupt defense counsel's presentation to discuss its consideration of whether or not appellant was remorseful, which it clearly stated, appellant was not.

> How do you square with what the doctor has said, Dr. Vicary's report of January 7, 2004, where he says the defendant does have remorse for the murder of her husband and that she's reluctant to share that remorse for legal and psychological reasons? There's been no indication of remorse at all during the trial, and in fact it's hard to believe that there would be any remorse. ¶ He was only married for a few months when she created the circumstances under which he received a $250,000 life insurance with her as a beneficiary, and two months after that roughly attempts to kill him by the use of loosening the gas connection, which also endangered not only her husband but also the community around her husband in the event that there had been an explosion, then attempting to poison him with oleander poisoning, and on the failure of that a week later poisoning him for a long period of time with anti-freeze. ¶ And I have to say it is the coolest killing I've ever seen. Most of the murders, and most of the cases we have our murder cases in this court, over the past 20 years I've ever seen a colder heart. She seemed to have no care for the agony that she put her husband through, and the sole goal being to make a profit in his death. ¶ So I don't see how the doctor's opinion squares with any of the evidence that I've seen throughout this trial. (RT 3976-3977.)

For all of the reasons stated above and in appellant's opening brief, the court improperly denied appellant's request to modify the judgment.

XVI. THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF

Without any substantive discussion of the cited case law cited by appellant in her opening brief respondent relies on prior case law of this Court and asserts appellant's claim that the California death penalty statute and instructions are unconstitutional because they fail to instruct the jury on any penalty phase burden of proof should be rejected. (RB 178-179.)

Appellant Rodriguez briefed this issue extensively in her opening brief (AOB 348-388) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XVII. THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Respondent summarily argues that the jury was properly instructed under CALJIC no. 8.88 essentially because this Court has rejected similar claims in the past. (RB 179-180.) Respondent is incorrect.

Appellant will not repeat the lengthy argument she made in her opening brief her. (AOB 389-403.) However, appellant strongly urges this Court reconsider its prior rulings holding otherwise.

Respondent also argues that the error was waived because appellant failed to object (RB 179.) However, a reviewing court may consider claim despite lack of objection when, as in the instant case, the error may have adversely affected defendant's right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8.)

As set forth above and in appellant's opening brief, because CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment, appellant's death judgment must be reversed.

XIII. THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

Respondent relies on prior case law of this Court and asserts appellant's claim that the absence of intercase proportionality renders California's death penalty law unconstitutional should be rejected without any substantive discussion of the cited case law cited by appellant in her opening brief. (RB 181.)

Appellant Rodriguez briefed this issue extensively in her opening brief (AOB 403-408) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XIX. CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

Respondent contends that the death penalty is constitutional and does not violate international law. (RB 181.) Respondent relies solely on prior case law of this

Court and asserts appellant's claim otherwise should be rejected without any substantive discussion of the cited case law.

Appellant Rodriguez briefed this issue extensively in her opening brief (AOB 408-414) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XX. CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

Respondent contends that the United State's Constitution does not require written findings regarding aggravating factors and asserts appellant's claim that her constitutional rights to meaningful review and equal protection of the law based on California's failure to require written findings should be rejected. (RB 182.) Respondent relies solely on prior case law of this Court without any substantive discussion of the cited case law.

Appellant Rodriguez briefed this issue extensively in her opening brief (AOB 414-417) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XXI. THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT, REQUIRING REVERSAL

Respondent argues there was no cumulative error, and if there were multiple errors, there was not prejudice. (RB 182-183.) Appellant, in her opening brief, argued

extensively why both the guilt and penalty determinations must be reversed due to the accumulation of multiple trial errors. (AOB 417-421.)

There can be little question that the purposeful, methodical, and unrelenting court-sanctioned deprivation of appellant's basic human rights and needs including medical attention, sleep, sunlight, nutrition, and exercise time outside her cell combined with the mental and physical abuse heaped on appellant by custodial staff broke appellant's spirit and negatively impacted her mental state. Compounding the impact of the horrendous and inhumane treatment appellant was forced to endure for more than two years was the fact that the two individuals tasked with protecting appellant -- her attorney and her trial judge -- not only abandoned appellant to the whims and cruelty of custodial staff, but aggravated the situation by their own biases and hostilities toward appellant.

Numerous legal errors, including the admission of irrelevant and highly prejudicial evidence and the erroneous denial of appellant's request to remove her retained counsel in a timely fashion so that appellant could hire counsel of her choice and the failure to remove ineffective and conflict ridden counsel resulted from the bias against appellant held by the court.

Here, respondent has not made any attempt to demonstrate that the cumulative effect of the errors were harmless beyond a reasonable doubt. There is, in fact, little doubt that absent these errors, appellant would not have been convicted at the guilt

phase, and even if she were convicted, a single juror may not have voted to sentence her to death. (*People v. Brown* (1988) 46 Cal.3d 432, 464-466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Appellant's convictions and death sentence must be reversed.

XXII. ANY FAILURE OF DEFENSE COUNSEL TO REQUEST OR OBJECT TO ANY OF THE JURY INSTRUCTIONS SHOULD BE EXCUSED

Respondent agrees that failure to object to jury instructions which affect a defendant's substantial rights does not result in waiver, in other words, where instructional error occurs but trial counsel failed to object, the defendant does not forfeit her claim on appeal. (RB 183.) In the instant case, appellant complains that instructional error was committed below in arguments XIV [IT IS REASONABLY LIKELY THAT ONE OR MORE JURORS WERE MISLED INTO THINKING THAT, IF APPELLANT KILLED UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE THAT WAS LESS THAN EXTREME, SUCH DISTURBANCE WAS NOT A FACTOR IN MITIGATION]; XVI [THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ONANY PENALTY PHASE BURDEN OF PROOF] and XVIII [THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S

CONSTITUTIONAL RIGHTS]. Insofar as appellant's substantial rights were impacted, these claims are not waived by trial counsel's failure to object below.

XXIII. THIS COURT SHOULD REVIEW ALL ERRORS ON THE MERITS, RATHER THAN INVOKING PROCEDURAL BARS BECAUSE DEATH IS THE ULTIMATE PENALTY

Respondent asks that appellant's request that this Court review all errors on the merits rather than invoking procedural bars because death is the ultimate penalty, should be rejected. (RB 184.) Appellant's reasons for this request are stated fully in her opening brief and need not be repeated here.

XXIV. CLAIMS RAISED IN THE HABEAS PETITION ARE INCORPORATED BY REFERENCE, BUT ONLY IF THIS COURT DETERMINES THAT SUCH CLAIMS SHOULD HAVE BEEN RAISED ON APPEAL

Respondent argues against appellant's request that claims which will be raised in appellant's habeas petition which this Court deems should have been raised on appeal not be forfeited by appellant's failure to do so now.

(RB 184.) Appellant's reasons for this request are stated fully in her opening brief and need not be repeated here.

CONCLUSION

For the reasons stated above and in appellant's opening brief, appellant respectfully requests this Court to reverse the judgment below and grant her a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated: 8/21/13

Respectfully submitted,

KAREN KELEY
Attorney for Appellant Angelina Rodriguez
By Appointment of the Supreme Court

CERTIFICATION OF WORK COUNT

I certify that Appellant Rodriguez' Reply Brief consists of 19,198words.

Dated: 8/21/13

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Angelina Rodriguez
By Appointment of the Supreme Court

PROOF OF SERVICE

I am a citizen of the United States and am employed in Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

APPELLANT'S REPLY BRIEF

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in a United States Postal Service mailbox at Modesto, CA addressed as follows:

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

Executed on 8/23/13 at Modesto, California.