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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JAMES MICHAEL FAYED, Defendant/Appellant.	SUPREME COURT CASE NUMBER.: S198132 TRIAL CASE NO.: BA346352

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER, THE HONORABLE KATHLEEN KENNEDY, DEPARTMENT 109

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Allowing the government "ignoble shortcut[s] to conviction . . . destroys[s] the entire system of constitutional restraints on which the liberties of the people rest." (*Mapp v. Ohio* (1961) 367 U.S. 643, 660.) From the start, the government adopted a "do now, ask for forgiveness later" approach to this case, flouting Appellant's constitutional rights in order to advance its investigation.

Now, on appeal, Respondent attempts to justify the numerous constitutional errors that occurred throughout this case by making several arguments that are inconsistent with the record and/or contrary to the government's arguments at trial. In doing so, Respondent asks this Court to ignore the numerous constitutional violations and instead focus on the

weight of the evidence that was unconstitutionally obtained. By applying, as Respondent's arguments suggest, "a toothless form of harmless error analysis that focuses on the reprehensibility of the crime rather than the impact of the improper testimony, we only embolden those who would commit further constitutional violations." (See *DeRosa v. Workman* (10th Cir. 2012) 696 F.3d 1302, 1303, on den. of petition for rehg. (dis. opn. of Lucero, J.).)

In this Reply Brief, Appellant incorporates by reference and reaffirms the arguments made in his Appellant's Opening Brief ("AOB"). Appellant replies to contentions by Respondent that necessitate an answer in order to present the issues fully to this Court. The absence of a reply to any particular argument, sub-argument, or allegation made by Respondent, or of a reassertion of any particular point made in the AOB, does not constitute a concession, abandonment, or waiver of the point by Appellant but reflects his view that the issue has been adequately presented. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

For the reasons set forth in the AOB and herein, Appellant's conviction and death sentence must be reversed.

A. ADMISSION OF THE RECORDED STATEMENT VIOLATED APPELLANT'S FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

The rights to a fair trial, to remain silent, to counsel, and to due process are only meaningful if those who prosecute and investigate crimes are committed to honoring those rights, not seeking out opportunities to circumvent them. Here, the centerpiece of the government's case was a

surreptitiously recorded statement of Appellant and a government agent, which was obtained after Appellant repeatedly invoked his right to counsel and right to remain silent. As set forth herein, the admission of the statement violated Appellant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights.[1]

1. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution requires, inter alia, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [defense]." (U.S. Const., 6th Amend.; see also Cal. Const., art. I, § 15, cl. 3.) This right has long been considered "indispensable to the fair administration of our adversary system of criminal justice." (*Brewer v. Williams* (1977) 430 U.S. 387, 398.)

In the instant case, the lower court gave little credence to Appellant's arguments that his Sixth Amendment rights had been violated, primarily because of its mistaken belief that Appellant needed to show the statement was coerced. (1CT 000088-000089.) This was plainly incorrect. "Since 'coercion' is not a Sixth Amendment question, 'voluntariness' simply plays no part in the test of admissibility." (*Cahill v. Rushen* (E.D.Cal. 1980) 501 F.Supp. 1219, 1225.) Thus, the lower court erred, and as set forth herein, Appellant's Sixth Amendment rights were violated when the government sent an agent to question him.

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[1] As noted in the AOB, a trial court's admission of a defendant's statement is reviewed de novo. (See AOB 66 [citations omitted].)

a. SHAWN SMITH WAS AN AGENT OF THE GOVERNMENT

In the AOB, Appellant argues, consistent with his arguments in the lower court, that when government agent Shawn Smith questioned Appellant in his cell, while wired and coached by law enforcement, Smith was acting as an agent for the government. (AOB 68-69.) Despite the repeated litigation of this issue in the lower court, for the first time on appeal, Respondent now argues that Smith was not the government's agent. (RB 63.) As set forth herein, this new argument on appeal is improper and, even if allowed, is unsupported by the evidence.

i. RESPONDENT MAY NOT ARGUE A NEW THEORY ON APPEAL

In each of Appellant's challenges to the admission of his statement in the lower court, the first subheading under the Sixth Amendment argument was "THE INFORMANT WAS A GOVERNMENT AGENT." Additionally, each argument included the statement of law: "[t]he defendant must also show that the informant 'was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage.'" (2CT 000292 [Common Law Motion to Suppress Statements]; 8CT 001833 [Motion to Dismiss pursuant to Penal Code section 995]; Supp. 1CT 000052 [Petition for Writ of Mandamus]; 11CT 002746 [Motion in Limine].) Despite all of the litigation on this issue in the lower court, Respondent never countered Appellant's argument with a contention that Smith was not a government agent. (See 3CT 000450-000458 [Opposition to Defendant's Motion to Suppress Statements]; 9CT 002065-002070

[Opposition to Motion to Dismiss under Penal Code section 995]; 13CT 003234-003251 [Opposition to Defendant Fayed's Motion to Exclude and/or Redact His Statements].) Instead, the government let Appellant's argument, that Smith was an agent, go wholly unchallenged. As a result, the lower court never specifically addressed nor resolved the facts of this issue.

Now, for the first time on appeal, Respondent argues that "even if this Court were to conduct a *Massiah* analysis, it should be noted that, under the first prong of that test, there is little evidence here that Smith acted as an informant with the 'expectation of some resulting benefit or advantage. . . .'" (RB 63.) Respondent continues: "In fact, Detective Abdul testified that Smith's eventual release from custody 'had nothing to do with the state crime that [appellant] was charged with.'" (RB 63, citing 10RT 1873.)

It is well settled that the government may not urge a new theory for the first time before an appellate court. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.) This rule has important practical underpinnings: the government cannot introduce on appeal a new theory because the defendant had no opportunity to "present evidence in response to it, to cross-examine the prosecuting witnesses on testimony supporting the new theory, or to argue before the trier of fact the theory's invalidity or inapplicability." (*People v. Miller* (1972) 7 Cal.3d 219, 227.) This prohibition is particularly important where, as here, "the theory contemplates factual situations the consequences of which are open to controversy and were not put in issue in the lower court." (*People v. Smith* (1977) 67 Cal.App.3d 638, 655, citing *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) Had Respondent, ever once, raised this argument in the lower court, Appellant could have made counterarguments, called different

witnesses, and/or asked for a ruling on this issue from the trial court. Respondent did not. Thus, Respondent is precluded from arguing on appeal that Smith was not an agent of the government.

ii. EVEN IF THE GOVERNMENT IS PERMITTED TO PROFFER A NEW THEORY ON APPEAL, THERE WAS SUFFICIENT EVIDENCE THAT SMITH WAS AN AGENT OF THE GOVERNMENT

Even if Respondent was permitted to now argue, for the first time on appeal, that Smith was not acting as an agent of the government, that argument has no merit. A defendant must show, inter alia, that the informant "was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage[.]" (*In re Neely* (1993) 6 Cal.4th 901, 915.) Specific direction from government agents or a prior working relationship with the government can establish an agreement. (*Id.* at pp. 915, 917-918.) This arrangement need not be explicit or formal, but may be "'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct[.]'" (*In re Neely, supra*, 6 Cal.4th at p. 915, quoting *United States v. York* (7th Cir. 1991) 933 F.2d 1343, 1357.) An agency relationship may also be established by evidence of government officials directing the informant "to focus upon a specific person, such as a cell mate, or having instructed the informant as to the specific type of information sought by the government." (*Ibid.*, citing *United States v. York, supra*, 933 F.2d at p. 1356.)

Respondent bases its new argument that Smith was not an agent of the government on the fact that LAPD Detective Abdul testified at trial that Smith's release from federal custody "had nothing to do with the state crime that [appellant] was charged with." (RB 63, citing 10RT 1873.) However, Abdul admitted that, as an LAPD officer, he did not know the specifics of what happened on Smith's federal charges, and acknowledged that he would not have been the one to get a cooperation deal for Smith.[2] (10RT 1873:8-12.) Thus, while it is correct Abdul stated that he did not know the specifics of any benefit Smith received from federal authorities, his lack of knowledge is certainly not proof that there was no agreement. Ultimately, the facts from trial show that LAPD and FBI placed a wire on Smith and sent him to ask Appellant questions. Detective Abdul even instructed Smith regarding the best way to elicit information. (See 10RT 1845:15-21.) Thus, Smith was an agent of the government, and Respondent's belated arguments are without merit.

b. THE RIGHT TO COUNSEL HAD ATTACHED ON THE STATE MURDER CASE WHEN THE GOVERNMENT AGENT QUESTIONED APPELLANT

In the AOB, Appellant set forth that his Sixth Amendment right to counsel had already attached on the instant murder allegations when the government sent an agent into his cell to question him. (AOB 70-72.) Respondent counters that Appellant's Sixth Amendment rights had not attached and asks this Court to employ a bright-line rule: "the Sixth

[2] Credit for cooperation in federal cases is governed by strict rules set forth in Federal Sentencing Guideline section 5K1.1, which requires that the government file an under seal motion for departure.

Amendment right to counsel, and its attendant protections, do not attach until adversarial judicial proceedings are initiated against a defendant, which in California occurs by way of a formal complaint or criminal information." (RB 54, citing *Rothgery v. Gillespie County, Tex.* (2008) 554 U.S. 191, 194 (*Rothgery*); *People v. Viray* (2005) 134 Cal.App.4th 1186, 1194-1195.) Yet, the cases cited by Respondent—and established precedence—do not support such a rigid stance.

i. RELEVANT LAW ON WHEN THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES

The meaning of the Sixth Amendment right to counsel has evolved. At the time the Sixth Amendment was drafted, the government did not confront a defendant before trial; thus, there were no pretrial hearings in which a defendant was placed in a position adversarial to the government. (*United States v. Ash* (1973) 413 U.S. 300, 309-310; see also Tomkovicz, *Sacrificing Massiah: Confusion over Exclusion and Erosion of the Right to Counsel* (2012) 16 Lewis & Clark L.Rev. 1, 37-39.) As a result, before trial, a defendant was not forced to defend himself against prosecutorial forces. Accordingly, the Sixth Amendment right to counsel was considered a trial right. (See *United States v. Ash*, *supra*, 413 U.S. at p. 309.)

However, Sixth Amendment jurisprudence has evolved. Over time, as the adversarial relationship between the government and a defendant extended backward from trial, so did the right to counsel. (See *id.* at pp. 309-310.) Initially, in *Massiah v. United States* (1964) 377 U.S. 201, 201 (*Massiah*), the United States Supreme Court extended the protection of the Sixth Amendment right to counsel to all situations post-indictment. That

finding was later expanded, and although the filing of formal charges by way of an indictment or complaint is plainly sufficient for the Sixth Amendment right to counsel to attach, it is currently not the only way. (See *Rothgery*, *supra*, 554 U.S. at p. 215 (conc. opn. of Alito, J.); *Moran v. Burbine* (1986) 475 U.S. 412, 431.) This is a particularly practical rule. As Justice Alito noted, "Because pretrial criminal procedures vary substantially from jurisdiction to jurisdiction, there is room for disagreement about when a 'prosecution' begins for Sixth Amendment purposes." (*Rothgery*, *supra*, 544 U.S. at p. 215 (conc. opn. of Alito, J.).) Indeed, as noted in the AOB, the United States has "50-plus jurisdictions, each with its peculiar rules of criminal procedure . . . ." (*People v. Viray*, *supra*, 134 Cal.App.4th at p. 1195.) Thus, it would be wholly unreasonable to require the filing of a specific document or a specific act by the prosecutor (which would have different meanings in different jurisdictions) as the triggering event.

This concept was addressed in *Rothgery*, *supra*, 554 U.S. at p. 191. There, the defendant was arrested on suspicion of being a felon in possession of a firearm. (*Ibid.*) The defendant was brought to court, notified of the allegations, and the court set bail. (*Ibid.*) At that time, the only document submitted to the court was the arresting officer's statement; the government had no participation in the initial appearance. (*Id.* at pp. 191, 224.) Consistent with Respondent's argument here, the government in *Rothgery* argued that the defendant's Sixth Amendment rights could not have attached before it had filed formal charges against the defendant or began participating in the hearings. (*Id.* at p. 193.) That argument was thoroughly rejected by the Supreme Court. Instead, the Court held that a defendant's initial appearance before a magistrate judge, where he is

informed of the allegations against him (but no formal charging document was filed by the government) and his liberty is restricted by imposition of bail, marked the initiation of adversarial judicial proceedings, triggering attachment of the Sixth Amendment right to counsel.[3] (*Id.* at p. 213.)

Instead of focusing only on the point where the charging document is filed, the Supreme Court has instead focused on when the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law[,]" which requires the defendant to defend against an accusation that he committed a crime.[4]

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[3] Additionally, other jurisdictions have found that the Sixth Amendment right to counsel attaches when a defendant has to argue bail to a court, even though the government has not yet become involved in the case by filing a formal complaint or charging document. (See, e.g., *State v. Tucker* (NJ. 1994) 645 A.2d 111, 119-120, 123 [137 N.J. 259] [right to counsel attached at "first court appearance," even though officers only filed allegations]; *State v. Barrow* (W.Va. 1987) 359 S.E.2d 844, 848 [178 W.Va. 406][right to counsel attached when defendant was arrested and made initial appearance before a magistrate who committed him to custody even though no formal complaint was required by law].)

[4] As Respondent notes in its brief, a few cases have even extended *Massiah's* protections to the point where police focused in on a suspect. (RB 54, fn. 19, noting *Escobedo v. State of Ill.* (1964) 378 U.S. 478, 485 [finding right to counsel attached where the investigation shifted from general inquiry to focus on specific suspect] and *People v. Dorado* (1965) 62 Cal.2d 338, 347-350 [applying *Massiah* where investigation focused on defendant], overruled on other ground in *People v. Cahill* (1993) 5 Cal.4th 478.) Additionally, in another California case, *People v. Flores* (1965) 236 Cal.App.2d 807, 811, the court found that the right to counsel had attached where defendant was under arrest and the investigation had focused on him. While these cases are still good law for the purposes for which they are cited, they have been largely ignored and courts have focused, instead, on determining the point where the government and the defendant are placed in adversarial positions and the defendant is made to answer against the

(*Kirby v. Illinois* (1972) 406 U.S. 682, 689-690; *United States v. Ash, supra,* 413 U.S. at p. 309.) Ultimately, the purpose of the Sixth Amendment right to counsel is to "'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."[5] (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177, quoting *United States v. Gouveia* (1984) 467 U.S. 180, 189, italics omitted.) The Sixth Amendment requires that once this occurs, the accused cannot be left to face the "prosecutorial forces of organized society" on his own. (*Moran v. Burbine, supra,* 475 U.S. at p. 430.) During these events, an accused's attorney is crucial. "[A]n attorney is not a mere courtroom gladiator, he 'act(s) as a spokesman for, or advisor to, the accused. The accused's right to [counsel] has meant just that, namely, the right of the accused to have counsel acting as his assistant.'" (*Cahill v. Rushen* (E.D.Cal. 1980) 501 F.Supp. 1219, 1223, affd. (9th Cir.1982) 678 F.2d 791, citing *United States v. Ash, supra,* 413 U.S. at p. 312.)

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charges, thereby requiring the assistance of counsel. (*United States v. Wade* (1967) 388 U.S. 218, 226-227.)

[5] Similarly, in *People v. Viray, supra,* 134 Cal.App.4th at p. 1194, the Sixth District Court of Appeal in California was presented with the issue of whether a criminal defendant was denied her Sixth Amendment right to counsel when a deputy district attorney interviewed her following the filing of a formal criminal complaint. In rejecting the government's contention that commencement of prosecution does not occur until arraignment on the criminal complaint, the court concluded that "the typical California criminal prosecution commences, for purposes of the rule of *Massiah, no later than* the point at which the prosecutor files a criminal complaint." (*Id.* at p. 1195, italics added.) Implicit in this holding is the recognition that the initiation of adversary criminal proceedings can occur before a criminal complaint is filed.

ii. FACTS OF THE INSTANT CASE

Here, at the time of the questioning by the government agent, Appellant needed counsel, and in fact had counsel, to defend himself against allegations that he killed Pamela Fayed. The fact that Appellant was brought before a federal court, twice, notified that the State of California believed that he killed Pamela Fayed, and then had to actually defend himself against the factual assertions of that allegation is evident from the record.

At the federal court hearings, counsel for Appellant tried to focus on the federal licensing violations, stating that Appellant's "detention hearing should center on the charge that he's facing at the present, which is this one-count indictment." (2CT 000417.) However, the government and the court refused, and instead focused on proof of the state's allegations that Appellant killed Pamela Fayed. The federal court made it absolutely clear that the issue in front of the Court was the state murder case: "I'm not focusing on the license. *I could care less about the fact the he was operating a business without a license.*" (2CT 000413, 000416, italics added.)

Both federal courts heard evidence at the bail hearings concerning the state's allegations that Appellant killed Pamela Fayed. In court, the government made the following proffer of evidence concerning those allegations:

> [T]hat the victim in the murder that occurred on July 28th, 2008 in Century City, Pamela Fayed, was the wife of the defendant. They were estranged pursuant to a divorce proceeding that was filed in Ventura County in or about October 2007. [¶] Pamela Fayed was killed after she attended a meeting with her attorney. Attending the meeting were the

> defendant and his attorney as well. . . . [¶] Pamela Fayed was killed by a perpetrator who was lying in wait in a parking structure in Century City. There was no evidence of an attempted car-jacking or of a robbery. [¶] The subject vehicle from which the assailant emerged was captured on surveillance video in that parking structure. The surveillance video identified a license plate. That license plate was traced to a car that had been rented in Camarillo at Avis Rent-A-Car at a location not far from the defendant's business using a credit card in the defendant's name and in the name of Goldfinger Coin and Bullion . . . . [¶] That same credit card was found during a search of the defendant in his wallet . . . . [¶] Pursuant to a search warrant served on the defendant's residence, approximately $60,000 in cash was found in what appears to be hermetically sealed wrapping material. . . .[¶] . . . [¶] Furthermore, Pamela Fayed, the victim in the murder . . . recently told a close friend that the defendant had told her he wanted to settle everything, that is, relating to the divorce case that I mentioned was filed in or about October of 2007, because the lawyers were costing him a lot of money, and that he wanted to meet with the victim and did so on or about July 15th. [¶] The victim told a friend that during that meeting the defendant told the soon-to-be victim of the murder, I could have you killed, and my hands would be clean. And patted his hands in that manner.

(2CT 000337-000339.)

After the proffer, the government called FBI Agent Swec as a witness. (2CT 000349.) Swec had no involvement with either the federal licensing or the murder case, and only testified concerning information an LAPD officer told him immediately before testifying. (2CT 000352.) After reviewing the government's evidence, the federal court immediately observed the strength of the state murder allegations:

> When the murder is captured on videotape and the murderer's vehicle license plate is recorded and that vehicle is traced to a particular car rental agency and it is learned that that vehicle

> was rented using a credit card found in your client's wallet, given the acrimonious nature of the divorce and how much money your client was standing to be ordered to pay, plus, plus the assertion, and whether it's true or not, that she might have been willing to provide evidence against her husband in connections with this case, you put that all together, and that is not "thin" in my book.

(2CT 000409.)

The federal court then told Appellant's counsel to respond to those allegations: "Tell me which of the facts that I recited [about the murder allegations] . . . is completely unsupported." (2CT 000409.) Counsel for Appellant then argued that the murder was not captured on video and "this allegation that my client may have had a motive to murder Pamela Fayed because she was going to cooperate with the government is also unsubstantiated." (2CT 000410.) Appellant's counsel continued, "So, it would be simply false for the government to assert, and it's unsubstantiated, that my client may have been motivated to commit this murder because he thought Pam Fayed was going to become an informant against him or a witness against him. It simply -- that nexus is missing, Your Honor." (2CT 000411.) In asking about the requisite quality of the evidence provided by the State of California, the federal court asked, for purposes of that hearing: "Do we have to prove that your client committed murder?" (2CT 000413.)

During these hearings, the testimony, evidence, and argument all concerned the state murder allegation. In fact, counsel for Appellant repeatedly pointed out that fact, stating: "As the prosecutor was speaking, I was looking around to see if I was in federal court or if I was in" state arraignment court. (2CT 000344.) Appellant's counsel further asserted that

Appellant was in federal court but "he is being detained based upon a separate LAPD homicide. . . . That seems to be the basis of his detention, Your Honor. And it's inescapable." (2CT 000418.)

Because of these allegations, made at the behest of the State of California, Appellant had to meet with, confer with, and develop a defense with his attorney to specifically combat the state's allegations that he killed Pamela Fayed. It is inconceivable that after Appellant and his counsel received evidence concerning the murder, developed a defense to those allegations, and then went to court, twice, to question witnesses and defend against the murder allegations, that the government could still argue Appellant had no right to that counsel. Once Appellant was required to defend himself against the state murder allegations, a formal adversarial relationship between Appellant and the State of California commenced, and Appellant's Sixth Amendment rights attached. The government then deliberately interfered with Appellant's right to counsel by sending in an agent to question Appellant.

c. APPELLANT'S RIGHT TO COUNSEL HAD ATTACHED ON THE FEDERAL CASE, PRECLUDING QUESTIONING CONCERNING THE MURDER ALLEGATIONS

In the AOB and herein, Appellant also argues that, even if this Court finds that the adversarial relationship had not commenced between Appellant and the State of California, the relationship had manifested between Appellant and the federal government, which prohibited federal and state officers from sending in an agent to question Appellant.

i. APPELLANT'S SIXTH AMENDMENT RIGHTS HAD ATTACHED ON THE FEDERAL CASE

In the AOB, Appellant set forth that although the Sixth Amendment right to counsel is normally "offense specific," it can also attach where "the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense." (AOB 73, citing *People v. Wader* (1993) 5 Cal.4th 610, 654, fn. 7, quoting *United States v. Hines* (9th Cir. 1992) 963 F.2d 255, 257.) In its brief, Respondent discounts the "inextricably intertwined" law. (RB 55, citing *Texas v. Cobb* (2001) 532 U.S. 162, 172-173 (*Cobb*) and *People v. Stayton* (2001) 26 Cal.4th 1076, 1082-1083 [adopting *Cobb*].) However, as set forth below, the instant case presents a different question than that at issue in *Cobb*.

In *Cobb*, upon questioning after arrest, the defendant admitted that he participated in an unrelated residential burglary. He was also asked about the disappearance of the people who lived in the home that was burglarized, but he denied any knowledge. (*Cobb*, *supra*, 532 U.S. at p. 162.) The defendant was indicted only for the burglary and had counsel appointed. (*Ibid.*) At that time, the defendant was not made to answer, in any court, for the allegations that he killed the occupants of the home. Approximately one year later, the defendant waived his *Miranda* rights and confessed to killing the residents of the home.[6] (*Id.* at pp. 165-166.) The

[6] The *Cobb* Court noted that "[i]n the present case, police scrupulously followed *Miranda's* dictates when questioning respondent." (*Id.* at p. 171.) As noted throughout the AOB and herein, this sharply contrasts with the instant case where Appellant had invoked his rights at every turn with the state and federal authorities; yet, both federal and state agents were involved in sending in the agent to question Appellant.

Court then held that the meaning of "offense specific" for purposes of the Sixth Amendment does not also include charges which are merely "closely related factually." (*Id.* at pp. 167-168.) The Court acknowledged that "offense" was "not necessarily limited to the four corners of a charging instrument," noting that "[t]he test . . . to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[7] (*Id.* at p. 173)

Relying on this language, Respondent contends, "The mere fact that there was a tragic background story connecting [the murder and white collar cases] . . . does not mean that Sixth Amendment protections had attached to the murder investigation." (RB 59, citing *People v. Slayton*, *supra*, 26 Cal.4th at pp. 1082-1083.) Respondent's argument is disingenuous. Appellant does not argue that the attachment of the Sixth Amendment right to counsel in the white collar federal case should apply to

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[7] Interestingly, this decision seems to be at odds with the seminal case of *Brewer v. Williams* (1977) 430 U.S. 387, 390, 393-395. In that case, the defendant had only been formally charged with the abduction of a child. After the now infamous Christian burial speech, designed to elicit statements about the location of the child's body, the defendant confessed to murder, and the Supreme Court held that the defendant's Sixth Amendment rights had been violated. (*Id.* at p. 406.) However, *Cobb* appears to undercut the *Brewer* opinion because the *Brewer* defendant was not formally charged with murder at the time of the questioning. (See *id.* at pp. 390-391.) This aspect of the *Cobb* decision is discussed in the dissent and is advocated herein by Appellant. (See *Cobb*, *supra*, 532 U.S. at pp. 184-186 (dis. opn. of Breyer, J.).)

the state murder prosecution because the two offenses have a similar "background story" or because, like in *Cobb*, they are "factually related."

Instead, Appellant's argument is twofold: First, as set forth above, the state authorities instigated, scripted, and directed the murder allegations against Appellant in the federal bail hearing, and, in doing so, Appellant's Sixth Amendment rights had attached to the state murder allegation; thus, the questioning of Appellant at the behest of state and federal law enforcement officers was improper. To be clear, that is Appellant's primary contention. However, alternatively, Appellant herein argues that even if this Court finds that the right to counsel had not attached on the state murder allegations, when Appellant was twice brought before a federal court and made to answer for those allegations, Appellant's right to counsel—concerning the murder allegations—attached through the federal case, i.e., the federal government had begun an adversarial relationship with Appellant not only on the licensing charges but on the murder charges. Appellant then contends that the questioning of Appellant (at the behest of federal and state authorities) concerning the murder violated Appellant's Sixth Amendment rights as to the federal murder allegations, which precluded use of those statements in the state murder case.

On that issue, Respondent correctly notes a federal circuit split on whether attachment of the Sixth Amendment right to counsel in one jurisdiction extends to another jurisdiction's questions about the same offense. Some circuits, including *United States v. Coker* (1st Cir. 2005) 433 F.3d 39, 44-45; *United States v. Avants* (5th Cir. 2002) 278 F.3d 510, 517-518; and United *States v. Alvarado* (4th Cir. 2006) 440 F.3d 191, 198, support Respondent's position that the attached right to counsel does not extend to cases involving separate sovereigns. However, other circuits have

held that the dual sovereignty principle does not apply in this context. (See *United States v. Mills* (2d Cir. 2005) 412 F.3d 325, 329-330; *United States v. Bird* (8th Cir. 2002) 287 F.3d 709, 714-715; *United States v. Krueger* (7th Cir. 2005) 415 F.3d 766, 775-78.) In those cases, the attachment of the Sixth Amendment right to counsel on the federal government's murder allegations would apply to the state case, thereby prohibiting questioning by state law enforcement. Appellant contends these cases better state the law.

For example, in *United States v. Bird, supra*, 287 F.3d 709, the defendant had been charged with sex offenses in a tribal court and had been assigned counsel. An FBI agent, accompanied by a tribal investigator, then interviewed the defendant concerning the allegations, and the defendant made statements. (*Id.* at pp. 711-712.) The court noted that the tribal authorities' investigation triggered the federal inquiry, and the two jurisdictions "worked in tandem" in questioning the defendant, noting:

> This is not a case where the federal agent was unaware of the tribal charge or unaware of the defendant's representation by counsel. Rather, it is a case where two sovereigns worked together to investigate conduct that violates the laws of both. We find that as a result of the way that tribal and federal authorities cooperated in connection with these charges, [defendant's] indictment in tribal court inherently led to his prosecution in federal court.

(*Id.* at p. 714.) Thus, the court held that due to the nature of the charges, and the joint investigation, the two cases were too intertwined to separate for purposes of the Sixth Amendment. (See also *United States v. Krueger, supra*, 415 F.3d 766 [in advocating against applying the dual sovereignty principle, the court noted the "substantial overlap" between the state and federal drug cases: "Once a federal warrant was issued for [the defendant's]

arrest, the state charges against [the defendant] were dismissed and he was immediately arrested on the federal warrant. . . . [T]he transition between the state and federal prosecutions . . . was virtually seamless . . . ."].[8])

Indeed in *United States v. Mills* (2d Cir. 2005) 412 F.3d 325, the court cautioned that where "the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached. . . and then to share information with the other sovereign without fear of suppression. We easily conclude that *Cobb* was intended to prevent such a result." (*Id.* at p. 330, citing *United States v. Bird, supra*, 287 F.3d at p. 715.)

To uphold the use of the statement in the instant case would be to allow what the *Mills* court feared. Here, for the reasons set forth above, Appellant and the federal government had entered into an adversarial relationship concerning the murder allegations. When state and federal officers, working together, wired an agent/informant and sent him to question Appellant about the murder, it violated Appellant's repeatedly invoked right to counsel. Thus, the state was precluded from using that tainted evidence.

ii. THE FEDERAL ARREST AND DETENTION WAS A SHAM PROSECUTION

In the AOB, Appellant set forth that there is an additional exception to the "offense specific" requirement of the Sixth Amendment where one case is used as a sham for gaining an advantage in another case. (See AOB

[8] The *Kreuger* court ultimately did not decide the Sixth Amendment issue for other reasons. (*Id.* at p. 778.)

74, noting *United States v. Coker* (1st Cir. 2005) 433 F.3d 39, 45.) Key to this concept is that jurisdictions are "proscribed from manipulating [another jurisdiction's] processes to accomplish that which they cannot constitutionally do themselves." (*United States v. Liddy* (D.C. 1976) 542 F.2d 76, 89.) In *United States v. Guzman* (1st Cir. 1996) 85 F.3d 823, the court noted:

> The defendant must produce some evidence tending to prove that the rule [requiring that the two cases be for the same offense] should not apply because one sovereign was a pawn of the other, with the result that the notion of two supposedly independent prosecutions is merely a sham. If the defendant proffers evidence sufficient to support such a finding—in effect, a prima facie case—the government must shoulder the burden of proving that one sovereign did not orchestrate both prosecutions, or, put another way, that one sovereign was not a tool of the other.

(*Id.* at p. 827; see also *United States v. Coker*, *supra*, 433 F.3d at p. 46.)

Respondent argues that the actions in the federal case were not a "sham," reasoning that the work the government had completed on the federal case (before the murder of Pamela Fayed) was "extensive."[9] (RB 61.) As set forth below, Respondent's assertions are contradicted by the record, and the evidence presented in the trial court showed that the federal

[9] Respondent also argues that the federal government went to "great lengths to obtain financial records about Goldfinger[.]" (RB 61, citing 7RT 1222-1223, 1227.) Yet, the documents Respondent claims that the government went to "great lengths" to obtain were described at trial as "*filed by Goldfinger* coin and [Appellant] in the federal case *after the indictment was unsealed.*" (7RT 1222:20-25, italics added.) The federal indictment was not unsealed until after the murder of Pamela Fayed; thus, documents that Appellant and Goldfinger submitted in the federal case after the murder of Pamela Fayed, do not indicate the government went to "great lengths" to get information about Goldfinger before Pamela Fayed's death.

arrest and detention was a sham to detain and question Appellant on the murder case.

aa. PRIOR TO APPELLANT'S ARREST, THE FEDERAL GOVERNMENT WAS NOT PURSUING AN ACTUAL CASE AGAINST APPELLANT

At trial, AUSA Aveis explained that the government had been conducting an independent investigation into Ponzi schemes when it determined that money from these schemes flowed through Goldfinger. (7RT 1218:12-23.) Aveis assured the court, "I am not testifying that Goldfinger or Fayed were perpetrating the schemes that I have talked about." (7RT 1219:3-5.) In fact, Aveis was clear as to the government's progress at the time of the indictment: "I determined that I believed there was sufficient evidence to bring or seek an indictment . . . as a *beginning or threshold matter of an investigation*[.]" (7RT 1220:3-8, italics added.) More importantly, Aveis candidly revealed that the reason for bringing the sealed indictment was to "obtain leverage" against Goldfinger to ensure its cooperation against the person(s) involved in the Ponzi schemes.[10] (7RT 1221:14-23.) Thus, although the government had filed a sealed indictment, it had made no actual move to prosecute that case; and contrary to Respondent's assertions, the government merely wanted to secure Appellant's cooperation against people using Goldfinger's services.

[10] Aveis similarly stated "the purpose of my charging solely those counts was to create an opportunity for considering an undercover operation where the F.B.I. might be able to have someone working at the business, monitoring the movement of money and thereby either obtain more evidence of the Ponzis, obtain evidence of other Ponzis or obtain other evidence of other transactions of interest to us." (7RT 1220:9-16.)

bb. ARRESTING AND DETAINING APPELLANT ON THE FEDERAL WHITE COLLAR CASE WAS A RUSE TO HOLD APPELLANT FOR MURDER

The day after Pamela Fayed was killed, Appellant went to the police station to request a welfare check on his minor daughter; state police then either arrested or detained Appellant (see discussion *infra*) and attempted to question him about the murder of Pamela Fayed. Appellant repeatedly invoked his right to remain silent and right to counsel. (2RT 27:25-28:8; 8CT 0002030.) Appellant was released. (8CT 0002030.) That same day, the LAPD met with AUSA Aveis. (4CT 000953.) After that discussion, the FBI arrested Appellant and he was detained without bail. (2CT 000321-00328.)

It is plain that Appellant was arrested by federal agents because of the state murder, not the federal investigation. In fact, at the bail hearing, the court responded to questions from the defense about why Appellant had been arrested and detained by the FBI at the time—and not five months earlier when the sealed indictment came down; in response, the court stated that Appellant had not been arrested earlier because "[t]he murder had not occurred then." (2CT 000416.) The federal court was unabashed in stating that the five month old warrant was irrelevant and that the pertinent issue in front of the court was the murder allegations: "I'm not sure why you're linking, you know, this indictment, which is, what, February, with the murder that took place a couple of weeks ago." (2CT 000416:18-20.) The court continued, "The government wasn't concerned [with arresting Appellant] five and a half months ago, and suddenly now the government is now concerned. Well, his wife has been murdered. He is suspected of being complicit in that murder. The stakes have now gone up from the statutory

maximum of five years for operating a business without a license to murder for hire." (2CT 000417.)

Defense counsel repeatedly asked the court to consider that Appellant's arrest, which was really for the murder case, was improper: "I would ask Your Honor to consider whether the vast disparity between the indictment for which [Appellant] stand[s] here today and this other case for which he's being detained, this vast disparity is a perversion[.]" (2CT 000416:3-7.) Appellant's counsel continued: "[F]or [the] government to arrest a man on a five-and-a-half-month old indictment and then detain him because of an ongoing murder investigation I believe creates such a disparity between what he was arrested for, what he was charged with and the basis for the detention that it distorts the fairness and the due process of this consideration." (2CT 000416:11-17.)

The evidence in the lower court showed that the federal government had no intention of arresting Appellant or unsealing and prosecuting the indictment. After the murder of Pamela Fayed, the LAPD either arrested or detained Appellant but had to release him because it did not have probable cause to hold him. Then, after meeting with the AUSA, the FBI did something the State of California could not do: arrest and detain Appellant without bail. The federal arrest was an underhanded way of holding Appellant for the state authorities. In fact, FBI Agent Swec, who testified at the bail hearing, had absolutely no knowledge of the state murder investigation or the federal white collar investigation when he was approached by two LAPD officers—immediately before the bail hearing—to testify about the state investigation. (2CT 000353.) The LAPD literally provided a "script" for the federal government to argue in support of Appellant's detention. (4CT 000759-000760.) It was this testimony about

the murder allegations that kept Appellant in custody without bail long enough for the government to wire Smith and get incriminatory statements. The state then filed murder charges *and the same day*, the federal government dismissed the federal indictment. (2CT 000438-000439.)

The federal case was a sham—a ruse to have the federal government hold Appellant in custody without bail because the state could not. The government then worsened these sham actions by sending in an agent to question Appellant.

d. DUE PROCESS PROTECTIONS PROHIBIT ADMISSION OF APPELLANT'S STATEMENT

The "most elemental of liberty interests" protected by the Due Process Clause is "the interest in being free from physical detention by one's own government. [Citations.]" (*Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 529 (plur. opn. of O'Connor, J.).) "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. [Citation.]" (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80, citing *Youngberg v. Romeo* (1982) 457 U.S. 307, 316.)

In the AOB, Appellant set forth that even if this Court finds that the cases were not inexorably intertwined or that the federal detention was a "sham," basic notions of due process still require dismissal. The instant case was akin to the conduct referred to as the "silver platter doctrine," where one agency acquires evidence knowing it will be inadmissible, and then gives it to another agency. (AOB 76-77.) Respondent fails to address this violation in its brief.

The government has an "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton* (1985) 474 U.S. 159, 171.) This Court has condemned police behavior intended to deprive suspects of their constitutional right to counsel. (See *People v. Neal* (2003) 31 Cal.4th 63, 81 [finding officer's deliberate violation of defendant's invocation of constitutional rights "unethical," rendering the confession inadmissible].) When evidence is obtained in violation of these provisions, the exclusionary rule "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard" the Fourth Amendment's commands. (See *Elkins v. United States* (1960) 364 U.S. 206, 217.) ["The [exclusionary] rule is calculated to prevent, not to repair."].)

As set forth above, the state could not hold Appellant for murder, so it worked with the federal authorities to have Appellant held without bail because of those same murder allegations. Even if this Court does not agree that Appellant's state or federal right to counsel had attached on the murder allegations, Appellant's right to counsel on the federal white collar case had irrefutably attached. In spite of this unquestioned constitutional right, the state and federal government sent in an agent to question Appellant. There was no evidence that the FBI or LAPD instructed Smith not to question Appellant concerning the federal case. In fact, Abdul testified "I didn't counsel him. I don't remember exactly what I said to Mr. Smith, but I didn't counsel him on what to say." (10RT 1874:26-28.)

The government cannot be allowed to bring charges against a defendant—even if they do not intend to pursue them—then knowingly or recklessly allow that defendant's rights to be violated in the hopes of

gathering evidence of another crime. The state and federal authorities, together, sent in an agent to question a defendant who had invoked his right to remain silent and right to counsel, knowing—but not caring—that such actions violated Appellant's rights on the federal case, because the real intent was to gain evidence for the state murder case. Such a practice is impermissible and unacceptable.

2. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS

In the AOB, Appellant set forth that when the government sent an agent to question him after he had repeatedly invoked his Fifth Amendment rights, the government violated his Fifth Amendment right against self-incrimination and right to have counsel present during questioning. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; see also *Dickerson v. United States* (2000) 530 U.S. 428.) In doing so, Appellant noted that the Fifth Amendment right to counsel attaches "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom in any significant way." (*Miranda v. Arizona* (1966) 384 U.S. 436, 477.) Further, while the Sixth Amendment right to counsel is offense specific (discussed *supra*), Fifth Amendment protections are not. Thus, the Fifth Amendment right to counsel applies regardless of why the suspect is in custody or why he is being subjected to interrogation. (*Mathis v. United States* (1968) 391 U.S. 1, 4-5.) Additionally, when the police elicit a confession in violation of *Miranda,* or as the result of coercion by a government agent, they violate the self-incrimination and due process clauses of the Fifth Amendment. (See *Miranda v. Arizona*, *supra*, 384 U.S. at p. 467; *Dickerson v. United States*, *supra*, 530 U.S. at p. 433.)

Respondent argues that, even though Appellant repeatedly invoked his rights, his Fifth Amendment rights were not violated because he was not subject to "force or intimidation" during the invasive questioning. (RB 64-65.) As noted in the AOB, "[i]nterrogation consists of express questioning or of words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1224, noting *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301.) Under *Miranda,* interrogation includes not only direct questions, but also their "functional equivalent," that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis*, *supra*, 446 U.S. at pp. 300-301.) Of course, if an agent of the state employs coercion, the Fifth and Fourteenth Amendment analysis is the same as if the police had used coercion. (*People v. Brown* (1961) 198 Cal.App.2d 253, 263; *Arizona v. Fulminante* (1991) 499 U.S. 279, 287 & fn. 4.)

The totality of the circumstances surrounding the "confession" in the instant case are compelling. As noted *infra*, LAPD officers had unlawfully "detained" or "arrested" Appellant on state murder charges, and released him; then, after the state and federal agencies conferred about the case, federal agents arrested Appellant and, as set forth below, unlawfully detained him without bail. Throughout this time, Appellant consistently invoked his right to counsel and right against self-incrimination. Capitalizing on the unlawful detention of an inexperienced detainee, the government sent in a career criminal who, during a lengthy conversation driven by the agent, obtained statements from Appellant. When the

government placed an agent in Appellant's cell to pointedly question him about the instant case, under the circumstances of the instant case, it violated Appellant's Fifth Amendment right to remain silent and right to counsel.

3. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHTS

In the AOB, Appellant set forth that the statement was obtained as a result of Appellant's unlawful detention and therefore violated the Fourth Amendment. (AOB 82.) To be clear, the state did not just happen to benefit from an unlawful detention; the state instigated and supported the unlawful detention. The state then capitalized on the unlawful detention it created by sending in an agent to question Appellant, directly resulting in the challenged statement. Respondent makes two counter-arguments: 1) Appellant's Fourth Amendment rights were not violated, and 2) even if they were violated, suppression is not warranted. As set forth herein, Respondent's arguments are without merit.

a. APPELLANT WAS UNLAWFULLY HELD IN FEDERAL CUSTODY WITHOUT BAIL

The right to liberty is fundamental under the California and United States Constitutions, and is "second only to life itself in terms of constitutional importance." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded by statute on other grounds; see *Stack v. Boyle* (1951) 342 U.S. 1, 7-8 (dis. opn. of Jackson, J.).) In contrast, detention without bail is an odious concept associated with only the most repressive totalitarian states. (*In re Nordin* (1983) 143 Cal.App.3d 538, 547 (conc. & dis. opn. of Racanelli, P.J.).) The federal criminal justice system "embraces a strong

presumption against detention" of persons charged with crimes. (*United States v. Ali* (D.D.C. 2011) 793 F.Supp.2d 386, 387; see also U.S. Const., 5th, 8th & 14th Amends.) As set forth in the AOB, in federal criminal proceedings, release and detention determinations are governed by the Bail Reform Act of 1984. (18 U.S.C. §§ 3141-3156.) These provisions contain specific, mandatory guidelines that the federal courts must follow in considering whether a defendant should be detained or released during federal criminal proceedings.

As set forth herein, at the insistence of the State of California, Appellant was unlawfully held without bail in federal custody.

i. REQUIREMENTS FOR DETENTION WITHOUT BAIL IN FEDERAL PROCEEDINGS

In attempting to justify holding Appellant without bail, Respondent asserts that detention in federal cases is "typically limited" to the enumerated offenses in title 18 United States Code section 3142(f) ("section 3142(f)"). (RB 70.) However, the limitation is not "typical," it is mandatory. (See 18 U.S.C. § 3142.) Section 3142(f) defines the specific situations under which a judicial officer may hold a hearing to detain a defendant without bail and limits the circumstances under which detention may be sought *to the most serious of crimes.*[11] (See 18 U.S.C. § 3142(f).)

[11] According to the legislative history to the Act, these discrete predicate categories "in effect serve to limit the types of cases in which detention may be ordered prior to trial." (Sen.Rep. No. 98-225, 1st sess., p. 20 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News, pp. 3182, 3203; see also *United States v. Himler* (1986) 797 F.2d 156, 160, quoting Sen.Rep. No. 98-225, 1st sess., pp. 6-7 (1983), reprinted in 1984 U.S. Code Cong. &

Those situations include: l) a crime of violence; 2) an offense with a maximum sentence of life imprisonment or death; 3) an offense for which the maximum term of imprisonment is 10 or more years as prescribed by the Controlled Substances Act; 4) any felony if the person has been convicted of two or more offenses described in paragraphs (a) through (c) or comparable state offenses; 5) where defendant poses a serious risk of flight; or 6) a serious risk that the defendant will obstruct justice or threaten a witness. (*Ibid.*) Contrary to Respondent's argument, the federal law "does not authorize a detention hearing in the absence of one of the six situations set forth above." (*United States v. Butler* (N.D.Ohio 1996) 165 F.R.D. 68, 71; see also *United States v. Salerno, supra*, 480 U.S. at pp. 749-751 [the procedural protections found in section 3142(f) constitutionally safeguard against unwarranted or unjustified intrusion into personal liberty].)

As a *separate consideration,* for a person who qualifies for detention without bail, the court uses the factors in title 18 United States Code section 3142(g) ("section 3142(g)") to determine if any combination of factors will "reasonably assure the appearance of the person" who qualifies under section 3142(f) "and the safety of any other person in the community[.]" (18 U.S.C. § 3142(g).) Accordingly, considerations in section 3142(g) are used to determine if detention is necessary. However, a defendant *must* first qualify for detention under section 3142(f). (*United States v. Butler, supra*, 165 F.R.D. at p. 71 [The "government is required to demonstrate that there

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Admin. News, p. 3189 ["The legislative history of the [Act] makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute . . . addressed to the danger from 'a small but identifiable group of particularly dangerous defendants.'"].)

are grounds for a hearing under the specific provisions" of section 3142(f)].)

As a result, regardless of the considerations under section 3142(g), the government was required to prove that Appellant qualified for detention under section 3142(f). Of course, the minor white collar crime Appellant was charged with is not one of the enumerated offenses required for detention, and there was no evidence that Appellant would obstruct justice as defined under that statute. Thus, the only way the government could detain Appellant was by a showing that there was "a serious risk, that such a person will flee." (See 18 U.S.C. § 3142(f).) The hefty requirements under that subdivision are discussed below.

ii. REQUIREMENT FOR SERIOUS RISK OF FLIGHT

A finding of a "serious risk of flight" under section 1342(f) is a thoughtful, considered determination that a person qualifies (the same as a person facing a life sentence) for detention in federal custody without bail because the need is so compelling.

Thus, in order to meet the "serious risk of flight" requirement of section 3142(f), the government must show that the risk of flight is "unusually great" or "exceptional." (*United States v. Acevedo-Ramos* (1st Cir. 1985) 755 F.2d 203, 206; see *United States v. Abrahams* (1st Cir. 1978) 575 F.2d 3, 7-8.) There must be "[e]vidence of a serious intent to flee[.]" (*United States v. Giordano* (S.D.Fla. 2005) 370 F.Supp.2d 1256, 1264, citing *United States v. Vortis* (D.C. Cir. 1986) 785 F.2d 327 and *United States v. Koenig* (9th Cir. 1990) 912 F.2d 1190, 1193.) "Relevant factors that support a serious risk of flight finding include the use of a

number of aliases, unstable residential ties to a community, efforts to avoid arrest, or hidden assets." (*Ibid.*, citing *United States v. Friedman* (2d Cir. 1988) 837 F.2d 48, 49.) Courts have found that "evidence that a defendant had already attempted to flee prosecution would certainly bolster a finding of a serious risk of flight, especially where the defendant had foreign contacts who could aid in his flight." (*Ibid.*, citing *United States v. Maull* (8th Cir. 1985) 773 F.2d 1479 (en banc).)

The key is that under section 3142(f)—as opposed to section 3142(g)—the significant risk has to be tangible: "A mere theoretical opportunity for flight is not sufficient grounds for pretrial detention." (*Id.* at p. 1264, citing *United States v. Himler* (3d Cir. 1986) 797 F.2d 156, 162 [possession of one false form of identification is not enough by itself to justify pretrial detention in the absence of evidence that defendant actually intended to flee from prosecution].) Further, the mere fact that a defendant is facing a long prison sentence, for an offense not otherwise enumerated under section 3142(f), is insufficient for detention without bail: "In cases where only a serious risk of flight is at issue under § 3142(f)(2), it is generally accepted that more than evidence of the commission of a serious crime and the fact of a potentially long sentence is required to support a finding of serious risk of flight." (*Ibid.*, citing *United States v. Friedman*, *supra*, 837 F.2d at p. 49.)

Additionally, and of particular import here: "Merely having access to significant funds is not enough; evidence of strong foreign family or business ties is necessary to detain a defendant even in the face of a high monetary bond." (*Id.* at p. 1264, noting *United States v. Epstein* (E.D.Pa. 2001) 155 F.Supp.2d 323; see also *United States v. Cole* (E.D.Pa. 1988) 715 F.Supp. 677, 679 [defendants posed serious flight risk because they

held and used foreign passports and told undercover agents they would flee if arrested].)

iii. NO EVIDENCE SUPPORTED HOLDING APPELLANT WITHOUT BAIL

In the AOB, Appellant sets forth that the federal court detained Appellant with no chance of release by balancing the factors in section 3142(g) without first finding he qualified under section 3142(f). (See AOB 83-85.) In the absence of a finding under section 3142(f), the detention was unlawful. Respondent counters that the court properly considered "whether any safeguard could reasonably ensure that appellant would not flee[.]" (RB 69.) However, Respondent, like the federal court, misses the critical step of determining whether Appellant *qualified* for detention at all, irrespective of the balancing of factors.

Regardless, Respondent contends that "Appellant mischaracterizes the court's findings" by asserting that the federal court "denied bail because '[A]ppellant posed a danger to the community.'" (RB 69, noting AOB 84-85 & fn. 31.) Respondent then claims that "[t]he court made clear that its primary (if not only) reason for denying bail was that appellant was a flight risk." (RB 69.) That is not a fair reading of the federal court proceeding. Throughout the detention hearing, the federal court repeatedly emphasized that, although Appellant was charged only with a minor federal licensing violation, the state murder case showed dangerousness. (See discussion of parties at 2CT 000409-000418.) The court emphasized that "when the threats are grave, then I think it's prudent for the Court to exercise some degree of caution." (2CT 000418.) The federal court further noted, inter alia, "charged crime or not, I think the risk is too grave[.]" (2CT 000432.)

Clearly, the federal court's primary consideration at the hearing was dangerousness. This was patently insufficient to warrant detention. (See 18 U.S.C. § 3142(f).)

Furthermore, it is correct that the federal court also discussed the risk of flight, which could allow for detention without bail if it met the high requirements noted above. However, the lower court merely discussed flight as an ordinary factor under section 3142(g), and did not make any determination that Appellant qualified as a serious risk of flight under section 3142(f). This distinction is apparent from the record.

For example, the federal court found that Appellant constituted a flight risk because he had "assets at his disposal" and was facing serious charges in the state case. (2CT 000420.) While these considerations would have been relevant for a determination under section 3142(g), per established case law, these vague allegations about the possibility of flight were plainly insufficient to meet the government's obligations under section 3142(f). As noted above, a defendant cannot be detained without bail under section 3142(f) for a non-enumerated offense simply because he has assets; particularly where, as here, the federal government had seized those assets and Appellant's passport. (See *United States v. Giordano*, *supra*, 370 F.Supp.2d at p. 1264; see 2CT 000421-000423.) Additionally, as set forth above, any "possible exposure" Appellant was facing in the state murder case could not be the basis for holding Appellant in custody without bail. (*United States v. Friedman*, *supra*, 837 F.2d at p. 50.) As a result, the fact that Appellant was facing a long prison sentence was, itself, not enough to support a finding of serious risk of flight under section 3142(f)(2). (See *United States v. Giordana*, *supra*, 370 F.Supp.2d at p. 1264.)

Thus, the record is clear that the federal court did not go through the proper steps; it merely weighed the section 3142(g) factors, without finding that Appellant qualified under section 3142(f). Adding to this error, the entirety of the federal detention was based, not on the federal allegations, but on the state case. As set forth in the AOB, courts have found that detention in federal criminal cases cannot be based on a state court case: "[W]e do not think that the preventative detention provisions of the Bail Reform Act were meant to be invoked in order to safeguard a state domestic relations proceeding unconnected to the federal proceeding that has given rise to defendant's bail hearing." (AOB 85, fn. 32, citing *United States v. Ploof, supra*, 851 F.2d at p. 11.) Despite this precedent, Respondent does not counter Appellant's argument that the findings keeping Appellant in custody without bail could not have been based on the state court accusation.

Thus, the federal court, at the behest of state authorities, unlawfully detained Appellant without bail.

b. UNLAWFULLY HOLDING A DEFENDANT IN CUSTODY VIOLATES THE FOURTH AMENDMENT

Respondent argues that even if Appellant was illegally held in custody, an unlawful detention is not a violation of the Fourth Amendment. (RB 70-72.) As set forth herein, Respondent's reasoning is unsound.

Respondent cites to a number of cases to support its position; none are applicable. Respondent cites to *Albright v. Oliver* (1994) 510 U.S. 266, 273-275 (*Albright*) for the proposition that the United States Supreme Court has declined to "decide whether the Fourth Amendment guarantees the

right to be free of prosecution without probable cause." (RB 67.) Respondent uses that quote as support for the proposition that the Fourth Amendment is not implicated in the instant case; however, quite the opposite is true. In *Albright*, the arrestee brought a civil rights action against a police officer after being arrested without probable cause. (*Id.* at p. 266) The arrestee alleged violations of the Fourteenth Amendment. (*Ibid.*) The Supreme Court found that unlawful detentions are governed by the Fourth Amendment—which the arrestee did not allege—and that, *since the arrestee did not allege that constitutional provision, the Court could not consider it.* (*Id.* at pp. 274-275.) In doing so, the Court noted, "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it," further noting: "We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." (*Id.* at p. 274.) Thus, contrary to Respondent's assertion, *Albright* does not stand for the proposition that unlawfully holding a defendant does not violate the Fourth Amendment. In fact, the Court there thought the Plaintiff *should* have brought a Fourth Amendment claim.

Similarly, the cases cited by Respondent which address post-verdict bail are, for reasons detailed in those cases, inapposite to a discussion of pre-trial bail. (See *United States v. Abuhamra* (2d Cir. 2004) 389 F.3d 309, 318-319 & fn. 6 [noting that a defendant's expectation for post-verdict bail was functionally different from "that of a pre-trial defendant"]; *Torres v. McLaughlin* (3d Cir. 1998) 163 F.3d 169 [Fourth Amendment may be implicated between arrest and trial, but the defendant's "post-trial incarceration does not qualify as a Fourth Amendment seizure."].) These cases do nothing to support Respondent's assertion.

Finally, Respondent cites a case which concerns the applicable arguments where a detention was lawful, but the detainee had subsequent concerns regarding the *condition* of the detention. (RB 67-68, citing *Riley v. Dorton* (4th Cir. 1997) 115 F.3d 1159, 1163, abrogated by *Wilkins v. Gaddy* (2010) 559 U.S. 34, 40.) In *Riley*, a detainee brought a section 1983 claim acknowledging that he was lawfully arrested, but arguing that at some point during his lawful confinement, a *condition* of his detention was unlawful because an officer used excessive force. (*Id.* at p. 1161.) The court held that when the claim concerns a *condition* of a lawful detention, the Fourth Amendment is not implicated. (*Id.* at p. 1162.) Again, this case does nothing to support Respondent's contention that an unlawful detention itself does not implicate the Fourth Amendment.

In addition to citing inapposite cases, Respondent also claims that "[t]here does not appear to be any California authority governing whether unlawful procedures leading to a defendant's pretrial confinement could amount to a Fourth Amendment violation[.]" (RB 68.) However, the Supreme Court has found that the unlawful pretrial confinement of a defendant "for the purpose of gathering additional evidence to justify the arrest" violates the Fourth Amendment. (*County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.) Similarly, unlawfully holding Appellant with no chance of release (ostensibly for a minor licensing investigation, but really for the state murder case), so that the government can conduct its investigation against Appellant (by means of fitting a government agent with a wire and sending him into Appellant's cell) violates the Fourth Amendment.

* * *

c. ATTENUATION DOES NOT DISSIPATE THE ILLEGALITY

The exclusionary rule attendant to the Fourth Amendment requires suppression of evidence seized during an unreasonable search or seizure. (U.S. Const., 4th & 14th Amends.; Cal. Const., art. I, § 13; *Mapp v. Ohio*, *supra*, 367 U.S. at p. 655.) Evidence may be excluded as "fruit of the poisonous tree" where its discovery "results from" or is "caused" by a Fourth Amendment violation. (*United States v. Ceccolini* (1978) 435 U.S. 268, 273.) Exclusion is not required, however, where the evidentiary "fruit" is derived from a source that is independent of the "poisonous" conduct or where "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" (*Id.* at pp. 273-274, quoting *Wong Sun v. United States* (1963) 371 U.S. 471, 478.)

Here, Respondent argues that even if Appellant was being unlawfully detained in violation of the Fourth Amendment, there was sufficient attenuation to "break" the "chain of causation." (RB 71, noting *People v. Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*).) In *Brendlin*, officers conducted an unlawful traffic stop, then discovered that the defendant had an outstanding arrest warrant. (*Brendlin*, *supra*, 45 Cal.4th at pp. 265-266.) This Court concluded that the discovery of the warrant was an intervening force which had attenuated the taint of the antecedent unlawful traffic stop. (*Id.* at pp. 269, 271.)

In the instant case, the government has no such legal, intervening act. Respondent asserts that the taint from the unlawful detention (which was continuing) was attenuated because Appellant was held (unlawfully) in custody for almost a month. Respondent does not explain why the Fourth

Amendment analysis does not continue for the length of the violation.[12] Further, Respondent seeks to portray Smith's questioning of Appellant as an intervening act. (RB 72.) It is difficult to understand how the taint of Appellant's unlawful detention would become attenuated by the fact that the government sent a wired informant to the cell to question Appellant after Appellant had repeatedly invoked his right to remain silent and right to an attorney. Thus, the statement was fruit of the unlawful detention of Appellant.

4. APPELLANT'S STATEMENT WAS ADMITTED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION

At trial, the government chose not to call Smith as a witness, instead introducing his statements via the tape recording. As set forth in the AOB and herein, the admission of Smith's statements violated Appellant's Sixth amendment right to confrontation as well as state constitutional and statutory rules.[13] (AOB 88-93; U.S. Const., 6th & 14th Amends.; Cal.

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[12] Indeed, an argument that the constitutional violation cannot be continuing is seemingly in conflict with the recent Supreme Court's decision in *United States v. Jones* (2012) __ U.S. __, __ [132 S.Ct. 945, 946, 181 L.Ed.2d 911] (*Jones*). In *Jones*, government agents attached a GPS devise to the defendant's vehicle and tracked it for nearly a month. In finding that the defendant's Fourth Amendment rights were violated, the Supreme Court did not state that the rights were violated at the time the device was attached, and everything thereafter was not a Fourth Amendment violation. Instead, the court found a continuing Fourth Amendment violation. (*Id.* at p. 949.)

[13] In its brief, Respondent notes that Appellant had argued about the tape multiple times, then points out that Appellant only raised this "new theory" concerning *Crawford* "shortly before the statement was played for the

Const., art. I, §§ 7, 14 & 15; *Crawford v. Washington* (2003) 541 U.S. 36 (*Crawford*).)

a. SMITH'S STATEMENTS WERE TESTIMONIAL

The Sixth Amendment's Confrontation Clause provides: "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" (U.S. Const., 6th Amend.; see also Cal. Const., art. I, §§ 7, 14, & 15.) Pursuant to *Crawford*, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.) To be "'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" (*Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705, 2714, fn. 6, 1 L.Ed.2d 610], quoting *Davis v. Washington* (2006) 547 U.S. 813, 822.)

In the AOB, Appellant set forth that Smith's statements on the tape were testimonial in that any objective witness would know that the statements would be used at trial. (AOB 89-90.) Respondent disagrees, citing to cases holding that statements to an undercover agent are not testimonial. (RB 74-75; *Davis v. Washington*, *supra*, 547 U.S. 825 ["statements made unwittingly to a Government informant" are not testimonial].) Certainly, cases have found that statements are non-testimonial when declarants do not know they are speaking to an agent of the police because they do not anticipate their statements would be used in a criminal prosecution. (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 ["The last thing [the defendant] expected was for his statement [to an

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jury." (RB 52.) Yet, *Crawford* is a trial right, which could not have been raised earlier. (See *Giles v. California* (2008) 554 U.S. 353, 375.)

informant] to be repeated in court."], noting *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175.)

Yet, there is a relevant distinction between statements *to* confidential informants and statements *of* confidential informants. In the instant case, the concern is not with the statements *of Appellant to* the undercover agent but with the statements of the undercover agent himself. While statements *to* an undercover agent may be non-testimonial, statements *by* an undercover informant, during a conversation which the informant knows the government is recording and will likely use at trial, are testimonial and can implicate the Confrontation Clause. (See *State v. Smith* (Conn. 2008) 960 A.2d 993, 1013.) As a result, admission of those statements, without the ability to cross-examine Smith, violated Appellant's Sixth Amendment rights.

b. SMITH'S STATEMENTS WERE ADMITTED FOR THEIR TRUTH

While *Crawford* adds a second layer of inquiry when hearsay is offered against a criminal defendant, it does not replace a conventional hearsay analysis. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 811.) The question of what constitutes hearsay is generally a question of state evidence law; however, that analysis cannot mean that state courts have the power to evade *Crawford* simply by attaching a nonhearsay label to testimonial statements. As the Supreme Court stated in another context, "'[l]abels do not afford an acceptable answer.'" (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494.)

"The primary reason for excluding hearsay is that the trier of fact has no adequate basis for evaluating the declarant's credibility, because the

declarant was not subject to cross-examination under oath in the trier's presence." (Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay under the Federal Rules of Evidence* (1990) 74 Minn. L.Rev. 783, 785.) The hearsay rule excludes such evidence because its value depends upon the perception, memory, and sincerity of the out-of-court declarant, which could not be explored and tested when the statement was made. (Rice, *Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 80l(a) of the Federal Rules of Evidence* (1992) 65 Temp. L.Rev. 529, 529.)

Respondent argues that Smith's statements were offered for a non-hearsay purpose, asserting that "the prosecutor explicitly told the jury that 'I am not asking you to take Shawn Smith's word for anything,' since appellant's own words were damning." (RB 76, citing 11RT 2317-2318.) Thus, Respondent contends that the prosecutor told the jury not to consider the "word" of Smith from the tape. That is simply not a reasonable interpretation of what the prosecutor argued. The prosecutor stated: "I am not asking you to take Shawn Smith's word for anything. *I am not saying, Yeah, Shawn Smith says that* James Fayed said this. *You can hear for yourself* on the DVD, on the tape. You can hear exactly what it is in all of its glory." (11RT 2317:8-10, italics added.) The government did not argue that the jury did not have to believe Smith—only that the jury did not have to take the district attorney's "word" for what Smith said—because they could hear for themselves the words Smith said on the tape.

In fact, the government repeatedly told the jury that Smith *was being truthful*: "When things happen in hell, you are not going to get an angel for a witness; we get that. *But is there anything that makes you suspect that*

Shawn Smith is not being truthful? No because you can hear every syllable that comes out of his mouth." (11RT 2318:26-2319:3, italics added.)

The government did more than just tell the jury that Smith was being truthful; it also, repeatedly, told the jury to use the statements on the tape to evaluate Smith's credibility. As noted above, the primary reason to exclude hearsay is because the jury cannot evaluate the credibility of the declarant. (Park, *supra*, 74 Minn. L.Rev. at p. 785.) Here, the government attempted to circumvent that primary purpose by asserting that it was admitting Smith's statements for a non-hearsay purpose, and then arguing to the jury about the veracity of Smith's statements and character, stating, "There is no evidence at all that, despite the fact that he has committed felonies, that Shawn Smith has ever murdered anybody. So he is not the scumbag here." (11RT 2317:1-4.) The government continued: "[W]hy exactly is he the scumbag?. . . Because he reached out to the authorities when he saw something that was wrong. . . . When he saw that James Fayed was trying to solicit the murder of other people, he reaches out to the authorities? That makes him the bad guy?" (11RT 2316:21-28.) The government even lauded Smith's mastery at questioning Appellant: "That's how sharp Shawn Smith is. He knows that 'uh-huh' can be interpreted a couple of different ways[,]" so he asks Appellant to clarify his statement. (11RT 2238:8-11.)

Here, the government sought to have it both ways. They were able to introduce Smith's statements by arguing to the court that nothing Smith said was true; then, they later, told the jury that Smith was a credible witness and his statements were truthful. In doing so, the government violated Appellant's Sixth Amendment right to confrontation and hearsay regulations.

5. ADMISSION OF THE UNREDACTED STATEMENT WAS ERROR

At trial, Appellant argued that even if the tape was admitted, it should be redacted to exclude irrelevant and highly prejudicial information, including, but not limited to, evidence that Appellant attempted to hire someone to kill co-defendant Moya, a crime for which Appellant was never charged. (See 11CT 002727, 002763-002775.) "'Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]'" . . . "'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.'" (*People v. Balcom* (1994) 7 Cal.4th 414, 422, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 404, original italics.) All doubts must be resolved in the defendant's favor. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

Certainly, courts have recognized the probative value of consciousness of guilt evidence. (See *People v. Brooks* (1979) 88 Cal.App.3d 180, 187, fn. 4.) However, here, the evidence—as it related to consciousness of guilt for the charged offense—had limited probative value because it was cumulative to other, more direct, evidence in the tape. (AOB 96-97.) Furthermore, it was clearly the government informant, Smith, who brought up, instigated, and encouraged a discussion about killing Moya. (AOB 98-102, citing 3CT 000475-000477, 000477-000479, 000558-0005, 00561.) Thus, any probative value was substantially outweighed by the probability of undue prejudice. (See Evid. Code, § 352.)

Before trial, Appellant also moved to redact other inflammatory statements in the tape, including Smith's graphic statements about "hitmen," Smith's offensive racial statements, and Smith's offensive

statements about women. (AOB 105-106.) Appellant also argued that portions of Appellant's statements should have been redacted, including the discussion about Appellant's involvement with the National Security Agency, his committing prior forgeries, his sex life, etc. (AOB 106-108.)

Respondent argues that these "details lent credibility to appellant's admissions to Smith because they revealed the two men talking as friends and co-conspirators." (RB 82.) This argument hardly explains why this evidence was relevant to the charged offenses or, as to the portions concerning uncharged criminal conduct, how these statements had "*substantial* probative value." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422.)

6. ADMISSION OF THE TAPE WAS PREJUDICIAL

As set forth in the AOB, the harmless error test applies to confessions and admissions. (AOB 88, citing *Milton v. Wainright* (1972) 407 U.S. 371, 372-373.) Thus, pursuant to *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), *reversal is required unless* the government proves beyond a reasonable doubt that the error was harmless. (*Id.* at p. 24.) Under *Chapman,* the reviewing court should look to whether the jury relied on the improperly admitted evidence in their deliberations, not whether there was sufficient evidence for a conviction. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 270.) This analysis focuses on whether *the government* can show that the error did not have any adverse effects on the jury, not on whether the defendant can prove any actual prejudice occurred. (*People v. Jackson* (2014) 58 Cal.4th 724, 774-775 (dis. opn. of Liu, J.).)

Here, Respondent argues that even if admission of the tape was error, it was "harmless beyond a reasonable doubt." (RB 82.) This argument

strains credibility. Respondent concedes, as it must, that the tape was "hugely damaging," but contends that "the People presented a vast amount of other evidence which was amply sufficient to convict appellant." (RB 82.) First, that is factually incorrect. Without the tape, the government had, essentially, the same evidence at trial that it had immediately after the death of Pamela Fayed, which was insufficient even for a lawful arrest.[14] More importantly, however, as noted above, Respondent misstates the requirement. The question is not whether the government had "other evidence" against Appellant. Reversal is required if there is a "reasonable possibility" the improperly admitted evidence "might have contributed to the conviction." (*Chapman*, *supra*, 386 U.S. at p. 23.) There is no genuine question that the tape did not contribute to the conviction. Although Respondent claims that the error was harmless, it makes no real argument that the jury was not affected by this evidence, nor could it.

* * *

[14] In the days and weeks following the death of Pamela Fayed, the government ascertained that Pamela and Appellant were going through a contentious divorce; that a vehicle associated with the family business was used in the crime; that the phone of an employee of the family ranch, co-defendant Moya, was in the area where Pamela was killed; that Moya's phone had been in contact with Appellant's phone on the day of the crime by text; and that a video recording captured the area near where Pamela was killed, showing that Appellant did not physically react to hearing screams or commotion. As discussed below, based on this evidence, the government could not even lawfully arrest let alone charge Appellant for the murder of Pamela Fayed. (See generally discussion in 4CT 000944; 5CT 001209; 6CT 001361.)

B. JURY MISCONDUCT REQUIRES REVERSAL

In the AOB, Appellant set forth, in detail, the persistent and bizarre jury misconduct which infected the trial. (See AOB 110-120.) Instances of misconduct included, but were not limited to: the lower court received a voicemail from an unnamed juror stating that he saw one juror and two alternate jurors communicating about the case outside of court, (9RT 1577:18-22); the lower court later received a note from a juror stating that he had observed one juror and two alternates discussing "at length" the testimony of one of the government witnesses, (9RT 1652:13-24); an alternate juror told the court he/she had heard other jurors discussing the evidence, (9RT 1678:7-23, 1679:12-23); Appellant's counsel received an anonymous e-mail stating that jurors were talking about the case and viewing websites, (10RT 1824:24-28, 1825:15-26); the lower court received another voicemail stating that the caller was a juror and that other jurors were discussing the case and mentioned which specific jurors were involved in the misconduct, (10RT 1852:23-1853:2, 1961:16-1963:9); the lower court received a note from a juror expressing concern over the discussions of jury misconduct, (10RT 1960:7-1961:10); and Appellant's counsel received a letter which stated that jurors had been sent materials from the political campaign of one of the prosecutors on the case, (11RT 2376:12-16). These acts occurred throughout trial. In fact, the lower court recognized: "You know, I have been on the bench for twenty-two years, almost twenty-three years. And I have just never experienced anything like this." (11RT 2382:4-6.)

Regardless, Respondent seeks to describe the jury misconduct as "limited" and not affecting the trial. (RB 85.) As set forth herein, the lower

court failed to properly investigate the misconduct, there was sufficient indicia of misconduct to raise the presumption of prejudice, and the lower court improperly denied Appellant's Motion for a New Trial based on the misconduct.

1. THE LOWER COURT DID NOT CONDUCT SUFFICIENT INQUIRIES INTO THE MISCONDUCT

"A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'[Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 547, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 519.) As set for below, the lower court did not sufficiently investigate the significant allegations of misconduct.

a. THE LOWER COURT WAS DISINCLINED TO BELIEVE THAT JURORS WERE COMMITTING MISCONDUCT

Part of the failure of the lower court to conduct sufficient inquiries seemed to stem from the court's belief that an "outside influence," not jurors, were responsible for the allegations of misconduct. (AOB 119, citing 11RT 2382:27-2383:2.) Throughout the allegations of jury misconduct, the lower court was steadfastly disinclined to believe that the complaints of misconduct were coming from jurors or that any of the jurors were engaging in misconduct. Even during the first allegation of misconduct, the lower court stated: "I really don't know whether it was a juror or somebody else that just was trying to cause issues or problems with this case[.]" (9RT 1579:28-1580:3.)

In front of the jury, the lower court gave every indication it believed that the malfeasance was coming from outside of the jury, telling the jury to be "extremely vigilant if anybody tries to contact you in any way in connection with this case," and stating: "there is someone out there that's trying to cause trouble, and I don't know who that someone is. [¶] So just be vigilant. And if anybody tries to contact you, you get any anonymous, you know, correspondence or information or anything like that, just please let us know right away." (11RT 2387:3-4, 2387:7-13.) These statements certainly informed the jury that "someone" was interfering with them. As set forth in the New Trial section below, the lower court plainly believed that "someone" was Appellant.

Despite the comments from the lower court, Respondent disagrees with Appellant's assertion that the court was disinclined to believe that the jurors were participating in misconduct. Respondent points to the lower court's discussion of the initial anonymous call, asserting: "the court expressed its opinion that the initial caller (who was later identified as Juror No. 5) *actually was a juror*, namely Juror No. 8." (RB 105, original italics.) However, that is an unfounded reading of the record. The lower court did not get the voicemail, decide it was from a juror, and then opine that it was Juror No. 8. Instead, the court told the parties that someone left a message on the court's answering machine concerning jury misconduct. (9RT 1577:15-1578:2.) After the bailiff determined that no juror admitted to placing the call, the court noted that Juror No. 8 had not yet arrived. (9RT 1578:12-21.) Since everyone else had denied the call, the court stated "one might guess that Juror No. 8 was the one who called." (9RT 1578:22-23.) That statement, in context, was not an assertion that the lower court believed the call came from a juror, or that the court believed that caller to

be a specific juror. It was merely a reference to the only juror left to be questioned. Thus, Respondent's argument is not supported by the record.

b. THE INVESTIGATION WAS INCOMPLETE

In addition to instinctively deciding that the jurors were not at fault, the lower court refused to conduct complete investigations into the allegations.

i. FACTS CONCERNING THE LOWER COURT'S INVESTIGATIONS

As noted above, the lower court dealt with the first allegation of misconduct, which was left on the court's voicemail, by having the bailiff ask the jurors if anyone left the message. (9RT 1579:12-13.) The defense asked that each juror be individually questioned, so that they did not have to implicate their fellow jurors in front of everyone. (9RT 1580:14-24.) However, the lower court refused, deciding instead to have the jurors come into the courtroom, sit together, and ask them as a group if other jurors were committing misconduct. (9RT 1582:7-18.) When no juror admitted misconduct, the court proceeded with the trial. (9RT 1582:14-18, 1582:27-28.)

It was not until the court received a subsequent note from a named juror, Juror No. 5, who stated that he overheard a juror and two alternates "discussing at length the actions [of a government witness]" that the court individually questioned that juror. (9RT 1652:14-21.) Upon questioning, Juror No. 5 explained that other jurors were discussing the "bravery" of the government witness "and his actions at the time" of Pamela's death. (9RT 1654:15-17.) Juror No. 5 continued:

> They talked about the photos that we had seen [of Pamela's dead body] as far as the graphic nature of the photos . . . they also talked about the defendant and how his actions up to this point, in their opinion, had led to his wife's death and how cruel it was and how, you know, they - - their opinion of him so far in the trial to date.

(9RT 1654:18-27.) The court then questioned the named jurors, who denied participating in the misconduct. (9RT 1657:5-1660:15.) Despite the fact that Juror No. 5 testified to some clear juror misconduct, the lower court was, again, reluctant to ask the other jurors individually if they participated in or observed misconduct, and defense counsel objected "to the court's decision to not query any further jurors[.]" (9RT 1664:10-14.) Only after the government requested questioning, did the lower court finally acquiesce. (9RT 1665:16-23.) Of course, as noted in the AOB, this individualized questioning confirmed the misconduct. (AOB 112-113, citing 9RT 1678:7-23, 1679:12-23.) The court ultimately excused one juror and one alternate. (9RT 1685:27-1686:3.)

The next day, defense counsel brought in the email he received which stated that jurors were discussing their opinions and had viewed websites about the trial. (10RT 1825:15-24.) As to this instance of misconduct, Respondent states: "After the anonymous email was sent to defense counsel, the court conducted yet another full-panel inquiry[.]" (RB 104.) Certainly the court asked the jurors, in a group, if they committed misconduct, but the court refused to question the jurors individually, and instead told them to self-report any misconduct to the bailiff. (10RT 1836:1-6.) Defense counsel asked that the jurors be questioned individually concerning the email, stressing that it was only after individual questioning that the last misconduct was finally exposed; that request was denied.

(10RT 1834:1-10.) It wasn't until later that day, after the court informed the parties concerning the voicemail from a female juror stating that named jurors were talking about the case and looking up things on the internet, that the court conducted individual questioning. (10RT 1852:22-28, 1958:27-28, 1959:1-3.) However, after the receipt of the letter and political flyer, the lower court again chose to ask the jurors, as a group, about any misconduct. (11RT 2386:5-21.)

During this time, the lower court even received a note from Juror Number 3 asking if the court could "question[] the jurors individually" about the occurrences stating "[p]ersonally, I would feel more confident[.]" (10RT 1960:23-25; 1961:1-4.)

ii. RESPONDENT'S ARGUMENT THAT THE LOWER COURT CONDUCTED A SUFFICIENT INQUIRY IS UNFOUNDED

Respondent argues that the lower court's actions noted above, "constituted a 'sufficient inquiry' to prove that the remaining jurors had not committed misconduct," relying on *People v. Davis*, *supra*, 10 Cal.4th at p. 467. (RB 104.) However, that case is inapposite.

In *People v. Davis*, *supra*, 10 Cal.4th 463, one of the jurors sent a note to the court asking a series of questions, including whether the defendant could get out on parole. (*Id.* at p. 546.) The lower court answered the question concerning possible release. (*Ibid.*) On appeal, the defense argued that the lower court should have inquired concerning the questions to see if there was jury misconduct. The court held, "A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror

may exist.'" (*Id.* at p. 547, citing *People v. Burgener*, *supra*, 41 Cal.3d at p. 519.) However, this Court concluded that the trial court did not have to conduct an inquiry because "[o]n this record, we cannot conclude that the trial court was put on notice of good cause. . . . Defendant merely speculates that there might have been jury misconduct." (*Id.* at p. 547.) Importantly, the Court noted that "[m]ere questions from individual jurors prior to actual deliberations do not constitute jury misconduct." (*Ibid.*, noting *People v. Anderson* (1990) 52 Cal.3d 453, 481.) The note did not show any bias or "suggest that the jury improperly discussed the case prior to submission to them. Accordingly no duty arose on the part of the trial court to. . . conduct an inquiry." (*Id.* at p. 548.) Thus, *People v. Davis*, *supra*, 10 Cal.4th 463, does not set forth the limits of a proper inquiry; instead, the Court in that case found that no inquiry was required. (See *id.* at pp. 547-548.)

The distinction with the instant case is manifest. Unlike in *Davis*, the allegations of jurors discussing the case and forming opinions here, if true, would have unquestioningly been jury misconduct. (See *In re Hitchings* (1993) 6 Cal.4th 97, 118.) Thus, the lower court was required to conduct an investigation. A perfunctory inquiry into the purported misconduct is insufficient; a court has a duty to make whatever inquiry is necessary to determine whether a juror should be discharged. (*People v. Espinoza* (1992) 3 Cal.4th 806, 821; see also *People v. Guzman* (1977) 66 Cal.App.3d 549.) Any decision of the trial court must be the product of a complete investigation and a sufficient hearing in which the trial court reached an informed and intelligent decision. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1117; *People v. Williams* (1997) 16 Cal.4th 153, 230-231.)

Here, the lower court failed to fully investigate all allegations of misconduct. Accordingly, when a trial court fails to fully investigate alleged jury misconduct, a reviewing court must reverse the judgment unless the court is "able to declare the error to be harmless beyond a reasonable doubt" under the standard set forth in *Chapman*, *supra*, 386 U.S. at p. 24. (*People v. Tuggle* (2009) 179 Cal.App.4th 339, 387.) The failure to properly investigate the misconduct is, itself, enough to warrant reversal.

2. THERE WAS GOOD CAUSE TO BELIEVE THERE WAS JUROR MISCONDUCT

Even with the minimal inquiry conducted by the trial court, there was good cause to believe that there was jury misconduct. Juror misconduct can occur in a variety of ways. Two such ways are 1) when the jurors receive outside information about the case which was not part of the evidence at trial, and 2) when jurors communicate about the case amongst themselves or with others. The rules regulating these types of misconduct differ. In its brief, Respondent addles the tests relevant to these different types of misconduct.[15] For example, Respondent argues that the rule concerning jurors "convers[ing] among themselves or third parties about the case" was "aptly summarized in *In re Lucas* (2004) 33 Cal.4th 682."[16] (RB 100.)

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[15] Respondent discusses the law concerning "inadvertent" or accidental disclosure of information to the jury, which is quite favorable to the prosecution because the rule concerning the presumption of prejudice is not typically applicable. (See *People v. Cooper* (1991) 53 Cal.3d 771.) However, that rule is inapplicable here.

[16] In *In re Lucas*, *supra*, 33 Cal.4th 682, a juror, who had experience with drugs, told other jurors about his experience to negate the defendant's assertions concerning the effect of drug usage. (*Id.* at p. 694.)

However, that case addresses the requirements for misconduct where a juror received outside information about the case during deliberations, not where jurors were preemptively forming opinions or talking about the case.[17] (See *In re Lucas*, *supra*, 33 Cal.4th at p. 696.)

Here, multiple instances of jury misconduct were confirmed by other jurors, and many additional accusations of jury misconduct were alleged. The bulk of the allegations asserted that jurors were discussing the case and that jurors had formed impressions of Appellant's guilt. Thus, the usual rules concerning jurors discussing the case apply, and even a single conversation by a juror about pending court proceedings could be serious misconduct. (See *In re Hitchings*, *supra*, 6 Cal.4th at p. 117; *People v. Pierce* (1979) 24 Cal.3d 199, 207.) Once misconduct is shown, "'prejudice is presumed; the state must then rebut the presumption or lose the verdict. [Citation.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1178, quoting *People v. Marshall* (1990) 50 Cal.3d 907, 949.) The presumption can only be rebutted by affirmative proof that "no prejudice *actually* resulted." (*People v. Pierce*, *supra*, 24 Cal.3d at p. 207, italics added.) If the presumption of prejudice is not rebutted by affirmative evidence proving that no prejudice actually resulted, "the accused is entitled to a new trial" regardless of the strength of the evidence against him. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 399.)

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[17] If the jurors gain knowledge of information or evidence through their own efforts, the reviewing court considers the entire record, and the verdict is only set aside where there is a substantial likelihood of juror bias. (See *In re Carpenter* (1995) 9 Cal.4th 634.) This test is more favorable to the prosecution than the general rules concerning jury misconduct because it requires a "substantial showing of bias."

The facts stated above and in the AOB show a significant number of instances of misconduct. As a result, Appellant has shown misconduct and prejudice is presumed. Respondent has not rebutted that presumption.

3. THE DENIAL OF THE NEW TRIAL MOTION WAS IN ERROR

Additionally, Appellant brought a Motion for New Trial, arguing, inter alia, that a new trial was warranted based on the jury misconduct. (14CT 003738.) When the issue of misconduct is raised in a motion for new trial, the lower court must utilize the same test noted above: first, determine if there was misconduct; second, if there was misconduct, prejudice is presumed and the government must rebut that presumption. (*People v. Davis*, *supra*, 10 Cal.4th at p. 547.) As noted in the AOB, the reviewing court must accept the trial court's factual determinations if "supported by substantial evidence," but may independently review whether those facts constitute misconduct and whether the misconduct was prejudicial. (AOB 125, citing *People v. Majors* (1998) 18 Cal.4th 385, 417; *People v. Nesler* (1997) 16 Cal.4th 561, 582-583.)

Respondent argues that the denial of the Motion for New Trial was proper because there was, in fact, no misconduct, except by the jurors who were removed. (RB 108.) Respondent gives no explanation as to all of the other occurrences of misconduct allegations or communications purporting to be from jurors, etc. In its brief, Respondent merely refers to these other incidents as "not credible," relying on the lower court's "findings." (RB 108.)

However, the lower court's "conclusion" that there was no jury misconduct was premised on one wholly unsupported assumption: that

Appellant was responsible for everything that happened. The lower court simply stated: "I never in all my years had a case like this where there were outside forces which . . . are associated with the defense. Not defense counsel, but somehow associated with the defense creating mischief and attacking our very, you know, heart of our criminal justice system and trying to derail the jury in this case." (14RT 2895:27-2896:5.) The lower court pressed on with its "finding" that any misconduct was conducted or orchestrated by Appellant: "[I]t was someone else that was creating the mischief, somebody associated with the defendant. If the defendant is willing to pay somebody $25,000 to kill his wife, then why wouldn't the defendant be willing to try to subvert the jury process in this case by having someone, you know, send anonymous letters and emails and make anonymous phone calls to the court? I mean, that just is, I think, to be expected." (14RT 2898:2-10.)

When confronted by Appellant's counsel with the fact that the court's findings had absolutely no basis, the lower court merely responded, "[T]he way I looked at that was, the only one that stood to benefit from this jury trial being derailed or there being some kind of a mistrial or the jury being dismissed somehow, was the defendant. . . . my suspicions are that it is associated with the defendant." (14RT 2899:24-2900:4.) Yet, as noted in the AOB, not only was there *absolutely no evidence* to support the lower court's "finding," the evidence in the record actually contradicts the lower court's assumption. Appellant was held in custody without bail, in isolation (K-10 status); thus, he had no ability to send emails, leave phone messages on the court's voicemail (without someone accepting the collect call), or access political mailers. (1CT 000031:27-28, 000041:24-27.) Not only did the evidence seem to show that Appellant, himself, could not have

committed these acts himself, there was absolutely no evidence in the record that any other family member or associate had ever even appeared in the courtroom to support Appellant, let alone that anyone associated with Appellant ever tried to interfere with the jury on his behalf. The lower court's suspicion or hunch, that it was Appellant who orchestrated the misconduct because he stood to gain, falls far short of substantial evidence. The lower court's "[s]peculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at p. 652, citing *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585.)

Something very disconcerting was going on during trial. Either jurors were committing serious and repeated misconduct, or someone went to great lengths to make it appear so. Yet, the lower court denied the New Trial Motion based on its wholly unsupported assumption that Appellant was responsible. Such a finding warrants reversal.

C. THE ERROR IN JURY INSTRUCTIONS REQUIRES REVERSAL

In the AOB, Appellant notes several errors in jury instructions. As set forth below, the errors require reversal.

1. THE LOWER COURT ERRED IN REFUSING TO GIVE A THIRD-PARTY CULPABILITY INSTRUCTION

In the AOB, Appellant argues that the lower court erred in refusing to instruct the jury concerning third-party culpability. (AOB 129-134.) In its brief, Respondent now argues that the refusal to instruct was proper, primarily because the evidence, including testimony that Mary Mercedes

had previously tried to solicit the murder of Pamela Fayed, was not actually third-party culpability evidence at all. (See RB 110-114.) As set forth herein, Respondent's argument, which contradicts its position at trial, is without merit; Appellant was entitled to a third-party culpability instruction; and the lower court erred in refusing to instruct on the third-party culpability defense.

a. ARGUMENTS IN THE TRIAL COURT

Briefing and arguments at trial centered on two issues: 1) was the proposed evidence third-party culpability evidence, and 2) should the defense receive the requested third-party culpability jury instruction.

On the first issue, all parties recognized that the evidence was third-party culpability evidence, and the government even agreed that the evidence should be admitted as third-party culpability evidence. (See 3RT 293-294 [government stipulates to defense third-party culpability evidence].) The government was not confused as to why the evidence was being admitted. In fact, the government succinctly summarized its understanding of the defense evidence as follows: the defense "alleges that Mary Mercedes, who is Mr. Fayed's sister, is the real killer. And it contends that the defense will establish this by bringing in Mr. Fayed's other sister, Patty Taboga. . . . and that Mary, according to the defense, admitted to—or solicited rather—solicited the murder of Pam Fayed . . . some months prior to Pam being murdered. So based on this, the defense seeks to introduce evidence of Mary's responsibility for the crime." (3RT 293:4-18.)

Thus, in the trial court the only remaining issue was whether Appellant would get a third-party culpability instruction. On May 11, 2011,

the defense filed its jury instructions, which included a proposed instruction. (14CT 003521.) At a hearing on May 13, 2011, the government's argument against the instruction centered around a desire to avoid "highlighting" the third-party culpability evidence, including "what I'm struggling with, that the defense is asking that the court almost direct the deliberations on how they should weigh and balance that particular piece of evidence, which happens to be the defense's only piece of evidence, they're asking that we draw it up and put a bright light on it and have the court actually highlight that singular piece of evidence to the jurors." (10RT 2091:12-19.) The lower court's concerns were that it had "problems the way this instruction is worded." (10RT 2083:14-15.) Namely, the court was concerned that the instruction as drafted *required* the jury to find that if Mary Mercedes had previously solicited the murder of Pamela Fayed, then Appellant was not guilty in the instant case. (10RT 2085:20-2086:5.) The lower court stated the instruction, as written "suggests that if they believe the Mary Mercedes testimony that Mr. Fayed then is not guilty, and *I don't think that is necessarily so*." (10RT 2086:16-18, italics added.) Ultimately, the lower court declined the instruction but stated Appellant could argue the significance of the third-party culpability evidence. (10RT 2088:17-22, 2095:26-2096:2.)

b. RESPONDENT'S POSITION ON APPEAL

On appeal, Respondent now argues that the third-party culpability evidence (it stipulated to before trial) was not third-party culpability evidence at all. Specifically, Respondent argues that even if the evidence of the prior solicitation is deemed true, it is "simply tangential to the charge against appellant" and claims that the evidence of the prior solicitation of

murder has "nothing to do with the People's case that appellant solicited Moya to arrange Pam's murder." (RB 112-113.)

Here, Respondent is, again, making an argument contrary to its position in the trial court, where it stipulated that the evidence was admissible third-party culpability evidence. (See *Lorenzana v. Superior Court*, *supra*, 9 Cal.3d at p. 640; *People v. Smith*, *supra*, 67 Cal.App.3d at p. 655-656.) Thus, this new, contradictory argument should not be entertained.

However, even if Respondent were now permitted to argue a position contrary to the one it stipulated to in the trial court, that position is without merit. The requirements for third-party culpability were set forth by this Court in *People v. Hall* (1986) 41 Cal.3d 826: "To be admissible, the third-party 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." (*Id.* at p. 833.) Trial courts were cautioned not to be unduly restrictive in assessing the relevance of third-party culpability evidence: "[Trial courts] should avoid hasty conclusion . . . that evidence of [a third party's] guilt was incredible. Such a determination is properly the province of the jury." (*Id.* at p. 834.)

Here, the evidence was that in 2008, Mary Mercedes solicited her brother-in-law to kill Pamela Fayed for $200,000. (10RT 1904:19-21.) During that solicitation, Mercedes explained that "money was running out and Pam had to go." (10RT 1905:8-9.) Call records show that Mary Mercedes called Joey Moya (who purportedly participated in the murder) shortly before Pamela Fayed was killed. (See 9RT 1747:24-1748:3, 1748:22-1749:1.) Additionally, the rental truck used by co-defendants

Moya, Simmons, and Marques to commit the murder was rented for, and used by, Mercedes' son. (6RT 1113:10-12, 1114:5-7.)

This evidence, taken together, was circumstantial evidence that Mary Mercedes committed the murder of Pamela Fayed and was capable of raising a reasonable doubt as to Appellant's guilt. As a result, the evidence met the low burden set forth in *People v. Hall, supra*, 11 Cal.3d at p. 836. Thus, even if Respondent were permitted on appeal to now argue, contrary to its arguments at trial, that the testimony was not third-party culpability evidence, this new position is without merit.

c. APPELLANT WAS ENTITLED TO AN INSTRUCTION ON THE THIRD-PARTY CULPABILITY EVIDENCE

Despite Respondent's new efforts to shift the focus to whether the evidence was third-party culpability evidence, as set forth in the AOB, the proper issue on appeal is whether the defense should have received a jury instruction, for a defense that all parties agreed was arguable. Thus, the cases cited in the AOB are controlling: A trial court must provide an instruction for a defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142.) The "substantial evidence" rule has been found to be very favorable to the defense: "[w]e conclude there was evidence of consideration by the jury that [defendant] was acting in self-defense. Regardless of how incredible that evidence may have appeared, it was error for the trial court to

determine unilaterally that the jury not be allowed to weigh and access the credibility of [defendant's] testimony . . . ." (*People v. Lemus* (1988) 203 Cal.App.3d 470, 478.)

It its brief, Respondent chides that "Appellant repeatedly insists that the defense evidence supporting an instruction must be accepted as true[.]" (RB 112, noting AOB 131.) However, Appellant's "insistence" is firmly rooted in established precedent. Even if the evidence is "incredible," the court must proceed on the hypothesis that it is entirely true. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143, citations omitted.) Any doubt as to the sufficiency of the evidence must be resolved in favor of the defendant. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685.[18]) These defense instructions are particularly important because they inform the jury that the defense does not have to "prove anything" and that the defense must "merely raise a reasonable doubt." (Com. to CALJIC No. 4.50.)

Despite a significant discussion on how such an instruction would be properly worded, the lower court eventually stated: "Yeah. Here's the way I look at it: there's no stock instruction on third-party culpability in either CALCRIM or CALJIC, so there's never been a feeling on the part of the people that draft these instructions that such an instruction is necessary." (10RT 2095:26-2096:2.) As set forth in the AOB, CALCRIM and CALJIC are not meant to be exhaustive lists of jury instructions. (See AOB 134.) "Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they

[18] Superseded by statute on other grounds at stated in *People v. Elmore* (2014) 59 Cal.4th 121.

belong." (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 840, overruled on other grounds as recognized by *United States v. Haischer* (2015) 780 F.3d 1277.)

Here, it was plainly acknowledged that the defense would be relying on this third-party culpability defense; thus, Appellant was entitled to an instruction. The fact that there was no pre-drafted instruction in CALJIC was immaterial, and the lower court erred in refusing to properly instruct the jury.

d. APPELLANT WAS PREJUDICED BY THE REFUSAL TO INSTRUCT ON THE THIRD-PARTY CULPABILITY DEFENSE

At trial, the defense had voiced its concern that the jury should be instructed on the correct burden of proof concerning the defense, specifically that "it is not required that defendant prove this fact [of third-party culpability] beyond a reasonable doubt." (10RT 2094:5-8.) Despite the repeated concerns of the defense, the lower court refused to instruct the jury on the burden of production and proof for the third-party culpability defense. The absence of the instruction allocated the burden of persuasion to the defendant, and the government capitalized on this notion at trial. When discussing the third-party culpability defense, the government argued in closing that the jury should weight the two versions of events (the defense third-party culpability versus the government's theory) to see which was more reasonable. (11RT 2223:3-11.) The government specifically told the jury that the law requires that they compare "all the evidence that points to Jim Fayed versus the ridiculousness" of the third-party culpability evidence. (11RT 2223:12-20.)

Furthermore, as set forth more fully below in Section E.1, the error in failing to properly instruct the jury on the third-party culpability defense was exacerbated by the government's failure to provide discovery, namely that the government clandestinely made a recording of Mary Mercedes denying the prior solicitation, concealed that recording, and then sprang it on the defense in their rebuttal. The government's failure to provide this key piece of evidence, combined with the lower court's failure to properly instruct on the defense burden, gutted Appellant's defense; and that error was harmful. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

2. THE LOWER COURT ERRONEOUSLY USED CALJIC

In the AOB, Appellant set forth that the lower court insisted on using the CALJIC instructions, to the detriment of Appellant, and that the court improperly intermingled CALJIC and CALCRIM. (AOB 135-140.)

a. APPELLANT DID NOT FORFEIT THE ARGUMENT

As a general rule, a party must bring an issue to the trial court's attention for it to be cognizable on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 434-435.) As noted in *People v. Stowell* (2003) 31 Cal.4th 1107, 1114, strong policy reasons support this rule:

> It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citation omitted] The law cast upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the

> result would be that few judgments would stand the test of an appeal.

(*Ibid.*, citing *People v. Vera* (1997) 15 Cal.4th 269,[19] and *People v. Sanders* (1993) 5 Cal.4th 580, 589.)

In its brief, Respondent argues that Appellant waived this issue because he did not specifically object to the use of CALJIC, particularly CALJIC No. 303 [withdrawal from aiding and abetting], rather than CALCRIM. (RB 115.) However, the position of the parties concerning the jury instructions were brought to the attention of the trial court throughout the long pre-trial case. The defense proposed using language from the CALCRIM instructions, while the government had advocated language from the disfavored CALJIC instructions. (8CT 001826; 9CT 002033.) This tension was evident at the preliminary hearing where the parties argued concerning the legal standard for withdrawal from aiding and abetting. At that hearing, the defense asserted that evidence on the tape showed that Appellant withdrew from aiding and abetting the offense by telling Moya "don't do it. I am going to court, and I am going to take care of my business with Ms. Fayed separately from any efforts on your behalf. I want my money back, and there is going to be no murder." (7CT 001755-001756.) The government countered that Appellant's statements were insufficient and that Appellant had to do "everything in his power" to prevent the crime, using language from the CALJIC instruction. (7CT 001770.)

Similarly during the Motion to Dismiss pursuant to Penal Code section 995, and the accompanying writ, Appellant advocated that the

[19] Abrogated on other grounds as recognized in *People v. French* (2008) 53 Cal.4th 36.

evidence at the preliminary hearing should be viewed against the CALCRIM instructions, while the government countered with the CALJIC instructions. (8CT 001826-1829 [Motion to Dismiss pursuant to Penal Code Section 995]; 9CT 002056-2060 [Opposition to Motion to Dismiss The Information Under Penal Code 995]; 9CT 002143-2147 [Reply to Opposition to Motion to Dismiss Pursuant to Penal Code Section 995].[20])

Respondent now complains that—despite the ongoing discussion of the parties' positions concerning the jury instructions—Appellant waived this issue by not specifically objecting again "when the attorneys and the court were discussing instructions line-by-line." (RB 115, citing 10RT 2070.) However, the position of both parties was already set when the lower court ruled that it would be using the CALJIC instructions. (8RT 1575:14-16.) Thus, the trial court was aware of the position of the parties when it made its original ruling. Any subsequent objection would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Accordingly, there was no waiver when Appellant did not, again, state his position and object to each "line-by-line" subsequent reading of the instruction.

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[20] Respondent insists that Appellant "misstates the record" concerning the defense arguments in the 995 Motion. (RB 114.) Respondent argues that "Appellant's citation refers to a footnote in the defense motion to set aside the information . . . which set forth the CALCRIM instructions regarding withdrawal [citation]. The defense did not argue that the corresponding CALJIC instruction on that issue misstated the law[.]" (RB 114-115.) Certainly in the 995 motion, itself, Appellant did not preemptively argue that Respondent's argument (which, of course, had not yet been made in the pleadings) concerning the CALJIC standard was going to be incorrect. However, in its Opposition, Respondent set forth its interpretation of the law on withdrawal, and Appellant plainly argued in his Reply Brief that the "everything within his power" standard was incorrect. (9CT 002042-002147.) Appellant continued this argument in the writ to the Court of Appeals. (IV-1ACT 000045-000050.)

Furthermore, even if this Court does find waiver, it can still review this issue. An objection is not required to review an error in giving or refusing to give jury instructions "if the substantial rights of the defendant were affected thereby." (Pen. Code, §§ 1259, 1469; see *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7; *People v. Gerber* (2011) 196 Cal.App.4th 368, 390.) Finally, as noted above "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party . . . . Whether or not it should do so is entrusted to its discretion." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Thus, this Court can consider this issue despite Respondent's claims of waiver.

b. USE OF THE CALJIC INSTRUCTION FOR WITHDRAWAL FROM AIDING AND ABETTING WAS ERROR

In the AOB, Appellant sets forth that CALJIC 3.03 incorrectly stated the law of withdrawal, specifically the portion which provides that a defendant "must do everything in his power to prevent its commission." (AOB 136-139, citing CALJIC No. 3.03.) In contrast, the favored CALCRIM instructions state that a defendant must do "everything reasonably within his or her power to prevent the crime from being committed." (CALCRIM No. 401.) Appellant contends that the law of withdrawal in CALJIC does not provide an accurate statement of law. (AOB 137, citing *People v. Norton* (1958) 161 Cal.App.2d 399 (*Norton*).) In the AOB, Appellant set forth the history of the case law addressing the standard for withdrawal, including that in *Norton* the court approved language that a defendant must do "everything practicable." (AOB 137-139.)

Respondent counters that "[t]his Court explicitly ruled in 2008, approximately three years after the California Judicial Council adopted the CALCRIM model instructions, that CALJIC No. 3.03 still correctly states the law on this issue." (RB 115, citing *People v. Richardson* (2009) 43 Cal.4th 959, 1022 (*Richardson*).) In *Richardson*, this Court noted that the defendant asserted on appeal, "without any citation to authority, that [3.03] 'imposes an unreasonable burden on the person desiring to withdraw from the criminal activity.'" (*Richardson*, *supra*, 43 Cal.4th at p. 1022.) The Court cited to the holding in *Norton*, *supra*, 161 Cal.App.2d 399. (*Id.*) However, as noted above and in the AOB, *Norton* states only that a defendant must do "everything practicable" to prevent the crime. (*Norton*, *supra*, 161 Cal.App.2d at p. 403.)

It is an intolerable legal requirement to expect a person to do "everything in one's power" to prevent the commission of a crime. This standard was addressed by the United States Supreme Court in *United States v. United States Gypsum Co.* (1978) 438 U.S. 422. In that case, the instruction stated that to withdraw, a defendant must either affirmatively notify every member of the conspiracy of his withdrawal or notify authorities of the illegal scheme. (*Id.* at p. 422.) The Supreme Court held that the instruction was unnecessarily restrictive: "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." (*Id.* at pp. 464-465.) The Court held that "the unnecessarily confining nature of the instruction, standing alone, constituted reversible error." (*Id.* at p. 465.)

As noted in the AOB, Appellant made several statements that he withdrew from any participation in the charged crimes before they were

committed. (See 3CT 000584:11-17, 000591:24-25, 000592:1-4, 000598:22-25, 000599:1-25, 000600:1-13, 000633:3-5, 000634:10-16.) However, the instruction given by the court, CALJIC 3.03, was susceptible to an unreasonable reading, requiring every defendant to "confess" his conspiracy to law enforcement in order to withdraw. Such an unreasonable reading is precisely what the government argued here, essentially setting an unreachable level of withdrawal; thereby denying Appellant that defense.[21] Thus, the instruction under CALJIC 3.03 violated Appellant's due process right to a fair trial.

3. THE LOWER COURT IMPROPERLY INTERMINGLED CALJIC AND CALCRIM

In the AOB, Appellant sets forth that after requiring the parties to use CALJIC, the lower court then sua sponte gave a CALCRIM instruction, which included language that the jury did not have to agree on the same theory of murder. (AOB 139-140.) In response, Respondent argues that the Judicial Council commentary, which unequivocally states that these CALJIC and CALCRIM instructions should never be used together, is not binding and that this Court allowed the parties to combine the two jury instructions into a single instruction in *People v. Beltran* (2013) 56 Cal.4th 935, 943 (*Beltran*).

In *Beltran*, the defendant argued that the charged crime was done in the "heat of passion." (*Id.* at pp. 942-943.) The parties disagreed on the proper standard for the nature of provocation required. (*Ibid.*) The trial court stated that it would give the CALCRIM instruction, No. 570. (*Id.* at p.

[21] As set forth below in Section G.2.a, the government repeatedly misstated the law concerning the burden of proof for withdrawal.

943.) "Defense counsel requested the instruction be modified to clarify that the jury could find defendant acted in the heat of passion even if he intended to kill the victim. The trial court and the parties properly agreed that heat of passion could still apply in such circumstances." (*Ibid.*, citations omitted.) The trial court then modified that instruction in accordance with the defendant's wishes. (*Id.* at pp. 943-944.) The defendant later claimed that the instruction it sought to modify was misleading. (*Id.* at p. 945.) In a footnote, this Court acknowledged the Judicial Commentary expressly cautions against mixing instructions, but noted that a trial court may modify instructions "to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion." (*Id.* at p. 943, fn. 6.)

However, the instant case presents a different set of circumstances. Here, it was not the defense who asked to mix the instructions for its benefit; quite the opposite. The lower court insisted on using CALJIC, which has a standard for withdrawal that is more stringent for the defense than CALCRIM; then, sua sponte, decided to give the language from the CALCRIM instruction, concerning dual theories, which is not in the CALJIC instruction. In doing so, the lower court cherry-picked the instructions from the two sets which had the language least favorable to the defense. Thus, the lower court improperly comingled the instructions.

4. THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING WITHDRAWAL FROM CONSPIRACY

In the AOB, Appellant sets forth that the jury was also improperly instructed regarding withdrawal from a conspiracy. (AOB 140-142.)

Specifically, the use of the CALJIC instruction did not fully state the law of withdrawal from a conspiracy because it did not include a requirement that the jury unanimously decide what overt act was committed before the withdrawal. (AOB 140-142, citing *People v. Russo* (2001) 25 Cal.4th 1124.) Respondent argues that the defense invited the error by requesting the CALJIC instruction. (RB 117-119.) However, the doctrine of invited error has very limited application to criminal cases. (See *People v. Barnard* (1982) 138 Cal.App.3d 400, 409.) "Defense counsel must be deemed to have intentionally caused the claimed 'error.'" (*People v. Marshall* (1990) 50 Cal.3d 907, 931.) With respect to a requested, erroneous instruction, the error will only be charged to the defendant if "his counsel requested [the instruction] for a deliberate tactical purpose . . . ." (*People v. Beardslee* (1991) 53 Cal.3d 68, 88-89.) "Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error' . . . ." (*People v. Green* (1995) 34 Cal.App.4th 165, 177.)

Here, the lower court stated at the start of trial that it would be using CALJIC instructions. (8RT 1575:14-16.) Appellant needed a jury instruction on the elements of withdrawal from a conspiracy, leaving him with only two options: request CALJIC 6.20 or completely forgo an instruction on a viable defense. Within those confines, Appellant requested the instruction. Appellant did not select that instruction from a list of options. Appellant's choices were already limited by the trial court, and Appellant worked within those limitations. Even so, Appellant is entitled to instructions which correctly state the law. Here, the lower court should have instructed the jury to unanimously decide which overt act occurred

before the jury could find that withdrawal was no longer available. (AOB 141-142.)

5. THE LOWER COURT ERRED IN REFUSING TO GIVE CALJIC NO. 2.23

In the AOB, Appellant set forth that the lower court erred in refusing to give CALJIC No. 2.23, which allows the jury to consider the prior felony convictions of a witness. Appellant argued that, although the government's agent/informant Smith did not testify live at the trial, his extensive statements were introduced; thus, the jury should have been instructed that it could consider Smith's prior convictions in assessing his credibility. (AOB 142-143.)

Respondent argues that because Smith's statements were not offered for their truth, he could not be impeached with his extensive criminal record. (RB 120.) As noted above, the notion that the government did not rely on Smith's statements for the truth is contradicted by the arguments the government made at trial, including, but not limited to, when the jury was told "*is there anything that makes you suspect that Shawn Smith is not being truthful? No* because you can hear every syllable that comes out of his mouth." (11RT 2317:28-2318:3, italics added.) Respondent further argues that the instruction was not necessary because the government did nothing at trial to "bolster [Smith's] credibility." (RB 121.) This argument, again, ignores the fact that, among other things, the government repeatedly told the jury that Smith is not a "scumbag," and that he was the good guy who "reached out to the authorities when he saw something that was wrong." (11RT 2316:21-2317:4.) Thus, the government plainly bolstered Smith's credibility.

To argue here that Appellant was not entitled to the CALJIC 2.23 instruction because the government never stated that Smith was being truthful or that it never tried to bolster Smith's credibility is insincere. It did precisely that in closing arguments. Thus, Appellant was entitled to impeach that assertion.

6. THE INSTRUCTIONAL ERROR INDIVIDUALLY, AND TAKEN TOGETHER, WARRANT REVERSAL

Jury instructions provide essential guidance to the jury. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 (plur. opn. of Stewart, J.).)

In the instant case, the lower court committed multiple errors when it instructed the jury, violating Appellant's right to a fair trial, due process, and equal protection. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As previously noted, when an instructional error deprives a defendant of a federal constitutional right, the burden is on the state to show "beyond a reasonable doubt" that the error had no effect on the verdict. (*Chapman, supra*, 386 U.S. at p. 18.)

Here, the instructional errors went to core issues, such as burden of proof for third-party culpability, and the defense of withdrawal. Indeed, the defense hinged on proving one of two things: either that Mary Mercedes orchestrated the murder of Pamela Fayed or that Appellant withdrew from

the crime before it was committed. By refusing to instruct on Appellant's primary defenses, the lower court crippled Appellant's ability to defend himself at trial. Further, Respondent has made no substantive argument that these instructional errors were harmless. (See RB 108-123.) Ultimately, this Court cannot speculate on what the jury might have found had they been properly instructed on both of Appellant's defenses. (*Chapman*, *supra*, 2 Cal.4th at p. 680.) Accordingly, the instructional errors in the present case were harmful and require reversal.

D. THE LOWER COURT ERRED BY ADMITTING EVIDENCE IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHTS

In the AOB, Appellant argued that the lower court admitted evidence obtained in violation of his Fourth Amendment right to be free from unlawful searches and seizures. (AOB 146-180.) Specifically, the government violated Appellant's rights when it: 1) seized and searched Appellant's cell phone, 2) obtained a warrant after improperly recording conversations of Appellant's investigator (September 10, 2008 warrant), and 3) obtained a warrant without probable cause (July 31, 2008 warrant).

1. EVIDENCE FROM APPELLANT'S PHONE WAS UNLAWFULLY ADMITTED

After Pamela Fayed's death, Appellant went to the Camarillo police station to conduct a welfare check on his daughter; upon his arrival, police handcuffed him, took his phone, and transported him over fifty miles to the West Los Angeles station for questioning. (See 2RT 18:21-23, 19:5-9, 20:13.) After he invoked his constitutional right to remain silent and right to counsel, police seized and manipulated his phone to obtain evidence.

(2RT 28:1-8, 53:10-14, 57:17-19.) The lower court held that officers illegally searched Appellant's cell phone, but upheld the admission of the evidence under the doctrine of inevitable discovery. (2RT 102:5-22.) As set forth in the AOB, admitting this evidence was error. (AOB 147-162.) Critical to the analysis of whether the cell phone was unlawfully seized and searched is whether Appellant was a detainee or arrestee at the time of the search and seizure. (AOB 147.) Notably, police reports memorializing the incident indicated Appellant was a detainee. (4CT 000952.) However, at the hearing on the Motion to Suppress and in Respondent's Brief, the government changed its position, arguing that Appellant was under arrest. (2RT 101:27-102:4; RB 129.) As discussed below, under either standard, the seizure and subsequent search of his cell phone was unlawful and should have been excluded.

a. IF APPELLANT WAS DETAINED, AS STATED IN THE POLICE REPORTS, THEN THE PHONE'S SEIZURE WAS UNLAWFUL

In the AOB, Appellant set forth the legal requirements for an officer to lawfully seize property from a detainee: 1) the detention must be justified by reasonable suspicion and limited in scope; 2) any pat-down requires officers have "reason to believe [they are] dealing with an armed and dangerous individual"; and 3) any pat-down must be limited to a search for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 19, 26-27; see *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) The officers in the instant case violated all three of these constitutional safeguards.

In its brief, Respondent attempts to sidestep the above analysis by arguing that Appellant was arrested, not detained, when his cell phone was

seized and searched. (RB 129.) However, the officers' own police report from the incident classified the encounter with Appellant as a detention. (See 4CT 000952.) Therefore, assuming the police reports were accurate, the officers' seizure and subsequent search of his cell phone exceeded the bounds of what is constitutionally permissible during a detention.

Appellant's detention was unlawful because officers handcuffed him and drove him over fifty miles from one police station to another for questioning. (*In re Justin B.* (1999) 69 Cal.App.4th 879, 887 [handcuffing and moving a detainee from one location to another exceeds the permissible scope of a detention]; see *Hayes v. Florida* (1985) 470 U.S. 811, 813-815.) Further, as argued in the AOB, the officers' pat-down of Appellant was unjustified because there were no facts supporting a reasonable suspicion that Appellant was armed and dangerous. (AOB 150-151.) Respondent does not contest this point. (See RB 129-130.) Moreover, the officers' physical manipulation of the cell phone during and after the pat-down search was patently unreasonable, given that the officers knew the phone was not a weapon. (AOB 151-152, citing *Minnesota v. Dickerson* (1993) 508 U.S. 366, 373-376.) Accordingly, if the encounter was, as police reports described, a detention, then it was unlawful.

b. IF APPELLANT WAS ARRESTED, THE SEIZURE AND SUBSEQUENT SEARCH OF HIS PHONE WAS UNLAWFUL

As argued in the AOB, even if Appellant was arrested and not detained, this Court should find: 1) the arrest was unlawful; and 2) if the arrest was lawful, the subsequent manipulation and search of his cell phone was not. (AOB 152-159.) Officers may only arrest a person without a

warrant when they have probable cause to believe the person has committed a felony. (Pen. Code, § 836; *In re Thierry S.* (1977) 19 Cal.3d 727, 734.) Officers must have knowledge supporting probable cause at the time of arrest—facts that would lead a reasonable person "to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Ingle* (1960) 53 Cal.2d 407, 412.)

In its brief, Respondent argues that Appellant was arrested and not detained, "given his transportation by officers between two police stations." (RB 129, citing *In re Justin B.*, *supra*, 69 Cal.App.4th at p. 887 [detentions exceeding boundaries of investigative stop, become de facto arrest requiring probable cause].) In doing so, Respondent attempts to salvage the officers' actions during what police reports classified as a detention, by arguing, retrospectively, that the officers had probable cause to arrest Appellant. (See RB 129.) In support of its position, Respondent states that Appellant and Pamela were divorcing; a car rented under Appellant's company's name was seen leaving the crime; and although the assailant's description did not match Appellant, this evidence was irrelevant because the case involves a murder-for-hire allegation. (RB 129.)

Again, Respondent's reclassification of the detention as an arrest is suspect, given that the officers' own police report classified Appellant as a detainee. (See 4CT 000952.) Further, Respondent's contention that police connected Appellant to the car leaving the crime scene has no basis in the record; at the suppression hearing, the lower court explicitly found that "the rental document was not in the possession of the police [at the time of the arrest] and it [was] not part of the record." (2RT 99:10-12.) Further, Respondent's argument that the actual assailant's description was irrelevant is tainted by hindsight. Although retrospectively, the assailant's physical

description seems irrelevant given the government's murder-for-hire theory, the police did not initially determine that this was a murder-for-hire case. Thus, the only evidence implicating Appellant at the time of the "arrest" was his divorce with the victim. A divorce, without more, does not give police probable cause to arrest an individual. Thus, to the extent the officers "arrested" Appellant, the arrest was unlawful.

Next, as argued in the AOB, even if Appellant was lawfully arrested, the subsequent search of Appellant's cell phone was unlawful. (AOB 154-159.) At trial, the lower court held that the search of the cell phone—even if incident to a lawful arrest—was illegal, expressing serious concern about the officers' manipulation of the phone after its seizure. (2RT 99:13-100:8, 100:25-101:8, 102:5-7.) Respondent concedes as much, acknowledging that the lower court's reasoning in this case largely mirrored the United States Supreme Court's recent decision in *Riley v. California* (2014) __ U.S. __ [134 S. Ct. 2473, 192 L.Ed.2d 416]. (RB 129-130.) In that case, the Court held that officers must have a warrant before searching a cell phone seized incident to a lawful arrest. (*Riley v. California*, *supra*, __ U.S. __, [134 S. Ct. 2473, 2485].) Thus, as discussed in the AOB and Respondent's Brief, the officers' search of the cell phone, even if incident to a lawful arrest, was unlawful.

c. THE LOWER COURT ERRED IN FINDING INEVITABLE DISCOVERY

At trial, the lower court found that the evidence recovered from Appellant's cell phone, although obtained unlawfully, was admissible under the doctrine of inevitable discovery. (2RT 102:4-22.) As argued in the AOB, the inevitable discovery exception is inapplicable here. (AOB 159-

162.) For that exception to apply, the government must prove that there is a "reasonably strong probability" that the evidence would have been discovered anyway through other lawful means. (*People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 681; *People v. Robles* (2000) 23 Cal.4th 789, 800-801.)

Respondent maintains that "police would have inevitably obtained [Appellant's] phone number" through various sources. (RB 130.) In doing so, Respondent ignores the fact that the unlawful search of the phone exposed more than just Appellant's phone number. Indeed, the officer's unlawful physical manipulation of the phone revealed information about the text messages stored on Appellant's cell phone—information the government relied heavily upon in closing argument:

> 39 minutes before the murder, James Fayed sends a text message to Jose Moya. [¶] Jose Moya . . . returns a text message. What do you think that text message said? . . . . Maybe something like, 'Get ready. The meeting is coming to a close. Get ready. It is time. She is coming.' . . . . [¶] It would be great if we knew what that text message said, wouldn't it? Because we actually got the phone. . . . [¶] But isn't it interesting that we will never know exactly what the text said because James Fayed deleted it. He didn't delete everything, but went through his Blackberry and deleted the text that he sent and received from Jose Moya. [¶] Why would he do that? Because it implicated him in her murder.

(11RT 2200:18-2201:9.) Respondent has failed to show that the content of the text messages, or lack thereof, would have been discovered through other means. Thus, the lower court erred in applying the inevitable discovery doctrine.

As discussed above, during the course of what the officers' own police reports classified as a "detention," officers handcuffed Appellant,

seized his cell phone, transported him over fifty miles to another police station, and then manipulated and searched his phone. The government should not be allowed to benefit from the information that was obtained during the course of these violations. Therefore, the cell phone evidence was unlawfully admitted and prejudiced Appellant.

2. THE LOWER COURT ERRONEOUSLY ADMITTED EVIDENCE OBTAINED BY THE UNLAWFUL RECORDING OF APPELLANT'S INVESTIGATOR

The government obtained several wiretaps in the course of their investigation. Using these wiretaps, the police intercepted and recorded twelve conversations involving defense investigator Glenn LaPalme, who was interviewing key witnesses for Appellant's defense. (2RT 104.) Law enforcement was aware of LaPalme's role in Appellant's defense team and still listened and recorded his conversations. (5CT 001088.) Statements made during the recorded interview were later used in a warrant affidavit for the September 10, 2008 search warrant. (4CT 000874.) In those affidavits, the government concealed LaPalme's role on the defense team.

As argued in the AOB and below, the trial court erred in denying Appellant's Motion to Traverse, Motion to Suppress Evidence, and Motion to Dismiss.

a. THE RECORDING OF APPELLANT'S INVESTIGATOR WAS AN UNLAWFUL INTRUSION INTO THE DEFENSE CAMP

Protections for the work product of the defense camp, including investigators, are essential to the legal profession and to an individual attorney's ability to "promote justice and to protect their clients' interests."

(*Hickman v. Taylor* (1947) 329 U.S. 495, 511.) Government action constitutes an improper invasion of the defense camp when the government deliberately intrudes into a confidential communication and prejudices the defendant as a result. (See *United States v. Mastroianna* (1st Cir. 1984) 749 F.2d 900, 905-906; see also *Barber v. Municipal Court* (1979) 24 Cal.3d 742.)

Here, the government interfered with the defense investigation by deliberately recording multiple conversations between Appellant's investigator and material witnesses. (5CT 001088, 001106.) In addition to the interview with Moya, the police also recorded LaPalme's conversations regarding the custody of Appellant's children and whether they would be willing to talk to him, information about a meeting of Appellant and Pamela Fayed, what areas of Appellant's home were searched, and numerous other details essential to a well-informed defense. (5CT 001088, 001124.) A portion of these conversations were then used in the affidavit supporting the September 10 warrant, and evidence seized under that warrant was introduced at trial. (4CT 000874.)

In its brief, Respondent relies primarily on the "core work product" theory, arguing that because there was no discussion with the client or written work product, law enforcement was unlimited in the extent to which they could record defense counsel's investigator. (RB 137.) If Respondent's position is correct—and the government can record any call that is not with a defendant—nothing would stop the government from listening in on all investigator or attorney calls to witnesses or to calls between two attorneys discussing a shared case. Respondent's argument ignores the practicalities of litigation and investigation in a technological society. Without such

protections, the defense would not be able to prepare its case without fear that the police would be listening freely.

b. THE TRIAL COURT IMPROPERLY DENIED THE MOTION TO TRAVERSE

The affidavit for the September 10 warrant included statements from the police's recordings of LaPalme's interviews with Moya about the murder of Pamela Fayed. The affidavit asserts these statements alone "prove[] Moya has knowledge of the murder." (4CT 000874.) Appellant argues that excluding information about LaPalme's role in on the defense team was a material omission. (AOB 164-166.)

On appeal, Respondent contends that omitting LaPalme's role as a defense investigator was immaterial. (RB 137.) However, even if not privileged, LaPalme's identity as an investigator gives context to the recorded statements about the seizure of the rented SUV. The recanting of this conversation in the affidavit makes it seem like a discussion between Moya and a random companion about the murder of Pamela Fayed, rather than the truth: that Moya was a witness answering specific questions as part of the defense investigation. There was no practical reason to exclude LaPalme's identity as a defense investigator. The omission of this information suggests an intent to deceive. Thus, the Motion to Traverse was improperly denied.

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c. THE TRIAL COURT IMPROPERLY DENIED THE MOTION TO SUPPRESS EVIDENCE OBTAINED IN VIOLATION OF MINIMIZATION REQUIREMENTS

As a highly intrusive investigative tool, wiretaps are extensively regulated by a comprehensive statutory scheme. (See *United States v. Leavis* (4th Cir. 1988) 853 F.2d 215, 221.) In the AOB, Appellant sets forth these regulations and how the wiretap in the instant case failed to comply with the minimization requirements. (AOB 167-169.)

Respondent argues that law enforcement satisfied rigid requirements by minimizing calls that were clearly privileged. (RB 137.) As set forth above, Appellant disagrees that LaPalme's interviews of witnesses on behalf of the defense were not privileged or otherwise protected from government intrusion. Additionally, however, the minimization requirement is not limited to only privileged communications but rather all communications not subject to the order. (18 USC § 2510; see also *United States v. Curcio* (D.Conn 1985) 608 F.Supp. 1346, 1357.) Even if not privileged, the calls concerning the defense investigation should have been minimized or, at least, the calls should have been subject to review before they were used in the affidavit. Thus, the trial court erred in denying Appellant's Motion to Suppress Evidence Obtained in Violation of Wiretap Provisions.

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d. THE TRIAL COURT IMPROPERLY DENIED THE MOTION TO DISMISS BECAUSE THE RECORDING OF APPELLANT'S INVESTIGATOR CONSTITUTED A DUE PROCESS VIOLATION

The Due Process Clause prohibits government practices that violate "prevailing notions of fundamental fairness." (*California v. Trombetta* (1984) 467 U.S. 479; see also *In re Winship* (1970) 397 U.S. 358, 372, fn. 5 (conc. opn. of Harlan, J.).) In the AOB, Appellant sets forth how the recordings of the defense camps investigation violated due process, including that the government took advantage of the defense's earnest efforts to build Appellant's defense by surreptitiously recording defense interviews of witnesses. (AOB 168-170.)

Moreover, the fundamental unfairness of the government's conduct is highlighted by the trial court's cavalier comment that, in seeking to investigate the crime and provide Appellant his best defense, LaPalme should have avoided conducting telephonic interviews. (2RT 106-107.) By supporting the invasive actions by the police, the trial court essentially relegates defense counsel to the shadows, unable to perform its investigation or interview processes without fear of being recorded or similarly disadvantaged by the police. This cannot reasonably be called fundamental fairness of due process. As a result of the government's actions, Appellant's due process rights were violated and the Motion to Dismiss was improperly denied.

* * *

e. REVERSAL IS APPROPRIATE BECAUSE ADMISSION OF THE EVIDENCE WAS PREJUDICIAL

Evidence seized in violation of the Fourth Amendment is subject to reversal as dictated by *Chapman, supra*, 386 U.S. at p. 18. As noted above, the *Chapman* test requires reversal unless the government proves beyond a reasonable doubt that the contested error is harmless. (*Id.* at p. 24.) This is a demanding burden for the government, and any doubts as to harmlessness must be settled in favor of the defendant. (*People v. Jackson, supra*, 58 Cal.4th at p. 794 (dis. opn. of Liu, J.).) This standard has been characterized as "intolerant and unforgiving of error." (*People v. Sims* (1993) 5 Cal.4th 405, 474 (dis. opn. of Mosk, J.).) Reversal is required if there is a "reasonable possibility" that the improperly admitted evidence "might have contributed to the conviction." (*Chapman, supra*, 386 U.S. at p. 23.) This analysis focuses on whether *the government* can show that the error did not have any adverse effects on the jury, not on whether the defendant proves that actual prejudice occurred. (*People v. Jackson* (2014) 58 Cal.4th 724, 793 (dis. opn. of Liu, J.).)

As argued in the AOB, the evidence seized under the September 10, 2008 search warrant (based on the recordings of Appellant's investigator) was harmful and prejudicial to Appellant. In executing the warrant, law enforcement seized several cell phones, including a flip-phone associated with Appellant's phone records. (4CT 000879-000880.) The government relied heavily on these phones to establish contacts and locations of Appellant and Moya at or near the time of Pamela Fayed's death. (9RT 1729:1-9, 1741:20-28, 1745:1-7.) The government used this information to argue that the only reason for Appellant and Moya to text each other at that

time was to discuss the murder. (11RT 2204:25-2205:16, 2206:1-11.) Respondent has not shown how this evidence was harmless.

3. LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH THE JULY 31 SEARCH WARRANT

Numerous warrants were issued in this case, including two warrants issued on July 29, 2008 and July 31, 2008. (4CT 000930; 3CT 000717.) The July 29 warrant authorized a search of Appellant's home for the rented SUV and other physical evidence. (4CT 000931.) This warrant was supported by a single affidavit. (4CT 000930-000935.) The July 31 warrant authorized a search of the home for all computers, safes, and certain soil samples. (3CT 000724.) This warrant fully incorporated the affidavit from the July 29 warrant with a short amendment. (3CT 000717-000724.) However, it did not reference the execution of the July 29 warrant or the extent to which Appellant's property was previously searched. As argued in the AOB, the second search of Appellant's home was unlawful because the July 31 warrant did not establish probable cause and was overly broad.

a. THE JULY 31 WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE

The affidavit for the July 31 warrant failed to establish probable cause for two reasons: First, the affidavit amendment did not set forth any new facts to justify a new search. Second, the incorporated affidavit was both moot and stale.

* * *

i. THE AMENDMENT DID NOT SET OUT NEW FACTS SUFFICIENT TO ESTABLISH PROBABLE CAUSE

The inclusion of sufficient facts in the affidavit is essential in facilitating the magistrate's independent review and preventing the court from becoming a "rubber stamp" for the police. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) Here, the affidavit amendment provides: "Desiree Fayed stated that her mother kept records and documents that incriminates James Fayed on her personal computer. Desiree Fayed advised that the computers that her mother used are in her father's residence and contain valuable information." (3CT 000724.) The amendment provides no facts which support or explain Desiree Fayed's belief that that was "valuable information" or "incriminating" documents in Appellant's home. Because of the amendment's brevity, it is unclear what the basis of knowledge for Desiree's belief was. For instance, her belief could have been based on firsthand knowledge; however, it is equally plausible that her belief was a mere assumption that there would be something of "value" to the police on the computer. Likewise, the amendment does not state what type of evidence the "valuable information" would likely be, how it was incriminating, or for which crime it would likely incriminate Appellant.[22]

Respondent urges considering "the context of the case as a whole." (RB 143, citing *People v. Cortez* (1981) 449 U.S. 411.) However, *Cortez*

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[22] Additionally, Respondent argues that the amendment also sufficiently set out separate probable cause for the search of safes under the July 31 warrant. (RB 144.) Yet, the first and only place safes are mentioned is in the amendment's list of property to be searched, not in the affidavit. (3CT 000724.)

advocates a totality of the circumstances approach when reviewing a brief investigatory stop. (*Id.* at p. 417.) Conversely, when reviewing a warrant, the court is limited to the facts of the affidavit, not a consideration of extraneous facts. Here, the amendment did not provide any details relating to Desiree's belief. Had the warrant detailed the complexities of the case in the affidavit, as argued in Respondent's brief, there would be a much stronger argument for probable cause. (See RB 143.) But a warrant must be issued based on probable cause, not reaffirmed by it in a pleading on appeal. Without factual details to support a finding of probable cause, the July 31 warrant violated the Fourth Amendment.

ii. THE INCORPORATED AFFIDAVIT LACKS PROBABLE CAUSE BECAUSE IT WAS BASED ON INFORMATION THAT WAS BOTH MOOT AND STALE

The July 29 warrant rested primarily on the need to search the home and vehicle and for "evidence consistent with evidence recovered from the crime scene" such as blood, shoes, and sharp objections. (4CT 000931.) However, the need to search for these reasons disappeared on July 30, 2008 when the LAPD searched the home and vehicle. (8RT 1488:3-10, 1488:17-22, 1489:1-3, 1489:22-25.) Thus, the need to do the same search for those same items was moot. Yet, the affiant copied that section of the affidavit from the July 29 warrant (without noting that the property had already been searched) and asserted it as a basis for the July 31 warrant.

Probable cause always requires that "there is a fair probability that regardless of whether they incorporated another warrant, contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates*, *supra*, 462 U.S. 213 at p. 238.) Even when reissuing an unused warrant,

law enforcement must provide some supplemental information showing probable cause still exists. (*People v. Sanchez* (1972) 24 Cal.App.3d 664, 682.) Where the government executes one warrant and then seeks another, subsequent warrant, it should be held to the same high standards of probable cause as every other warrant. Here, the government did not have probable cause to re-search the property.

b. THE JULY 31 WARRANT WAS OVERLY BROAD ON ITS FACE

As to the search for Appellant's computers, the July 31 warrant gives police leave to search all of Appellant's electronic devices, storage areas, and financial records without any meaningful restriction on the property to be seized. The warrant leaves total discretion to the police in deciding what documents, data, or physical evidence was relevant. Such an expansive warrant should be considered invalid on its face.

Moreover, even if this Court determines that Desiree's statements supported a finding of probable cause, the search of Appellant's safes and storage areas was outside the scope of the warrant. Desiree's statements relate only to the possible existence of evidence on a computer, not to the existence of any physical evidence elsewhere within Appellant's home. As such, the search for "locked safes, secured lock boxes, [and] authorization of forced entry into locked safes" is unsupported by the probable cause as set in the affidavit. (3CT 000724.)

Additionally, the government argues that because of the complexity of this case, the July 31 warrant was appropriately broad. (RB 145, 146.) However, even in a complex case, there must be sufficient basis of probable cause to prevent exploratory searches. (See *People v. Carpenter* (1999) 21

Cal.4th 1016, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1189 [upholding provisions of a warrant that were broad because all the items in that category were "clearly relevant."].) The nature of a case cannot and should not be the only basis for upholding a warrant.

c. ADMISSION OF EVIDENCE SEIZED UNDER THE JULY 31 WARRANT CONSTITUTES PREJUDICIAL ERROR

Questions of reversal for Fourth Amendment violations are governed by the *Chapman* test, which is discussed *supra*. (*Chapman*, *supra*, 386 U.S. at p. 18.) Here, the government has failed to meet this high burden as the evidence seized under the July 31 warrant was far from harmless. During the search of Appellant's home, the police seized numerous gold bars and coins, several computers, and two stacks of currency. (4CT 000925.) At trial, the prosecution pointed to the gold and seized money as the means of committing the murder, stating: "Who has the means to hire a $25,000 hit man? How about someone who owns a $6.3 million business? . . . [Appellant] had $6.3 million in gold sitting in his living room, folks in the vaults in his house[.]" (11RT 2208:14-19.)

The prosecution did more than just merely use the evidence to prove the essential elements of the crime. In addition to showing numerous photos of the contents of the safes and eliciting extensive testimony as to the value of the seized gold, the prosecution also produced a $50,000 gold bar for the jury to physically handle. (9RT 1600:23-28; 11RT 2208.) Given the importance of this evidence to the prosecution's theory and the rather dramatic presentation of the evidence, it is clear that there is at least a

reasonable probability that this jury relied on the evidence obtained under the July 31 warrant in making their determination.

d. THE REASONABLE RELIANCE TEST DOES NOT JUSTIFY UPHOLDING THE JULY 31 WARRANT

Finally, Respondent contends that even if the warrants violated the Fourth Amendment, the good faith exception should apply. (RB 146.) However, the reasonable reliance test is a limited exception based on a standard of objective reasonableness. (*People v. Maestas* (1988) 204 Cal.App.3d 1208, 1213.) The officer's reliance must be based on the affidavit and the evidence of probable cause, not on the magistrate's issuance of the warrant. (*People v. Camarella, supra*, 54 Cal.3d. 592 at p. 605.)

Here, the affidavit in question was so bare that an officer could not have had a reasonable basis to believe that the warrant would be valid. The short amendment, sparse details regarding the basis for the warrant, broad and overly inclusive language, and lack of restrictions or detail regarding the items to be searched should have been sufficient to put a reasonably well-trained officer on notice that the warrant was deficient.

E. THE LOWER COURT ERRONEOUSLY ADMITTED STATE EVIDENCE AND EXCLUDED DEFENSE EVIDENCE

As noted in the AOB, improper admission or exclusion of evidence can violate a defendant's right to confront witnesses, right to a fair trial, and right to due process. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.) These considerations are heightened when a defendant faces capital punishment. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411.) As

set forth below, the lower court erred in the admission and exclusion of several pieces of evidence.

1. THE LOWER COURT ERRONEOUSLY ADMITTED EVIDENCE THE GOVERNMENT HAD FAILED TO DISCLOSE TO THE DEFENSE

Before trial, the defense properly noticed its intent to introduce evidence of third-party culpability, including the testimony of Appellant's sister, Patricia Taboga, that in May of 2008, Mary Mercedes asked Patricia Taboga if her husband, Curt Taboga, would kill Pamela Fayed for $200,000. (See 13CT 003395-00341.) As discussed above in the jury instruction section, the government had conceded that the third party culpability evidence should be allowed. (See 3RT 293:4-294:9.) Prior to trial, the government surreptitiously recorded a conversation with Mary Mercedes where she denied trying to hire Curt Taboga to kill Pamela Fayed. (10RT 1996:9-14, 1997:9-28.) The government failed to produce this evidence in discovery; then, during its rebuttal, the government, for the first time, revealed the existence of the damaging evidence. (10RT 1993:1-13, 2044:2-5, 2046:1-5.)

Respondent presents two main arguments: 1) that the tape was used at trial as impeachment evidence; thus it was not subject to disclosure under the Penal Code, and 2) that the tape recording was not made in the course of the investigation into Pamela Fayed's murder. (RB 146-147.) As set forth below, these assertions are contradicted by a plain reading of the discovery laws and the trial court record.[23]

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[23] In its brief, Respondent argues that "rulings on discovery matters are reviewed under an abuse of discretion standard." (RB 149, citing *People v.*

a. RESPONDENT'S ATTEMPTS TO CHARACTERIZE THE WITHHELD EVIDENCE AS "IMPEACHMENT" IS IMMATERIAL

Penal Code section 1054.1 sets forth what the government must disclose to the defense before trial, including:

> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness. . . [and]
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial[.]

(Pen. Code, § 1054.1, subds. (c), (d) & (f).) If an item falls into one of the categories, it must be disclosed.

i. RESPONDENT'S "CHARACTER" OR "USE" TEST CONTRAVENES THE DISCOVERY STATUTE

Respondent seeks to focus, not on the plain language of Penal Code section 1054.1, but on the "character" and "use" of the evidence *at trial* to explain its failure to produce the item during pre-trial discovery. (RB 146-151.) Specifically, Respondent discusses what it believes is the prevailing "character" of the evidence: "[t]he recording is most accurately characterized as impeachment information[.]" (RB 146-147.)

Ayala (2000) 23 Cal.4th 225, 299.) While this is generally correct, as noted in the AOB, questions of law are reviewed *de novo*, and Appellant contends that the lower court misapplied the law. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

Similarly, Respondent also emphasizes the "use" of the evidence at trial: "Appellant claims the recording was 'real evidence' under section 1054, subdivision (c). However, appellant's position fails because the recording, *as actually used* by the People, was merely impeachment information[.]" (RB 149, italics added.) Respondent further contends, "the prosecutor made clear that *he sought to have the recording admitted* solely as an impeachment of Taboga's credibility, not as affirmative evidence relating to Pam's murder." (RB 149, italics added.)

Relying on its "character" and "use" arguments, Respondent states that nothing in Penal Code section 1054.1 "compels the People to disclose information used to impeach a defense witness's credibility." (RB 149.) In doing so, Respondent cites *People v. Tillis* (1998)18 Cal.4th 284, 294 (*Tillis*). Yet, Respondent omits this Court's full holding in *Tillis*: "Section 1054, subdivision (e), precludes *us from broadening the scope of discovery* beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution." (*Id.* at p. 294, italics added.) Thus, in *Tillis*, this Court held that the government was not required to disclose impeachment evidence *that was not otherwise required to be disclosed*. (See *id.* at p. 287.) The Court did not say that evidence required to be disclosed under Penal Code section 1054.1, somehow morphs into items not required to be disclosed, if the evidence could be "most accurately characterized" as impeachment evidence. (See RB 146.)

Respondent's argument seeks to turn *Tillis* on its head, and start not with the Penal Code list of what is to be disclosed (regardless of admissibility), but instead with a determination of how the evidence was "actually used" by the government at trial. As set forth below, such an argument is as untenable as it is impractical. (3RT 293:24-294:1.)

ii. RESPONDENT'S "CHARACTER" OR "USE" TEST IS UNWORKABLE

In addition to being contrary to the plain language of Penal Code section 1054.1, the government's proposed "character" or "use" test makes no sense in the context of the entire discovery statute. (See RB 149.) Penal Code section 1054.1 requires, inter alia, disclosure of the "existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial" and "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial[.]" (Pen. Code, § 1054.1, subds. (d) & (f).) Felony convictions are, of course, commonly used as a way to impeach a witness's credibility. (See Evid. Code, § 788.) Additionally, when a witness testifies at trial contrary to prior written or recorded statements, the witness can be impeached by prior inconsistent statements. (See Evid. Code, § 780, subd. (h).) The fact that these items' "character" or "use" at trial is typically for impeachment purposes does not change the requirement that they be disclosed pre-trial under the Penal Code. Thus, Respondent's request to focus on the character or use of this recording at trial is unavailing.

Furthermore, the government's argument, is wholly impractical. The Penal Code sets forth a list of items which must be disclosed *pre-trial*, meaning, of course, before the trial and well before the parties have made their arguments at trial concerning the admissibility of evidence. The inherent timing conflict—having use at trial govern pre-trial disclosure—precludes consideration of Respondent's argument.

* * *

b. RESPONDENT'S CLAIM ON APPEAL THAT THE TAPE WAS NOT MADE DURING THE INVESTIGATION OF PAMELA FAYED'S MURDER IS PLAINLY CONTRADICTED BY THE RECORD

Under Penal Code section 1054.1, real evidence must be disclosed before trial if it was "seized or obtained as part of the investigation of the offenses charged[.]" (Pen. Code, § 1054.1, subd. (c).) Respondent now claims that in surreptitiously recording potential witness, Mary Mercedes, the government was not investigating the murder of Pamela Fayed.[24] (RB 150-151.) Thus, Respondent contends, the tape was not obtained as part of the investigation into the offense.

First, as a statement of law, Respondent is asking for an excessively narrow interpretation of the term "investigation of the charged offenses." Interviewing any witness potentially involved in a case is fundamentally part of an investigation. However, even using Respondent's unreasonably narrow definition, its argument is wrong.

Respondent supports its assertion—that the tape was not part of the government's investigation—by arguing that "[t]here is no indication that prosecutors ever suspected Mercedes of actually planning Pam's murder." (RB 150.) That is simply false. In fact, to justify the heavy-handed

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[24] To buttress its claim that the recording was not made as part of the investigation into the murder of Pamela Fayed, Respondent argues: "Mercedes's interview took place on March 30, 2011, nearly *three years* after these events." (RB, 150-151, original italics.) This argument seems particularly disingenuous considering it was not until *two years* after Moya and Appellant were arrested that the detectives finally investigated the fingerprints on the parking ticket from the murder scene and even began their investigation into Simmons and Marquez. (9RT 1811:1-19; 1812:27-1812:4.)

surveillance of Mary Mercedes, the Deputy District Attorney wrote in a court filing: "A complex murder for hire plot was under investigation and the basic purpose of the wiretap was to develop proof of James Fayed, *Mary Mercedes*, and Jose Moya's involvement in the death of Pamela Fayed." (5CT 001057, italics added.) Additionally, one wiretap order states:

> [T]he individual[s] identified and/or referred to in the Application as James FAYED, Mary MERCEDES, Jose Luis MOYA and other yet-to-be identified co-conspirators (hereinafter referred to as the Target Subjects) . . . have engaged in the crime of murder and conspiracy to commit murder . . . [I]ntercepted conversations of these persons will provide additional evidence regarding their participation and other persons participation in the target offenses.

(4CT 000886.) Thus, Respondent's argument that it never considered Mary Mercedes a suspect in the murder of Pamela Fayed is plainly untrue.

Respondent next contends that the evidence was not part of an "investigation" into the death of Pamela Fayed because the government never considered that evidence concerning Mercedes' prior solicitation would have any bearing on Appellant's guilt or innocence. (RB 151.) Yet, again, this is contrary to the words of the district attorney in the trial court when he summarized the evidence as follows: "[The defense motion] alleges that Mary Mercedes . . . is the real killer. . . . So based on this, the defense seeks to introduce evidence of Mary's responsibility for the crime." (3RT 293:4-18.) Thus, contrary to Respondent's arguments, the government was aware, before making the tape, that Mercedes' prior solicitation of murder would be used at trial to show Appellant's innocence.

Finally, Respondent asserts that the government made the tape only to impeach Taboga, and that it had no intention of countering the defense

allegation that Mercedes solicited Pamela's murder. (RB 150-152.) Yet, again, this argument is refuted by the words of the district attorney in the trial court. The government expressed its clear intent to counter the defense allegation that Mercedes has previously solicited the murder of Pamela Fayed. In fact, after discussing the evidence of Mercedes' prior solicitation, the district attorney plainly stated, on the record, that it intended to "battle" that evidence and be "prepared to destroy it" at trial. (3RT 294:2-7.) Thus, Respondent's assertion on appeal, that the recording was not made in an effort to battle the defense evidence that Mercedes solicited the murder of Pamela Fayed, is untenable.

As a result, Respondent's assertion that the tape recording was not obtained as part of the investigation into the death of Pamela Fayed is without merit.

c. THE ERRONEOUS ADMISSION OF PREVIOUSLY UNDISCLOSED EVIDENCE PREJUDICED APPELLANT

The improper admission of prejudicial evidence results in a due process violation when it renders the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 68-70 and *Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) As previously discussed, when an error deprives a defendant of a federal constitutional right, the burden is on the state to show "beyond a reasonable doubt" that the error had no effect on the verdict. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Here, the prejudice resulting from the government's failure to disclose this evidence is unmistakable. The government knew well in advance of trial that Appellant would be presenting a third-party culpability

defense. (13CT 003395-003401.) In spite of this knowledge, the government created and concealed a piece of real evidence, which went to the heart of Appellant's defense. The government then revealed the evidence in its rebuttal, gutting Appellant's defense. By capitalizing on its deceit, the government was able to launch a devastating counterattack at the end of trial. The failure to give pretrial notice creates precisely the kind of unfair surprise that the Constitution forbids. Thus, this error was harmful and requires reversal under *Chapman*.

Even if this Court finds that the admission of the tape recording did not render the trial "fundamentally unfair," Appellant asserts that reversal is also required under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under *Watson*, reversal is necessary if there is a "reasonable probability" that the defendant would have achieved a more favorable verdict but for the error. (*Watson, supra*, 46 Cal.2d at p. 836.) Here the lower court's error undermined the defense by discrediting the testimony of Appellant's star witness. As such, the error was also harmful under *Watson* and requires reversal.

2. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF THE FEDERAL INDICTMENT AND INVESTIGATION

As set forth in the AOB, the trial court abused its discretion by admitting evidence from the federal indictment and investigation, which included Appellant's classification by the FBI as a "level 3 terrorist" and other uncharged allegations exploring Appellant's connection to a litany of Ponzi schemes. (AOB 188-96; 12CT 003177, 003181.) The admission of

this evidence was error because it was highly prejudicial character evidence that was not relevant.

a. EVIDENCE CONCERNING THE FEDERAL INDICTMENT WAS INADMISSIBLE CHARACTER EVIDENCE

In the AOB, Appellant set forth case law which holds that in order to admit evidence of prior bad acts relevant to motive, there must be a clear and distinguishable link between the prior bad acts and the subsequent offense. (See AOB 192-194, cases cited therein.) Because evidence of uncharged conduct can be so damaging, if the connection is unclear, the evidence should be excluded. (*People v. Thompson, supra*, 27 Cal.3d at p. 316.)

Respondent argues that evidence from the federal investigation was admissible to prove motive because the evidence supports the "conclusion that appellant was very worried that Pam would cooperate with the federal authorities." (RB 158.) However, the record simply does not support that contention. There are no facts from the record which suggest that Appellant or Pamela Fayed knew about the sealed federal indictment. (7RT 1301:20-25, 1302:5-14, 1385:20-28.) Moreover, as argued in the AOB, at trial the government could not prove that Pamela Fayed intended to cooperate in the federal investigation; in fact, Pamela's own attorneys testified to the contrary. (AOB 193; see 7RT 1278:13-16, 1386:17-27.) Additionally, there was *no evidence* presented that Appellant thought that Pamela was going to cooperate with federal authorities. Thus, the evidence did not suggest a clear connection between the federal investigation and the murder, and the evidence should have been excluded. (RB 158.)

b. EVIDENCE FROM THE FEDERAL CASE SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352

Even if this Court determines that the evidence was properly admitted under Evidence Code section 1101(b), it should have been excluded under Evidence Code section 352. (AOB 194-196.) Respondent argues that "evidence from the federal indictment was not particularly prejudicial because it outlined a crime which was not remotely as egregious as the charged offense." (RB 159.) Respondent reiterates the trial court's reasoning that the evidence was admissible because it "pales in comparison" to the charges in this case. (RB 159.)

However the "egregiousness" of the crime charged in comparison to evidence of uncharged conduct does not mitigate the protections of the Evidence Code. A prior bad act that speaks to character cannot be admitted simply because it is "less serious" than a subsequent prosecution. To the contrary, courts have recognized the "extremely careful analysis" that is necessary when balancing the probativeness of uncharged offenses with any prejudicial impact, "'[s]ince substantial prejudicial effect [is] inherent in [such] evidence.'" (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Thus, the trial court abused its discretion by admitting evidence from the federal indictment and investigation on grounds that it was less serious than the crimes charged.

c. THE ERROR WAS NOT HARMLESS

Respondent contends that "even if the court erred by admitting evidence of the federal indictment or investigation, or should have imposed stricter limits on the scope of that evidence, such error was harmless under

any standard." (RB 159.) However, Respondent does not provide any particulars from the record to show exactly how the potential prejudice was harmless beyond a reasonable doubt, other than calling the Appellant's argument "purely speculative." (RB 159.) Since Respondent has not argued that the error was harmless beyond a reasonable doubt, they have certainly not carried the burden of dispelling any uncertainty. (See *Chapman, supra*, 386 U.S. at p. 24.)

Additionally, even if, as Respondent contents, the error did not deny Appellant a fair trial, reversal is required under the *Watson* standard. *Watson* requires only a "reasonable chance" that the outcome would have been more favorable to the defendant in order for reversal. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) The evidence against Appellant at issue here was uncharged, unsupported, time consuming, and confusing. Under *Watson*, there is a reasonable chance that the outcome would have been more favorable to Appellant had this damaging character evidence been excluded.

3. THE LOWER COURT ERRED IN ADMITTING HEARSAY TESTIMONY FROM CAROL NEVE

At trial, Carol Neve testified regarding a purported conversation between herself and Pamela Fayed. (7RT 001369-001374.) The trial court allowed in evidence of two relevant statements from that conversation: (1) that Neve told Pamela Fayed that Goldfinger needed to obtain a money transfer license, and (2) that Pamela replied that she would obtain the licenses. (7RT 001372:24-26, 001373:17-20.) As set forth in the AOB, both statements were inadmissible hearsay. (AOB 196-199.)

As to the first statement, the lower court allowed in Neve's statement because "that was what Miss Fayed was advised;" however, that exception does not exist in the Evidence Code. (AOB 161-162.) Those statements were simply hearsay.

As to Pamela's statement to Neve, Respondent argues it was admissible under Evidence Code section 1250. However, that section creates an exception for evidence of "*a statement of the declarant's then existing state of mind*, emotion, or physical sensation" where, inter alia, the evidence is "offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, italics added.) Under this exception, the declarant's state of mind must be relevant to the issues in dispute. (See *People v. Smith* (2009) 179 Cal.App.4th 986, 1004.) The issue in the instant case was Appellant's state of mind, not Pamela Fayed's. Respondent argues that Pamela's statements show that she intended to get a license, "which gave appellant motive to kill her." (RB 160.) Such a statement is without support in the record. More importantly, however, the fact that a statement may be relevant for some purpose does not make it non-hearsay.

4. THE LOWER COURT ERRONEOUSLY ADMITTED PREJUDICIAL PHOTOGRAPHS DURING THE GUILT PHASE

Crime scene and victim photographs are only admissible when relevant. (Evid. Code, §§ 350, 210; *People v. Lewis* (2001) 25 Cal.4th 610, 641.) However, even relevant evidence may be inadmissible when it is merely cumulative or when its probative value is clearly outweighed by its prejudicial effect. (Evid. Code, § 352; *People v. Scheid* (1997) 16 Cal.4th 1, 19.) During the guilt phase, the lower court improperly admitted numerous

gruesome photographs from the crime scene and numerous photographs of Pamela Fayed while she was alive. As set out below, these photographs were not relevant and were highly prejudicial.

a. PHOTOGRAPHS OF BLOODIED ITEMS SHOULD NOT HAVE BEEN ADMITTED AT TRIAL

Courts have recognized that murder cases often call for the admittance of relatively graphic evidence. (*People v. Gurule* (2002) 28 Cal.4th 557, 624; *People v. Smithey* (1990) 20 Cal.4th 936, 973.) However, like all other evidence, such photographs must be relevant to a fact at issue. (Evid. Code, § 210.)

As argued in the AOB, the trial court improperly allowed into evidence photographs of Pamela Fayed's bloodied shirt, pants, purse, and glasses. (8RT 1457-1461.) These photographs do not to show that Appellant killed Pamela Fayed nor are they probative of whether the murder was committed with malice aforethought or in a deliberate, willful, or premeditated manner. In its brief, Respondent argues that the photographs portray the manner of the murder; thus, they are relevant. (RB 163.) However, unlike the testimony by the government's pathologist as to the Pamela Fayed's wounds, or the testimony of bystander Edwin Rivera as to her condition immediately after the attack, the photographs gave no indication as to how Pamela Fayed was murdered. (See 8RT 1522-1525, 1530-1566.) Rather, the photographs depict the bloody clothes as they were found at the crime scene after the crime occurred and after the clothes had been cut off by the paramedics. (8RT 001461:6-16.) Although

dramatic imagery, such photographs are not probative as to whether Appellant committed the charged offense.

Nonetheless, even if the photographs were relevant, they are still not admissible because of their unduly prejudicial nature. The photographs were highly inflammatory and prejudicial to Appellant. During sidebar about this issue at trial, the prosecution stated that the intended effect of the evidence was to make the murder "much more real to the jury." (8RT 001460:10.) This statement in itself shows intent to solicit an emotional reaction from the jury. These gruesome photographs served no purpose except to excite the emotions of the jury, in sympathy for Pamela Fayed and anger or hostility for Appellant. The trial court erred in admitting photographs that were redundant and prejudicial.

b. SENTIMENTAL AND EMOTIONAL PHOTOGRAPHS OF PAMELA FAYED WERE IMPROPERLY ADMITTED

Irrelevant emotional photographs carry the risk of merely generating sympathy for the victim. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230.) This Court has cautioned against the admittance of such photographs unless the prosecution establishes their relevance. (*Ibid.*)

During the guilt phase, the prosecution admitted numerous emotional and sentimental family photographs of Pamela Fayed with her daughters. (6RT 001039-001042.) As argued in the AOB, these photographs did not pertain to the issues of the case nor were they necessary to identify Pamela Fayed. As such, there was no evidentiary value in the admission of the photographs.

Respondent argues that the photographs were relevant because the Fayeds' family relationships "shed light on the divorce." (RB 164.) However, this argument is flawed in two distinct ways. First, the prosecution fully questioned Pamela Fayed's daughter, Desiree, about her relationship with Appellant and her family life with him and her mother. (6RT 001031-001035.) As this questioning occurred before the admittance of the photographs, inclusion of multiple family photographs was cumulative. Second, these particular photographs were so prejudicial that they should have been excluded even if they were relevant. Of the ten family photographs admitted during Desiree's testimony, nine photographs focused entirely on Pamela Fayed's relationship with her daughters. (6RT 001036-001038.) These photographs showed the victim in her role as loving mother, pictured with her eldest daughter at her graduation and prom, with her youngest daughter while fishing, and in many other intimate situations. (6RT 001039:24-001040:20, 001041:25-28.) Even taken together, these photographs shed no light on the complexities of a mixed family. Instead, they are pointedly geared towards encouraging sympathy for the victim while alienating Appellant in the minds of the jurors.

5. THE TRIAL COURT IMPROPERLY HINDERED APPELLANT'S CROSS-EXAMINATION RIGHTS

Appellant has a right to confront and cross-examine witnesses. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art I, § 15.) A restriction imposed on cross-examination violates the Confrontation Clause if it "limits relevant testimony and prejudices the defendant." (*United States v. Shabani* (9th Cir.1995) 48 F.3d 401, 403, quoting *United States v. Jackson* (9th Cir. 1985) 756 F.2d 703, 706.)

At trial, the government argued that Appellant had motive to kill Pamela using evidence from the sealed, federal indictment against Appellant and Goldfinger for a money licensing violation. (AOB 188-190.) On cross-examination, Appellant's counsel engaged the government's witness, AUSA Mark Aveis, in a line of questioning designed to expose the relative strength of the federal allegations against Appellant, and to determine whether Appellant believed he had a legitimate defense in the federal case. The government interposed hearsay objections to these questions which were sustained by the lower court. (7RT 1261:16-20, 22-28; 1262:7-14, 18; 1263:3-8.) As set forth in the AOB and below, exclusion of this evidence was error.

a. THE ARGUMENT WAS NOT FORFEITED

In its brief, Respondent argues that because defense counsel did not oppose the above-mentioned hearsay objections, and did not explain to the court at that time that the testimony was not intended to be admitted for its truth, Appellant forfeited the opportunity to make a claim on appeal. (RB 165.) Respondent cites *People v. Saunders* (1993) 5 Cal.4th 580 (*Saunders*) to support the contention that Appellant's failure to challenge the court's limitation of the cross-examination at trial precludes him from reviewing the issue on appeal. However, *Saunders* is plainly inapplicable.

Saunders stands for the proposition that an appellate court will typically not review procedural defects or erroneous evidentiary rulings where the party challenging the admission of the evidence does not make a timely objection at trial. (*Id.* at pp. 589-590.) *Saunders* does not say that the *non-objecting party* must also object. (See RB 164-166.) Yet, Respondent argues that Appellant should be precluded from raising this issue on appeal

for failing to object to an objection: "defense counsel did not oppose the hearsay objection on any basis at all. Thus, Appellant forfeited the opportunity to make this claim on appeal." (RB 165, citing *Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) *Saunders* does not support this contention, and requiring an objection to each objection in order to preserve an issue for appellate review would be redundant and wasteful of judicial economy. Thus, the issue was not forfeited.

b. THE CROSS-EXAMINATION OF AUSA MARK AVEIS WAS IMPROPERLY LIMITED

Evidence Code section 1250 provides an exception to hearsay rules for "evidence of a statement of the declarant's then existing mental state of mind, emotion, or physical sensation." (AOB 205-207.) The declarant's mental state must be factually relevant, and it must be "itself an issue in the action." (*People v. Noguera*, *supra*, 4 Cal.4th at p. 621, citing Evid. Code, §1250, subd. (a).) As discussed in the AOB, Appellant's state of mind was undoubtedly an issue at trial, and defense counsel sought to reveal that Appellant did not believe Goldfinger needed a money license to operate legally. (AOB 206-207.) This information was critical in order to rebut the government's theory that Appellant murdered Pamela Fayed because he feared she would cooperate in the federal money licensing investigation, and that Appellant thought he would "lose everything" because of the federal case. (11RT 2192:17-18,)

Respondent argues that the defense sought to admit the testimony as "evidence of Goldfinger's defense strategy for its truth (i.e. whether Goldfinger actually needed the licenses under federal law)." (RB 165-166.) That is not correct. The questions were offered as circumstantial evidence

of Appellant's mental state, and to cast doubt upon the government's theory of motive: that Appellant murdered Pamela Fayed because Appellant was tremendously worried about the licensing investigation, and he believed that she would cooperate with the federal authorities.

Furthermore, throughout Appellant's trial, the government was permitted to elicit testimony concerning the federal licensing allegations, (see 7RT 1371:23-28, 1372:19-28); yet, Appellant was prohibited from asking AUSA Aveis any questions about the strength of the federal allegations or about Appellant's belief that Goldfinger did not require the money licenses. Thus, the trial court improperly limited the cross-examination of Aveis, and Appellant's right to confront and cross-examine the witness was unduly hindered resulting in prejudice to Appellant.

6. THE LOWER COURT IMPROPERLY EXCLUDED DEFENSE EVIDENCE DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO MOUNT A DEFENSE

Defendants have a due process and Sixth Amendment right to present all relevant and material evidence favorable to his or her theory of defense absent valid state justification. (AOB 207, citing *Washington v. Texas* (1976) 388 U.S. 14, 23; *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) As set forth here and in the AOB, the lower court improperly excluded evidence that was critical to Appellant's defense in violation of the Sixth Amendment. (See AOB 207-213.)

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* * *

a. THE LOWER COURT IMPROPERLY EXCLUDED EVIDENCE PERTAINING TO APPELLANT'S STATE OF MIND

At trial, Pamela Fayed's divorce attorney, Greg Herring, testified on cross-examination that he received a letter from opposing counsel informing him that Appellant intended to shut down and liquidate Goldfinger. (6RT 1199:28-1200:1.) Appellant's counsel then attempted to elicit from Herring testimony about statements in the letter, which would have explained Appellant's state of mind in deciding to liquidate. (6RT 1199:28-1200:1.) The prosecutor objected on the grounds of hearsay and lack of foundation; the lower court sustained the objection on the basis of hearsay. (6RT 1200:18-1201:6.)

As set forth in the AOB, this testimony was admissible under the state of mind exception to the hearsay rule, which includes "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation." (Evid. Code, § 1250.) Appellant's state of mind—his desire to liquidate Goldfinger rather than purchase money-transmitting licenses—was critically important; it would have rebutted the government's theory that Appellant murdered Pamela Fayed to prevent her from purchasing money-transmitting licenses and cooperating with federal investigators. (AOB 209.)

Here, Respondent, again, argues that because Appellant did not respond to the government's objection, Appellant is precluded from making the argument on appeal. (See RB 167.) In support, Respondent again cites *Saunders*, *supra*, 5 Cal.4th 580. However, as noted elsewhere, *Saunders* merely recites the well-known principle that when evidence is offered, *the party who wants to preclude its admission* must object and state its basis.

(*Id.* at pp. 589-590.) It does not, however, place any such restrictions on the non-objecting party to challenge the court's ruling. (See *ibid.*) Thus, *Saunders* does not, as Respondent contends, require that the party (who initially sought to admit the evidence) object to the opposing party's objection and state the basis for its objection to preserve the argument on appeal.[25]

b. THE LOWER COURT IMPROPERLY EXCLUDED TESTIMONY CRITICAL TO APPELLANT'S THIRD-PARTY CULPABILITY DEFENSE

The lower court improperly excluded evidence that was critical to Appellant's third-party culpability defense by limiting Patricia Taboga's testimony regarding Mary Mercedes' attempt to solicit Taboga's husband to kill Pamela Fayed. (AOB 209-213.)

i. THE LOWER COURT IMPROPERLY EXCLUDED RELEVANT PORTIONS OF TABOGA'S TESTIMONY

As argued in the AOB, the lower court improperly prevented Appellant from asking Taboga questions about Mercedes' animus toward Pamela Fayed, ruling the statements inadmissible hearsay unless made against her penal interest. (10RT 1901:10-12.) Respondent does not contest that the statements should have been admitted under Evidence Code section 1250 either "to prove the declarant's state of mind, emotion, or physical sensation," or to "prove or explain acts or conduct of the declarant." (See

[25] Furthermore, here, the question from Appellant's counsel: "Now Mr. Herring, that letter actually contains rationale for why he is liquidating?," specifically asks about Appellant's state of mind. (6RT 1199:28-1200:1.)

RB 169-170; Evid. Code, § 1250, subd. (a); *People v. Kovacich* (2011) 201 Cal.App.4th 863.) Instead, Respondent asserts the invited error doctrine precludes Appellant's argument because when the court stated that the evidence had to be limited to those against penal interest, defense counsel states, "I will do that." (RB 170, citing 10RT 1902.)

As noted above in the jury instruction section, the doctrine of invited error has very limited application to criminal cases. Specifically, "[d]efense counsel must . . . have intentionally caused the claimed 'error.'" (*People v. Marshall* (1990) 50 Cal.3d 907, 931.) Here, after discussion from all parties, Appellant's counsel merely agreed with the lower court's restrictions on the testimony; thus, the doctrine of invited error is inapplicable. Consequently, the lower court excluded relevant, admissible evidence in violation of Appellant's Sixth Amendment right to mount a defense.

ii. THE LOWER COURT ERRED IN EXCLUDING QUESTIONS TO TABOGA REGARDING APPELLANT'S LACK OF KNOWLEDGE OF MERCEDES' PRIOR SOLICITATION

Additionally, as set forth in the AOB, Appellant was improperly prevented from asking Taboga about 1) whether Appellant was involved when Mercedes solicited Taboga's husband to murder Pamela Fayed, and 2) whether she discussed Pamela Fayed's death with Mercedes after it occurred. (AOB 211-212, citing 10RT 1906:14-15, 1909:20-21.) The lower court erred in sustaining the prosecution's hearsay objections because answers to these questions were admissible as statements against Mercedes' penal interest pursuant to Evidence Code section 1230.

Respondent contends that these statements do not fall under the penal interest hearsay exception because this line of questioning "would not have subjected Mercedes to any criminal liability beyond that which her other statements (i.e., that she solicited Kurt to kill Pam) already had." (RB 170.) Respondent's argument is unsupported by the law.

Section 1230 of the Evidence Code contains no limitation on the statement against penal interest exception where, as Respondent asserts, additional statements (against penal interest) would not subject the declarant to *further* liability. (See Evid. Code, § 1230.) Indeed, the court must conduct an individual inquiry into each statement to see if that statement, alone, subjects the declarant to liability. (See *ibid.*) Here, Mercedes' statements that she, alone, solicited Taboga's husband to murder Pamela Fayed, and then later spoke to Taboga about Pamela Fayed's murder, are against both her penal and social interests; thus, they should have been admitted.

iii. THE LOWER COURT IMPROPERLY EXCLUDED TABOGA'S PRIOR CONSISTENT STATEMENT

Appellant also asserts that the lower court improperly excluded a letter Taboga wrote regarding statements Mercedes made to her while attempting to solicit Pamela Fayed's murder. (AOB 212-213.) As argued in the AOB, the March 9, 2011 letter should have been admitted under the prior consistent statement exception to the hearsay rule. (AOB 212-213.) However, the lower court excluded it based on an incorrect interpretation of that exception. (See 10RT 2052:14-22, 2053:1-2.) Evidence of a prior consistent statement is admissible to support the declarant's credibility if it is offered after "[a]n express . . . charge has been made that his testimony at

the hearing is recently fabricated. . . and the statement was made before the . . . motive for fabrication[.]" (Evid. Code, § 791.)

Respondent asserts that the letter was properly excluded because it was not written prior to Taboga's motive for fabrication: "[T]he People's theory was that Taboga's motive to lie was to exculpate appellant, which became necessary almost immediately after Pam's death in July 2008"; and "the March 9, 2011, letter was written nearly three years later[.]" (RB 171-172.) However, this Court has rejected the contention that prior consistent statements are limited to statements made "prior to the time the [original] motive of interest existed," when they are admitted for the purpose of refuting inferences of subsequent fabrication. (*People v. Walsh* (1956) 47 Cal.2d 36, 41-43, overruled on another ground in *People v. Sharer* (1964) 61 Cal.2d 869.) Therefore, the critical date for determining whether Taboga's letter was a prior consistent statement is whether it was made before the government challenged Taboga's testimony by introducing the tape recordings of Mercedes made on March 30, 2011, (see 10RT 2041:24-27), not, as Respondent asserts, when Appellant became a prime suspect. (RB 171-172.) Accordingly, because Taboga's March 9, 2011 letter was written before the government challenged her testimony at trial, the letter was consistent with the statement she made at trial, and should have been admitted as a prior consistent statement.

7. APPELLANT WAS PREJUDICED BY THESE EVIDENTIARY ERRORS

As set forth in the AOB, the evidentiary errors discussed above violated Appellant's rights to due process and a fair trial under the United States and California Constitutions. (See U.S. Const., 6th & 14th Amends.;

Cal. Const., art. I, § 15.) As such, the standard articulated in *Chapman*, *supra*, 386 U.S. 18, governing federal constitutional error applies. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.) Under *Chapman*, reversal is required unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[26] (*Chapman*, *supra*, 386 U.S. at p. 24.)

Here, as previously discussed, Appellant was severely prejudiced by the improper admission of state evidence—namely, a previously undisclosed tape recording rebutting Appellant's third-party culpability defense, and prejudicial allegations concerning the federal case and characterizing Appellant as a shady businessman involved in global Ponzi schemes. In addition to the evidentiary errors that improperly supported a finding of guilt, this harm was compounded by the jury's desire to convict *any* culprit because prejudicial photographs of bloodied items and pictures of the victim and her young daughter were also erroneously admitted. Further heightening the effect of these errors, Appellant was also prevented from eliciting critical testimony on cross-examination from multiple witnesses. Some of this evidence undermined the government's theory of the case; other evidence supported Appellant's third-party culpability defense. These errors deprived Appellant of the basic right to have the prosecutor's theory of the case survive meaningful adversarial testing. (See *United States v. Cronic* (1984) 466 U.S. 648, 656.) As such, when viewed individually and collectively, these errors significantly undermine the

[26] As discussed in further detail below, reversal may be based on the consideration of these errors cumulatively, even where no single error standing alone would necessitate such a result. (*People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on another ground by *California v. Ramos* (1983) 463 U.S. 992.)

confidence in the result reached by the jury and were harmful under *Chapman* or *Watson.*

F. THERE WAS INSUFFICIENT EVIDENCE OF THE SPECIAL CIRCUMSTANCES

In the AOB, Appellant set forth that there was insufficient evidence on the two alleged special circumstances: 1) murder for financial gain, Penal Code section 190.2, subdivision (a)(1), and 2) lying in wait, Penal Code section 190.2, subdivision (a)(15). (AOB 214-225.) These contentions are further supported below.

1. THERE WAS INSUFFICIENT EVIDENCE OF FINANCIAL GAIN

In the AOB, Appellant argued that, in accordance with established precedent, in order for Appellant to be liable for the financial gain special circumstances under an aiding and abetting theory, there had to be sufficient evidence of the financial gain of the actual killer. (AOB 215-218.) Respondent now asserts that Appellant's aiding and abetting discussion "misstates the People's main" argument at trial, which it now contends was that Appellant himself would benefit financially from the killing. (RB 176-177.) Respondent then chides that Appellant's focus on the money paid to Moya (a non-killer co-defendant) is "largely a digression." (RB 177.)

As set forth herein, Respondent is, again, changing its arguments from those made during trial, when it plainly argued that Moya's receipt of money proved the special circumstance. Furthermore, even if Respondent had adequately argued a different, valid legal theory to the jury (that Appellant would financially benefit), the fact that the government also

argued an invalid legal theory (that payment to Moya was sufficient for the special circumstance) warrants reversal.

a. RESPONDENT'S POSITION IN THE TRIAL COURT

Despite Respondent's current claim that Appellant's discussion of the aiding and abetting argument is a "digression," the foray into this theory and argument was undertaken by the government, repeatedly, in the trial court.

At the preliminary hearing, the government clearly set forth that its primary theory on financial gain was an aiding and abetting theory, stating that Appellant "admits to having paid Mr. Moya, which is sufficient, I believe, for that special circumstance." (7CT 001767:27-001768:1.) Later, in the Opposition to Motion to Dismiss pursuant to Penal Code section 995, the government actually titled its argument heading: "The Murder for Hire Special Circumstance Applies Regardless of whether Fayed Stood to Gain from Pamela's Death." (9CT 002054:5-7.) The government then argued that by presenting evidence that Moya received financial consideration, there was sufficient evidence to hold Appellant to answer for the financial gain special circumstance.[27] (9CT 002054:8-26, 002055:1-5; see also 10RT 2025:1-6 [government's similar argument at Appellant's Motion for Judgment of Acquittal pursuant to Penal Code section 1118].) Thus, while Respondent may want to shift attention away from what it now calls an "alternate theory," this argument was clearly the focus of the government at

[27] The government also argued that "even though it is not required," there was evidence to show that Appellant would have benefited financially. (9CT 002055:6-9.)

trial: "[I]f you find that Mr. Moya was going to or did gain financially to the tune of $25,000, then *that is enough to establish the special circumstance for financial gain.*"[28] (11RT 2177:1-6, 2178:14-17, italics added.)

b. THE FINANCIAL GAIN SPECIAL CIRCUMSTANCE APPLIES TO AIDERS AND ABETTORS WHERE THERE IS EVIDENCE *THE KILLER* FINANCIALLY BENEFITTED

As set forth in the AOB, Appellant contends that the government's theory—that evidence of Moya's financial gain supports Appellant's special circumstance—was incorrect. Appellant's argument is supported by the legislative history and case law. Prior to 1978, death penalty law included a specific special circumstance of murder for hire. (Former Pen. Code, § 190.2, subd. (a) (1977).) However, the 1978 amendments replaced that provision, and now the special circumstance applies where "[t]he murder was intentional and carried out for financial gain." (Pen. Code, § 190.2 subd. (a)(1).) When an express provision of law is deleted and replaced with something different, it is presumed that a substantial change in the law was intended. (*People v. Valentine* (1946) 28 Cal.2d 121, 142.) Therefore, it must be assumed that the legislature intended to eliminate the murder-for hire special circumstance, which applied automatically whenever a person contracts for a killing, and replace it with a standard that examines whether financial-gain motivated the killing.

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[28] The government also speculated that Appellant would benefit because "this is [a] community property state." (11RT 2176:16-17.)

Here, the government has repeatedly cited two cases to support its position that proof of payment to Moya was sufficient: *People v. Bigelow* (1984) 37 Cal.3d 731, 750 (*Bigelow*), and *People v. Freeman* (1987) 193 Cal.App.3d 337 (*Freeman*). (See, e.g., 11RT 2177:26-28.) However, neither case supports the government's position that a non-killer co-defendant's receipt of payment is sufficient.

Bigelow held that the financial gain circumstance "applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the *defendant*," not a co-defendant. (*Bigelow*, *supra*, 37 Cal.3d at p.751 (italics added).) *Freeman* held that the financial gain special circumstance could apply to the hirer where there was significant evidence that *the actual killer* acted for his own financial gain. (*Freeman*, *supra*, 193 Cal.App.3d at p. 337.) Thus, neither *Bigelow* nor *Freeman* stand for the proposition that proof of payment to a co-defendant, who is neither the person doing the hiring nor the alleged murderer, is sufficient under this special circumstance.

On appeal, Respondent adds a new case to support its argument: *People v. Battle* (2011) 198 Cal.App.4th 50 (*Battle*). According to Respondent, *Battle* supports the proposition that "the existence of an intermediary between the hirer and the killer does not insulate the hirer from being subject to this special circumstance." (RB 178.) Respondent is incorrect.

In *Battle*, defendant Abramyan hired a second defendant to kill his father. The second defendant (the one who received the money) then hired two other defendants, *who each received payment*, to do the actual killing. (*Battle*, *supra*, 198 Cal.App.4th at p. 56.) Defendant Abramyan appealed the financial-gain special circumstance, arguing—not that there was

insufficient evidence that the actual killers received financial gain—but that he did not directly induce the actual killers to do the killing for financial gain. (*Id.* at p. 82.) Ultimately, the court found that there did not have to be a direct relationship between the hirer and the actual killer. (*Id.* at p. 83.) However, that decision does not change the fact that the government must still prove that *the actual killer* was motivated by financial gain. In fact, the court stated that when the government proceeds on an aiding and abetting theory of financial gain "[i]t is enough that (1) the non-killer hired another to kill, (2) the hirer intended to kill, and (3) *the actual killer was motivated by financial gain.*" (*Id.* at p. 84, italics added.)

Simply put, the financial gain special circumstance is concerned with the financial benefit of the hirer or the actual killer. (See, e.g., *People v. Howard* (1988) 44 Cal.3d 375, 405; *People v. Padilla* (1995) 11 Cal.4th 891, 933.) Thus, the government's argument that payment to Moya was sufficient was legally incorrect.

c. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT ACTED FOR HIS OWN FINANCIAL GAIN

Respondent also argues that Appellant's challenge to the "aiding and abetting" theory is irrelevant because Appellant himself benefited financially. (See RB 176.) As set forth above, the government argued, repeatedly, that the special circumstance was proven by evidence that Moya received money. While the government peppered its arguments with references to Appellant's possible financial gain as a motive, those references were limited to statements that California is a community property state, implying that Appellant would receive Pamela Fayed's share

of community property upon her death. (See, e.g., 11RT 2176:13-21, 2309:23-27.) Using this understanding of community property laws, the government then invented Appellant's thought process, stating that Appellant thought, "why not? Why don't I just kill her, and I can have it all?" (11RT 2176:22-27.)

First, the government misstated what would happen to assets on Pamela Fayed's death. Evidence at trial showed that Pamela Fayed had a will at the time of her death, which left instructions for her daughters. (See 12RT 2430:4-12.) Thus, the government was incorrect that, because California is a community property state, Appellant would "have it all" upon her death. (See also Prob. Code, §§ 100-105.) Here, the assertion that Appellant killed Pamela for his own financial gain is pure speculation, based solely on the fact that the Fayeds were married in a community property state. "Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 325, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) The question is not whether a person could, potentially, benefit from the murder; rather, the special circumstance applies when the killing was "carried out" for financial gain. (See Pen. Code, § 190.2, subd. (a)(1).) Here, the government did not prove that Appellant murdered Pamela Fayed for his own financial gain.

d. EVEN IF RESPONDENT'S NEW "MAIN" THEORY THAT APPELLANT PERSONALLY BENEFITED IS CORRECT, REVERSAL IS STILL WARRANTED

In *People v. Green* (1980) 27 Cal.3d 1, this Court stated the "settled and clear" rule on appeal that "when the prosecution presents its case to the

jury on alternate theories, some of which are *legally* correct and others *legally* incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.* at p. 69, italics added.) For the purposes of this rule, a "legal error" is a "mistake about the law," and must be distinguished from a "factual error," which is a "mistake concerning the weight or the factual import of the evidence." (*Griffin v. United States* (1991) 502 U.S. 46, 59; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1125.)

Here, the jury was affirmatively told that evidence that a non-killer co-defendant received payment was legally sufficient: "[T]he prosecution can establish that something was committed—a conspiracy was committed or a murder was committed for financial gain because any one of the perpetrators, any one of the aiders and abettors, if they are going to gain financially, then that is imputed right back to his lap." (11RT 2177:1-6.) Since the jury was repeatedly, incorrectly informed, over defense objection, that payment to Moya was legally sufficient, there is no way to determine that the jury did not find this special circumstance to be true based on that improper legal ground. Thus, the special circumstance cannot stand.

2. THERE WAS INSUFFICIENT EVIDENCE OF LYING IN WAIT

The jury also found true the special allegation for lying in wait pursuant to Penal Code section 190.2, subdivision (a)(15). (14CT 003631-003632.) At trial, the government argued that it only had to show that any co-defendant, killer or not, was "lying in wait." (11RT 2178:23-2179:18.)

In the AOB, Appellant sets forth that special circumstances can be broken down into two categories: those relating to the defendant, (see, e.g.,

Pen. Code, § 190.2, subds. (a)(2), (a)(3) & (a)(15)), and those related to the specific nature of the murder or the victim, (see, e.g., Pen. Code, § 190.2, subds. (a)(1), (a)(4) & (a)(5)). (AOB 218-225.) After discussing the ramifications of the 1990 Amendment to Penal Code section 190.2, Appellant argued that when a special circumstance is described in terms of "the murder" or "the victim," it applies to both the actual killer and any aider and abettor; however, when the statute used the word "defendant," the special circumstance must be interpreted to apply specifically to the particular defendant. (See AOB, 219-222.) Appellant further argued that allowing a defendant to be put to death based on the lying-in-wait special circumstance without satisfying any mens rea or actus reus requirement, violates due process. (See AOB 222-224.)

Respondent acknowledges Appellant's "creative" contention and recognizes that "courts have applied the lying in wait special circumstance in cases of hired killings under the current version of section 190.2 without necessarily addressing the logical consistency of other portions of the statutory scheme." (RB 180-181.) However, Respondent argues that this issue is a "red herring" in the instant case because either Appellant himself was "lying in wait" or Appellant actually aided and abetted the "lying in wait" of codefendants. (RB 180-181.) As set forth herein, Respondent is incorrect.

a. THERE WAS NO EVIDENCE OF APPELLANT "LYING IN WAIT"

In its brief, Respondent argues that Appellant had several discussions with Moya over a three month period about killing Pamela. (RB 179.) During this time, Respondent contends that "Appellant obviously had

concealed all of these plans from Pam and had engaged in a substantial period of watching and waiting for an opportune time to act[.]" (RB 179.) Thus, Respondent argues that "lying in wait" is shown when a defendant "conceals" his plans for months in advance of the death. (RB 179.) This is similar to the government's argument to the jury that Appellant was, himself, "lying in wait" by "sitting in a room, not five feet from Pamela Fayed thirty seconds before she was killed. So certainly he was concealing his purpose as well." (11RT 2179:14-18.)

This repeated argument misunderstands "lying in wait." As set forth in the AOB, the historical reason for subjecting "lying in wait" murders to harsher punishment was the abhorrence of an attack from a concealed position on an unsuspecting victim. (See discussion in *Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 314, disapproved of on meaning of concealment by *People v. Morales* (1989) 48 Cal.3d 527; see also AOB 265-271 [discussing history of "lying-in-wait"].) Respondent's argument that Appellant himself was "lying in wait" by planning the offense for months, or by sitting in a room with the victim and not telling her of the plan, is so devoid of any relationship to the true meaning of "lying in wait" as to lose all meaning. This special circumstance is meant to address the act of taking the victim by surprise, not premeditation or failure to warn about the crime. There was simply no evidence that Appellant was himself "lying in wait."

b. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT AIDED AND ABETTED CO-DEFENDANTS "LYING IN WAIT"

Assuming, for purpose of argument, that the government could prove the "lying in wait" special circumstance applied to a defendant based

on an aiding and abetting theory, it did not provide sufficient evidence here. Respondent argues "when a defendant hires others to kill his victim, actions by any of them may satisfy the lying in wait special circumstance as to any of them." (RB 181, citing *Battle, supra*, 198 Cal.App.4th at p. 79.) That is incorrect.

As this Court has noted, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, original italics.) The requirement of act and intent "applies to aiding and abetting liability as well as direct liability. An aider and abettor must do something and have a certain mental state." (*Ibid.*) "Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder." (*People v. Chiu* (2014) 59 Cal.4th 155, 167, citing *People v. McCoy, supra*, 25 Cal.4th at p. 1118 ["an aider and abettor's mental state *must* be at least that required of the direct perpetrator"].) Similarly, here, the government must show that Appellant shared not only an intent to kill but also the intent to accomplish the killing by "lying in wait." It is not enough, as Respondent contends, that just "any" of the co-conspirators intended to commit the offense while "lying in wait."

Respondent also asserts that Appellant "directed Moya and the others exactly how to proceed." (RB 182.) However, that is not borne out by the evidence. On the tape, Appellant states that Moya "went rogue" and that "It sure wasn't the way that I would've wanted things taken care. You know what I mean?" (3CT 00581:20-22.) Despite these statements,

Respondent contends that Appellant's desire for "lying in wait" is shown by his statements that "he wished that the killers had been *more* discreet, professional, and competent than they actually were." (RB 182, original italics.) As noted in the AOB and above, Respondent continues to misunderstand the meaning of "lying in wait." This special circumstance is about the way in which the killing is executed, from a place of surprise to the victim, not about the planning or desire to get away with the crime. Simply put, a defendant's desire for a "discreet" killing is not the same as sharing the mental intent requirement for aiding and abetting the "lying in wait" special circumstance. As a result, this special circumstance finding must be reversed.

G. THE GOVERNMENT COMMITTED NUMEROUS INSTANCES OF MISCONDUCT IN THE GUILT PHASE DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

As set forth in the AOB and herein, the government committed serious, prejudicial misconduct throughout the trial. In addition to violations of specific rights, the culmination of this error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, § 15.)

1. THE GOVERNMENT'S INFLAMMATORY STATEMENTS ABOUT PAMELA'S SUFFERING PREJUDICED APPELLANT

During closing argument, the government went into vivid detail about the purported last moments of Pamela Fayed's life: "She had time. She had time. Her spine wasn't severed; she wasn't unconscious. She was

very much alive, very much conscious, very much aware. And she had time." (11RT 2241:2-5.) The prosecutor then asked the jury to speculate as to what was going "through her mind," and helped the jury imagine Pamela's final thoughts as: "she would never again touch the hand of her daughter, never kiss the cheek of [her younger daughter] GiGi, never see their smiling faces." (11RT 2241:10-15.)

The prosecutor made no attempt to disguise what he was doing. Instead, he directly told the jury to "[t]hink about what [Pamela] was going through." (11RT 2241:18.) Indeed, the prosecutor went even further, and literally told the jury to sit silently for a minute and think about Pamela's last thoughts and the pain she was experiencing: "I am going to ask you just to think for one minute, starting now." (11RT 2241:2-20.) Proceedings then stopped, so the jury could sit quietly and think about what Pamela Fayed was going through in the final minutes of her life.

As set forth herein, in making these statements, the prosecutor committed clear error, which prejudiced Appellant.

a. THE STATEMENTS WERE IMPROPER

"'It is, of course, improper to make arguments to the jury that give it the impression that 'emotion may reign over reason,' and to present 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response.' [Citation.]" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192, quoting *People v. Redd* (2010) 48 Cal.4th 691, 742.) In the AOB, Appellant set forth a plethora of case law firmly establishing that it is misconduct to appeal to the jury's passions by urging them to consider the victim's suffering. (See AOB 226.) In fact, refraining from this type of

conduct is so fundamental that it has been called the "Golden Rule" of argument. (See *People v. Vance*, *supra*, 188 Cal.App.4th at p. 1193.)

Here, the prosecutor's remarks are no less graphic and objectionable than remarks this Court has previously deemed improper.[29] Additionally, the misconduct was further amplified in the minds of the jurors when the government stopped the proceedings and told the jury to sit quietly and reflect on the horror going through Pamela's mind in the last moments before her death. (See 11RT 2241:2-20.) After making the jury engage in what must have been an uncomfortable and emotional silent minute, the government subsequently blamed Appellant for making the jury endure that minute, stating: "[D]o you think we take great satisfaction in making you feel what a minute is like to Pam Fayed? [¶] Who chose her final minute? . . . [Appellant] did. Not us." (11RT 2302:11-15.)

On appeal, Respondent concedes that the remarks were "arguably improper," but contends that the government's misconduct did not "infect the trial with unfairness or constitute deceptive trial tactics." (RB 186.) As set forth below, Respondent's arguments are unpersuasive.

* * *

[29] In *People v. Stansbury* (1993) 4 Cal.4th 1017, as modified on den. of rehg. (May 26, 1993), revd. *sub nom. Stansbury v. California* (1994) 511 U.S. 318, this Court found prosecutorial misconduct based on the following argument: "Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried." (*Id.* at p. 1057, italics omitted.) Similarly, in *People v. Leonard* (2007) 40 Cal.4th 1370, misconduct was found where the prosecutor asked the jury to "imagine yourself, put yourself there. I ask you to put yourself there, also. [¶] Imagine in that last millisecond before the lights go out . . . . " (*Id.* at p. 1407, fn. 7.)

b. THE MISCONDUCT WAS PREJUDICIAL

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct. (*People v. Clark* (2011) 52 Cal.4th 856, 960-961.) Such actions require reversal under the federal constitution when they infect the trial with such unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Additionally, under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 606; *People v. Hoyos* (2007) 41 Cal.4th 872.) Indeed, a prosecutor commits prejudicial misconduct where he "presented to the jury a strong case but . . . needlessly coupled that case with an even stronger appeal to passion and prejudice." (*People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.) In considering prejudice, "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

Here, the prosecutor's invitation to the jury to decide Appellant's guilt based on sympathy, fear, and passion in lieu of objective reasonableness was "of sufficient significance to result in the denial of the defendant's right to a fair trial[,]" because the prosecutor used "deceptive or reprehensible methods to attempt to persuade the . . . jury. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 960.) When the prosecutor invited the jurors to sit for a minute and imagine what it was like for Pamela Fayed

to realize that she would never touch her daughters hand, kiss her daughters, or look at the their "smiling faces," the prosecutor was not drawing reasonable inferences from the evidence at trial. (11RT 2241:10-12.) Instead, the prosecutor's argument was directed at eliciting an emotional response from the jury, distracting their attention from the important function of properly assessing Appellant's guilt or innocence.

Respondent seeks to categorize this misconduct as unimportant because it lasted for only "approximately one page" of the closing argument. First, the misconduct, in total, is greater than one page; however, more importantly, Respondent asks this Court to focus only on size (in pages) and not the import of the misconduct. As noted above, refraining from marking these improper remarks is the "Golden Rule" of argument. (See *People v. Vance*, *supra*, 188 Cal.App.4th at pp. 1192-1193.) This is not some obscure form of misconduct that the government innocently and inadvertently violated; it is well settled in capital cases that the government cannot make these arguments in the guilt phase. (*People v. Jackson* (2009) 45 Cal.4th 662, 691, quoting *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.)

Additionally, this was not a "passing" remark or "single reference in a long, complex and otherwise scrupulous argument" as was the case in *People v. Stansbury*, *supra*, 4 Cal.4th 1017. Instead, it was accomplished by a steady build-up that began by asking the jury to imagine the thoughts of a dying woman, then led them to the conclusion that her final thoughts were about the "smiling faces" of her daughters, and culminated in a dramatic pause in argument so that they could sit quietly and do something that the prosecutor, who was undoubtedly familiar with the prohibition against such argument, had to consciously know was improper. This was unflinching

and purposeful misconduct on the part of the government. The fact that the misconduct "only" covered a few, out of a hundred, pages does not mean that the jury was not deeply affected by this misconduct—to Appellant's great detriment.

2. THE GOVERNMENT MISSTATED KEY ELEMENTS OF LAW

It is a particularly egregious form of misconduct for the government to misstate the law, particularly where doing so lowers the government's burden of proof. (See *People v. Marshall* (1996) 13 Cal.4th 799, 831.) In the AOB, Appellant set forth several instances where the government misstated the relevant law. (AOB 228-233.) The specific instances are addressed herein.

a. THE GOVERNMENT MADE MISSTATEMENTS OF THE LAW CONCERNING WITHDRAWAL

As set forth in the AOB and herein, the prosecutor misstated the law concerning withdrawal in two ways: 1) by misstating the burden of proof, and 2) by misstating a defendant's obligations.

i. THE GOVERNMENT MISSTATED THE BURDEN OF PROOF

After a preliminary showing justifying a jury instruction on the defense of withdrawal, the government has the burden of proving beyond a reasonable doubt that a defendant did not withdraw. (See *People v. Fiu* (2008) 165 Cal.App.4th 360, 384.) In the instant case, the lower court heard argument from both sides and determined that the defense presented sufficient evidence to warrant an instruction on withdrawal. (See 10RT

2069:9-2070:8.) Thus, the burden had shifted to the government to prove, beyond a reasonable doubt, that Appellant did not withdraw. (See *People v. Fiu*, *supra*, 165 Cal.App.4th at p. 384.)

In the AOB, Appellant set forth that at trial the government improperly placed the burden on Appellant to prove withdrawal, and incorrectly advised the jury that Appellant's burden was a "pretty demanding legal standard." (11RT 2343:9-11.) Respondent contends that the government did not commit misconduct for two reasons: 1) the government properly stated that Appellant had to produce evidence of withdrawal to the jury, and 2) the government properly informed the jury that the government had the burden of proof. As set forth herein, Respondent's arguments are without merit.

aa. THE GOVERNMENT INCORRECTLY TOLD THE JURY THAT THE DEFENSE HAD TO PRODUCE EVIDENCE TO PROVE WITHDRAWAL

Respondent maintains on appeal that it was proper for the government to argue to the jury that Appellant did not sufficiently produce evidence of the two elements of withdrawal. (RB 190, citing *People v. Shelmire* (2005)130 Cal.App.4th 1044, [finding insufficient evidence to warrant jury instruction on withdrawal].) In doing so, Respondent is addling the law of what a defendant must show to get a jury instruction with the law regarding the defense burden of proof at trial.

The judge, not the jury, makes the determination of appropriate jury instructions. Here, the judge had already completed this task. (10RT 1069:9-2070:8.) As such, the government was prohibited from pleading its

case to the jury that the defense had to present sufficient evidence to warrant the jury instruction. Instead, once that decision was made, the burden had shifted to the government. (See *People v. Fiu*, *supra*, 165 Cal.App.4th at p. 384.) Any argument that the defense had to prove something further was improper and worked to diminish the government's burden of proof.

Moreover, the government did not just suggest that it was the defense's responsibility to prove withdrawal, it also added that Appellant had "no business" making the argument he withdrew without more evidence because it was such a "demanding standard." (11RT 2341:16-19, 2343:4-8.) Specifically, the prosecutor argued "So even as a legal standard, he has no business telling you that he withdrew from this crime. No business. *And then factually is there anything to back that up*?" (11RT 2343:9-14, italics added.) The government even told the jury that the defense knew it could not meet this fierce burden, arguing that defense counsel, who had been talking at "full volume," lowered his voice "way down" when discussing the requirements for withdrawal, presumably because the defense didn't want the jury to hear the high burden requirements. (11RT 2341:25-2342:5.) Thus, even after the lower court found sufficient evidence to warrant the instruction, the government continued to clearly and repeatedly tell the jury that the burden was on the defense to prove that Appellant withdrew from the crime. This misstatement of law was misconduct.

* * *

bb. RESPONDENT'S ARGUMENT THAT IT CORRECTLY TOLD THE JURY THE BURDEN OF PROOF FOR WITHDRAWAL IS CONTRADICTED BY THE RECORD

In addition to asserting that the government correctly stated that the defense had to produce evidence of withdrawal, Respondent conversely contends that the government made "clear that the People have the burden of proof[.]" (RB 190.) In doing so, Respondent relies on statements made by the prosecutor: "I am not saying [Appellant] has any burden of proof whatsoever to bring evidence into court[.]" (RB 190, citing 11RT 2337-2338.) However, that quote is taken out of context. In closing, the government was arguing about the lack of text messages on Appellant's phone. The prosecutor stated: "he deleted them. Not just from one phone, but from two phones." (11RT 2336:13-15.) "[I]f they are as innocuous as [defense counsel] has suggested, if they are as harmless as what [defense counsel] has suggested, why did Mr. Fayed get rid of all of the texts . . . ." (11RT 2336:16-20.) He continued, "Because he knew that those text messages contained information that would link him to the murder. And he got rid of them." (11RT 2336:20-22.) The government then argued that, because they were purportedly erased, the messages had to be inculpatory, and stated: "I am not saying he has any burden of proof whatsoever to bring evidence into court, because he doesn't[.]" (11RT 2337:27-2338:1.) The government continued, "I am saying if you are suggesting that there is another reason [to delete the text messages], that reason has to make sense[.]" (11RT 2338:2-4.) Thus, when discussing the text messages, the

prosecutor referenced that Appellant had no obligation to bring in that evidence.

That statement, however, was completely unrelated to the government's argument concerning withdrawal. Specifically when discussing withdrawal, the prosecutor repeatedly told the jury that Appellant had to meet a high burden, stating: "Well, there is a pretty demanding legal standard that you have to meet before you can escape responsibility for a crime if you are saying you" withdrew. (11RT 2341:16-19.) The government further argued, "So even as a legal standard, he has no business telling you that he withdrew from this crime. No business[,]" and later, even asked the jury to consider if Appellant produced anything "*factually . . . to back . . . up* [the withdrawal defense]." (11RT 2343:9-13, italics added.)

By telling jurors that Appellant had to *produce* evidence and *prove* withdrawal by a "demanding standard," the government unquestionably misstated the legal requirements and created a serious risk that the jury misunderstood the burden of production with respect to the defense of withdrawal. Consequently, the government's misstatements caused the jury to mistakenly shift to Appellant a greater burden than he was legally compelled to carry.

ii. RESPONDENT AFFIRMATIVELY TOLD THE JURY THAT APPELLANT HAD TO CONTACT THE POLICE IN ORDER TO WITHDRAW

Furthermore, when discussing the standard for withdrawal, the government argued, repeatedly, that Appellant had to show that he did "everything in his power" to stop the crime in order to withdraw. (11RT

2342:15-2343:6.) Appellant argues, in the AOB and in the jury instruction section above, that this was the incorrect standard. (See AOB 229-230.) However, here, the government further misstated this requirement when the prosecutor explained that in order to withdraw, Appellant needed to inform other participants of his intent by "pick[ing] up the phone and call[ing] the police and tell[ing] them exactly what it is that he [did] to prevent the commission of this crime." (11RT 2343:4-6)

On appeal, Respondent takes issue with Appellant's assertion that the prosecutor affirmatively told the jury that Appellant had to call the police. (See RB 189-190.) Respondent now argues that the government merely stated that "calling the police was one obvious example" of something Appellant might have done. (RB 189-190.) However, that argument is belied by the words of the prosecutor. In closing, the prosecutor argued that Appellant's statements to co-conspirators that he wanted out of the conspiracy would not have been enough, stating Appellant had to do "everything in his power" to prevent the commission of the offense. (11RT 2342:15-18.) The prosecutor affirmatively stated that Appellant needed to do the following to withdraw: 1) tell Pamela "I did something really terrible, and I am going to prevent its commission right now. I plotted your murder, and you need to be escorted out of here by security. We are going to go straight to the police station[,]" and 2) "*[h]e need[ed] to pick up the phone and call the police* and tell them exactly what it is that he [did] to prevent the commission of this crime." (11RT 2342:27-2343:7, italics added.) Thus, Respondent's assertion that the prosecutor did not tell the jury that Appellant had to actually call the police in order to withdraw from the crime is incorrect. That is precisely what the prosecutor told the jury, and it was a misstatement of law.

b. THE GOVERNMENT MADE MISSTATEMENTS OF THE LAW CONCERNING AIDING AND ABETTING

In the AOB, Appellant argued that the prosecutors "real life" example in closing argument, which stated that a back-up quarterback who "sits on the bench . . . never takes a snap[,] [n]ever throws a touchdown pass or hands the ball off, never gets on the field. . . . is encouraging, he is promoting, facilitating the win of the game because he is there," was improper. (AOB 231-232, noting 11RT 2182:17-2183:2.) This analogy improperly instructed the jury that mere presence or knowledge was sufficient to constitute aiding and abetting. (See *People v. Durham* (1969) 70 Cal.2d 171, 181 [mere presence insufficient for aiding and abetting].) Furthermore, to find aiding and abetting, the government must present evidence that the *defendant shared* the purpose or intent to facilitate the crime with the co-defendant who committed the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Respondent defends the use of this analogy, calling it "apt," and asserts that "[t]he prosecutor made clear in the analogy that the backup 'is . . . facilitating the win of that game *because he is there.*'" (RB 192, noting 11RT 2182, italics added.) Respondent further argues:

> It is common knowledge . . . that a backup player facilitates his team's win by allowing the starters to play with the knowledge that they have replacements. If the starters knew they had no backups, they would likely play more cautiously and less effectively overall.

(RB 192.) Respondent's argument here merely highlights the impropriety of the government's argument to the jury. As noted by Respondent, the prosecutor's argument focuses on the mindset of the "starters" on the

field—who equate to the person committing the offense. Respondent argues that those "starters" "play" better—or presumably are more comfortable committing the crime—because they know about the presence of the person sitting on the bench: the aider and abettor. Thus, the government, in the trial court and on appeal, argues that the defendant (or the "backup's") mere presence somehow spurs on the person committing the offense.

In doing so, the government is focused only on mindset of the person being "encouraged" (the person committing the offense) and ignores the mindset of the person on the bench (the person doing the aiding and abetting). Yet, as set forth above, to prove aiding and abetting, the government had to prove evidence concerning the mental state of the aider and abettor, not the principle; namely, the government must show that the defendant shared the intent of the principles and aided or encouraged them. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) The mere presence of the "backup" on the "bench" is plainly insufficient for aiding and abetting, and it is wholly immaterial whether the principles—or players on the field—are encouraged by the aider and abettor's presence. (See *People v. Durham* (1969) 70 Cal.2d 171, 181.) Thus, the government's argument plainly misstated the law and constituted error.

3. THE GOVERNMENT COMMITTED MISCONDUCT BY REFERENCING FACTS OUTSIDE OF THE RECORD AND/OR MISSTATING THE EVIDENCE IN CLOSING ARGUMENTS

As discussed in the AOB, the government committed misconduct by making several statements in closing argument based on facts which were not in the record and by misstating the evidence. When the prosecution references facts outside the record, or uses facts that were excluded or

stricken, this is a highly prejudicial form of misconduct that is a frequent basis for reversal. (AOB 233-234; see *People v. Hill, supra*, 17 Cal.4th at p. 829; *People v. Stankewitz* (1990) 51 Cal.3d 72, 102.) While Respondent is correct that prosecutors do have some latitude to discuss and draw inferences from the evidence, (see RB 194), the prosecutor may not "argue facts or inferences not based on the evidence presented." (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) In the instant case, inferences were drawn in closing argument that did not accurately reflect the evidence in the record.

a. THE ARGUMENT WAS NOT FORFEITED

Respondent argues that the prosecutorial misconduct claims were forfeited by defense counsel's failure to preserve the issues for review on appeal. (RB 194.) Courts have generally held, "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion and on the same ground the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill* (1998) 17 Cal.4th 800, 820, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) This, however, "is only a general rule," and "[a] defendant will be excused from necessity of either a timely objection and/or a request for admonition if either would be futile." (*Id.* at p. 820, quoting *People v. Arias* (1996) 13 Cal.4th 92.)

While the general rule that an objection be specific and timely serves important interests, "to further these purposes, the requirement must be interpreted reasonably, not formalistically." (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Appellate courts have overlooked preservation issues in the context of prosecutorial misconduct when the cumulative effect of the

misconduct is pervasive in combination with other errors made at trial. (See *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.) When there are several instances of misconduct in closing argument, courts have weighed the "cumulative effect of the improper statements that pervaded the prosecutor's closing argument." (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075, citing *People v. Bell* (1989) 49 Cal.3d 502, 534.)

As set forth in the AOB and below, the prosecutor in the instant case committed misconduct by drawing inferences from facts not in the record and by misstating the evidence several times in closing argument. Like the misconduct in *Hill*, the cumulative effect of these misstatements, in combination with the other pervasive errors presented in this appeal, rendered Appellant's trial fundamentally unfair. Thus, both a timely objection and a request for admonition in the instances of misconduct described below would have been futile, and repeated objections to the numerous instances of prosecutorial misconduct in closing arguments would have been counterproductive to Appellant.

b. INFERENCES BASED ON THE FEDERAL SUBPOENA WERE UNREASONABLE

In closing arguments, the government repeatedly and deceptively asserted that information concerning a subpoena for accounting records from a firm working on the Fayed divorce matter was "leaked" on May 27, 2008. (11RT 2313:25-2314:4.) The prosecutor then argued, by attenuated inference, that Appellant's phone/text activity following the issuance of the subpoena showed evidence of conspiracy. (11RT 2314:1-21, 2314:24-2315:14.) As set forth in the AOB, this argument was not supported by the

facts presented at trial. (See AOB 234-235; 11RT 2314:1-21, 2314:24-2315:14.)

Respondent argues it was reasonable to infer that Appellant had knowledge of the subpoena on May 27, 2008 because "there was evidence that it would not have taken long for word of the subpoena to reach [A]ppellant and Pam, so two days was a reasonable inference." (RB 195.) Respondent emphasizes the prosecutor's statement in closing arguments that once the divorce attorneys learned of the subpoena, "*then everyone ended up knowing about it.*" (RB 195, original italics; 11RT 2314:1-4.)

Again, the government's argument that "everyone" became aware of the subpoena in May of 2008 was plainly not supported by the actual testimony at trial. The government produced no witness who testified that anyone became aware of the subpoena at that time. Pamela Fayed's former family law Attorney, Greg Herring, did not testify as to when the subpoena became known; Pamela's former criminal attorney, David Willingham, testified that he became aware of the subpoena a month later in June; and even AUSA Aveis admitted that he did not hear from an attorney until about thirty days after the subpoena was served. (See 6RT 1164:27-1165:12; 7RT 1278:21-26, 1247:28, 1248:3-8.)

The exact timing that "everyone" purportedly knew about the subpoena was critical to the present case. The prosecutor argued, with no support, that Appellant knew in May of 2008; then went further, and argued that there was evidence that phone/text correspondence took place "within 48 hours of [Appellant] getting word that the subpoena [had] leaked[,]" and that Appellant and others were communicating "to let each other know" about the subpoena, asserting that "everyone" was calling/texting each other in a panic about the subpoenas. (11RT 2315:5-6, 2315:11-14.) Yet,

these statements were not reasonably inferred from the evidence because there were *no facts* showing when Appellant actually became aware of the subpoena.

c. INFERENCES BASED ON THE FEDERAL CASE WERE UNREASONABLE

In closing argument, the government also misstated the evidence by arguing that Pamela Fayed was going to cooperate in the federal investigation, and mischaracterized her as a "witness" who intended to testify against Appellant in the federal case. (AOB 236-238.) Respondent asserts that the prosecutor was simply restating testimony from trial regarding Pamela Fayed's intent to cooperate, and that "[t]he evidence o[f] Pam's intentions in this regard was very clear, and was consistent with the prosecutor's arguments." (RB 196.) This argument is without merit.

Pamela Fayed's prior attorney, David Willingham, explained that in federal cases, there is a recognized distinction between a person categorized as "a target," "a subject," and "a witness." (7RT 1291:17-23, 1292:10-27.) Anyone involved in the investigation aspect of a federal criminal case is placed in one of these three categories. As Willingham explained at trial, a person characterized as "a witness" in a federal criminal investigation is simply a person involved in a case who the government does not currently intend to prosecute. (AOB 237; 7RT 1292:26-1293:14.) Willingham stated that, like most defense attorneys, he hoped to position Pamela into "witness" status. (*Id.*) That characterization does not mean—as the term is commonly used in California criminal courts—that a person is going to be "a witness" against the defendant.

Despite the clear and unequivocal testimony explaining the meaning of the federal classification of "witness," the government then used Willingham's use of the word "witness" to affirmatively assert that Pamela was going to cooperate with the federal authorities and serve as "a witness" against Appellant. (See 11RT 2313:6-14.) The government continued: "[Appellant] finds out that Pamela wants to cooperate with the authorities. He knows that she wants to cooperate with the authorities. He knows that if she does, he is going to be implicated, in violation of several federal laws, and he stood to lose everything." (11RT 2192:13-18.)

Yet, the government presented no evidence that Pamela was cooperating or had agreed to be a "witness" against Appellant. In fact, *Pamela's own attorneys testified that she was not going to be "a witness" for the prosecution and that she had not decided to "cooperate" with the authorities*. (7RT 1290:26-1291:4.) Thus, the government's announcement to the jury at closing argument that Pamela was cooperating with the federal government, and Appellant knew Pamela Fayed intended to cooperate with the federal authorities, was a critically damaging and prejudicial statement that was neither supported by evidence in the record nor reasonably inferred from evidence concerning the federal case. (See AOB 236-38; 11RT 2192:13-2193:10, 2305:11-18, 2313:13-2314:4.)

d. INFERENCES ABOUT NEVE'S TESTIMONY WERE UNREASONABLE

The lower court had placed limitations on the evidence that the government was allowed to elicit from their witness Carol Neve. (See 7RT 1271-1274, 1315-1369.) In closing argument, however, the government avoided the lower court's limitations by referencing testimony that was

never presented at trial. (See AOB 240-241.) For example, the government argued: "Her company became a focus of federal investigation, and her company got shut down. . . [b]ecause they didn't follow the federal guidelines and have money transfer licenses. You have to have one for each state, according to Carol. And James Fayed didn't have any." (11RT 2187:25-2188:2.)

Respondent concedes that Neve never testified about "her business being shut down" or "what you have to do in each state" in regard to money licenses, but argues that the government's statements were proper because Neve testified, more generally, that her company was "faced with charges of [failing to have] money transmitter licenses." (RB 198, citing 7RT 1372.) While Neve may have testified that her company faced these charges, the government's argument should have been limited to that testimony. Instead, as argued in the AOB, the government created testimony from Neve about having her business "shut down" and then used this made-up testimony to argue that the federal allegations were serious—not minor violations. (See AOB 240, citing 11RT 2188:3-13.) As such, those statements were improper.

e. THE GOVERNMENT MISCONDUCT REQUIRES REVERSAL

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill*, *supra*, 17 Cal.4th at p. 820, citing *People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As such, the United States Supreme Court has held that a conviction warrants reversal when the accumulation of

misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, § 15.) Indeed, reversal is required unless the reviewing court is able to declare a firm belief that misconduct is harmless beyond a reasonable doubt. (*Boyde v. California* (1990) 494 U.S. 370.)

Here, the government misconduct was pervasive. (See AOB 225-242.) The government violated the "Golden Rule" by having the jury put itself in the victim's place; misstated the law regarding withdrawal, aiding and abetting, and lying in wait; and repeatedly referenced facts outside the record.

In determining whether the afore-mentioned misconduct was harmful "the inquiry . . . is not whether, in a trial that occurred without the error[s], a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279, original italics.) As such, the burden is on the government to show that the guilty verdict "was surely unattributable to the error" (i.e., that the repeated instances of misconduct did not and could not have assisted the jury in arriving at the resulting verdict). (*Ibid.*; see also *People v. Quartermain* (1997) 16 Cal.4th 600.) Respondent has failed to meet this heavy burden.

H. APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE ADMISSION OF IMPROPER EVIDENCE AT THE PENALTY PHASE

In the AOB, Appellant set forth that his Fifth, Eighth, and Fourteenth Amendment rights to due process and a fair trial were violated

during the penalty phase, when the government improperly admitted 1) an emotional letter from Pamela Fayed to her daughter; and 2) over thirty photographs and a video of Pamela Fayed and her family. (AOB 243-252.)

1. THE LOWER COURT IMPROPERLY ADMITTED A LETTER WRITTEN BY PAMELA FAYED

As discussed in the AOB, the government sought to have Desiree read an emotional letter from her mother, for the first time, on the stand. (AOB 246; 13RT 2622:14-28.) Initially, the lower court excluded the letter. (12RT 2432:8-18.) It later overruled its decision and admitted the evidence based on the government's assurances that it showed Desiree the letter, and that the evidence would only be admitted for the non-hearsay purpose of showing its impact on Desiree. (13RT 2576:2-5).

As set forth in the AOB, this Court has cautioned against the admission of "irrelevant information or inflammatory rhetoric" that "invites an irrational, purely subjective response" or "diverts the [sentencer's] attention from its proper role" in violation of due process. (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) Under section 190.3, subdivision (a) of the Penal Code, evidence and argument is limited to "the specific harm caused by the defendant, including the impact on the family of the victim." (*Id.* at p. 835.)

In its brief, Respondent contends that the letter was properly admitted because it "'demonstrate[s] the close bond' between [Pamela and her daughter], 'the relationship lost as a result of [the] murder, and the impact [the victim's] death had on her [family members].'" (RB 205.) In support, Respondent cites *People v. Verdugo* (2010) 50 Cal.4th 263 (*Verdugo*), where the Court admitted a cassette of songs that the victim

recorded and gave to her father shortly before her death as evidence of their "close bond" and "the relationship lost." (*Id.* at pp. 288-289.) The critical difference between the cassette tape in *Verdugo*, and the letter in the instant case, is that here, the letter was explicitly written in contemplation of death, while the gifted cassette tape was an accurate reflection of the victim's relationship with her father during life.

As such, the lower court's admission of the letter violated Appellant's due process rights under the Fifth and Fourteenth Amendments, and his right to confront witnesses under the Sixth Amendment. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1 & 15; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

2. THE LOWER COURT IMPROPERLY ADMITTED PHOTOS OF THE GRAVE SITE

Additionally, in the penalty phase alone, the government admitted over thirty photographs and a video of Pamela Fayed, one of which was a distressing photograph of Desiree kneeling down and kissing her mother's coffin. (12RT 2426:10-11; 13RT 2578:18-23, 2618:11-22, 2620:7-12.) As argued in the AOB, this evidence should have been excluded because it was partially irrelevant, largely cumulative, and "so unduly prejudicial that it render[ed] the trial fundamentally unfair," and "invite[d] a purely irrational response from the jury." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *People v. Kelly* (2007) 42 Cal.4th 763, 793, 794 (*Kelly*).)

Respondent argues that this evidence was properly admitted because "[e]ven victim impact evidence consisting of video or hundreds of photographs, and accompanied by music, may be admissible so long as it

does not devolve into a eulogy or memorial service for the deceased." (RB 207, citing *Kelly*, *supra*, 42 Cal.4th at p. 793.)

However, in *Kelly*, this Court did not approve of, but cautioned against the type of victim-impact evidence Respondent describes above, warning that it often injects the proceedings with a "legally impermissible level of emotion." (*Id.* at pp. 795-796.) Significantly, in *Kelly*, even though this Court upheld the admission of a video culminating in "a brief view of [the victim's] unassuming grave marker," this Court found it significant that "the tape did not . . . display the victim in her home or with her family." (*Id.* at pp. 796-797.) Here, however, the lower court not only allowed a video presentation and numerous pictures depicting Pamela Fayed's grave, but also admitted a picture of Desiree kissing her mother's coffin. This evidence was so "unduly emotional" that it improperly invited an "irrational response from the jury."

Thus, a significant portion of the victim impact evidence presented at the penalty phase was irrelevant, prejudicial, and violated Appellant's rights under the Fifth, Eighth, and Fourteenth Amendments. (AOB 243-250.)

I. THE LOWER COURT VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY EXCLUDING MITIGATING EVIDENCE IN THE PENALTY PHASE

Under the Eighth and Fourteenth Amendments, a defendant in a capital case must be allowed to present all relevant mitigating evidence to prove he is more deserving of a life sentence than death. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

At trial, Appellant's counsel sought to elicit mitigating testimony from Melanie Jackman that Appellant, after recognizing Pamela Fayed's unhappiness in their marriage, asked her what he could do to make his wife happy again. (AOB 250-252, citing 13RT 2695:12-19.) As argued in the AOB, the lower court improperly excluded this testimony, finding that the second layer of hearsay regarding Appellant's statement about Pamela Fayed's mental state was inadmissible hearsay. (13RT 2697:9-2698:10.)

However, as set forth in the AOB, non-assertive conduct is not hearsay. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068, citing Cal. Law Revision Com. com., Deering's Ann. Evid. Code, § 1200 (1986) p. 339.) For example, in *People v. Snow* (2003) 44 Cal.3d 216, 237, the court held that a defendant's passive response to the news of someone's death was admissible as non-assertive conduct.

Respondent does not contest that Jackman's testimony was relevant mitigating evidence, but argues that Pamela's unhappiness could not be shown through non-assertive conduct: "[E]xpression by a spouse that she is unhappy in her marriage cannot readily be expressed by a nonassertive act such as fainting or a blank facial expression, let alone be described as such by the other spouse[.]" (RB 209.) To the contrary, unhappiness in a marriage is something a significant other is quite likely to notice, and is often exhibited through conduct that is not meant to be communicative—including general sadness, depression, and distancing. Further, in speaking with Jackman, Appellant never recounted a specific statement that led him to believe Pamela Fayed was unhappy; instead, reporting in a more general sense, that his wife seemed unhappy based on her conduct.

Accordingly, as set forth in the AOB, Appellant was improperly denied the right to present mitigating evidence in violation of the Eighth

and Fourteenth Amendments. (AOB 250-253; see U.S. Const., 8th & 14th Amends.)

1. THE ERROR WAS NOT HARMLESS

As a threshold matter, Respondent states that the proper standard for reversal is *Watson*, *supra*, 46 Cal.2d at p. 836, because it governs errors in applying the Evidence Code. (RB 210, citing *People v. Carpenter* (1999) 15 Cal.4th 312, 404.) However, the case Respondent cites, *People v. Carpenter*, *supra*, 15 Cal.4th 312, holds only that a defendant's constitutional right to present all relevant mitigating evidence is subject to the rules of evidence. (*Id.* at p. 404.) Appellant does not dispute that the rules of evidence govern the admissibility of mitigating evidence; however, where, as here, the evidentiary error prevents Appellant from presenting relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments, the standard articulated in *Chapman*, *supra*, 386 U.S. 18, governing federal constitutional error, applies. (See *People v. Brown* (2003) 31 Cal.4th 518, 576; *People v. Payton* (1992) 3 Cal.4th 1050, 1086.) Since Respondent has not argued that the error was harmless beyond a reasonable doubt, as required under *Chapman*, the government has not met its burden to dispel the uncertainty. (See RB 210.)

Reversal would also be required under *Watson*, given the great import of the evidence at issue. At trial, as Respondent notes, the government repeatedly argued that Appellant had contentious feelings for Pamela Fayed. (See 11RT 2231:6-22; RB 210.) As such, excluding the only testimony that shed light on another side of Appellant's relationship with Pamela Fayed would have significantly impacted the outcome of the proceedings.

J. THE GOVERNMENT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHTS AND RIGHT TO A FAIR TRIAL BY IMPROPERLY APPEALING TO THE PASSION AND PREJUDICE OF THE JURY DURING PENALTY PHASE CLOSING ARGUMENTS

As set forth in the AOB, the government violated Appellant's Eighth Amendment rights by improperly appealing to the passions and prejudices of the jury during the penalty phase when it argued in closing:

> Sympathy is what it really comes down to . . . . You can give mercy to him, but you can't give justice to them and mercy to him. . . . He's had a jury of his peers. He's had evidence in mitigation, and he's going to ask you for mercy when Pam Fayed had none of these? Pam didn't have a trial. James Fayed was her judge, jury, and executioner. Don't you think Pam Fayed would have liked the opportunity to say, I'm sorry, objection . . . Before you kill me, I'd like to impose the - - a very strict legal - - don't you think she would have liked that chance? Or maybe the chance . . . to present mitigating evidence of what a great sister Pam was . . . And he's going to ask you for mercy?

(AOB 253-255, citing 13RT 2807-2808.)

Appealing to the passions and prejudices of the jury violates the Eighth Amendment because death verdicts must be based on a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328; see *People v. Edwards* (1991) 54 Cal.3d 787, 836.)

In its brief, Respondent argues that the government's closing was appropriate given this Court's approval of statements "that a defendant is not entitled to mercy[.]" (RB 212, citing *People v. Gamache* (2010) 48 Cal.4th 347, 548-551.) Additionally, Respondent asserts that comparing

Pam's death to Appellant's trial was appropriate because "it highlighted the brutality of appellant's crime." (RB 212.)

As argued in the AOB, however, the prosecutor exceeded the bounds of what this Court has deemed appropriate. By stating that Pamela Fayed did not have the right to a judge, a jury, to object, or to present mitigating evidence in her defense, the prosecutor implied that Appellant should not be entitled to such legal niceties. Such an implication—that the jury should disregard the law and impose the death penalty without considering mitigating evidence—directly contravenes this Court's requirement that the jury follow the guided discretion set forth in Penal Code section 190.3 "soberly and rationally" rather than allowing "emotion [to] reign over reason." (See *People v. Sanders* (1995) 11 Cal.4th 475, 550-551.) Thus, the government's arguments improperly appealed to the passion and prejudices of the jury in violation of the Eighth Amendment.

K. THE GOVERNMENT COMMITTED MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE IN THE PENALTY PHASE DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL

In the AOB, Appellant set forth that the government committed misconduct during the penalty phase by arguing facts not in evidence. (AOB 255-257.) Government misconduct in closing argument may violate due process and the right to a fair trial. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181; see also U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, § 15.)

* * *

1. THE GOVERNMENT MADE ARGUMENTS CONCERNING JANETTE BASED ON FACTS NOT IN EVIDENCE

As argued in the AOB, the government committed misconduct when it berated Appellant for asking the jury to feel sympathy and pity for his family in choosing a life sentence over death, even though Appellant never made such an argument. (See 13RT 2789:8-12; AOB 256-257.) In doing so, the government's closing remarks improperly referenced facts outside the record. In its brief, Respondent argues that the government did not "wrongly impl[y] that the defense . . . appealed to the jury's sympathy for Jeanette," and suggests that the government's argument was "merely a summary of the applicable law." (RB 213-214, citing *People v. McDowell* (2012) 54 Cal.4th 395, 437.)

However, the government was not summarizing the law when it criticized Appellant for making arguments that defense counsel never made: "He didn't think about [Jeanette] before. He had a cold, calculated, deliberate, brutal, vicious plan that he set into motion. *And now to hide behind her is more cowardly than it was to dispatch our two-bit assassins to ambush your wife in that parking lot.*" (13RT 2789:8-12.)

In its brief, Respondent tries to justify this argument, noting that defense counsel elicited testimony from Desiree that Appellant loved Jeanette. (RB 214.) However, such a statement does not support the government's assertion that Appellant appealed to the jury for sympathy to protect Jeanette (i.e. that Jeanette loved Appellant and would be hurt if Appellant were sentenced to death). As such, the government's closing was improper because it argued facts not in evidence.

2. THE GOVERNMENT MADE OTHER ARGUMENTS BASED ON FACTS NOT IN EVIDENCE

Additionally, as set forth in the AOB, the government also argued, based on facts not in evidence: 1) that Pamela Fayed "wasn't just risking her own safety in cooperating; she was offering a very direct and concrete benefit to the community in her willingness to cooperate with the federal authorities," (12RT 2449:24-27); and 2) that Pamela Fayed's final thoughts were "[Appellant] won. He won. That's what she's thinking. He won. He got me." (13RT 2795:11-12.)

In its brief, Respondent asserts that "the argument that Pam was cooperating with the federal authorities was a reasonable inference based on the fact that Willingham, Pam's first defense attorney, told Aveis that Pam should be treated as a witness rather than a suspect." (RB 214.) However, again, as discussed throughout the AOB and the instant brief, the evidence from Pamela's own lawyers was that she was not cooperating. (7RT 1284:18-20, 1284:23-25, 1386:17-22.) Therefore, there was no evidence that Pamela agreed to cooperate; she was not risking her own safety; and she was not offering a concrete benefit to the community.

Additionally, Respondent asserts that the prosecutor's statements about Pamela Fayed's last thoughts were "reasonable" given that "Pam and appellant had a very antagonistic relationship, that appellant was blocking progress on the divorce, and that Pam had the intention of cooperating with federal authorities against appellant." (RB 215.) Again, as argued in the AOB, nothing in the record supports the assertion that the government knew, or could possibly know, what Pamela Fayed was thinking in the final moments of her death. (AOB 257.) Regardless of whether Appellant and

Pamela Fayed's relationship was "antagonistic," the government may not create facts that have no basis in evidence and argue them to the jury.

Thus, the government committed misconduct during the penalty phase by repeatedly arguing facts unsupported by the record.

L. CUMULATIVE ERROR REQUIRES REVERSAL

As set forth in the AOB, "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." (AOB 258-259, citing *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927 and *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, n.6.) As such, this Court must examine "whether the combined effect of multiple errors rendered a criminal defense far less persuasive and had a substantial and injurious effect or influence on the jury's verdict." (*Parle v. Runnels*, *supra*, 505 F.3d at p. 928 [internal quotations omitted], citing *Strickland v. Washington* (1984) 466 U.S. 668, 696.)

The error and misconduct in Appellant's case was pervasive. In spite of the numerous and significant constitutional violations alleged by Appellant in the AOB, Respondent baldly states that "Appellant fails to demonstrate that any error occurred in the vast majority of claims that he makes, and those few errors that did occur were not prejudicial." (RB 215.) However, this conclusory statement is unsupported by the record.

As argued in the AOB, the strength of the government's case rested on the admission of Appellant's own statement—a statement that was unconstitutionally obtained through inter-agency collusion designed to deny Appellant his right to counsel and right to remain silent. Furthermore, several other pieces of evidence were obtained in violation of Appellant's

Fourth Amendment right to be free from unlawful searches and seizures. In addition to the various constitutional violations that occurred during the course of the government's pre-trial investigation, the frequent evidentiary errors that permeated the trial tipped the scales of justice in favor of the government. To make matters worse, even the integrity of the jury's evaluation of the case was infected with error; indeed, the jurors tasked with deciding Appellant's fate committed repeated misconduct even after being admonished by the trial court not to discuss the case amongst themselves prior to deliberation, or to form opinions about the case. Accordingly, as set forth here and in the AOB, because these numerous errors, individually and collectively, most certainly affected and influenced the jury's verdict in this case, reversal is required.

M. THE SUBSTANTIVE PROVISIONS OF CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED AND APPLIED, CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. (U.S. Const., 8th & 14th Amends.; see also Cal. Const., art. I, § 17.) In interpreting this clause as it relates to the death penalty, the United States Supreme Court has held that the death penalty is unconstitutional when inflicted in an arbitrary and capricious manner. (*Furman v. Georgia* (1972) 408 U.S. 238 hereafter (*Furman*); *Gregg v. Georgia* (1976) 428 U.S. 153, 188-189 (plur. opn. of Stewart, J.).)

As set forth in the AOB, Appellant asserts that California's death penalty scheme is unconstitutionally arbitrary. As such, Appellant requests that this Court employ Justice Brennan's four-part test laid out in *Furman*, *supra*, 408 U.S. 238, to determine whether the continued use of the death

penalty violates the Eighth Amendment. This test requires the "cumulative" consideration of the following four factors, whether the punishment is 1) inflicted arbitrarily, 2) unusually severe, 3) "rejected by contemporary society"; and 4) more effectively serves penal purposes than some less severe punishment. (*Id.* at p. 281 (conc. opn. of Brennan, J.).)

1. CALIFORNIA'S CURRENT DEATH PENALTY SCHEME IS ARBITRARY

As discussed above, and in the AOB, the United States Supreme Court has consistently found that a death penalty scheme violates the Eighth Amendment if it creates a substantial risk that the punishment will be inflicted arbitrarily. (*Furman*, *supra*, 408 U.S. at pp. 249, 274, 291-293, 309-310, 313; *Gregg v. Georgia*, *supra*, 428 U.S. at pp. 188-189.)

Specifically, in *Furman*, the Court found that the death penalty statutes in Texas and Georgia violated the Eighth Amendment because their discretionary sentencing schemes—lacking sufficiently defined standards—created a substantial risk that the death penalty would be imposed arbitrarily. (*Furman*, 408 U.S. at p. 313.) Each of the five majority Justices wrote separate opinions, but each determination rested, at least in part, on the idea that the death penalty is cruel and unusual when arbitrarily imposed. (See *id.* at p. 250 (conc. opn. of Douglas, J.); *id.* at p. 293 (conc. opn. of Brennan, J.); *id.* at p. 309 (conc. opn. of Stewart, J.); *id.* at p. 313 (conc. opn. of White, J.).)

In its brief, Respondent argues that "Appellant's heavy reliance on [*Furman*] is misplaced given the current state of California law." (RB 216.) Respondent fails to explain how reliance on binding Supreme Court precedent is "misplaced." Thus, in accordance with *Furman*, this Court

must invalidate California's death penalty statute if it arbitrarily imposes death. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 188 (plur. opn. of Stewart, J.).)

As set forth here, and in the AOB, section 190.3 of the Penal Code arbitrarily imposes death because 1) it does not sufficiently narrow the class of death-eligible defendants; 2) it is used in so few cases that it is arbitrarily applied; and 3) in the forty years since the Court decided *Furman*, considerable evidence has accumulated that even carefully-drafted death statutes still impose death arbitrarily.

a. CALIFORNIA'S DEATH PENALTY SCHEME IS ARBITRARY BECAUSE IT DOES NOT SUFFICIENTLY NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS AND DEATH IS RARELY IMPOSED

As set forth in the AOB, when the number of cases that qualify for the death penalty is great, but the number of cases in which death is sought is few, it is "virtually inescapable" that the punishment is being arbitrarily imposed. (*Furman*, *supra*, 408 U.S. at p. 292 (conc. opn. of Brennan, J.); see *id.* at p. 313 (conc. opn. of White, J.); *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428.) Accordingly, to determine whether a punishment is arbitrary, courts should consider whether: 1) the statute sufficiently narrows the class of death-eligible inmates; and 2) the sentence is imposed in so few cases it is arbitrarily applied.

In its brief, Respondent states without supporting argument that "Section 190.2 . . . including lying in wait and various forms of felony murder[], adequately narrows the class of eligible offenders[.]" (RB 216, citing *People v. Elliot* (2012) 53 Cal.4th 535, 593; *People v. Lee* (2011) 51

Cal.4th 620, 653-654; *People v. Martinez* (2010) 47 Cal.4th 911, 967.) The cases Respondent cites provide only one-sentence findings that California's death penalty scheme is not overly broad. As such, Appellant respectfully requests that this Court reexamine California's death penalty statute to see if it truly prevents the arbitrary imposition of death as *Furman* requires.

First, as set forth in the AOB, to comply with the Eighth Amendment, states must "genuinely narrow the class of defendants" in a way that "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.) California's thirty-three separately enumerated special circumstances that qualify a defendant for death have failed in this regard. (Pen. Code, § 190.3.) In fact, California's death penalty statute is widely believed to be the broadest in the nation, creating an extraordinarily large pool of death-eligible defendants. (See, e.g., *Tuilaepa v. California* (1994) 512 U.S 967, 994 (dis. opn. of Blackmun, J.).)

Specifically, as argued in the AOB, one of the special circumstances applicable in the present case, lying in wait, is constitutionally problematic because it grossly increases the number of death-eligible defendants without identifying "the worst of the worst." (AOB 264-273.) Under its current interpretation, the lying-in-wait special circumstance in essence fails to serve any narrowing function at all because the definition of "lying-in-wait . . . is essentially the same as what constitutes premeditation and deliberation for first degree murder." (See *People v. Stevens* (2007) 41 Cal.4th 182, 204; *People v. Edelbacher* (1989) 47 Cal.3d 983, quoting CALJIC No. 8.25.)

Second, as argued in the AOB, the rate at which the death penalty is imposed also determines whether it's arbitrary. In *Furman*, all five of the majority Justices expressed significant concern about how infrequently the death penalty was imposed. (*See Furman*, *supra*, 408 U.S. at p. 248, fn. 11 (conc. opn. of Douglas, J.); *id.* at pp. 291-295 (conc. opn. of Brennan, J.); *id.* at pp. 309-310 (conc. opn. of Stewart, J.); *id.* at p. 313 (conc. opn. of White, J.); *id.* at pp. 354, fn. 124, 362-363 (conc. opn. of Marshall, J.).)

In 1972, when the Court decided *Furman*, the number of cases in which the government actually sought to impose the death penalty compared to the total number of death-eligible cases (in Georgia and Texas) was estimated to be between 15 and 20 percent. (*Furman*, *supra*, 408 U.S. at p. 436, fn. 19 (dis. opn. of Powell, J.).) Under that scheme, Justice Stewart found that receiving a death sentence was cruel and unusual "in the same way that being struck by lighting is cruel and unusual." (*Id.* at p. 310 (conc. opn. of Stewart, J.).) In the AOB, Appellant set forth multiple studies indicating that the death sentence rate in California is substantially below the 15-20% pre-*Furman* death sentence rate. (AOB 274-279.)

Each of the majority Justices in *Furman* agreed that when the government seeks death in only 15-20% of death-eligible cases, the risk of arbitrariness is constitutionally unacceptable. Given that California's death sentence ratio is significantly less, there is a great risk that the death penalty is being arbitrarily imposed in California. (See *Furman*, *supra*, 408 U.S. at p. 256.)

Thus, for the reasons discussed above, California's death penalty scheme is arbitrary under *Furman.*

b. THE DEATH PENALTY IS STILL IMPOSED ARBITRARILY

Even if this Court finds that California's death penalty statute, when written, complied with the specific concerns articulated in *Furman*, there are fundamental constitutional defects in its application that render it arbitrary in violation of the Eighth Amendment. Significantly, considerable evidence has accumulated that "improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty . . . [and] proper factors—such as "egregiousness"—do *not.*" (*Glossip v. Gross*, __ U.S. __ [135 S.Ct. 2726, 2762, 192 L.Ed.2d 761] (dis. opn. of Breyer, J.).)

Forty years ago, the *Furman* majority, by striking down Georgia and Texas's death statutes on the basis of unbridled discretion and arbitrariness rather than invalidating the death penalty outright, essentially put its faith in the legislature to increase the fairness and reliability of capital punishment. (See *id.* at p. 2755 (dis. opn. of Breyer, J.).) In that vein, Respondent clings to the old adage from *Gregg v. Georgia*, *supra*, 428 U.S. 153, that this Court need not worry, because "the concerns expressed in [*Furman*] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance." (RB 217, citing *People v. Weaver* (2012) 52 Cal.4th 1056, 1093.)

While Respondent's argument may make sense in theory, it has failed in practice. Information gathered in the forty years since *Furman* has demonstrated that "careful drafting" has not achieved this goal. (*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2762 (dis. opn. of Breyer, J.).) Rather, "considerable evidence has accumulated" that these attempts have not

worked "to reconcile [the death penalty's use] with the Constitution's commands." (*Id.* at p. 2760 (dis. opn. of Breyer, J).) For this reason, rather than continuing to rely on the vague precept that "careful drafting" prevents the arbitrary application of the death penalty, Appellant requests that this Court consider the significant evidence set forth here and in the AOB, to find that the death penalty, in actuality, is unconstitutionally arbitrary.

"The Court has . . . sought to make the application of the death penalty less arbitrary by restricting its use to . . . 'the worst of the worst.'" (*Id.* (dis. opn. of Breyer, J.), quoting *Kansas v. Marsh* (2006) 548 U.S. 163, 206 (dis. opn. Souter, J.).) However, at least one study examining Connecticut's death-eligible cases between 1973 and 2007 found that comparative egregiousness is not the largest predictor of death. (*Ibid.*, citing Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 J. Empirical Legal Studies 637 (2014) (Donohue).) During those years, the court imposed death (after appeal) in 9 of Connecticut's 205 death-eligible cases. After ranking each of the cases in terms of comparative egregiousness, the study found that only one of the nine defendants sentenced to death was actually "the worst of the worst" (i.e. within the top 15% of the most egregious crimes), while the remaining eight defendants were no worse than at least 33 of the defendants who were not sentenced to death, and as many as 170 of the other defendants. (*Ibid.*, citing Donahue, 11 J. Empirical Legal Studies at pp. 643-645, 678-679.) Unsurprisingly, studies have shown that constitutionally impermissible factors such as race, gender, and geography, play a significant role in whether a defendant is sentenced to death. (See *id.* at pp. 2760-2763 (dis. opn. of Breyer, J.); see AOB 278-279.)

In sum, as Justice Breyer expressed this year in finding the death penalty should be deemed per se unconstitutional: "The imposition and implementation of the death penalty seems capricious, random, and indeed arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning." (*Id.* at p. 2764 (dis. opn. of Breyer J.).) For this reason, Appellant requests that this Court find the death penalty, as it is actually applied, violates *Furman.* (See *Furman*, *supra*, 408 U.S. at p. 256.)

Further, as set forth in the AOB, Appellant argues that the continued use of the death penalty is unconstitutional. To make this determination, Appellant asks this Court to consider the death penalty's arbitrariness in combination with the remaining three factors of Justice Brennan's four-part test discussed below.

2. THE PUNISHMENT OF DEATH IS UNUSUALLY SEVERE

Next, as set forth in the AOB, in determining whether the death penalty is per se unconstitutional, this Court should consider whether the death penalty is unusually severe. (AOB 279-284, citing *Furman*, *supra*, 408 U.S. at pp. 282, 285-286 (conc. opn. of Brennan, J.).) To be sure, "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." (*Id.* at p. 287 (conc. opn. of Brennan, J.).)

In determining whether a punishment is too severe, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 365

U.S. at p. 100.) "[T]he judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use" to determine whether society considers the punishment unacceptable. (*Furman*, *supra*, 408 U.S. at p. 279 (conc. opn. of Brennan, J.).)

Respondent argues that the death penalty does not violate norms of human decency because it is "only available for the crime of first degree murder, and only when a special circumstance is found true." (RB 217, citing *People v. Jennings* (2010) 50 Cal.4th 616, 690.) As argued above, however, nearly all first-degree murders qualify for a special circumstance in California, so this restriction does not sufficiently limit the pool of death-eligible defendants. Further, in determining whether death is too severe a punishment, this Court must look to "the evolving standards of decency" and consider whether society believes the death penalty *itself* comports with current notions of human dignity. (See *Trop v. Dulles*, *supra*, 365 U.S. at p. 100.) Respondent's perfunctory response sidesteps the important constitutional analysis Appellant has asked this Court to undertake.

In the AOB, Appellant set forth in detail the evolution of what society has deemed cruel and unusual punishment, including significant changes in regard to how the death penalty can be carried out under the Eighth Amendment. (AOB 281-284.) In short, these changes are substantial. Prior executions by the state were accomplished by having the defendant "hanged, disemboweled, or drawn and quartered," (John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement* (2009) 4 Nw. J.L. & Soc. Pol'y 195, 219); today the death penalty is carried out in a private room using lethal injection. By continually enhancing the propriety of the death penalty's

administration, it seems society has sought to separate the infliction of pain from the infliction of death.

Pain is certainly a factor in the judgment of whether a punishment is too severe. (*Furman*, *supra*, 408 U.S. at p. 271 (conc. opn. of Brennan, J.).) However, "[i]t appears there is no method available that guarantees an immediate and painless death."[30] (*Id.* at p. 287 (conc. opn. of Brennan, J.).) Additionally, courts must also consider the emotional toll of a punishment,

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[30] Since the United States Supreme Court reaffirmed that the death penalty does not violate the constitution forty years ago, states have sought more "humane" ways to execute their prisoners. (*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2732.) States eventually settled on lethal injection. (*Ibid.*, citing *Baze v.* Rees (2008) 553 U.S. 35, 61.) However, even lethal injection has not achieved the painless results society has sought. For instance, in *Glossip v. Gross*, *supra*, 135 S.Ct. 2726, prisoners challenged the constitutionality of using midazolam in Oklahoma's three-drug lethal injection protocol after the state botched the execution of Clayton Lockett. Various reports indicated that Lockett "began to writhe against his restraints, saying, '[t]his s*** is f***ing with my mind,' something is wrong,' and '[t]he drugs aren't working.'" (*Id.* at p. 2782 (dis. opn. of Sotomayor, J.).) Even though Lockett suffered the chemical equivalent of being burned alive, the Court upheld the drug's use relying on this flawed syllogism: "[B]ecause it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out." (*Id.* at pp. 2732-2733.) The constitutionality of the death penalty cannot, in the abstract, justify any particular means of accomplishing it. Further, rather than placing the burden on the government to prove that the use of midazolam was constitutionally defensible, the Supreme Court faulted the death row inmates for failing to identify a better alternative by which the state could kill them. (*Id.* at p. 2729.) The states' purpose in adopting lethal injection as its means of execution was to decrease the chance of pain in state-sanctioned executions. However, because the death penalty does not (and arguably cannot) live up to society's idea of an acceptable execution—the infliction of death without pain—it is time for this Court to stop trying to fix the problems with the death penalty, and reexamine whether the death penalty itself is cruel and unusual punishment.

which is exacerbated by the lengthy delays between conviction and execution. (See *Trop v. Dulles*, *supra*, 356 U.S. at p. 102 (plur. opn. of Warren, C.J.); *Glossip v. Gross*, *supra*, 135 S.Ct. at pp. 2765-2766 (dis. opn. of Breyer, J.).) Indeed, even in 1890, the United States Supreme Court recognized that awaiting an execution is "one of the most horrible feelings to which [a man] can be subjected . . . is the uncertainty . . . as to the precise time when his execution shall take place." (*In re Medley* (1890) 134 U.S. 160, 172 [describing a delay of four weeks].) Today, the lengthy delays between conviction and execution—and the emotional harm that goes along with it—span not for weeks, but for decades.

Accordingly, this Court should determine that the continued use of death as a penalty is too severe a punishment.

3. THE DEATH PENALTY HAS BEEN REJECTED BY CONTEMPORARY SOCIETY

Next, under Justice Brennan's test, the Court must also consider whether the death penalty has been rejected by contemporary society. (*Furman*, *supra*, 408 U.S. at p. 278 (conc. opn. of Brennan, J.); *see id.* at p. 332 (conc. opn. of Marshall, J.).) Cruel and unusual punishment is not a static concept; but rather, draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Furman*, *supra*, 408 U.S. at pp. 332 (conc. opn. of Marshall, J.).) That is, just because a punishment was permissible in the past, does not make it constitutional today. Notably, Respondent has failed to address this point in its entirety. (See RB 216-222.)

As set forth in detail in the AOB, contemporary society, both domestically and internationally, disfavors the death penalty. (AOB 284-

288.) Significantly, the imposition and implementation of the death penalty in the United States has become increasingly unusual. In the past fifteen years, the number of people sentenced to death annually has declined significantly: "In 1999, 279 persons were sentenced to death. . . . Last year, just 73 persons were sentenced to death."(*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2773 (dis. opn. of Breyer, J.).) Similarly, the number of annual executions has also significantly declined: "In 1999, 98 people were executed. . . . Last year, that number was only 35." (*Ibid.*)

Furthermore, the United States Supreme Court has found that "[i]t is not so much the number of . . . States [that abandoned the unconstitutional practice] that is significant, but the consistency of the direction of change." (*Roper v. Simmons* (2005) 543 U.S. 551, 566 (*Roper*), quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 315.) For example, in *Roper*, the Court held that the juvenile death penalty violated the Eighth Amendment; in doing so, the Court found it constitutionally instructive that in the sixteen years after the Court's prior decision to uphold the juvenile death penalty, five states abolished it. (*Id.* at pp. 566-567.) The Court found that this pattern provided objective evidence that society disfavored the punishment, not because the number of states prohibiting the punishment was particularly great, but instead because no State that previously prohibited the juvenile death penalty subsequently reinstated it. (*Id.* at p. 566.)

The same evidence of societal consensus against the juvenile death penalty that was presented in *Roper*, applies with equal force to capital punishment here. In the last decade, seven states have abolished the death penalty, and, in the past two decades, "no State without a death penalty has passed legislation to reinstate the penalty." (*Glossip v. Gross*, *supra*, 135 S.Ct. at pp. 2774, 2775 (dis. opn. of Breyer, J.).) In fact, after filing of the

AOB in the instant case, yet another state, Nebraska, joined in abolishing the death penalty. (See *id.*; see also 2015 Nebraska Laws L.B. 268 (2015 1st Sess.), passed over Governor's veto May 27, 2015.) Accordingly, given that society has begun to reject state-sanctioned executions as a form of punishment, and there is consistency in the direction of change, this Court should find that the death penalty has been rejected by contemporary society.

4. THE DEATH PENALTY DOES NOT SERVE PENAL PURPOSES MORE EFFECTIVELY THAN LIFE WITHOUT THE POSSIBILITY OF PAROLE

Finally, Appellant requests that this Court consider whether the death penalty serves the penal purposes of deterrence and retribution more effectively than a less severe punishment, such as life without the possibility of parole. (*Furman*, *supra*, 408 U.S. at p. 280 (conc. opn. of Brennan, J.).) As a threshold matter, Respondent argues that "Appellant's opinions on whether the death penalty serves its societal goals of retribution and deterrence . . . are inapposite and are not based on any binding authority."[31] (RB 218.) Respondent's assertion directly contravenes

[31] Respondent also asserts that "consideration of the death penalty's deterrent effect should be reserved for the Legislature." (RB 218, citing *People v. Marshall* (1996) 13 Cal.4th 799, 859 ["Questions of deterrence or cost in carrying out a capital sentence are for the Legislature . . . .].) Respondent conveniently omits the end of this quotation, which if read in context, simply stands for the proposition that the *jury* considering sentencing a particular defendant to death should not consider the death penalty's deterrent effect. (See *People v. Marshall*, *supra*, 13 Cal.4th at p. 859.) Moreover, the United States Supreme Court has consistently held that "objective evidence of contemporary values as it relates to punishment. . . is entitled to great weight, but . . . . [t]he Constitution

decades of United States Supreme Court Eighth Amendment jurisprudence, in which the Court has repeatedly found that the consideration of whether a particular punishment serves its intended penological purpose is critical to analyzing Eighth Amendment claims. (See *Graham v. Florida* (2010) 560 U.S. 48, 68; *Kennedy v. Louisiana* (2008) 554 U.S. 407, 420; *Trop v. Dulles*, *supra*, 356 U.S. at pp. 111-113 (conc. opn. of Brennan, J.); *Robinson v. California* (1962) 370 U.S. 660, 677, fn. 2 (conc. opn. of Douglas, J.).) The Supreme Court has explicitly identified deterrence and retribution as the two penal objectives of the death penalty. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183 (plur. opn. of Stewart, J.).)

In the AOB, Appellant set forth in detail that the death penalty does not serve the purposes of deterrence or retribution more effectively than a sentence of life without the possibility of parole. (AOB 289-292.) Significantly, since the United States Supreme Court last examined the constitutionality of the death penalty in *Furman* four decades ago—and even since Appellant filed his AOB—courts have expressed significant concern about the excessive delays that have resulted from the Legislature's attempts to increase fairness and reliability in capital sentencing. (See, e.g., *Glossip v. Gross*, *supra*, 135 S.Ct. at pp. 2764-2772 (dis. opn. of Breyer, J.).) These delays largely undermine the penological goals of the death penalty. As Justice Breyer recently explained, constitutional safeguards have placed the death penalty in a Catch-22: "[I]n this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes

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contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (*Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 434, quoting *Coker v. Georgia* (1977) 433 U.S. 584, 597.)

or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact . . . supports the claim that the death penalty violates the Eighth Amendment." (*Id.* at p. 2772 (dis opn. of Breyer, J.).)

Thus, after considering the four factors delineated by Justice Brennan, Appellant requests that this Court find the continued use of death as a punishment violates the Eighth Amendment. As Justice Marshall explained when he came to that conclusion over forty years ago, "We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment." (*Furman*, *supra*, 408 U.S. at p. 371 (conc. opn. of Marshall, J.).) It is time for this Court to follow suit.

N. THE PROCEDURAL PROVISIONS OF CALIFORNIA'S DEATH PENALTY STATUTE, ALONE OR CUMULATIVELY, CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Additionally, as set forth in the AOB, Appellant also argues that California's death penalty scheme is unconstitutional because it fails to provide proper procedural safeguards. (See AOB 294-326, citing U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I.) Appellant submitted nine bases for this assertion in the AOB: 1) Penal Code section 190.3 is overly broad, and results in the arbitrary imposition of death; 2) the death penalty and accompanying jury instructions fail to set forth the appropriate burden of proof; 3) California's death penalty requirements are constitutionally defective because the jury is not required to provide written or other specific findings regarding aggravating factors; 4) the lower court

failed to instruct the jury that an absence of mitigating factors is not an aggravating factor; 5) California's death penalty statute fails to require unanimity regarding aggravating factors; 6) Penal Code section 190.3 fails to require inter-case proportionality; 7) the use of the adjectives "extreme" and "substantial" as modifiers for potential mitigating factors prevents full consideration of all mitigating factors; and 9) California's death penalty scheme unconstitutionally allows the prosecution to rely on unadjudicated criminal activity. (See AOB 294-326.) In the interest of brevity, and because Respondent has not substantively replied to these arguments, Appellant merely reasserts those claims here.

CONCLUSION

Thus, for the foregoing reasons, Appellant James Michael Fayed respectfully requests reversal of his convictions and the judgment of death.

Date:October 29, 2015

Respectfully submitted,

By _____
Mark J. Werksman
Kelly C. Quinn
Defendant/Appellant
JAMES MICHAEL FAYED

CERTIFICATE OF COUNSEL

Pursuant to California Rules of Court 8.204 and 8.630, the undersigned certifies that this brief contains 47,232 words, according to the Word word count program. The word count includes footnotes but excludes the table of contents and table of authorities.

Date: October 29, 2015

Respectfully submitted,

By _____
Mark J. Werksman
Kelly C. Quinn
Defendant/Appellant
JAMES MICHAEL FAYED

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, Suite 400, Los Angeles, California 90017.

On October 29, 2015, I served the foregoing documents described as APPELLANT'S OPENING BRIEF on interested parties in this matter by placing a true copy in a sealed envelope addressed as follows:

Honorable Kathleen A. Kennedy Clara Shortridge Foltz Criminal Justice Ctr. Los Angeles Superior Court Central District - Department 109 210 West Temple Street Los Angeles, CA 90012	Eric Harmon, DDA LA District Attorney's Office Major Crimes Division 210 W. Temple St., 17th Floor Los Angeles, CA 90012
Bertha Magana California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105	Joseph P. Lee Deputy Attorney General Office of the Attorney General Ronald Reagan State Building 300 So. Spring Street Los Angeles, CA 90013
James Michael Fayed CDC # AK3340 CSP - San Quentin 1-AC-57 San Quentin, CA 94974	

(BY MAIL) ✓ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service made pursuant to C.C.P. ' 1013(a) should be presumed invalid if postal cancellation date of postage meter date is more than one day after date of deposit for mailing in affidavit.

(STATE) ✓ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 29th day of October 2015 in Los Angeles, California.

M. Rod

Martha Rodriguez