IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MANUEL BRACAMONTES Defendant and Appellant.	Supreme Court No. S139702 (San Diego County Sup. Ct. No. SCD178329) Death Penalty Case

APPELLANT'S REPLY BRIEF

On Appeal from the Judgement of the Superior Court
of the State of California for the County of San Diego
Honorable John M. Thompson, Judge

MARY K. MCCOMB
State Public Defender

AJ KUTCHINS
Senior Deputy State Public Defender
Cal. State Bar No. 102322
E-mail: aj.kutchins@ospd.ca.gov

1111 Broadway, Suite 1000
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MANUEL BRACAMONTES, Defendant and Appellant.	Supreme Court No. S139702 (San Diego County Sup. Ct. No. SCD178329) Death Penalty Case

APPELLANT'S REPLY BRIEF

I.
APPELLANT WAS UNJUSTIFIABLY SHACKLED IN FULL VIEW OF THE JURY, DURING THE TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

A. The Visible Shackling of Appellant Is A Matter of Record

Appellant's principal claim is that he was shackled in a manner visible to members of the jury during his entire trial and that, as a result, he was deprived of rights guaranteed him under the United States and California constitutions. As Respondent accurately observes,

> The federal Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Deck v. Missouri* (2005) 544 U.S. 622, 629.) And under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.)

(RB at 40.)

The record in this case is plain: when trial counsel pointed out to the trial court that appellant's shackles were visible to the jury, the trial court – finding it inconvenient to remedy or mitigate the situation – decided to "leave it the way it is" for the duration of the trial.[1] (23 RT 1700-01.) The trial court did not suggest that there was any "manifest need" for the restraints to have been seen by the jury[2] – and there was none. Rather, that egregious misstep could have been avoided (as it has been in myriad cases) through the simple expedient of a drape concealing the area beneath the defense table. (See, *e.g.*, *People v. Young* (2019) 7 Cal.5th 905, 934; *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 908; *People v. Wallace* (2008) 44 Cal.4th 1032, 1049; *Maus v. Baker* (7th Cir. 2014) 747 F.3d 926, 927 and cases cited therein; *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069.) Under the authority recited by respondent, the trial court's failure to take such remedial steps resulted in a clear violation of appellant's federal and state constitutional rights.

Respondent does not explain why the claim actually set forth in appellant's opening brief falls short of demonstrating a constitutional violation under the precedent it cited. Instead, respondent rewrites both the claim stated by appellant and the record facts on which it is based.

Thus, respondent characterizes appellant's claim as being that "the wire to his ankle restraints may have been visible to one or more prospective jurors" (RB at 37) – a claim that, it asserts, "is predicated on an

---

[1] As respondent has premised its argument on what we submit is a misleading paraphrase of the pertinent colloquy between the trial court and defense counsel, the full text will be set out *post.*

[2] Indeed, as was demonstrated in Appellant's Opening Brief and will be revisited presently, there was no manifest need for restraints at all.

assumption that his ankle restraints were visible to one or more prospective jurors during one afternoon of voir dire." (RB at 44.) But Appellant's Opening Brief was absolutely clear in its assertion – fully supported by the record, and undisputed at trial – that the restraints were visible to the jury *for the duration of the trial*.[3]

As for the disparity between the actual record and how respondent characterizes it, the pertinent text is as follows:

> [Defense counsel]: It appeared to us yesterday that with the table turned facing the audience, that the jurors that were seated in the jury box, at least some of them could see that Mr. Bracamontes was shackled to the floor, which I think is a violation of his constitutional rights for the jurors to be aware that he was appearing shackled in front of the jurors in a death penalty [case]. I think that's a problem. The wire was visible underneath the chairs at least to probably the six people that are closest to the bench.
>
> [The Court]: We'll make every effort to make sure they can't see it.
>
> [Defense counsel]: Well, I'm afraid that they already have seen it.
>
> [The Court]: I'm afraid I'm going to do nothing about it other than possibly turn the table. We are not going to get rid of the panel. Do you want to turn the table, Frank?

---

[3] Thus the claim was headed: "Appellant Was Improperly Shackled In Full View of the Jury," and went on to assert that "the restraints – 'ankle cuffs' – were readily visible from the jury box" and that appellant "went through . . . the entire trial visibly shackled in full view of the jury" (AOB at 67); that there was "absolutely no justification for the court's failure to ensure that the restraints were concealed from the jury – particularly after it was brought to the court's attention that the restraints were indeed visible from the jury box" (AOB at 75-76); and – significantly – that "there was no dispute that the restraints were visible to the jury . . . ." (AOB at 78.)

> [Bailiff]: I don't know how I can. There's more people at the counsel table than expected and there's more people in the way when he stands.
>
> [The Court]: We'll leave it the way it is.

(23 RT 1700-01.) At no point did either the judge or the prosecutor contradict, or raise any question regarding, counsel's representation that "[t]he wire was visible" to at least half of the people in the jury box at any given time.

In its factual summary, respondent picks out defense counsel's more tentative formulations, recounting that "defense counsel told the court that during the previous day's voir dire it had 'appeared' that the 'wire' for Bracamontes's ankle cuffs had been visible to some of the prospective jurors," and quoting defense counsel's remark that "she was 'afraid that they already ha[d] seen it.'" (RB at 39.) Respondent notably omits counsel's definitive assertion: "*The wire was visible underneath the chairs at least to probably the six people that are closest to the bench*." (23 RT 1700.)

Nor does respondent actually quote the trial court's final word on the subject: "*We'll leave it the way it is.*" (23 RT 1701.) That direct statement in turn illuminates defense counsel's (undisputed) remark at the close of the penalty phase that the court employed "the same procedure . . . throughout the trial . . ." (46 RT 4137-4138.)

While the pertinent record is not extensive, it admits of only one fair interpretation: that appellant's shackles were visible to the jurors at the time of voir dire and they remained that way until the end of the trial. Given that, so far as the record discloses, the trial court made no effort either to justify the obtrusive shackling or to remedy it, the ineluctable conclusion is

that appellant's constitutional rights, as spelled out in *Deck* and *Duran*, were transgressed.

Respondent nonetheless insists that appellant's assertion – that the restraints were visible – is "entirely speculative." But respondent does not explain why counsel's definite statement of that fact, clearly accepted as such by the trial court and never disputed by the prosecutor, is somehow inadequate to establish it. It is a commonplace of this Court's case law for courtroom realities to be demonstrated in just this fashion. (*E.g.*, *People v. Motton* (1985) 39 Cal.3d 596, 604 [reviewing claim of discrimination in jury selection, Court notes that "[n]either the prosecutor nor the judge . . . disputed defendant's assertion that Laura Foster and John-Oliver Richardson were also Black. . . . Thus the record demonstrates with reasonable accuracy that the prosecuting attorney exercised 13 peremptory challenges, and that 7 of those challenges were against Black jurors."]; see also, *People v. Fuentes* (1991) 54 Cal.3d 707, 715–716 [fact that, after prosecutor struck four jurors whom defense asserted were Black, trial court directed prosecutor to respond to *Batson* motion[4] demonstrates that there was a *prima facie* case finding – and hence that the defense assertion was accepted]; *People v. Turner* (1986) 42 Cal.3d 711, 718 [treating defense counsel's uncontradicted representation regarding number of Black prospective jurors as established record fact]; Cf. *People v. Sanchez* (2019) 7 Cal.5th 772, 785 [record fact – regarding the design on the prosecutor's tie – established by the response in the courtroom and the fact that "[n]o one suggested otherwise."]; *People v. Superior Court* (*Bryan Jones*) (2019) 34 Cal.App.5th 75, 85 [statements made by counsel in open court, though unsworn, are presumed to be truthful as "[a]n attorney is an officer of the court, and in presenting matters to the court may employ only such

[4] *Batson v. Kentucky* (1986) 476 U.S. 79.

means as are consistent with the truth[ ] and may not mislead the court in any fashion."]; *People v. Howard* (2010) 51 Cal. 4th 15, 27–28 [suggesting the fact defense counsel objected to use of a stun belt was evidence that stun belt was in fact used as a restraint].)

Nor does respondent suggest what else appellant was supposed to do to establish that otherwise undisputed fact. Was he required to ask for an evidentiary hearing to prove up the uncontroverted factual predicate for an objection that had already been heard and denied? Respondent cites no authority for such a requirement, and appellant is aware of none. Rather, if there had been any uncertainty regarding the facts, it was the trial court's duty to ensure that the record was clarified. (See, *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1826 [holding that "[t]he trial court . . . erred in failing to make a full factual record of the type of restraints used, whether they were visible to the jury, and the number of armed officers in the courtroom."].)

Finally, in this regard, respondent cites the fact that counsel did not ask for an instruction regarding the shackles as proof that the jury did not see them. This is unadorned speculation. There are any number of reasons why trial counsel may have omitted to request such an instruction, ranging from forgetfulness on her part to some belief that such an instruction would just draw further attention to the fact that appellant was tethered like an animal. (Cf. *People v. Stanley* (2006) 39 Cal.4th 913, 965–966 [holding that counsel may have chosen not to request jury instruction "since the instruction itself draws attention to the fact that the defendant is not testifying at the same time that it cautions the jury not to draw any adverse inferences from such failure to testify."].) But the most pertinent response to this speculative argument is that it was the trial court's duty to provide such an instruction, sua sponte. (*People v. Lopez* (2013) 56 Cal.4th 1028,

1079-1081; *People v. Mar* (2002) 28 Cal.4th 1201, 1217; *Duran, supra,* 16 Cal.3d at p. 291.) As detailed in Appellant's Opening Brief, the trial court's failure to fulfill this sua sponte duty was a separate error, in and of itself. (See AOB at 77-78.) While no reliable inference can be drawn from the fact that counsel did not rescue the trial court from this clear error, the fact that respondent has chosen not even to address appellant's claim speaks volumes.

The record, in short, is more than adequate and without ambiguity; it demonstrates that, without justification therefore, appellant was visibly shackled in view of the jurors at his trial. It thus makes out a straightforward violation of the constitutional principles reaffirmed by the United States Supreme Court in *Deck* and by this Court in *Duran*, acknowledged in both parties' briefs.

B. There Was No "Manifest Need" For Any Restraints

In addition to asserting that the trial court erred by unjustifiably shackling appellant in *visible* restraints – an error for which no justification was tendered and none appears – appellant maintains that there was no manifest need for *any* shackles, visible or not, and thus that the court below violated the federal constitution even if the jury had never seen them. (See, *e.g.*, *Holbrook v. Flynn* (1986) 475 U.S. 560, 569; *Duran*, *supra*, 16 Cal.3d at p. 290-291.) Such extraordinary measures require evidence that the defendant poses "a sufficient threat of violence or disruption to justify physical restraints during trial." (*People v. Seaton* (2001) 26 Cal.4th 598, 652.) Thus, reviewing courts look to whether "the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031-1032.) It is undisputed that

appellant did none of those things, nor did he otherwise "threat[en] violence or disruption." (*People v. Seaton*, *supra*, 26 Cal.4th at p. 652.)

Respondent counters that the trial court properly found shackling appellant necessary based "both on the penalty he was facing and on the facts showing he had twice fled from law enforcement authorities trying to arrest him ...." (RB at 41.) But this Court's precedent in capital cases makes clear that the fact a defendant is charged with murder – even capital murder – does *not* provide a valid basis for imposing restraints. (See AOB at 74-75, citing *People v. Seaton*, *supra*, 26 Cal.4th at p. 652; *People v. Hawkins* (1995) 10 Cal.4th 920, 944; *Duran*, *supra*, 16 Cal.3d at p. 293; and *Stephenson v. Wilson* (7th Cir. 2010) 619 F.3d 664, 668-69.) This point is of particular significance in the instant case given the trial court's broad suggestion to the effect that it made a practice of shackling defendants in murder cases – both capital and non-capital. (See 7 RT 668.)

That leaves the fact that appellant tried to flee when first plain-clothes personnel, and then uniformed officers, attempted to arrest him in October of 2003. But the bare fact that appellant attempted evading arrest while behind the wheel of a car on the street does little or nothing to prove he would attempt to escape from a heavily secured courtroom nearly two years later. Nor was there a shred of evidence to suggest that he had any intention of doing so – unlike in the principal case on which respondent relies. (See RB at 41, quoting *People v. Gamache* (2010) 48 Cal.4th 347, 367.)

Gamache is instructive; in that case, the prosecution introduced proof that a search of the defendant's cell has turned up a hacksaw blade; a large quantity of toothpaste (to assist in sawing through bars); a homemade silencer; and a written, five-step escape plan involving freeing himself, committing a carjacking, obtaining weapons and money, robbing a casino

and changing his identity. In addition, the authorities intercepted a letter Gamache had addressed to his mother asking her to get a device that would trigger a stun belt so that he could be hospitalized and escape from there. (*Id.* at pp. 368-369.)

Gamache is an apt example of a case in which there was indeed a "manifest necessity" for the imposition of restraints based on real evidence of "'potential security problems and the risk of escape at trial.'" (*Id*. at p. 367, quoting, *Deck*, *supra*, 544 U.S. at p. 629.) There was not a scintilla of such evidence in the instant case. On the contrary, as defense counsel stated without contradiction, there had "been no showing of . . . unruliness or intention to escape or disruptive conduct over the past year and a half in court." (7 RT 668-669.) For its part, the trial court noted that appellant had been consistently well-behaved and there had been no "incidents" either in or out of court that would trigger concern. (7 RT 670.)

In short, the trial court offered no substantial justification for its decision to shackle appellant apart from a general notion that, in murder cases, such precautions are warranted. That is a very far cry from the "manifest need for such restraints" that is required to justify trespassing on appellant's federal constitutional rights.

C. The State Cannot Demonstrate That The Unlawful Shackling Of Appellant Was Harmless Beyond A Reasonable Doubt

In his Opening Brief, appellant explained why and how the trial court's unconstitutional use of restraints was prejudicial to him, in both the guilt and penalty phases of the trial. (See AOB at 79-85 [guilt phase prejudice]; *id*. at 85-88 [penalty phase prejudice].) Respondent tenders no reply to either wing of that analysis. While respondent does address guilt

phase prejudice in response to other of appellant's claims,[5] respondent offers no response anywhere regarding the prejudicial effects of shackling on a jury's death penalty decision, so powerfully outlined by the Supreme Court in *Deck.* (See *Deck*, *supra*, 544 U.S. at pp. 632-633 [concluding that "the use of shackles can be a 'thumb on death's side of the scale."].)

In lieu of an effective response to this analysis, respondent falls back on its failed assertion that the jurors never saw the shackles and then adds that, even if they did see the restraints, it was only a brief glimpse and thus could not have caused prejudice.[6]

But appellant's claim of prejudice is predicated on the record itself, which shows that the shackles were visible, at any given time, to about half of the people in the jury box and that the trial court chose to "leave it the way it [was]" throughout the trial. (23 RT 1700-1701.) That respondent is unable to tender any argument as to why that actual state of affairs did not result in grave prejudice compels the conclusion that it comprised reversible error.

//

//

[5] Appellant will answer respondent's various contentions about guilt phase prejudice – which mostly boil down to repeated invocations of the acronym "DNA" – in the context of the claims as to which they are presented.

[6] In doing so, respondent once again pretends that this was *appellant's* version of the facts – that "Bracamontes's claim of prejudice is predicated on an assumption that his ankle restraints were visible to one or more prospective jurors during one afternoon of voir dire." (RB at 44.)

II.
THE REFUSAL TO GIVE A BALANCED FLIGHT INSTRUCTION VIOLATED DUE PROCESS

In 1991, the police baldly accused appellant of murdering Laura Arroyo and, over the course of the next several years, attempted to put together a case against him. Appellant cooperated with the police and made no effort to impede their investigation or flee the area until the day, 12 years later, when a plainclothes officer tried to arrest him – at which point he fled.[7] This case thus presents a novel question: whether a trial court, when instructing a jury that flight evidences a consciousness of guilt, can properly refuse a request to also instruct the jury that the defendant's decision not to flee after being accused of murder could be considered as evidence that he *lacked* "consciousness of guilt."[8] As discussed in the opening brief, the trial court's refusal to instruct the jury regarding the exculpatory inference to be drawn from the evidence, while proceeding to

---

[7] Respondent makes much of evidence – which the trial court excluded – that appellant spent approximately six of those years (from 1997 to 2003) in prison on completely unrelated charges. (RB at 52.) We can put aside the propriety of respondent placing such reliance on evidence that was excluded below, for its mention has no significance here aside from being a transparent effort to diminish appellant in the eyes of the Court. Simply put: it is irrelevant whether appellant "merely" remained in Chula Vista for six years, rather than twelve years, after he was accused of – and while he was being investigated for – murder.

[8] The requested instruction read as follows:

"ABSENCE OF FLIGHT: The absence of flight of a person immediately after the commission of a crime, or after he is accused of a crime, although the person had the opportunity to take flight, is a fact which may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The absence of flight may tend to show that the defendant did not have a consciousness of guilt and this fact alone may be sufficient to create a reasonable doubt as to the defendant's guilt. The weight and significance of such circumstances are matters of the jury to determine." (8 CT 1705.)

instruct on the corresponding inculpatory inference, violated the federal due process and fair trial guarantees affirmed by the United States Supreme Court in *Cool v. United States* (1972) 409 U.S. 100.

The Attorney General's response to this claim consists almost entirely of an invocation of the opinions of this Court (and one from the Court of Appeal) holding that a defendant does not have a right, constitutional or otherwise, to an "absence of flight" instruction. (RB at 49-52, discussing *People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Green* (1980) 27 Cal.3d 1, 39–40 & fn. 26; *People v. Montgomery* (1879) 53 Cal. 576, 577-578; and *People v. Williams* (1997) 55 Cal.App.4th 648, 652–653.) As an answer to appellant's argument, this is essentially a non sequitur. In setting out his claim, appellant acknowledged and addressed the same cases on which respondent relies and explained why they do not provide a persuasive response to appellant's federal constitutional claim.

On the most immediate level, respondent's cases are distinguishable; none of them involves a situation in which a trial court *both* gave the pattern flight instruction *and* refused to give a supported "absence of flight" instruction. The Court's case, upon which respondent places principal reliance, explicitly notes that "[i]t is highly unlikely that in a single trial the record would support instructions on both flight and absence of flight by the same defendant" and thus holds that it is not unfair to refuse to give an "absence of flight" instruction when no "flight as demonstrating consciousness of guilt" instruction has been given. (*People v. Green*, *supra*, 27 Cal.3d at p. 40, abrogated on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225.) This case – unlike any upon which respondent relies – presents the "highly unlikely" situation described in *Green.* Appellant's claim is premised entirely on the unfairness of giving one instruction and not the other where the facts support both.

Nor do any of the cases cited by respondent take account of (much less distinguish) the Supreme Court's opinion in *Cool*, holding that it is federal constitutional error for a trial court to instruct only on inculpatory inferences to be drawn from a body of evidence while refusing to instruct on clearly exculpatory inferences that could be drawn from that evidence. (*Cool*, *supra*, 409 U.S. at p. 103, fn.4.)

In a more important sense, respondent's discussion really just affirms the validity of the analysis presented in the opening brief. The premise underlying respondent's argument is that the inference of guilt to be drawn from a defendant's flight is a very strong one, while the contrary inference to be drawn from his absence of flight – although it is indisputably a reasonable inference – is much weaker.[9]

As discussed in the opening brief, on its own terms that premise is debatable. Innumerable authorities, including the United States Supreme Court, have opined that the "consciousness of flight" inference to be drawn from a defendant's flight is weak at best and arguably valueless, and a large number of jurisdictions have accordingly prohibited the use of such flight instructions entirely. (See AOB at 93-96, discussing, inter alia, *Wong Sun v. United States* (1963) 371 U.S. 471, 484; *Alberty v. United States* (1896) 162 U.S. 499, 511.)[10]

---

[9] In *Green*, the Court acknowledged that a defendant's "absence of flight" is relevant evidence – in that it tends in some measure to show the "defendant's innocent state of mind" – while finding that its "probative value . . . is slight." (*Green*, *supra*, 27 Cal.3d at pp. 38, 39 & n.25.)

[10] A leading treatise on the Federal Rules of Evidence summarized the weaknesses inherent in the flight inference as follows:

> The premise linking flight to guilty mind is that those who flee are likely to feel guilt (more likely than another). The logic or common experience that supports the premise is that those who

But the essential point remains that – whatever the relative strength of the inference on which the "consciousness of guilt" flight instruction turns – the trial court was still instructing on a specific inference for the jury to draw from the evidence presented. As this Court has observed: "[A] trial court's instruction on . . . a permissive inference with reference to the specific facts of the case is comparable to a restrained form of judicial comment on the evidence." (*People v. Roder* (1983) 33 Cal.3d 491, 506.) And as the Court has emphasized for more than a century-and-a-half, such judicial commentary is generally prohibited by the California Constitution. (See, e.g., *Quint v. Dimond* (1905) 147 Cal. 707, 714, and cases discussed therein).[11]

> are guilty have more reason to flee than those who are innocent. [But h]ow much more likely are the guilty than the innocent to flee? Slightly? A lot? Do age, race, sex, education, geography, personality factors have any bearing? ... People react differently to the crisis of arrest and the realization that they are suspected or implicated in a crime. Rather than consciousness of guilt, flight may express fear of police or incarceration, a desire to avoid inconvenience or legal expense, or aversion at having to implicate a friend. In short, evidence of flight is inherently ambiguous, and the inference from flight to guilty mind is always subject to some doubt.

(1 Kirkpatrick & Laird, Federal Evidence (4th ed. 2013 & 2019 update) § 4:4.)

[11] Whether or not it would be wiser to allow judges to instruct juries as to matters of evidence and fact, and thus influence their verdicts as to such matters, as is permitted in some jurisdictions, is not a question to be here considered. Our Constitution expressly prohibits it. . . . '[T]o weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of this duty the judge cannot interfere without a palpable violation of the organic law' and 'the court has no right

Thus, any such instruction runs the risk of trenching upon the function committed exclusively to the jury, for "[i]t [is] for the jury to resolve conflicts in the evidence and to determine the inferences to be drawn therefrom." (*People v. Baker* (1954) 42 Cal.2d 550, 563 [citations omitted]; accord, *Musacchio v. United States* (2016) ___ U.S. ___, [136 S.Ct. 709, 715] [affirming it is the jury's role 'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts'"]; quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 314-315; *Anderson v. Liberty Lobby, Inc*. (1986) 477 U.S. 242, 255 ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"]; *Hunt v. Cromartie* (1999) 526 U.S. 541, 552; *People v. Yeoman* (2003) 31 Cal.4th 93, 128.)

This division of responsibilities between trial court and jury is particularly freighted in criminal cases for, as the Court has explained:

> A jury resolves conflicting propositions of fact and does so by drawing inferences from physical evidence and the testimony of witnesses. Yet "(f)acts are always elusive and often two-faced. What may appear to one to imply guilt may carry no such overtones to another." As this court noted more than a century ago, "the human mind is so constituted, that facts and circumstances do not always produce the same results; the judgment of two men upon the same set of facts may be diametrically opposite, particularly in the determination of a criminal case, when every doubt is carefully weighed and scrupulously balanced."

(*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 24 [citations omitted].)

---

to dictate or suggest the process of reasoning by which the evidence shall be judged'" (*Ibid*. [citations omitted].)

Certainly the "consciousness of flight" instruction concerns facts as to which reasonable minds could – and do – draw conflicting inferences; that reality is readily demonstrated by the vigorously stated but irreconcilable views expressed by the courts and commentators that have discussed it. (Compare, *e.g.*, *People v. Williams*, *supra*, 55 Cal.App.4th at p. 652 ["the inference of consciousness of guilt from flight is one of the simplest, most compelling and universal in human experience"]; with, *e.g.*, *United States v. Robinson* (7th Cir. 1998) 161 F.3d 463, 469 ["'We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.'"] quoting, *Wong Sun*, *supra*, 371 U.S. at p. 483 n. 10.)[12]

That is not to say that the pattern instruction itself is constitutionally impermissible. This Court has emphasized that, when the issue is solely whether or not jurors should draw an inference of guilt from the flight of the accused, the instruction strives to give jurors a balanced view regarding how to interpret that information.[13] (*People v. Jackson* (1996) 13 Cal.4th

---

[12] Respondent writes off the significance of the United States Supreme Court's repeated pointed criticism of flight instructions in *Wong Sun* by quoting a footnote in *Green*, to the effect that, regardless of whether the instruction is "free from ambiguities," it is required by statute. (*People v. Green*, *supra*, 27 Cal.3d at p. 39, fn. 26.) But that is a response to a completely different claim – namely, an attack on the propriety (and perhaps the legality) of giving the flight instruction required by Penal Code section 1127c. As emphasized in the opening brief, and reiterated here, appellant is not making that attack. The point is merely one that this Court acknowledged in *Green*: That the strength of the inference of guilt from the flight of an accused is highly debatable, to say the least, and the high court has consistently called its efficacy into question. (*Ibid*., discussing *Wong Sun*, *supra*, 371 U.S. 471 and *Alberty*, *supra*, 162 U.S. at p. 511.)

[13] Respondent goes much too far in this vein, however, by suggesting that the pattern flight instruction "was actually helpful to the defense . . . ." (RB at 51.) In this regard, the proof is in the pudding – one need only

1164, 1224.) However, when the facts also reasonably support the inverse inference – that the absence of flight may be considered as exculpatory evidence – but the court only instructs regarding the inculpatory inference to be drawn from flight, the requisite balance is upset, and the scales are impermissibly tipped in favor of the prosecution.[14]

That imbalance, favoring the prosecution, is what rendered the trial court's instructions "fundamentally unfair," and thus intolerable under the United States Constitution. (*Cool*, *supra*, 409 U.S. at p. 103, fn. 4.) Respondent first attempts to distinguish *Cool* by reciting the facts and legal principal undergirding the high court's alternative holding in that case – that the instruction given there impermissibly shifted the burden of proof beyond a reasonable doubt. (RB at 51.) This argument is not responsive to the other holding in *Cool*, upon which appellant relies – namely that, "[e]ven if there had been no other error" the instruction was "fundamentally unfair" to the extent that it told the jury that it could convict on the basis of a certain body of evidence (there, accomplice testimony) without informing the jurors that they could also acquit based on that evidence. (*Cool*, *supra*, 409 U.S. at p. 103, n.4) Respondent's next argument – that, unlike the instruction given in *Cool*, the pattern flight instruction in the instant case

---

review the emphatic use the prosecutor made of the flight instruction in his jury arguments to know beyond a doubt which side was actually helped. (See 25 RT 3451-3454.)

[14] In *Green* the Court opined that, as the "absence of flight" evidence was itself properly excluded pursuant to Evidence Code, section 352, the trial court did not err in refusing to instruct regarding the "innocent mind" inference. (*People v. Green*, *supra*, 27 Cal.3d at pp. 38-39.) That reasoning has no application to this case, for here the trial court explicitly encouraged defense counsel to argue that the evidence properly supported a "lack of guilty consciousness" inference – but without benefit of a supporting instruction. (35 RT 3358.)

"was actually helpful to the defense" – was dispatched in the preceding footnote. Simply put: in this case the instruction was demonstrably helpful to the prosecution and of no help whatever to the defense.

Finally, Respondent argues that "[u]nlike the instruction in *Cool*, which provided a basis for conviction, the flight instruction here merely helped the jury interpret the evidence." (RB at 51.) This argument misses the point: the flight instruction only "helped the jury interpret the evidence" to the extent that evidence could have "provided a basis for conviction." The jury was never given any correlative instruction that could help it interpret the evidence regarding appellant's decisions to flee – and *not* to flee – in a manner that could provide a basis for acquittal. That was the vice condemned by Supreme Court in its (second) holding in *Cool*, and why the federal constitution was violated in this case.

Which brings us to respondent's argument regarding prejudice – that "the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836." (RB at 52.) This is another non-sequitur, for *Watson* is the wrong test for assessing prejudice when – as in this case – appellant's claim is that the trial court's failure to give an instruction violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[15] Rather, it is respondent's burden to demonstrate beyond a reasonable doubt that the error did not contribute to the judgments of guilt and death entered against appellant. (See *People v. Wright* (2006) 40 Cal.4th 81, 98; applying, *Chapman v. California* (1967) 386 U.S. 18, 24.)

[15] Respondent gives no hint as to why it thinks the *Watson* test applies instead of the "harmless beyond a reasonable doubt" standard which governs federal constitutional error and which was invoked in the opening brief (at pages 99-100.)

Why the State cannot meet the *Chapman* test is reviewed in detail in the opening brief. (See AOB at 97-100.) Respondent's only substantive comments regarding prejudice do not meet that analysis. As set out in the opening brief, allowing defense counsel to argue the "absence of flight" inference was no substitute for an instruction to parallel the "flight – consciousness of guilt" charge, delivered with the imprimatur of the trial court, upon which the prosecutor founded much of his jury argument. (See AOB at 98-99, discussing, inter alia, *People v. Rivera* (1984) 157 Cal.App.3d 736, 744.) And as discussed above, whether appellant remained in the area for six years – as opposed to twelve years – after he was accused presents a distinction without a difference.

Respondent then makes talismanic reference to the DNA evidence – as it does throughout the brief when the question of prejudice comes up. While such evidence assuredly has force in any case, it was not the beginning and end of the jury's extended deliberations in this case. On the contrary, it had to compete with a quantity of other evidence strongly suggesting that appellant was *not* the killer, and with legitimate questions about the reliability of the DNA evidence itself.[16] (Please see AOB at 79-84 & 97-98.) Respondent finally relies on the fact that, when appellant was ultimately arrested, a dozen years after the crime, "he fled – twice." (RB at 53.) This observation just brings us full circle. The fact that appellant fled,

[16] Respondent asserts that "[t]he insinuation throughout the opening brief that the DNA evidence was the result of 'contamination' or malfeasance is unfounded" because appellant had never provided a sperm sample to the police, yet "his" sperm was found (a dozen years after the fact) on the oral swabs collected from the victim's body. (RB at 53 n. 8.) The argument is specious: the only way the sperm was identifiable as appellant's was because it (supposedly) contained his DNA, and that fact does not put to rest the real possibility that the DNA got there through contamination, "malfeasance," or other causes.

and the inculpatory inference to be drawn therefrom, was the subject of an instruction by the trial court – while his lengthy period of staying put, after he was accused, received no similar treatment. The inference to be drawn from the former cannot fairly defeat the argument that it was error to fail to instruct the jury regarding the latter. Respondent cannot demonstrate, beyond a reasonable doubt, that this error had no effect on the jury's verdict. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

//

//

III.
BASED ON A NON-EXISTENT RULE, THE TRIAL COURT FORECLOSED APPELLANT'S COUNSEL FROM PRESENTING AND ARGUING A THIRD PARTY CULPABILITY DEFENSE

Because there is again some disjuncture between the claim set forth in appellant's opening brief and how that claim is characterized when it is addressed in respondent's brief, we begin by summarizing what the actual claim is.

At trial, the court below made clear that it would not permit any evidence or argument regarding possible third party culpability for the murder of Laura Arroyo. This was because, according to the trial court, appellant's counsel was required under *People v. Hall* (1986) 41 Cal.3d 826 to obtain leave, *prior to trial*, as a precondition to relying on any third party culpability evidence. (7 RT 665; 31 RT 2804-2806.) As shown in the opening brief, neither *Hall*, nor any other case, statute or rule sets forth any such requirement.

As the trial progressed, however, there was testimony from several witnesses regarding a suspicious brown Datsun parked, with three or four occupants, near the locale where the victim was abducted. (25 RT 2051-2052; 25 RT 2056-2066; 26 RT 2070-2071; 26 RT 2087.) When the witnesses saw them, the occupants of the vehicle "squatted down to hide." (25 RT 2066, 2087.) The victim's mother reported to police that other people who had seen the car "left the park around 8:50 or 9:00 p.m. because they felt 'frightened' by the occupied car." (RB at 55, citing 26 RT 2087.) That was just minutes before the victim disappeared. (See 25 RT 1994-95.)

When defense counsel then attempted to inquire regarding someone whom the victim's father had identified as an enemy who was possibly responsible for the kidnapping – someone with whom he had dealings

regarding a taco shop – the prosecutor objected on hearsay grounds and requested a sidebar. (31 RT 2802-2805.) To this the trial court responded – in open court and before the jury – "It's about time." (31 RT 2805.) Then (without ruling on the prosecutor's hearsay objection) the trial court reiterated that the defense was completely barred from raising third-party culpability issues because "[a]ll of third-party liability [*sic*] stuff has to be noticed, has to be litigated pretrial. ... We discussed it during pretrial motions. No pleadings were filed. I don't see any reason to let you go into it now." (*Ibid*.) Later, while settling jury instructions and discussing what could and could not be argued to the jury, the trial court reiterated its understanding of a "notice requirement" for any third-party culpability defense based on *Hall*. (35 RT 3311.)

Appellant's claim is thus straightforward: Based on an indisputably erroneous interpretation of the law, the trial court prohibited the defense from developing and arguing exculpatory evidence, and in doing so violated appellant's constitutional right to present a defense (see, *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325), as well his constitutional right to have counsel present pertinent argument (see, *e.g.*, *People v. Farley* (2009) 46 Cal.4th 1053, 1130, fn. 31; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739.)

Respondent makes no effort to dispute appellant's fundamental premise: that the trial court was simply wrong about what the law requires, and that any ruling based on that patently incorrect legal premise is indefensible. Instead, respondent refashions appellant's claim into something different – a straw man that it proceeds to attack with whatever weapons it finds at hand.

Thus, respondent begins its argument by characterizing appellant's claim as being solely based on the trial court's refusal to allow evidence

concerning "the 'acrimonious' sale of a taco shop." (RB at 53, citing AOB at 100-110.) But while the dispute about the introduction of third party culpability evidence was most fully discussed when the prosecutor objected to testimony regarding the taco shop, the more significant evidence – which defense counsel was ultimately forbidden from arguing – concerned the suspicious (and apparently frightening) presence of the strangers in the brown Datsun just at the time the victim was kidnapped. (See AOB at 103-104.) By narrowing the focus in this way, respondent sets up its contention that the evidence of a potential alternative perpetrator (or perpetrators) was insufficient to merit further development.

To begin with, respondent's argument misses the essential point – namely that it is impossible to fairly assess what the third party culpability evidence would have looked like, because the trial court erroneously stifled that line of inquiry before it had a chance to emerge. Thus, respondent misses the mark when it argues that appellant failed to make an adequate "offer of proof relating to third party culpability" (RB at 58), and when it asserts that the trial court properly exercised its discretion in denying the defense leave to present and argue such evidence. (RB at 58-62.) The record plainly shows that the defense was not given the opportunity to make an offer of proof once trial commenced; nor did the trial court exercise any discretion in that regard. Rather, the court below simply – and erroneously – announced that it was enforcing a (non-existent) rule that precluded appellant from relying on any such defense because it had not been vetted pretrial. (See 31 RT 2805-2806; 35 RT 3311.)

Respondent insists that the trial court did not rely on its manufactured "notice" requirement but really ruled on the merits of the third party culpability defense, finding the evidence irrelevant. To that, appellant can only reply that the record speaks for itself. (See, 31 RT 2805-

2896 ["It was never noticed. We even talked about it in pretrial motions. It was never noticed. All this stuff is irrelevant. [¶] You can say someone else did the murder, but you can't point to who it is. . . . All of this third-party liability stuff has to be noticed, has to be litigated pretrial. . . . [¶] It was not resolved because it was never noticed that you were going to be making a third-party liability claim. As I understand it, you are required to do so."]; 35 RT 3311 [reiterating "the notice requirement" – that "the people are required to receive notice of third-party culpability."].) To the extent that the evidence was "irrelevant" it was simply because it went to a defense that had been improperly disallowed.[17]

But to the extent that it was necessary to show, even preliminarily, the existence of evidence with some "direct or circumstantial connection to the actual perpetration of the crimes" (RB at 60, citing *Hall*, *supra*, 41 Cal.3d at pp. 832-833), the fact that seemingly dangerous strangers were lurking nearby at the instant the victim disappeared was surely the key component. (See, e.g., *People v. Mendez* (1924) 193 Cal. 53 [holding third-party evidence may be relevant if it shows the third party close to the scene of the crime]; cf. *Hall*, *supra*, 41 Cal.3d at p. 833 ["In order for evidence suggesting third party culpability to be relevant, and thus admissible, the evidence 'need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.'"].) This is not to say that the evidence, undeveloped as it was as a result of the trial court's mistake of law, would

[17] After defense counsel – forbidden from presenting a third party culpability defense and attempting to get the evidence in on other grounds – disavowed such a defense, the trial court responded: "Then it [the evidence] is not relevant." (31 RT 2806.) The clear implication was that, if a third-party culpability defense had been permissible, the evidence would indeed have been relevant.

surely have been sufficient to support a third party culpability defense, even if it had been filled out and the necessary connections made. But respondent's contention – that the evidence was so clearly irrelevant that the trial court would have been justified in not even letting the defense delve deeper and attempt to connect its strands – is itself insupportable.

Respondent's lead argument is forfeiture – that appellant "forfeited his claim that the trial court erred in excluding" the alternative perpetrator evidence by "by failing to seek [its] admission at trial." (RB at 57-58.) The argument ignores the fact that the trial court had already ruled that (pursuant to its mistaken reading of *Hall*) such evidence could only come in by way of a noticed motion, litigated *prior* to trial. (7 RT 665.) Nonetheless, the defense did successfully "seek the admission" of a quantum of evidence regarding the brown Datsun and its sinister occupants, and was in the process of seeking the admission of evidence regarding the animosities surrounding the sale of the store when the trial court cut off the defense and reasserted its ruling, forbidding the use of any of the tendered evidence for purposes of making out a third party culpability defense. At that point it would have been futile for the defense to attempt to insist on its right to present such a defense, and the law does not find forfeiture on the basis of a party's nonperformance of a futile act. (*People v. Brooks* (2017) 3 Cal.5th 1, 92; *People v. Welch* (1993) 5 Cal.4th 228, 237.)

Respondent similarly places great reliance on defense counsel's statement, made in an attempt to get the taco shop evidence admitted *after* the trial court had decisively ruled that no third-party culpability evidence could come in, that "we are not making a third party culpability claim." (RB at 56, quoting 31 RT 2806.) But this demonstrated nothing more than counsel attempting to salvage the situation as best she could. As this Court has observed, such "defensive acts," performed to mitigate the effects of an

adverse ruling, do not waive or forfeit the right to challenge the original ruling. (See, e.g., *People v. Turner* (1990) 50 Cal.3d 708, 744 and fn. 18; see also, *People v. Venegas* (1998) 18 Cal.4th 47, 94 ["'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."' (citations omitted)].)

As for prejudice, respondent announces, ipse dixit, that "[t]he exclusion of third party culpability evidence did not implicate the federal constitution and therefore is not governed by the *Chapman* standard of review." (RB at 62.) Respondent seems to get to this conclusion by reasoning that, because there was no error, there was no federal constitutional error, and thus any error must be subject to the *Watson* standard. This formulation describes a perfect circle.

Beyond that, respondent's remarks regarding prejudice amount to nothing more or less than another invocation of the unquestionable finality of the DNA evidence. (RB at 62.) We have already discussed why there was, in fact, good reason to question the reliability of that evidence and why it is apparent that the jurors were not so conclusively persuaded by it, given the time they spent and the readbacks they requested of testimony tending to show that appellant could not have committed the crime during the established timeline. The only question for the jury, finally, was whether it was appellant or someone else who committed the crime. As such, it cannot fairly be concluded, beyond a reasonable doubt, that the result would have been the same if the defense had been permitted to adduce evidence of and argue the existence of an alternative perpetrator. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Wright* (2006) 40 Cal.4th 81, 98.)

IV.
THE PROSECUTION'S TWELVE-YEAR DELAY IN CHARGING APPELLANT WAS UTTERLY UNJUSTIFIED AND DEPRIVED HIM OF DUE PROCESS

Although respondent (unsurprisingly) dubs appellant's due process prosecutorial delay claim "meritless" (RB at 63), in fact the parties agree on the basic rules of decision and respondent does not contest (indeed, does not even mention) significant points – both legal and factual – set forth in appellant's opening brief. When those legal principles are applied to the (largely undisputed) facts, it is clear that the failure of law enforcement authorities to charge appellant with the capital crime in this case for more than a dozen years deprived him of due process.

A. Pertinent Legal Principles

As respondent accurately recounts, "'negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process.'" (RB at 69, quoting, *People v. Nelson* (2008) 43 Cal.4th 1242, 1255.) As shown in the opening brief – a showing to which respondent does not fully respond – the authorities' failure to employ obvious investigative procedures and techniques that were available in 1991 renders their twelve-year delay in charging appellant clearly negligent. (On the other hand, there is a genuine dispute between the parties as to whether appellant has demonstrated the requisite prejudice.)

But before addressing those two predicates – unjustified delay and prejudice – a threshold point bears note. The opening brief demonstrated that the trial court founded its ruling denying appellant's prosecutorial delay motion on a clear error of law: the court below held that appellant

needed to show purposeful misconduct on the part of the prosecution in order to make out a due process violation. (See AOB at 99-101).[18]

As this Court has repeatedly held – and both sides recognize – that is simply not the law; rather, a negligent delay (combined with prejudice therefrom) provides sufficient grounds for a due process claim. (See *People v. Cowan* (2010) 50 Cal.4th 401, 431; *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.) Respondent's Brief proceeds as if the resolution of this claim turns on whether the lower court abused its discretion in denying appellant's motion. But the brief never rebuts (nor even acknowledges) the necessary conclusion that the trial court *perforce* abused its discretion by relying on an invalid rule of law. (See AOB at 99-100, quoting, inter alia, *People v. Patterson* (2017) 2 Cal.5th 885, 894 ["When a trial court's decision rests on an error of law, that decision is an abuse of discretion"].) Thus – contrary to respondent's working assumption – this Court owes no deference to the trial court's determination.

B. The 12-Year Delay Was Unjustified

On the one hand, appellant does not contend that the authorities had some nefarious purpose when they delayed for all those years; on the other hand, it is really beyond fair to dispute that the delay was the result of inexcusable incompetence, and thus unjustifiable. According to respondent, the authorities were unable to charge appellant "until 2003 when substantial DNA linked him to the crime." (RB at 64.) What appellant demonstrated in the trial court, and argued in his opening brief, is

[18] The trial court held (presumably in the alternative) that even if negligent delay could be a basis for a due process claim, the prosecution's "good faith" would itself constitute a "valid reason" to justify that delay. As traced in the opening brief, this was just saying the same thing – i.e., that making out a due process violation requires a showing of bad faith – in different words. (See AOB at 101.)

that what respondent contends was the crucial evidence – necessary before charges were filed – was readily discoverable at the time of the initial investigation in 1991, employing analytical tools that were in common use at that time. (AOB at 90-94.)

The DNA that "linked [appellant] to the crime" in 2003 was found in semen in three sets of places: on the swabs taken by the medical examiner from the victim's oral cavity and a wound on her neck; from under her fingernail clippings; and from a large stain on the victim's pajama top. (13 RT 1107-1108, 1114-1116; 15 RT 1316-1318.) Respondent's argument is that the delay in discovering that crucial evidence was justifiable – and indeed inevitable – because (a) the medical examiner had opined that there was no sexual assault in the case, and it was reasonable for the police to stop looking for semen at that point;[19] and (b) "the DNA testing that was prevalent in 1991 – RFLP – required significantly more sperm to generate a DNA profile than were present on all of the oral swabs collected in this case." (RB at 67.)

We can note, but put aside, the fact that the defense put on expert law enforcement evidence directly to the contrary – namely, that in 1991 it was standard practice in such cases to test bodily cavities and victims' clothing for semen, regardless of what the medical examiner thought had

[19] Respondent pointedly notes in this regard that the medical examiner was correct in his conclusion that there was no sperm present on the "oral swabs" – i.e., that even in 2003 none was found on the swabs taken from the victim's oral cavity. (RB at 67.) If respondent means to propose this fact as proof that the medical examiner's investigation was thorough and competent in this regard, the effort fails because it omits other, crucial facts. Specifically, respondent does not mention that sperm ultimately *was* found on the swabs taken from the wound on the victim's neck (13 RT 1123) – which no one ever bothered to test in 1991-1992. (13 RT 1213, 1219-1221.)

occurred, and that standard tests, readily available at the time, would indeed have revealed semen on the swabs and the pajama top and would have been able to match DNA in the available amounts of semen. (15 RT 1331, 1333-1340; 16 RT 1370, 1373-1374.) We can similarly put aside the undisputed fact that, in 1996 – when the investigation was reopened, appellant's car was located and searched again, and the police employed a psychic – the necessary advances in serology and DNA testing had certainly occurred, but the police did not bother to retest the evidence. (See 16 RT 1380-1381.)

Even putting all of that aside, respondent's argument fails on its own terms for the "oral swabs" were not the only evidence available for testing. As noted above, the swab taken from the victim's neck did have sperm on it – but no one bothered to test it until 2003. And the uncontroverted evidence is that the semen on the victim's pajama top was detected and extracted through (relatively crude) techniques that were in common use at the time of the initial investigation, in 1991.[20] (15 RT 1336.) The amount of DNA contained in the sperm on the pajama top was ample to permit testing, even under the techniques used by the authorities in this case back then. (15 RT 1318-1322, 1324, 1339; 31 RT 2819; 32 RT 2902.)

In short, the evidence that respondent claims was the critical prerequisite to filing charges in this case was as readily available to the charging authorities in 1991 as it was in 2003. Nor was the medical

---

[20] The criminalist who tested the pajama top in 2003 first identified the presence of semen by shining an "alternate light source" (*i.e.*, a "black light") on it, and then extracted the sperm for DNA testing by putting pieces of the cloth in water and agitating it. (RT 1316-1318.) A different police criminalist had similarly used the "alternate light source" in 1991, when he searched appellant's room. (32 RT 2902-2903.) Suffice it to say that there was nothing particularly sophisticated about the process of immersing the cloth in water and agitating it. (See 15 RT 1336.)

examiner's view – that there had not been a sexual assault – any excuse for the authorities' failure to obtain this purportedly crucial evidence in 1991. We can say this with assurance because the authorities *did* in fact test the pajama top for semen in 1991 and 1992; first in the San Diego Sheriff's Crime laboratory and then in the Federal Bureau of Investigation laboratory in Quantico, Virginia. (13 RT 1208-1209; 5 CT 832.) Both labs reported that no semen was found on the clothing, nor was any other evidence found connecting appellant to the murder. (*Ibid*.) The very best explanation for this, from respondent's side, was that the testing was not competently performed. (13 RT 1150-1151.)[21] Put in plain terms, the failure of the authorities to obtain the evidence requisite to charge appellant in 1991 was, at best, the result of negligence in the conduct of the investigation. Under this Court's clear precedent, the ensuing twelve year delay was unjustified and – if appellant was prejudiced as a result – constituted a violation of due process such that the judgment below must be reversed. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431; *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.)

C. The Delay Was Prejudicial

Appellant's Opening Brief set out how the unjustified delay handicapped his counsel's ability to present his defense, at both the guilt and penalty phase of the trial. In regard to guilt, the delay insured that defense counsel would be unable effectively to investigate the potential alternative perpetrator defense that could have made all the difference in the case. As respondent acknowledges, by the time appellant was charged the person named by the victim's father as a possible culprit – the woman with

[21] The only other possible explanation – according to the testimony of the supervisor of the Sheriff's crime lab – was that there was no semen on the garment in 1991. (*Ibid*.) Of course, that explanation could only serve to fully exculpate appellant.

whom he was locked in a bitter dispute regarding the sale of a taco shop – was long dead. (RB at 66.) More significant yet was the fact that any possibility of investigating the brown Datsun, and its frightening occupants who were lurking near the scene when the victim was kidnapped, had long since vanished.

Respondent counters, as to the taco shop dispute, that "the lead was followed and apparently found unsubstantiated by police in 1991." (RB at 70.) The response is inadequate, for several reasons. To begin with, it does not even touch on what the police did – or, more to the point, did *not* do – in regard to investigating the people in the brown Datsun. But, in any event, it is established beyond cavil that a police investigation of a potential defense is no substitute for a timely investigation by the defense team itself. (See, e.g., *Campbell v. Reardon* (7th Cir. 2015) 780 F.3d 752, 768; *Riley v. Payne* (9th Cir. 2003) 352 F.3d 1313, 1318-1319; *Anderson v. Johnson* (5th Cir. 2003) 338 F.3d 382, 392; see also, *In re Cordero* (1988) 46 Cal.3d 161, 181-182, 184.)

A direct effect of the prosecution's unjustifiable twelve-year delay in charging appellant was that his defense lost any opportunity whatever to conduct an adequate investigation of this crucial defense. In light of that fact, respondent's insistence that appellant has failed to produce sufficient evidence of third party culpability to make out prejudice simply adds insult to injury.

A similar analysis applies with even greater force to the assessment of the harm done to appellant's penalty phase defense. As the Court knows well, death penalty proceedings are the most freighted hearings in the entire justice system and, in order to ensure that the jury has a full opportunity to decide whether this particular defendant should live or die, "[i]t is imperative that all relevant mitigating evidence be unearthed . . ." (*Caro v.*

Woodford (9th Cir. 1999) 165 F.3d 1223, 1227; accord, *In re Lucas* (2004) 33 Cal.4th 642, 708 [emphasizing the importance of "secur[ing] an independent, thorough social history of the accused . . ."]) This is because "the failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1135.)

As detailed in the opening brief, by the time the case was tried in 2005, great quantities of potentially mitigating evidence had been lost: medical, school and employment records had been destroyed; memories had faded and – worst of all – important witnesses had died. (See AOB at 87-89.) As the trial court itself recognized, for purposes of "provid[ing] the trier of fact with the 'fabric' of Defendant's life, it is . . . clear that several avenues have been closed due to the passage of time." (7 CT 1563.)

Nonetheless, the trial court ruled (as respondent now argues) that appellant's claim must fail because he cannot show concretely what was lost due to the prosecution's inexcusable delay. This is tantamount to demanding that appellant prove a negative; he cannot say exactly what was lost, and thus could not be provided to the jury – for the precise reason that (due to the prosecution delay) it was lost.

In the opening brief appellant addressed this conundrum by proposing that – in the unique circumstance of a death penalty proceeding – the burden regarding prejudice should fall on the prosecution, which caused the loss. In line with this Court's approach to assessing other penalty phase errors, the prosecution should be required to demonstrate, beyond a reasonable doubt, that the evidence lost due to its needless delay would not have made a difference to the outcome. (See AOB at 107-108, discussing, *People v. Hamilton* (2009) 45 Cal. 4th 863, 917*;* and *People v. Brown* (1988) 46 Cal.3d 432.) As the Court reiterated in the latter case: "For over

two decades, however, we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination. Accordingly, we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*Id*. at pp. 446–447.) The necessity of this different approach to assessing prejudice could not be clearer than when – as in this situation – the very nature of the error involves the loss of potentially mitigating evidence, and thus goes directly to the jury's "normative, discretionary penalty phase determination."

Respondent neither acknowledges nor addresses this analysis but instead concentrates on trivializing the significance of the lost evidence. Thus, respondent argues that some of appellant's records "still existed in 2003 to the extent they would have existed in 1991" (RB at 70-71) – but neglects to mention the many other records that were destroyed between the date of the crime and the time of trial (see, e.g., 8 RT 743-746; 846-858). Similarly, respondent asserts that, because appellant was 27 years old when the crime occurred, "teachers from his early school years were about as likely to recall him in 1991 as they were in 2003." (RB at 71.) But the evidence was that most of appellant's teachers from those years were dead by the time he had a defense team preparing for trial (8 RT 986-992, 994), and thus were certain not to remember him at all. The one teacher from those years that the defense investigator could locate – appellant's first grade teacher – was 87 years old by the time they spoke and could not remember him. (8 RT 984-985.) It would be truly extraordinary if her memory had not suffered during the intervening twelve years. And none of appellant's teachers from his high school years could even be identified,

because virtually all of those school records had been destroyed – even report cards and yearbooks. (8 RT 839-856, 982-984.)

More significant yet – but not addressed at all in respondent's brief – was the death of witnesses close to appellant who likely would have made a real contribution to his mitigation defense. Among them were the parents of his girlfriend (and later wife), Maggie Porter – who were thus also the grandparents of his son – and who thought and spoke very highly of appellant. (8 RT 791-793.) Their testimony could have provided a crucial counterweight to what was essentially the only aggravation evidence presented by the prosecution – regarding appellant's purported mistreatment of Ms. Porter. Similarly, appellant's uncle, with whom he was very close and who esteemed appellant, had been anxious to testify on his behalf – but died the year before the trial finally commenced. (8 RT 785-789.)

It is impossible fairly to assess, with any certainty, what effect any and all of this missing evidence would have had on the jurors' "normative, discretionary penalty phase determination." But for exactly that reason, the loss of those quantities of evidence as the result of negligent, unjustifiable delay on the part of the prosecution cannot simply be discounted as harmless. The prosecutorial delay in this case deprived appellant of due process, and the judgment against him should be reversed.

//

//

V.
THE TESTIMONY OF THE VICTIM'S ELEMENTARY SCHOOL TEACHER BREACHED THE BOUNDS OF PERMISSIBLE VICTIM IMPACT EVIDENCE

As traced in appellant's opening brief, a woman named Mari Peterson, who had been Laura Arroyo's third-grade teacher at the time of the victim's death, gave poignant "victim impact" testimony that went far afield of the rules of evidence as they would be applied in any other setting. She provided evocative descriptions of the thoughts and feelings of unnumbered and mostly unnamed others – her students, their parents and siblings, those in attendance at the funeral, capped with this heart-wrenching account of the funeral itself:

> There was [sic] so many children at that funeral. Everybody was crying. The church was packed. Packed. . . . The picture of Laura was in front of the church. And then they brought in this tiny little casket. I mean, it looked like a toy casket. It was white. It had a teddy bear. . . . The children still [sic] went to the burial. It was just so many kids crying. And then you could see on this kind of a hill this tiny little hole. Even the hole was small, it looked to me, and the tiny casket with the flowers and the teddy bear.

(42 RT 3778-3779.) Quotations from Ms. Peterson's testimony played a prominent part in the prosecutor's final argument to the jury, imploring them to put appellant to death.

It is impossible to square such testimony with the constitutional limitation on victim impact evidence, reiterated by this Court: "'The jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 836 [citation omitted].) Respondent disagrees, arguing – in essence – that the Court has approved the admission of evidence similarly calculated to sway jurors in other cases. As will be

shown, presently, that is neither wholly accurate nor an appropriate response to the claim of constitutional offense.

Before entering that discussion, however, Respondent contends that the claim may not be considered on its merits because it was forfeited by lack of objection below. While such forfeiture arguments appear to be a *de rigeur* response to victim impact claims, it is a particularly odd assertion in the instant case.

Defense counsel objected strenuously and repeatedly, both in writing and orally, to the introduction of the teacher's victim impact testimony. (9 RT 915-920; 40 RT 3596-3598; see, 4 CT 725-734; 735-748.) Prominent in the text of the written motion addressing all victim impact evidence was an objection to "inflammatory" and unnecessarily emotional testimony, asserting that when the prejudicial impact of any such evidence outweighed its probative value within the meaning of Evidence Code section 352, it also perforce violated the federal and state due process protections outlined in *Edwards, supra*, 54 Cal.3d 787 and *Payne v. Tennessee* (1991) 501 U.S. 808. (4 CT 746-747.) Although the trial court denied the pretrial defense objections, it announced that it would "monitor the presentation of the victim impact evidence subject to section 352 as well as a continuing objection that the presentation is cumulative." (9 RT 916-917.) That assurance reflected the trial court's previous rulings that *all* pretrial objections to the introduction of evidence would be treated as "continuing objections" throughout the course of trial (7 RT 718), and that all objections made on statutory grounds would be assumed to include their related constitutional bases.[22] (7 RT 723; see 3 CT 588, et seq.)

[22] It bears noting that – asked for his view by the trial court – the prosecutor agreed that objections made pretrial did not have to be repeated when the evidence was introduced during the course of the trial. (7 RT 719

Respondent nonetheless contends that appellant forfeited his right to challenge "Ms. Peterson's testimony as being excessive or overly emotional" because his counsel did not say that explicitly at the time the testimony was adduced. (RB at 75.) This Court responded to a similar effort to reduce capital litigation to a game of "Mousetrap," as follows:

> The Attorney General argues that defendant has forfeited this claim on appeal because he failed to renew his objection during the testimony of the witnesses who recounted Lopez's statements. But defendant's objection to Lopez's statements was properly preserved for appeal. In order to avoid disruption at trial, the trial court granted defense counsel's motion for a continuing objection to all such testimony introduced at trial, which indicates that the court understood that the defense opposed the introduction of this evidence. (*People v. Banks* (2014) 59 Cal.4th 1113, 1165 [it was not incumbent upon defense counsel to disrupt the trial by continuing to object to each subsequent question in order to preserve the objection].) Defense counsel again raised the issue at the penalty phase, and the court affirmed its prior decision. Consequently, defendant did not forfeit this claim.

(*People v. Johnson* (2015) 61 Cal.4th 734, 761.)

In this case, defense counsel properly relied on the trial court's assurance that it would treat the pretrial motion as a continuing objection and would "monitor" the content of the victim impact evidence – including Ms. Peterson's – for being (in respondent's words) "excessive or overly emotional." To hold that defense counsel somehow forfeited the claim by

---

["I don't see why if we have an in limine hearing and you say – overrule that objection, I agree, why would they have to say it at trial. It's in the in limine record. Unless it's some kind of really weird issue or something. I can't think of an example where somebody has made an objection in limine and then later on the appellate court said you had to say it at trial also."].)

taking both the trial court and the prosecutor at their words would be to lay a cruel trap for the extremely wary.

The cases on which respondent relies in this regard – *People v. Simon* (2016) 1 Cal.5th 98, 139, and *People v. Huggins* (2006) 38 Cal.4th 175, 236, 238 – do it no service. In *Huggins*, the defendant forfeited his claims that the use of victim impact evidence violated the *ex post facto* clause and involved matters beyond the acceptable scope of such evidence because trial counsel had narrowly tailored his objections to what he viewed as "irrelevant or unduly prejudicial." (*Ibid*.) Respondent's own description of *Simon* demonstrates why that case is inapposite: "This Court ... explained that because the court had deferred making any specific rulings pretrial, it was 'incumbent upon the defendant to monitor the victim impact evidence on an ongoing basis during the penalty phase and raise any specific objections at that time." (RB at 74, quoting *Simon*, *supra*, 1 Cal.5th at p. 139.) As that summary imports, the trial court in *Simon* did not recognize any continuing objections, nor did it promise – as the court did in this case – to "monitor" the victim impact evidence itself.

Several of the cases upon which respondent relies regarding the merits of the claim are similarly inapposite and, if anything, help demonstrate why the teacher's victim impact testimony in this case was excessive and inappropriate. Thus, he quotes *People v. Smith* (2005) 35 Cal.4th 334, 365, for the proposition that such testimony "was 'what one would expect in any case involving the murder of a child.'" (RB at 77.) But, as respondent then acknowledges, the disputed testimony in *Smith* was the victim's "mother's testimony concerning the loss of her child, how the pain would never go away and how what happened to him stayed in her mind." (*Ibid*.; also citing *People v. Dykes* (2009) 46 Cal.4th 731, 782 [testimony of victim's grandmother].) Essentially identical testimony was

in fact given by the victim's parents and siblings in the instant case (see 42 RT 3701-3711; 3745-3767) – but is *not* the subject of appellant's claim.

Rather, the point is that, given the family's very powerful testimony, the addition of Ms. Peterson's invocation of the truly pathetic details of the funeral – as well as her unverifiable but nonetheless potent description of the effect of the victim's life and death on others (starting with how Laura was the "best friend" of every single child in her class) – was excessive and had no function beyond inflaming the passions of the jury. Respondent quotes this Court for the proposition that evidence regarding the impact of the victim's death is relevant and admissible "'[u]nless it invites a purely irrational response from the jury . . . .'" (RB at 76, quoting *People v. Dykes, supra*, 46 Cal.4th at p. 781.) Tearful descriptions of the victim's "tiny little casket ... like a toy casket ... It had a teddy bear," and the "tiny little hole" in which she was buried (42 RT 3778-3779), have no plausible function in a trial except to inflame the jury and demand such a "purely irrational response."

That leads directly to the question of prejudice. In regard to this claim, at least, respondent acknowledges that it bears the burden of demonstrating, beyond a reasonable doubt, that "there is no reasonable possibility that Bracamontes would have enjoyed a more favorable outcome, absent the testimony of Laura's teacher." (RB at 79, citing *People v. Gonzales* (2006) 38 Cal.4th 932, 960-961.)

Respondent's argument in this regard consists of the flat assertion that the jury's death verdict was the "direct result" of the circumstances of the crime of which it had previously convicted him. (RB at 79-80.) This argument ignores the fact that – despite having already convicted appellant of that crime (and despite having also heard the moving testimony of the victim's family) – the jurors spent two full days deliberating before

returning their penalty verdict. (10 CT 2130-2132; see AOB at 48 and n. 56.) What that reflects is that, much like in the guilt phase (in which the seemingly insuperable DNA evidence was challenged by extremely persuasive exculpatory evidence), the penalty phase evidence presented the jurors with two stark and irreconcilable visions. The facts of the crime were tragic and horrible. But the competing evidence regarding appellant – particularly his virtues as a family man, kindness to his parents, attentiveness to and supportiveness of his siblings, and his loving and appropriate adult presence in the lives of the children (including his stepdaughter) – combined with whatever lingering doubt the jurors entertained about his guilt – surely gave jurors (or the jury) pause in deciding whether to condemn him to death. As demonstrated in the opening brief (AOB at 148-149), it cannot fairly be concluded, beyond a reasonable doubt, that Mari Peterson's powerfully evocative testimony did not make the final, critical difference in that decision.

//

//

VI.
THE CONSTITUTION REQUIRES THAT THE JURY'S DEATH PENALTY DETERMINATION MUST BE MADE BEYOND A REASONABLE DOUBT

Appellant's Opening Brief demonstrated that *Hurst v. Florida* (2016) __ U.S. __, [136 S.Ct. 616], building upon the United States Supreme Court's opinions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, requires that the jury must find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh those in mitigation before it can condemn the defendant to death. (AOB at 150-167.) In doing so, appellant asked this Court to reconsider its earlier holdings – that the weighing determination is "'outside the scope of *Ring* and *Apprendi*'" (*People v. Merriman* (2014) 60 Cal.4th 1, 106 [citations omitted]) – and instead to adopt the analysis put forth by the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 (per curiam) and advocated by Justice Sotomayor in *Woodward v. Alabama* (2013) 571 U.S. 1045 (dis. opn. from cert. den.).

Respondent's Brief simply relies on the Court's earlier cases; both the precedent it cites and the arguments it presents were anticipated and dispatched in the opening brief. (RB at 80-81). Appellant recognizes, however, that since the opening brief was filed, this Court has again rejected the view that *Hurst* compels a reexamination of the burden of proof standard in the penalty decision. (*People v. Powell* (2018) 6 Cal.5th 136, 193, fn. 36; *People v. Smith* (2018) 4 Cal.5th 1134, 1183.) Nonetheless, the question of whether the weighing of aggravating and mitigating factors in the context of a capital sentencing scheme requires the higher standard of proof remains a matter of nationwide debate, and the preponderance of authority on the issue remains in flux. Thus, the Delaware Supreme Court has reaffirmed and extended its precedent, stating:

> The burden of proof is one of those rules that has both procedural and substantive ramifications. Prior to our holding in *Rauf* the burden of proof was governed by the lesser standard of a preponderance of the evidence set forth in Delaware's death penalty statute. *Rauf* recognized that, after *Apprendi*, substantive Due Process required the higher "beyond a reasonable doubt" burden of proof. As we observed in *Rauf*, "[t]here is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die."

(*Powell v. Delaware* (Del. 2016) 153 A.3d 69, 74-75.) Other courts have taken the contrary view. (See, *Underwood v. Royal* (10th Cir. 2018) 894 F.3d 1154, 1184; *State v. Lotter* (2018) 301 Neb. 125, 917 N.W.2d 850, 863-864 [noting split of authority but holding that high court precedent does not mandate the "beyond a reasonable doubt" standard in penalty phase decisions].)

Appellant urges this Court to take a fresh look at this much-debated issue, to follow the Delaware Supreme Court's analysis in *Rauf* and *Powell* as well as Justice Sotomayor's conclusion in her dissenting opinion from the denial of certiorari in *Woodward v. Alabama*, *supra*, 571 U.S. 1045 and to conclude that the jury must render its penalty phase determination beyond a reasonable doubt before sentencing the defendant to death.

//

//

CONCLUSION

For the reasons set forth in Appellant's Opening Brief, and above, the judgment of conviction and sentence of death must be reversed.

Dated: September 9, 2019

Respectfully submitted,

MARY MCCOMB
State Public Defender

/s/ AJ Kutchins

AJ KUTCHINS
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

Cal. Rules of Court, rule 8.630(b)(2))

I, AJ Kutchins, am a Senior Deputy State Public Defender assigned to represent appellant, Manuel Bracamontes, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer generate word count, I certify that this brief is 13,137 words in length excluding the tables and this certificate.

Dated: September 9, 2019

/s/ AJ Kutchins
AJ KUTCHINS
Senior Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Bracamontes***
Case Number: **Supreme Court Case. No. S139702**
San Diego County Superior Court No. SCD178329

I, **Sydney Goodhart**, declare as follows: I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/**X**/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **September 9, 2019**, as follows:

San Diego Superior Court
Clerk of the Superior Court
220 W. Broadway
San Diego, CA 92101

Mr. Manuel Bracamontes
F-06185; CSP-SQ
San Quentin, California 94974

San Diego County Public Defender
450 B Street, # 900
San Diego, CA 92101

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

Signed September 9, 2019 at Oakland, California.

/s/ Sydney Goodhart
SYDNEY GOODHART

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BRACAMONTES (MANUEL)**
Case Number: **S139702**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **aj.kutchins@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPELLANT'S REPLY BRIEF	2019_08_15_Working Final - AJK

Service Recipients:

Person Served	Email Address	Type	Date / Time
Stephen McGee Department of Justice, Office of the Attorney General-San Diego	Stephen.McGee@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Natalie Rodriguez Department of Justice, Office of the Attorney General-San Diego	Natalie.Rodriguez@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Office Of The State Attorney Office Of The State Attorney General Court Added	sdag.docketing@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Attorney General - San Diego Attorney General - San Diego Office Theodore Cropley, Deputy Attorney General	theodore.cropley@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Attorney General - San Diego Attorney General - San Diego Office Heather F. Crawford, Deputy Attorney General	Heather.Crawford@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Holly Wilkens Office of the Attorney General	Holly.Wilkens@doj.ca.gov	e-Serve	9/9/2019 8:34:16 AM
Office Of The State Public Office Of The State Public Defender-Sac Timothy J. Foley, Sr. Deputy State Public Defender	docketing@ospd.ca.gov	e-Serve	9/9/2019 8:34:16 AM
California Appellate Project	filing@capsf.org	e-Serve	9/9/2019 8:34:16 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/9/2019

Date

/s/Sydney Goodhart

Signature

Kutchins, AJ (102322)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm