IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

JAMES DAVID BECK AND GERALD DEAN CRUZ,

Defendants/Appellants.

Crim. S 029843

Alameda Superior Court
Case No. 110467

AUTOMATIC APPEAL FROM THE JUDGMENT AND DEATH SENTENCE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

The Honorable Edward M. Lacy, Jr.
Superior Court Judge

Appellant Beck's Reply Brief

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DEATH PENALTY

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INTRODUCTION

This reply brief is intended solely to respond to the Attorney General's contentions which require further discussion for the proper determination of the issues raised on appeal. Therefore, the arguments will be numbered according to the issue in the opening brief but cross-referenced to the numbering in Respondent's Brief. Appellant specifically adopts his arguments presented in the opening brief on each and every issue whether or not discussed individually below. Appellant intends no waiver of issues and arguments not expressly reiterated herein.

I.

THE TRIAL COURT'S FAILURE TO SEVER BECK'S TRIAL FROM HIS CO-DEFENDANTS' VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRIVACY, A FAIR TRIAL, TO DUE PROCESS, AS WELL AS RELIABLE GUILT AND PENALTY DETERMINATIONS[1]

The parties do not dispute the applicable law on the question of proper severance of defendants. However, Respondent misreads the record both as to the guilt phase and as to the penalty phase severance motions.

A. Severance of the Guilt Phase

Respondent faults the defendants for not producing all of the prejudicial evidence at the pre-trial stage which might be introduced during a joint trial and argues that because the appellate court must review the record that was before the trial court at the time of the hearing, Beck has not made a sufficient showing to overturn the denial of the severance motion. (RB at 87.)

Thus, Respondent attempts to separate the bases presented for the severance motions made before and during trial. However, this

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[1]See Respondent's Arguments I and XVI.

Court must examine the full appellate record to determine if the denial of the severance motions constituted a violation of due process. "[W]hen the issue is raised on appeal we must also consider the actual impact at trial of the joinder. (See, *Pointer v. United States* (1894) 151 U.S. 396, 403–04 [14 S.Ct. 410, 412, 38 L.Ed. 208]; *People v. Kelly* (1928) 203 Cal. 128, 134 [263 P. 226].) Here we look to the evidence actually introduced at trial to determine whether 'a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.' (*People v. Turner* (1984) 37 Cal.3d 302, 313, 208 Cal.Rptr. 196, 690 P.2d 669.)" (*People v. Bean* (1988) 46 Cal.3d 919, 940 [251 Cal.Rptr. 467, 760 P.2d 996].) In this case, the predictions of conflict among the four defendants which were made in the pre-trial hearings were borne out by the record during the trial, thus mandating severance in this case.

The defendants could not fully set forth the antagonistic defenses and evidence at the pre-trial hearings that would be introduced at a joint trial. Instead, they were limited at the pre-trial hearings; and what eventually happened was a trial where each

defendant testified in ways which were completely antagonistic and prejudicial to each other individual defendant's case.

In addition, Beck was able to point to the inadmissibility of physical evidence which had been suppressed by the Court as seized in violation of Beck's Fourth Amendment rights. (RT 345-348, 795-796.) While the trial court assured Beck that no physical evidence would be introduced against him solely because of the joint trial, LaMarsh's counsel questioned Beck about the illegally seized evidence (RT 5395-5398) and then actually moved the illegally seized evidence into trial. (RT 5489-5492.) Thus, despite the trial court's *assurances* that no illegally seized physical evidence would be permitted in trial, the evidence was admitted solely because of the joint trial. Respondent's reliance on the "fact" that the evidence would not be admitted (RB at 90) is thus unsupported by the record and must be rejected by this Court.

By not conducting a full hearing on the issue of the antagonistic defenses, and by not considering the reality that each defendant would produce evidence harmful to the other defendants or

evidence that the prosecution would not and could not otherwise introduce, the trial court denied Beck the due process of law.

Respondent claims that Beck and Cruz misread the record on this factor, asserting that they refer only to prejudice likely to occur at the penalty phase. (RB at 392.) But it is Respondent who misreads the record.[2] Each of the attorneys who made arguments regarding severance discussed both the guilt and penalty phases. For example, Mr. Magana argued:

> It's not mandatory that these defendants be tried jointly. I think one of the factors the Court should consider in applying its discretion in severing one or more of the defendants is – is the prospect of their receiving a fair trial. It's my position that if all four are tried together, not any of them will receive a fair trial given the circumstances of what took place and given the fact that there are varying bits of evidence applicable to one severally and of course some of them jointly. . . . My points and authorities deal directly with the issue of due process. Is Mr. LaMarsh going to be tried by the evidence and the facts related to his conduct or is he going to be tried by the conduct of his associates?

(RT 812-813.)

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[2]In a footnote, Respondent cites to Beck's motion for reconsideration of the severance of the penalty phase of the trial. (RB at 396, n. 59.) But the failure to ask for reconsideration of the denial on guilt phase severance does not constitute a concession that the trial court ruling was correct.

While there is also discussion of the penalty phase prejudice during the hearing, the parties were again relying on the prejudicial evidence which might be presented by the four co-defendants at the joint trial. And these "predictions" of problems that would arise in a joint trial were fully borne out during the guilt phase.

Respondent argues that this is a "classic case for joinder," relying on *People v. Carasi* (2008) 44 Cal.4th 1263, 1297 [82 Cal. Rptr.3d 265, 190 P.3d 616]. (RB at 394.) But while there is a superficial similarity between the instant case and the facts in *Carasi* regarding the nature of the charges and the prosecution's theory of the commission of the murders, there is a major distinction which belies reliance on *Carasi*. As this Court noted, even where joinder of defendants is favored and otherwise permitted, severance should be granted "where the *acceptance* of one party's defense precludes the other party's acquittal." (*Id.* at p. 1296 (emphasis added).)

Respondent attempts to parse out LaMarsh and Willey's defense by creating a distinction not made at trial by their counsel. The primary defense was that there was no conspiracy, and the

secondary defense was that if there was a conspiracy, only Cruz, Beck and Vieira were part of it. (RB at 395.) But during trial, LaMarsh and Willey cast blame on Beck as both an actual killer and an active participant in the conspiracy. The jury could have convicted Beck of the Ritchey killing solely on Willey's testimony that he saw Beck cut Ritchey's throat (RT 5998-5999) and could have convicted Beck of the Colwell murder because of LaMarsh's testimony that Beck stabbed Colwell. (RT 5752-5753.) Thus, the jury could have found Beck guilty of multiple murders based only on the antagonistic defenses presented as a direct result of the denial of the severance motions.

As *Carasi* notes, a comparison of the defenses presented is a critical part of the severance determination. In *Carasi*, this Court noted that the defenses of the two co-defendants were "compatible."

> [S]tatements made by each defendant before or during trial did not implicate the other and, if credited by the jury, would have been mutually exculpatory. In particular, both denied any participation in the murders. Defendant told police and medical personnel at the crime scene that he was attacked on the top floor of the garage by robbers he never saw and could not identify. Similarly, Lee testified at trial that she was stabbed by an unknown assailant while sitting in her car waiting for

> defendant and the victims in the same location. All of these circumstances, including the compatible nature of each third party culpability defense, strongly supported the court's denial of severance here.

(*Id.* at p. 1297.)

In contrast, here Willey and LaMarsh provided a totally different version of the crimes to the jury. Respondent focuses solely on their testimony regarding the alleged meeting in the trailer and ignores their damaging testimony about Beck's actions on the night of the murders. Thus, unlike the defendants in *Carasi*, the defenses here were completely antagonistic, and the testimony at the joint trials denied Beck his due process of law under the federal constitutional guarantees.

As Beck set forth in his opening brief, the main thrust of Willey and LaMarsh's defense was that Cruz was the leader of a militant, survivalist cult with whom Beck and Vieira conspired. (See AOB at 96-98.) Thus, Willey and LaMarsh sought successfully to introduce evidence of bad acts performed by Beck at Cruz's direction. Significantly, it was a co-defendant, not the prosecution, who presented the damaging testimony of Beck's former girlfriend,

Rosemary McLaughlin. Her testimony, set forth in detail in the opening brief (AOB at 98-100), was probably the most damaging testimony against Beck. It included testimony 1) of the cult-like nature of the men, evidence that had been excluded previously by the trial court (RT 5545); 2) of Beck's total obedience to Cruz (RT 5560-5564); and 3) of alleged statements about the killings made by Beck, including a statement that Beck told her they "had to do them all." (RT 5549-5550; 5553.)

Respondent argues that the prosecution could have called McLaughlin as a witness, and thus, Beck suffered no harm. (RB at 400.) But this Court looks at the trial court record in determining whether there was sufficient unfairness to have warranted severance. What matters is what *actually* transpired at the trial, not speculation about what *could* have occurred. The trial record is clear that the prosecution rested without calling McLaughlin, and there was no indication that she was going to be called in rebuttal.[3] Therefore, Respondent's argument must be rejected.

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[3]The prosecution called only two police officers in rebuttal in regard to the collection of evidence from Cruz's residence. (RT 6338, 6361.)

B. By Arbitrarily Holding Beck's Penalty Phase After Cruz's, the Trial Court Denied Beck his Due Process Rights

Respondent ignores the sole basis for the trial court's decision to deny the severance of the penalty phase trials. The decision resulted from the prosecution telling the court that it would not present any aggravating evidence against Cruz other than the "facts of the crime and the special circumstances that would be found to be true." (RT 817.) Based on this showing, the trial court held that there would be no prejudice in either defendant's penalty phase going after the other; and it arbitrarily chose to conduct the Cruz penalty phase trial first.

Both Beck and Cruz asked for reconsideration of the denial of the severance motion, and at that hearing Cruz's attorney stated, ". . . I really can't see how Mr. Cruz's penalty phase trial would not affect Mr. Beck. I believe – I don't think I'm telling any secrets when I say the minute I bring in character evidence of Mr. Cruz, that allows the People to bring in bad character evidence. And I believe they're in possession of bad character evidence that relates to Mr. Cruz and Mr. Beck's actions together." (RT 848.) The prosecution again reiterated

that it had not "noticed any of that evidence as evidence in aggravation." (RT 849.)

Even when Beck renewed his motion, and his counsel charged that the prosecution "is going to use a lot of evidence which not only involves Mr. Cruz, but by necessity involves Mr. Beck . . . ." (RT 1301), the prosecutor again stated that he was not going to present any evidence in Mr. Cruz's penalty phase. (RT 1302.)

But of course, as Beck and Cruz predicted, when the Cruz penalty phase was held the prosecution presented the evidence of Jennifer Starn, which by implication involved Beck. Respondent seeks to justify this about-face by the prosecution stating that Starn had not yet agreed to testify for the prosecution at the time of the severance motions. But as shown by counsels' comments throughout the severance motions, all the attorneys knew of the potentially harmful material connecting Beck and Cruz that was in existence and might be used at the first penalty phase. Although Respondent argues that the Cruz penalty trial only barely mentioned Beck, the fact is that the Cruz jury made the decision to impose the death penalty on Cruz;

and that same jury again heard from Starn, who this time specifically set forth Beck's participation in the acts committed by Cruz.

Had the prosecution stated at the time of the severance motions that it would introduce such evidence if Starn was willing to testify, and had the prosecution acknowledged that it might use other evidence to rebut the Cruz character evidence, the trial court would have had a completely different calculus before it prior to casting it's decision in stone.

Respondent argues that Beck suffered no prejudice because much of the Starn evidence was admitted at his separate penalty phase. However, Beck presented mitigating evidence which might have affected at least one juror had the same twelve jurors not already imposed a sentence of death on Cruz a short time before. Beck had no prior criminal record. His family members testified about Beck's childhood, Beck's early devotion to the church, and his failed relationships with the two women in his life. They also testified about Beck's later disillusionment with the church and how Beck changed, after meeting Cruz, from a caring and kind individual to someone secretive, uncaring and distant. (RT 8026-8033.)

Testimony, including that of mental health experts and sociologists, was introduced to demonstrate that Beck would make a good inmate if sentenced to life. (See, AOB at 67-83.)

Reversal of the sentences of death and remand for a new penalty phase are required to remedy this error.

II.

BECK'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE REOPENING OF JURY SELECTION TO ALLOW A STATE PEREMPTORY CHALLENGE[4]

A. Facts Relating to the Improper Reopening of Jury Selection

On March 3, 1992, Juror Lopez completed his written jury questionnaire. (CT 8102-8143.) His answers did not appear out of the ordinary. His general feeling regarding the death penalty was "undecided." (CT 8135.) He did not feel the death penalty should be automatic for any particular crime, explaining that "it depends on the circumstances." (CT 8136.) His response was the same for consideration of a penalty of life without the possibility of parole. (CT 8136.) When asked to check "which best describes your feeling about the death penalty: would impose whenever had the opportunity, strongly support, support, will consider, oppose, strongly oppose and will never under any circumstances impose death penalty," Mr. Lopez marked "will consider." (CT 8137.) When asked what information he would like to have in making the decision

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[4]See Respondent's Argument XVII.

to impose the death penalty, he wrote "the nature of the person and the crime committed." (CT 8138.) When asked about the circumstances under which he thought the death penalty would be appropriate, he answered "on extreme cases, when the public is or will be endangered and the criminal is beyond reform." (CT 8141.) When asked if his religious views would affect his service, Mr. Lopez marked "no," and then wrote "I am not sure in certain cases." (CT 8107-8108.) When Mr. Lopez was called for his voir dire examination, none of these responses generated any concern for either the prosecution or the defense .

Mr. Lopez was thirty-five years of age at the time of the trial. Employed by Intel in engineering design and construction management, he had lived in Alameda County for the past thirteen years. (CT 8104-8106.) He was married with one child. He had been born in the Philippines, where his father had once been a police officer. (CT 8116.) He moved from Oakland to Union City after his two sisters had been robbed at gunpoint. (CT 8118.) Neither his background nor beliefs as exhibited in the juror questionnaire were unusual or warranted any challenge for cause.

On March 11, 1992, Judge Lacey conducted a brief voir dire of Mr. Lopez. Judge Lacey asked him specifically about his answer regarding his religious views. Mr. Lopez explained that once he was informed of the law applicable to this case, his religious views would not preclude him from following the law in this case, and he would be able to put aside his religious beliefs and follow the law. (RT 2034-2035.) When asked about his feelings regarding the death penalty, he said he would have to follow the law and he would do so. (RT 2036.) When asked about the purpose of the death penalty, he said it served "as a deterrent, to stop all crime, to protect the public." (RT 2036.)

When asked by the judge whether there was a challenge for cause from the prosecutor, Mr. Brazelton responded by asking the court to ask a follow-up question concerning Mr. Lopez's sister's work in the state judicial system. Mr. Lopez stated that she was a clerical worker in that system, and the prosecutor had no further inquiries and stated "no challenge" to this juror. (RT 2039.)

Mr. Faulkner, on behalf of Mr. Beck, had the court ask further questions about the juror's feelings about the death penalty. In response, Mr. Lopez stated that he would follow the law, that he

believed the death penalty "should be applied to some cases," and that he had no preconceived idea about the type of cases where it should be applied. (RT 2039-2040.)

Other jurors were then examined before counsel began to exercise their peremptory challenges. The following day, with Mr. Lopez seated as a potential juror, the prosecution and the defense passed the seated jurors for cause. (RT 2181.) Just as the jury was to be sworn, Mr. Lopez requested to speak with the court and counsel in private. After a twenty minute recess, the court conducted a further interview of Mr. Lopez outside the presence of the other jurors. (RT 2184.) Before conducting that questioning, the court inquired of counsel about any questions they proposed for seated Juror Lopez and asked that the questions be written down and handed to the bailiff as had been the court's practice throughout jury selection. (RT 2184.) In response, the prosecutor proposed that the court ask the "Witherspoon" questions, specifically the fourth one. Mr. Cruz's counsel, Mr. Faulkner and Mr. Amster, agreed with asking Juror Lopez the Witherspoon line of questions. (RT 2184-2185.) Almost immediately and before any questions were posed, counsel for

LaMarsh, Mr. Magana, objected to asking any questions, and all four defense counsel joined in the objection. (RT 2185.) The court overruled that objection and began a renewed voir dire of Mr. Lopez. (RT 2185.)

Mr. Lopez responded to the "six very specific death penalty questions" asked of all jurors in this case.[5] (RT 2186-2187.) At the conclusion of the renewed examination of Juror Lopez, the prosecutor *did not make a challenge for cause* based upon the new responses and noted that he was even unsure "that we have a challenge for cause." (RT 2190.) Instead, the prosecutor asked to reopen jury selection so he could "exercise a peremptory challenge." (RT 2190.) After a noon recess, in response to claims that the court had improperly permitted the prosecutor to raise questions for the purpose of a peremptory challenge in contradiction of Proposition 115, the prosecutor asserted for the first time that these questions were guided toward a challenge for cause. The prosecutor stated:

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[5]Mr. Lopez's responses are set forth verbatim in Beck's Opening Brief (AOB at 115-119) and will not be repeated here.

> And I feel I probably have a challenge for cause although I'll agree it's probably not one that the Supreme Court would agree with. But I think that Mr. Lopez has indicated that he's not going to follow the law. I think that's a good challenge for cause. *If the Court agrees*, I'd make that challenge. But in any event, I think I have the right under those cases and the law to ask the Court to reopen this case so we can proceed with picking a fair and impartial jury.

(RT 2204 [emphasis added].)

After arguments from all counsel, the trial court ruled that Mr. Lopez's answers to the questions did not form the basis for a challenge for cause. (RT 2206.) "He has not told us he could not follow [the law]. Mr. Lopez in his comments to the Court today has not, as I said a few moments ago, established a challenge for cause." (RT 2208.)

In response to the motion by the prosecutor to reopen jury selection to exercise a peremptory challenge against Mr. Lopez, the trial judge denied that motion stating: "With Mr. Lopez not being challengeable for cause and many peremptories being exercised by the defense since he was seated, the Court will not allow peremptory challenges to be reopened." (RT 2210.)

The prosecutor then asked that the jury not be sworn and the case continued so he could seek an extraordinary writ in the Court of Appeals and to permit him time to consult with the Attorney General's Office on the issue of pursuing the writ. (RT 2211, 2215.) Without swearing in the jury, the Court then continued the matter for five days until March 17, 1992. In that time period, the prosecutor did not seek the extraordinary writ he referred to five days before, though the trial court postponed swearing the jury for that reason. However, the prosecutor did contact the trial judge on the morning after the hearing to tell the court that he was going to file a motion to reconsider and would not file a writ, even if the motion to reconsider was denied. (RT 2238.)

Despite having the weekend to prepare the motion, the prosecutor returned to court on the afternoon of March 17 and hand served and filed the motion for reconsideration in open court. (RT 2238.) Attached to the motion was a four-page declaration of the prosecutor setting forth a number of allegations based entirely on

supposition and hearsay.[6] He concluded the declaration with his belief that the "People of the State of California cannot have a fair and impartial trial of this case if Mr. Mario Lopez is allowed to remain as a juror." (CT 1695.)

The thrust of the motion was that the prosecutor believed there was a basis for a challenge for cause resulting from Mr. Lopez's answers both on his questionnaire and in open court. In his motion, the prosecutor argued that Mr. Lopez "had given answers directly contradictory to his response afterward." (CT 1687.) The prosecutor

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[6]For example, relying on statements from two fellow district attorneys who happened to be on the jury panel, the prosecutor stated that he now believed Mr. Lopez's questionnaire answers "appeared to have been hurried and not well thought out." (CT 1693.) Mr. Brazelton's timing calculation was based solely on his own theory that Mr. Lopez finished his questionnaire after one district attorney and before another who happened to be in the jury pool. (CT 1692-1693.) Of course, Mr. Brazelton made no mention of this fact when he first examined Mr. Lopez nine days after Mr. Lopez and the two district attorneys had completed the questionnaires on March 3, 1992. Mr. Brazelton also complained about the small amount of time he devoted to reviewing the questionnaires of all prospective jurors; he estimated that he "averaged 10 minutes per questionnaire or about 4.5 seconds for each of the 133 questions." (CT 1694.) This calculation has no impact of the issue before this Court, and it cannot justify the prosecutor's failure to challenge Mr. Lopez for cause or his belated motion to reconsider the trial court's ruling holding that there was no basis for either party to challenge Mr. Lopez for cause.

directed the next four pages of his seven-page motion arguing that the trial court erred in failing to remove the juror for cause, citing a number of cases directed solely to challenges for cause.

After hearing brief oral arguments from the parties, the trial judge ruled first that there was no basis to challenge Mr. Lopez for cause:

> In view of the answers given by Mr. Lopez in court last Thursday, coupled with the answers he had previously given, I believe, two days earlier, coupled with his answers in the questionnaire, this Court finds as it did last Thursday that Mr. Lopez's beliefs re the death penalty are not such as would make him unfit to serve as a juror in this case.
>
> Mr. Lopez has consistently been ambivalent about his ability to impose the death penalty. However, he has been clear that he understands what he has been told concerning the law about the death penalty, and he either believes that his feelings about the death penalty are not so strong as to interfere with his duty as a juror or that he's not sure if his beliefs are so strong as to interfere with his duties as a juror.
>
> Further, and perhaps what is most important, Mr. Lopez has clearly expressed and reiterated that if he came to the conclusion that his beliefs about the death penalty were so strong that he could no longer follow the law and perform his duties as a juror, he would tell us.
>
> I still find that Mr. Lopez is not challengeable for cause.

(RT 2246-2247.)

The court then addressed the motion to reopen jury selection to permit the prosecutor to use a peremptory challenge against Mr. Lopez. The court granted this motion, stating:

> In the instant case there were new facts, Mr. Lopez's return to his questionnaire state of mind. Last Thursday the Court should have only considered the new state of facts and should not have further taken into consideration how the failure to earlier challenge Mr. Lopez would have affected the defendant's peremptory challenge. . . . The Court finds that Mr. Lopez's volunteered comments to the Court, along with his subsequent answers to questions put to him, establish good cause for the district attorney to reopen to exercise peremptory challenges.

(RT 2249.)

B. The Relevant Legal Principles

The parties do not dispute the relevant legal bases for exercising peremptory challenges. The jury selection process is controlled by Code of Civ. Proc. §§ 226 and 231. Thus, a court must have good cause to avoid the dictate that the jury be sworn once both sides pass the jury panel for cause. The parties diverge on two issues in this case: 1) was there good cause to re-open jury selection; and 2) once the court found there was not good cause, did the trial court ignore the mandate of section 231(d) by failing to swear the jury,

instead permitting the prosecutor to seek reconsideration of the court's ruling.

C. No Good Cause Existed to Re-Open Jury Selection

Respondent ignores the procedural history of this issue and focuses only on the prosecutor's renewed attempt to argue that there was good cause to permit the reopening of jury selection solely to permit the peremptory challenge to Juror Lopez. (RB at 419-422.) The most critical portion of the record is from the day the prosecutor presented his first request to re-open jury selection on March 17. When the court rejected the prosecutor's motion, the sole action the court had to take was to swear the jury. The prosecutor did not ask for additional time to seek a basis to ask for reconsideration; he only asked for time to determine whether a writ should be taken on the record already presented to the court. Instead, the prosecutor returned to court and moved for reconsideration, at a time when the jury already should have been sworn under the dictates of the relevant statutes.

The renewed questioning of Mr. Lopez did not disclose any new significant information to justify re-opening the entire jury

selection process. Indeed, the trial judge found, after permitting the prosecutor to make as full an inquiry as requested, that there was no basis to permit a challenge for cause, even if the prosecutor had moved for removal of the juror on that ground. After this additional examination by the court and the parties, the trial judge held that there was no basis for a challenge for cause and no basis for reopening jury selection. In fact, the trial judge informed Juror Lopez that if in fact his opinions changed during the trial, he would have a continuing opportunity to address the court. At that point, if there was additional information which would make the juror subject to removal, the trial court would do so and would replace Juror Lopez with one of the alternates who had not yet been seated. (RT 2219, 2247.)

Respondent's main argument rests on the theory that the trial court erred in not granting a challenge for cause of Mr. Lopez. (RB at 418-419.) That argument must be rejected. First, the prosecutor initially did not make a motion to excuse the juror for cause. Instead, the prosecutor argued only that the new information justified reopening the entire selection process specifically to enable him to exercise the peremptory challenge against Mr. Lopez. The prosecutor

did not make this challenge when he passed the panel with Mr. Lopez sitting as a juror during the exercise of his timely peremptory challenges. (RT 2190.)

However, as counsel for Mr. Beck stated:

> [Mr. Lopez is] having some serious thoughts about it and that's what we want jurors to do. He's passed the test. He's indicated that he can impose the death penalty in certain cases. He hasn't said that he can't and won't vote against first degree murder because of death penalty reasons. He said that he can't – he has not said that he can't vote for special circumstances because of death penalty reasons.

(RT 2192.)

Second, even if the prosecutor's belated challenge for cause, made five days later, was properly before the trial court, the law is clear that there was no basis to support a for-cause challenge, and the trial court correctly denied that belated motion. The trial court found that Mr. Lopez, through his answers on the questionnaire and his voir dire, "believed that the death penalty was appropriate in certain cases, and if it was appropriate, he could vote to impose it." (RT 2207-2208.) Nothing further is required to reject a challenge for cause. "[T]he group of 'Witherspoon-excludables includes only those who

cannot and will not conscientiously obey the law. . . ." (*Lockhart v. McCree*, (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

Finally, Respondent argues that there was "good cause" to reopen the selection process to permit the prosecution's challenge for cause against Mr. Lopez. But of course, any such evidence must first be "new" and second must support a finding of good cause. Here, Mr. Lopez's statements after he indicated his concerns were not significantly different from his initial responses in his questionnaire and during the initial voir dire.

In response to the question, "Under what circumstances, if any, do you believe that the death penalty is appropriate," he wrote, "In extreme cases, when the public is or will be endangered and the criminal is beyond reform." (CT 8141.) When asked on the initial voir dire about his ability to follow the law, Mr. Lopez responded numerous times that he could do so. (RT 2034-2035.) Further, when questioned about the relationship between his religious views and the law, he stated clearly he would put any religious views aside and follow the law. (RT 2035.) He stated that his religious views would not preclude him from imposing a death sentence in this case. (RT

2035-2036.) In fact, he indicated when he answered the questionnaire that he was not sure what the law was, and after the court explained the law he would be able to follow it in all cases. (RT 2036.)

Respondent's argument that Mr. Lopez "said the death penalty was only justified if the defendants were repeat offenders or the court could prove they would kill again" (RB at 419) misstates Mr. Lopez's answers on voir dire and distorts the record before this Court. On renewed voir dire, the trial court asked Mr. Lopez, "as you sit here right this minute, do you know for a fact that you could vote for the death penalty if you felt it was appropriate." (RT 2185.) He responded, "Under one case which I think will be appropriate, you know. There's one thing – there is one case where I think I can vote for the death penalty, which is, you know, I don't know if I am allowed to say it . . . . If the persons are repeat offenders or the Court can prove they will kill again." (RT 2185-2186.) Other than re-asking the "standard" death penalty questions, which had been asked of all jurors, the trial court did not follow up on this answer. Once again, Mr. Lopez indicated that he would follow the law and that he

would not be automatically opposed to imposition of the death penalty. Thus, there was no basis to challenge him for cause, and the trial court was correct in this conclusion.

Trial court findings regarding a prospective juror's views on capital punishment are entitled to substantial deference on appeal (*People v. Avila* (2006) 38 Cal.4th 491, 529 [43 Cal.Rptr.3d 1, 133 P.3d 1076]) and where answers given on voir dire are "equivocal or conflicting" (as the State has alleged in its Reply), the trial court's evaluation of the person's state of mind and its determination that the juror was not impaired under *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] is generally binding on the reviewing court. (See, e.g., *People v. Pearson* (2012) 53 Cal.4th 306, 327 [135 Cal.Rptr.3d 262, 266 P.3d 966]; *People v. Garcia* (2011) 52 Cal.4th 706, 742 [129 Cal.Rptr.3d 617, 58 P.3d 751].)[7]

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[7]See, also *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-332 [The trial court's decision to excuse a juror who was uncertain about his views on the death penalty violated *Witherspoon* and *Witt*. Notwithstanding the deference owed to the trial judge, the appeals court concluded that the factual record "does not fairly support [the juror's] exclusion under the standards of *Adams* and *Witt*." The discomfort with the death penalty expressed by the juror did not appear to the appeals court to "'prevent or substantially impair the performance of his duties as a juror in accordance with his

Even though the trial court initially ruled that there was no basis to permit either a challenge for cause or the reopening of jury selection, it permitted the prosecutor time to seek a writ to the appellate court.[8] Yet, when confronted with the same set of facts five days later, the trial court reversed its prior ruling and permitted the prosecutor to reopen jury selection solely to exercise a peremptory challenge to Mr. Lopez. This was error.

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instructions and his oath.'" Notably, the juror rejected the proposition that his mind was "closed" to imposing the death penalty. Moreover, on several occasions, he stated that he would possibly, or even very possibly, feel the death penalty was appropriate in certain factual scenarios. The juror also maintained that he believed he could and would follow the law as instructed. The court of appeals held that the juror's statements did not demonstrate that he was "'so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its' death penalty scheme." Further, the juror's statements that his decision would likely depend on the facts with which he was faced "suggested that his selection would comport with a trial court's 'quest' to find jurors who 'conscientiously apply the law and find the facts.'" The juror's uncertainty about how the option of the death penalty would affect his decision should not have provided a basis for removal under *Adams*. Finally, not once did the juror state that his beliefs would prevent him from serving as an impartial juror.]

[8]While the other counsel did not object to postponing further jury selection until after the prosecutor had sought the writ, counsel for Mr. Beck did not make that concession and submitted that issue to the court. (RT 2214.)

There were no new facts to justify reopening the jury selection in this case, and thus the trial court's ruling was an abuse of discretion. Respondent's attempt to portray Mr. Lopez's statements as a "change of heart" (RB at 422) must be rejected. The trial court stated that "Mr. Lopez has consistently been ambivalent about his ability to impose the death penalty." (RT 2246.) Yet, the trial court obviously resolved this ambiguity in favor of rejecting any "for cause" challenge, and the trial court felt that the juror's ambivalence and attitudes toward the death penalty were consistent throughout the voir dire process.

The "return to his questionnaire state of mind" is neither new evidence nor does it warrant the drastic remedy of reopening jury selection. As the trial court noted in initially denying the motion, his answers both orally and in the questionnaire were consistent.

> However, specifically referring to questions 110, 115, 117, 127, 128, and 129, he's also made clear that Mr. Lopez believed that the death penalty was appropriate in certain cases, and if it was appropriate he could vote to impose it.
>
> In questioning in open court yesterday, and specifically referring to page 2034, line 23, and page 2036, line 20, page 2038, line 4 to 27, and page 2039, line 23, to page 2040, line 7, Mr. Lopez made it

> abundantly clear that he understood the law regarding the death penalty and agreed that if it was appropriate in the proper situation that he would put his personal feelings aside and follow the law regarding. And particularly at page 235, line 17 to 21, stated that if the law was so contrary to his religious beliefs that he could not follow the law, he would bring it to our attention.
>
> He has today reiterated his concern about not being able to follow the law. He has not told us he could not follow it.

(RT 2207-2208.)

As in *People v. Niles* (1991) 233 Cal.App.3d 315 [284 Cal.Rptr. 423] , there was no good cause to reopen the jury selection process in this case. In *Niles*, the defendant claimed there was "new" information that the juror may have been talking with her husband who worked at the county jail. However, during the renewed questioning of the juror, this issue was not raised as a basis for the challenge. Instead, the defendant relied on the information that the juror was married to a jailer. Holding that there was no basis to find an abuse of discretion, the appellate court examined the circumstances surrounding the juror's statements and concluded that all of the relevant information had been known at the time the defense

passed the juror for cause and did not exercise a peremptory challenge.

> Each of the pertinent facts regarding Juror Perreault, including her husband's employment and assignment at the county jail where defendant was confined and thus might possibly come in contact with Sergeant Perreault, were known to defendant at the time defendant originally passed on peremptory challenges and accepted Mrs. Perreault as a member of the jury. Further, defendant did not offer any facts additional to those presented the preceding day when defendant agreed, after questioning Mrs. Perreault, that she should remain on the jury. In our view, defendant showed nothing more than that he had reconsidered his decision of the day before and had changed his mind. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's request to reopen in order to exercise his remaining peremptory challenge.

(*Id.* at p. 321. (footnote omitted).)

This is precisely the situation here: the prosecutor knew all of the information about the juror, he did not offer any other relevant information upon the renewed examination, and the prosecutor merely wished to reconsider his decision.[9] Therefore, the initial

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[9]In fact, the prosecutor implied here that he was not performing his job properly when he failed to propose a number of questions and blamed his lack of time to review the questionnaires. (CT 1694.) Such negligence, if there was any, cannot meet the standard for good cause sufficient to reopen jury selection in a capital case.

decision by the trial court was proper, and the reconsideration of that decision was an abuse of discretion where there was no evidence of any good cause to justify reopening jury selection.

D. Mr. Beck's Due Process Rights Were Violated by the Reopening of Jury Selection

Respondent argues that the exercise of peremptory challenges in capital cases is broad and does not violate the constitution unless there is a discriminatory ground for the challenge. (RB at 424-425.) However, none of the cases relied upon by Respondent present a situation even remotely similar to the facts here. Reopening the jury selection process was for the sole purpose of permitting a late peremptory challenge by the prosecution. There was no valid reason for the reopening, and that procedure created the due process violation.

Respondent fails to address a single case relied upon in Mr. Beck's opening brief on this claim. While Respondent ignored case law from both this Court, e.g. *People v. Hamilton* (1963) 60 Cal.2d 105 [32 Cal.Rptr.2d 4, 383 P.2d 412], and the federal circuit court of

appeals, e.g. *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, that does not dictate this Court to do so as well.

The cases cited in Beck's opening brief demonstrate that the procedures employed here provided an unfair advantage to the prosecution and deprived Mr. Beck of his federal and state constitutional rights to a fair trial.

For these reasons and those relied upon in the opening brief, Beck's convictions and sentence of death should be reversed on the basis of this claim.

III.

THE TRIAL COURT VIOLATED BECK'S DUE PROCESS RIGHTS BY EMPLOYING JURY SELECTION PROCEDURES THAT FAVORED THE PROSECUTION[10]

Respondent admits that the record before the court is deficient because only Cruz's written questions are before this Court, (RB at 427, "the record is not as clear as it could be" (RB at 426) and the "trial court's order settling the record found 'it cannot be determined whether or not questions asked were the questions actually submitted.'" (RB at 428.) Nevertheless, Respondent argues that this Court can conclude from bits of the existing record that the trial court did not favor the prosecution. An examination of the existing record does not support Respondent's argument.

First, there can be no dispute that the trial court re-opened voir dire for the benefit of the prosecution. (See, Argument II, above.) Having done so, the trial court then permitted the prosecution to exercise a peremptory challenge after the trial court denied the prosecution's challenge for cause regarding this same juror.

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[10]See Respondent's Arguments III and XVIII.

Second, while the trial court invited counsel to submit written questions and counsel did in fact submit written questions, the record does not support Respondent's speculation that the court actually asked those questions. (RB at 428, "it seems unlikely that it kept [asking counsel to submit written questions] throughout voir dire, but never actually asked any of those questions.") But of course, the record settlement process could not produce any of the written questions which had been submitted, and the trial court's order acknowledges that it cannot be determined if any of those questions were actually asked. Thus, it is Respondent's mere speculation that the trial court acted properly. When the question of a defendant's life or death is before the court, the Eighth Amendment requires heightened reliability, not speculation, before a death sentence is affirmed. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944]; *Caldwell v. Mississipi* (1985) 472 U.S. 320, 328-30 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

Third, upon examination of the only record that does exist – Cruz's proposed follow-up questions – the conclusion is that the trial court unduly restricted the voir dire process favoring the prosecution.

Respondent cites to the voir dire of Juror Sherburne as an example of the court's asking the submitted questions. However, Cruz submitted fourteen questions for Mr. Sherburne (CT 1670-71), and the trial court appears to have asked only two – one concerning the juror's political views and one concerning mental health evidence. (RT 2154-58.) Most critically, the trial court refused to ask Mr. Sherburne a single proposed question going to the juror's views on the death penalty. Because of the trial court's refusal to ask these questions the following colloquy between the court and counsel ensued:

> MR. AMSTER: I have some follow-up questions, Your Honor.
>
> THE COURT: Okay.
>
> MR. AMSTER: Assuming the Court is not going to ask my follow-up questions I put in the questionnaire.
>
> THE COURT: That's correct.
>
> MR. AMSTER: Okay.
>
> MR. AMSTER: Your Honor, for the record, I'd like to state that I'm requesting Hovey voir dire and based on the same constitutional grounds I have stated beforehand, federal constitutional grounds, 6th, 8th, and 14th.
>
> THE COURT: Mr. Faulkner?
>
> MR. FAULKNER: Join in the request, Your Honor.
>
> THE COURT: Mr. Magana?

MR. MAGANA: I would also. And I have a question.

THE COURT: Okay. If you would hand that to the bailiff, please.

MR. AMSTER: And in addition, I'd like to the record to reflect that I feel that my written questions that I have submitted are proper or that the Court could amend them maybe a little bit to have them be proper, and that by not asking, that those rights I formerly enmerated, I'm being denied as well.

THE COURT: All right. I'm not going to ask the questions submitted.

Mr. Faulkner, are you joining in Mr. Amster's challenge?

MR. FAULKNER: I am, Your Honor.

THE COURT: Mr. Magana?

MR. MAGANA: Yes.

THE COURT: Not your challenge, your objection to Mr. Brazelton's challenge. You join in that?

MR. MAGANA: That's correct, Your Honor.

THE COURT: And Mr. Miller?

MR. MILLER: Yes, I join. And I pass this juror for cause.

MR. AMSTER: And, Your Honor, I further want the record to reflect that I feel the questions as submitted are also proper; and by not asking those questions as well, the constitutional grounds are being denied.

(RT 2158-2160.)

A similar problem arose during the voir dire of Juror Dorenzo when the trial court denied the request for additional questioning.[11]

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[11]The list of questions proposed for this Juror are not included in the ones in the Clerk's Transcript and were not able to be located, so the specific questions referred to by Mr. Amster are unknown.

THE COURT: Do any counsel have any additional questions they wish me to ask?

Mr. Amster?

MR. AMSTER: Yes, Your Honor. One, is the Court rejecting asking my written Questions 18 through 25?

THE COURT: Yes.

MR. AMSTER: Okay. Then, I – yes, I do, Your Honor. Wait a second.

THE COURT: I'm not going to ask that question, either.

MR. AMSTER: Your Honor, I'd like to have a hearing on this point; or I would specifically at this point ask that being that all my questions are being rejected, that I be entitled to Hovey voir dire. Otherwise, I think that what is being done now, that we have a juror of this state of mind that I'm not being given the ability to rehabilitate, that my client's consitutional rights under the 6th, 8th, and the 14th is specifically being denied, because I believe with the ability to either have the Court ask questions that I have submitted or allow me to directly voir dire this question, I could rehabilitate her.

THE COURT: Mr. Faulkner?

MR. FAULKNER: I join that request, Your Honor.

MR. AMSTER: Your Honor, I want to put on the record the reason why I believe that, is this juror did state that – something to the effect that in defense of her own life, that the death penalty might be all right, or something to that effect. So I want the record very clear that there is – I can rehabilitate here.

(RT 2071-2072.)

The trial court did ask the standard *Witt-Witherspoon* questions after the above exchange. At the conclusion of that questioning, Cruz's attorney addressed the joint objection again:

> MR. AMSTER: Yes, Your Honor. I feel the Court is not giving us the ability to properly rehabilitate this juror, asking her specific questions on that. I'd also like to know specifically why the Court feels that my questions 18 through 25 are improper, because they are certainly a reasonable situation that could exist, and I just feel, as I've stated before, that my defendant's – the defendant's federal constitutional rights are being dramatically infringed on at this point and it has to come a point where Proposition 115 should go away and what is proper and right – my client is on the line here.
>
> MR. BRAZELTON: I object to this being on the record –
>
> MR. AMSTER: Well, I've asked for a Hovey and it's been denied; so I have to put everything on the record.

(RT 2075.)

During the voir dire of Juror Davis, the defense attorneys asked to submit written questions: "Mr. Magana: Then could I ask for an opportunity to present written questions, if the Court would give us a few moments? The Court: All right. Your request is denied." (RT 2281; see also, RT 2299, 2340, request to submit written questions denied.)

In contrast when the prosecution sought to rehabilitate a potential juror, the trial court allowed the prosecutor to *himself orally* pose a lengthy hypothetical directly to juror:

> MR. BRAZELTON: Could I ask a hypothetical, Your Honor?
>
> THE COURT: Go ahead.
>
> MR. BRAZELTON: Q. Mr. Navarro, given a situation – not this case, but let's say a situation where a person is involved with some other people, plans some murder and actually goes along with them, but he himself doesn't personally kill anybody, legally the person is – assume that he's legally guilty, as well as the other people, for the commission of those murders, and it comes out after he's found guilty and special circumstances are found to be true – it comes out in the penalty phase that this person was exemplary in his youth, a boy scout leader, valedictorian of his class, perfect child, and a parade of witnesses tell you that this is the only thing, bad thing, this kid has ever done in his life. Would you think that would be an appropriate case for a death penalty or perhaps for life without possibility of parole?

(RT 1909-1910.)

When Mr. Beck's counsel objected to an additional hypothetical, the prosecutor responded, "I'm certainly entitled to do so to try to rehabilitate [the juror] – ." (RT 1910.) The trial court then interposed its own question which the prosecutor amended. Respondent points to not a single instance where the defense counsel

themselves were permitted to propose a question to a potential juror, let alone a detailed hypothetical one. Respondent can only point to a few times when the trial court itself asked a question which appeared to be suggested by defense counsel in writing or orally. (RB at 430.)

Contrary to Respondent's argument, the existing record demonstrates the trial court's restriction of attempts by the defense to rehabilitate a juror as asserted in the opening brief and the opportunity the court provided to the prosecution in its attempts regarding the rehabilitation of a juror. Based on this record, this Court should reverse the convictions and sentence imposed in this case.

IV.

THE TRIAL COURT VIOLATED BECK'S DUE PROCESS RIGHTS BY EXCLUDING CERTAIN JURORS FOR CAUSE[12]

Respondent does not challenge the critical importance of having the trial court conduct proper jury selection in order to determine if a defendant's Sixth Amendment right to an impartial jury has been violated. Nor does Respondent contest that a person cannot be excluded from the jury merely because he is opposed to the imposition of capital punishment. (RB at 182-183.)

As the United States Supreme Court has reiterated numerous times, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.)

"[T]he State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate

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[12]See Respondent's Arguments IV and XIX.

their oaths. But [the Constitution does not allow the exclusion of] jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Adams v. Texas* (1980) 448 U.S. 38, 50-51 [100 S.Ct. 2521, 65 L.Ed.2d 581] (1980).)

"The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' *Wainwright v. Witt*, 469 U.S., at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon v. Illinois*, 391 U.S., at 523." (*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659 [107 S.Ct. 2045, 95 L.Ed.2d 622] .)

Rather than challenging these basic tenets of Sixth Amendment law, Respondent instead relies on the general proposition that reviewing courts must always defer to the trial court's ruling on a

challenge for cause. (RB at 192-193.) Beck does not dispute that general proposition, but this Court must first determine if the circumstances surrounding the conduct of the jury selection process entitles the trial court to deference. First, Respondent completely ignores this Court's decision in *People v. Stewart* (2004) 33 Cal.4th 425 [15 Cal.Rptr 3d 656, 93 P.3d 271] where no deference was afforded the trial court which had based its ruling solely on the answers to jury questionnaires. In *Stewart*, this Court held that "[b]efore granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would '"prevent or substantially impair"' the performance of his or her duties (as defined by the court's instructions and the juror's oath) (*Witt*, *supra*, 469 U.S. 412, 424) ' " ' "in the case before the juror" ' "' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 [110 Cal.Rptr.2d 324, 28 P.3d 78], italics omitted.)" (*Id.* at p. 445.) Obviously, the record must be sufficient to afford deference; it is not automatic in all circumstances as Respondent asserts.

In addition, the burden of proof to support the challenge for cause is upon the party making the challenge. "The prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors. (*Witt*, *supra*, 469 U.S. 412, 423 ['As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality. . . . It is then the trial judge's duty to determine whether the challenge is proper'].)" (*Id.* at p. 445 (emphasis added).)

In this case, the limited procedures used by the trial court should prohibit this Court from granting full deference to the rulings below. The primary basis for the grant of the prosecution's challenge was reference to answers jurors provided in the written questionnaires. Moreover, the defendants' proposed follow-up questions to prospective Juror Dobel were not asked, and there is no record of those questions.[13] The failure to ask Dobel these questions,

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[13]Respondent cryptically references a notation by the trial judge that "only Cruz filed follow-up questions" and references the request by Cruz's attorney to ask certain questions of particular jurors. (RB

coupled with the incomplete record which contains no copy of the written questionnaire and no record of the requested questions, is another reason why this Court should not afford deference to the trial court's ruling excusing Dobel.

Even on the limited record before this Court, the trial court erred in excusing Dobel for cause. As the parties agree, removal of a juror for cause is permitted only after the court applies the standard of "[w]hether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright*, 469 U.S., at p. 424.)

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at 170.) However, Respondent ignores the record quoted "in full" in Respondent's Brief. (RB at 171-182.) That record reflects that Mr. Amster indicated during the examination of Dobel that he had questions for her, even though his previously submitted document did not address Juror Dobel at all. (cf. RT 2426 and CT 1636-1673.) The trial judge refused to ask any of the submitted follow-up questions. Respondent strangely ends his "full text of the voir dire of Dobel" (RB at 171) immediately before Mr. Faulkner makes the following statement: "Your Honor, one other matter. Although you didn't ask my questions, I assume those are going into the record, those that have my name and the juror's name." (RT 2431.) Respondent's version of the "full text" does not include this statement. (RB at 182.) Therefore, it is clear from the remaining record that Beck's attorney did in fact submit questions which were ignored, with no reason given, by the trial judge.

Respondent, as did the trial court, relies primarily on Dobel's apparent single questionnaire answer to question "#130 – Is there anything else about your present state of mind that you feel the attorneys would like to know?" The trial judge quoted her response: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as to guilty with a life imprisonment." (RT 2430.) Reliance on that statement, written before she appeared in court and before she was informed of the law related to the imposition of the death penalty, is as invalid as the reliance on the questionnaire response in *Stewart*.

The error in this approach is demonstrated by Respondent's attempt to have this Court ignore her answer when she was specifically asked whether she could follow the law: "If called upon as a juror in this case or if you are selected as a juror in this case and the jury got to the place where the penalty was to be decided, and that if after hearing all the law and the evidence you felt that the death penalty was the appropriate disposition, would you be able to vote for it." (RT 2420-2421.) Dobel answered, "If I felt it was appropriate, yes." In response to further inquiry by the court, she described

situations that involve "[s]evere human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty, but it would have to be something very extreme and severe." (RT 2421.)

Respondent concedes that "Dobel may have given the expected response when asked if she would follow the law." (RB at 191.) Nevertheless, Respondent argues that the trial court was correct in rejecting the juror's responses to the most specific questions about following the law and relying primarily on this one response to the open-ended question.

While Dobel fully explained her general opposition to the death penalty, she indicated both in the questionnaire and the oral voir dire that she could put those feelings aside and follow the law. Moreover, one example of possible situations was where there were "multiple murders, if no remorse or promise of rehabilitation." (RT 2428.) Here Mr. Beck was charged with four murders, and the prosecution would eventually argue that there was no remorse or promise of rehabilitation. Indeed, Mr. Beck testified under oath that he did not

commit a single act of murder, therefore exhibiting no remorse. Because the facts here were very similar to the types of situations where Dobel stated she could possibly impose the death penalty, it was error for the trial court to grant the challenge for cause.

Respondent, however, urges two main grounds in support of its argument that the trial court properly excused Dobel: (1) because she was biased against the death penalty; and (2) because she indicated she would automatically vote against the death penalty in the current matter. (See, RB at 187.) But in making the second point, the State misconstrues the record, failing to accurately respond to Dobel's entire response concerning the types of situations where she might find for the death penalty. (See, RB at 188.) Contrary to Respondent's arguments, Dobel did not limit her consideration to Jeffrey Dahmer type cases. When her response is examined fully, it is clear she would consider imposing a sentence of death in cases of "[s]evere human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty; but it would have to be something very extreme and very severe." (RT 2421.) Thus, the

proper, complete review of the record on this juror supports the conclusion that the trial court erred in granting the prosecution's challenge for cause of Juror Dobel.

While Dobel indicated she generally opposed the death penalty, she stated that as a juror she *could* follow the law and impose the death penalty. Respondent argues that the trial judge could have excused her solely because she stated it would be difficult to vote for the death penalty (RB at 191-192); however, the cases Respondent relies upon are distinguishable.

In *People v. Roldan* (2005) 35 Cal.4th 646, 697 [27 Cal.Rptr.3d 360, 110 P.3d 289], one juror initially stated that voting for the death penalty would be hard, but then affirmed that she would "probably never" vote for death; and the other juror stated, "No, I don't think I could ever vote for death." In contrast, Dobel stated she could impose the death penalty (especially in multiple murder cases like Beck's) and agreed that she would follow the law.

In *People v. Harrison* (2005) 35 Cal.4th 208, 228 [25 Cal.Rptr. 3d 224,106 P.3d 895], the excused juror did not indicate she would follow the law.

> Several times during voir dire, Prospective Juror Elaine Q. said she could not vote for the death penalty, although she hedged her answer by stating that "maybe" she could not do so. At the end of voir dire, she stated: "I would find it very, very difficult [to vote for the death penalty], but I could probably do it. I mean, that's as good as I can come." After the prosecutor challenged Prospective Juror Q. for cause, the trial court noted that she was "quite uncomfortable" during questioning and that "the record may not reflect the physical manifestations of her anxiety."

(*Id.* at pp. 227-228.)

Here, Dobel voiced her opposition to the death penalty but did not indicate that she could *never* vote for the death penalty. Instead, Dobel, as with many jurors, indicated she would seriously consider the facts presented and *could* vote for the death penalty, although the decision itself would be a difficult one. As the Supreme Court stated in *Adams*, the purpose of the voir dire process is not to exclude "jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 50-51; *People v. Pearson*, *supra*, 53 Cal.4th at p. 331.)

Respondent does not contest that any error in excusing Dobel requires reversal of the convictions and sentence in this case.

Therefore, because the trial court erred in excusing this juror, the convictions and sentence in this case must be reversed.

V.

THE EXCLUSION OF JURORS BASED ON THEIR MISSING JUROR QUESTIONNAIRE RESPONSES VIOLATES DUE PROCESS[14]

Respondent concedes that the questionnaires for four of the jurors are missing and cannot be replaced by settlement of the record. (RB at 444.) Nevertheless, Respondent argues that there is no basis for reversal because (1) only four questionnaires are missing; (2) the trial court did not excuse each of these jurors "solely on the basis of their questionnaires"; (3) "most of the jurors' significant questionnaire answers are discussed on the record"; and (4) each juror was properly excused for cause. (RB at 442-43.) Respondent misunderstands the critical nature of having an adequate record in a capital case, especially during jury voir dire where the improper grant of a challenge for cause "goes to the very integrity of the legal system" and requires reversal of the conviction and sentence. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 667 ("Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, *Wainwright v. Witt*, 469 U.S., at 416, and because the

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[14]See Respondent's Arguments V and XX.

impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply.").)

An examination of each of the jurors' voir dire demonstrates the error and the prejudice to Mr. Beck.[15] Mr. Beck acknowledged in his opening brief that each of the jurors made statements which indicated that they might be impaired in regard to the imposition of the death penalty. (See, AOB at 143-144.) However, the existing record denies Mr. Beck the opportunity to challenge or explore the validity of the trial court's exclusion of these jurors.

First, at the conclusion of Ms. Flores's court-conducted voir dire, and in response to the prosecution's challenge for cause, each defense attorney joined in a motion "to be given the opportunity of giving follow-up questions on this point." (RT 2340.) The court implicitly denied this motion by immediately granting the prosecution's challenge:

> The Court feels that the answers given here in open court clearly reflect Mrs. Flores's state of mind and belief against the death penalty. . . .

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[15]Mr. Beck will not repeat his arguments regarding Juror Dobel, which are contained above at pp. 44-54.

> The Court finds in the written questionnaire, her answer to 108 she had mixed feelings, 110 she did not feel that the death penalty should be automatic for any particular type of crime. No 123 she answered "no" to the question "do you believe the state should impose a death penalty on everyone" - - strike that.
>
> All of those answers clealy reflect her feeling, and the Court finds that those feelings and beliefs are not diminished by the one answer to 115 that she would consider the death penalty.

(RT 2340-41.)[16]

When the denial of defense follow-up questions is considered in light of Flores' answers on the questionnaire, which conflicted with her answers during voir dire, the precise questionnaire answers are a critical component for this Court's proper review of the trial court's exclusion of Flores. Respondent argues that there is no error because

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[16]Question 108 was an open-ended question asking, "What are your GENERAL FEELINGS regarding the death penalty?" Question 110 asked, "Do you feel the death penalty should be automatic for any particular crime. Yes ____ No _____. Please explain." Question 115 asked, "Check the entry which best describes your feeling about the death penalty: Would impose whenever had the opportunity ____Strongly support ____ Support ____ Will consider _____ Oppose ____ Strongly oppose_____ Will never under any circumstances impose death penalty _____. Please explain or expand your answer if you wish: _____." Question 123 asked, "Do you believe the state should impose the death penalty on everyone who, for whatever reason, murders another human being? Yes ___ No ___. Please explain: _____."

this Court would defer to the trial court's assessment of the juror's state of mind. (RB at 449.) But accepting Respondent's argument would obviate the need for any review of the record in the voir dire process of a capital case. All that would be needed is a ruling by the trial court, and then no appeal would be permitted. But that is not the state of the law. The United States Supreme Court has noted the critical importance of a complete record when according deference to a trial court's exclusion of a juror.

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion. The record does not show the trial court exceeded this discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment.

(*Uttecht v. Brown* (2007) 551 U.S. 1, 20 [127 S.Ct. 2218, 167 L.Ed.2d 1014].)

Another juror, Juror Mann, also indicated she had strong feelings about the death penalty and would be unlikely to impose it.

When asked by the trial court, apparently based on a question posed by Mr. Beck's counsel, whether she would be able to put aside her beliefs about the death penalty and vote for death if she felt that under the law and the evidence it was appropriate, she responded, "I don't know the law. What is the law on that?" (RT 2377.) After a single-sentence explanation of weighing aggravating and mitigating factors, the trial court asked her if she "[w]ould ever be able to vote for the death penalty." She responded, "Never been – I've never been in this situation. As far as I believe, I believe in life imprisonment." Finally, when asked whether she could put her beliefs aside and vote for the death penalty, she said, "I don't think so." (RT 2378.)

In granting the prosecution's challenge for cause, the trial court relied heavily on Mann's questionnaire responses:

> I cite specifically question No. 108, she does not believe in the death penalty; 115, she opposes it. 116, it serves no purpose. 118, one imposition of the death penalty is too much. 122, she would vote against it. 127, the death penalty is never appropriate. And 128, life without possibility of parole would always be appropriate.

(RT 2379.)[17]

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[17]Question 116 asked, "What purpose do you believe the death penalty serves?" Question 118 asked, "Do you feel the death penalty

Juror Guesdon was similarly excused on the prosecution's challenge for cause based upon her beliefs about the death penalty.[18] First she indicated that her beliefs on the death penalty would not affect her ability to determine the defendants' guilt of the murder charge or the special circumstances. When asked whether her feelings about the death penalty would substantially interfere with her ability to function as a juror, she responded, "I guess so." (RT 2417.)

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is imposed: Too often ___ Too seldom _____ Randomly _____. Please explain _____." Question 122 asked, "If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote? For ___. Against ____. Not sure ____." Question 127 asked, "Under what circumstances, if any, do you believe that the death penalty is appropriate?" Question 128 asked, "Under what circumstances, if any, do you believe that the death penalty is not appropriate?" None of the answers to these questions alone would prohibit a juror from sitting in a capital case. Yet, based upon Ms. Mann's answers, the trial court granted the challenge for cause.

[18]Respondent notes the number of questions she was asked – 43 – but ignores the fact that the trial court informed her at the beginning of her voir dire that he would ask her "a significant number of questions" as she was the first juror questioned in that voir dire session; and that other jurors would not be asked all of the same questions, but should volunteer if their responses might be different. (RT 2406.) Thus, many of the questions had nothing to do with her views on the death penalty. In fact, of the thirteen pages of voir dire of Ms. Guesdon, less than two pages involved the death penalty.

The trial court then asked her about her answer to question 129, where she apparently indicated she could put aside her feelings on the death penalty. The trial court asked her, "Would you be able to put your beliefs against the death penalty aside and vote to impose the death penalty after hearing the law and the evidence if you felt that the death penalty was the appropriate circumstance – disposition." She responded, "No, I wouldn't." (RT 2417.)

The court immediately solicited the prosecutor's challenge for cause. All four defendants objected to the challenge. The court then ruled:

> Based on Miss Guesdon's answers to Question No. 108, she wishes to - - 115, 122, 127, and answers given here orally in court, I find that Miss Guesdon's personal beliefs and feelings about the death penalty are such that her ability to serve as a juror in this type of case would be substantially impaired.

(RT 2418.)

However, because of the incomplete record, the parties and this Court are left to speculate about her answers to those questions on the questionnaire and the impact they have on this Court's review of the propriety of the grant of the prosecution's challenge for cause.

Review of the complete record, which would include the missing questionnaires, is especially critical here where the trial court based its decision to exclude jurors on a combination of both the oral and the questionnaire answers. Moreover, where the trial court stated partial responses of the jurors, these "responses" do not appear to support the trial court's rulings. For example, when one compares the trial court's statements about Flores's and Mann's questionnaire answers to the actual questions contained in the document, it appears the trial court misread and overstated the extent to which their questionnaire answers demonstrated their inability to follow the law in this case.

Because the trial court was relying not just on the venire person's oral responses, but questionnaire responses as well, to exclude the jurors, the missing questionnaires are critical to this Court's ability to review the trial court's action, even under a deferential standard of review. As this Court is prevented from the complete review to which Mr. Beck is entitled, his convictions and sentence must be reversed.

VI.

HEIGHTENED COURTROOM SECURITY INCLUDING ADDITIONAL UNIFORMED BAILIFFS IN THE COURTROOM VIOLATED BECK'S DUE PROCESS RIGHTS TO A FAIR AND IMPARTIAL JURY, A FAIR TRIAL, AND RELIABLE GUILT AND PENALTY DETERMINATIONS[19]

Respondent argues that the trial court was not required to hold a hearing under *People v. Duran* (1976) 16 Cal.3d 282 [127 Cal.Rptr. 618, 545 P.2d 1322], because "appellants cannot show that one deputy for each defendant was unreasonable." (RB at 461.)

The trial was held in the "high security courtroom," and jurors had to pass through more than one security entrance on their way to court several times a day. On one occasion when the lights were dimmed for viewing the exhibits, the deputies shined flashlights on each defendant throughout those proceedings.

Without an evidentiary hearing on the issues of courtroom security, including the courtroom configuration and previously existing security measures, it is impossible to conclude that the presence of four deputies, with three sitting directly behind the

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[19]See Respondent's Argument XXI.

defendants, was "reasonable." Indeed, Respondent's argument amounts to a general policy that there should always be one deputy in the courtroom for every defendant. This kind of general policy directly contravenes the holding in *Duran*, that under no circumstances can the court adopt a "general policy" of imposing restraints on certain types of defendants or in certain types of cases. (*Id.* at p. 291.) Instead, when a "manifest need" arises due to a showing of unruliness, an announced intention to escape, or evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if a defendant is unrestrained (*id.* at p. 292, n. 11), the trial court has the discretion to order the most suitable security measures for a particular defendant in view of the attendant circumstances on a case by case basis.

Respondent next contends that requiring witnesses and spectators to pass through more than one security entrance was not prejudicial, because jurors were not aware of this extraordinary security measure. (RB at 451.) Respondent cites to no evidence in the record for its speculation that the jury was unaware of the extra security measures. Accordingly, this contention has little merit. As

explained in Beck's opening brief, the fact that Beck was tried in a high security courtroom and guarded by multiple uniformed bailiffs was known to the jury throughout the trial, because the heightened security measures were in plain view. Moreover, the court made the jury aware of these measures by telling the jury it should not consider these measures as evidence of guilt.[20] The impact of this knowledge on the jury simply cannot be measured. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569 [106 S.Ct. 1340, 89 L.Ed.2d 525] [Even when a practice is inherently prejudicial, "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will especially be true at the very beginning of proceedings; at that point, they can only speculate how they will feel after being exposed to a practice daily over the course of a long trial."].)

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[20]As explained in Beck's opening brief, the trial court's attempt to cure this prejudice by instructing the jury to disregard the obvious security measures does not, in any way, mitigate the harm caused by the presence of the heightened measures. (AOB at 190.) If anything, by focusing the jury's attention on the heightened security measures, it may have created fear in the eyes of the jurors or increased their fear of the defendants and predisposed them to believe the defendants were guilty.

The heightened security measures in the instant case improperly risked conveying to the jury that Beck and his co-defendants were violent people disposed to commit crimes of the type of which they had been accused, especially considering that other judges in the courthouse did not utilize such devices. (See, *Duran*, *supra*, at p. 290.) In light of this risk of prejudicially influencing the jury, the trial court had a duty under *Duran* to conduct an open hearing at which the prosecution could present evidence about the specific security threats and the need for heightened security measures and where defense counsel could cross-examine the prosecution's evidence.

Two fundamental factors distinguish this case from *Holbrook* and the other cases relied upon by Respondent, and dictate that this case is controlled by *Duran*. First, it is not simply the number of officers in the courtroom, but how they were employed in this case. By stationing the officers directly behind the defendants, the clear message was that this was more than the normal security situation – these defendants were considered dangerous and potential courtroom violence was feared or anticipated. Moreover, having the officers

seated directly behind the defendants, who were seated behind their respective counsel, inhibited their ability to converse with counsel during trial, thereby abridging their constitutional rights of counsel and defense.

Second, and more importantly, it is the cumulative effect of these security measures which, when viewed in total, made it clear to the jury that this was more than the normal courtroom security – these defendants were to be considered very dangerous. When one adds the instance of the flashlight shining on the defendants, the attorney comments to their clients, and the positioning of the deputies directly behind the defendants to the special security entrance measure, the jurors would infer that the defendants were considered very dangerous.

The record reveals no showing by the prosecution of cause for the heightened security measures, which thus impaired Beck's right to a fair and public trial, to the presumption of innocence, to an impartial jury, and to reliable guilt and penalty determinations. In addition, the court's ruling was prejudicial. Accordingly, Beck's conviction and death sentence must be reversed.

VII.

THE TRIAL COURT'S DENIAL OF BECK'S MOTIONS FOR MISTRIAL FOLLOWING CO-DEFENDANT WILLEY'S IMPROPER CROSS-EXAMINATION OF CRUZ AND BECK VIOLATED BECK'S STATE AND FEDERAL DUE PROCESS CONSTITUTIONAL RIGHTS[21]

Respondent first complains that Beck did not address his due process claims in the body of the argument in the opening brief. However, the body of the argument contains references to both the Fifth and Fourteenth Amendments to the United States Constitution, which are sufficient to support the due process claim. Appellant cited *Doyle v. Ohio* (1976) 426 U.S. 610, 618-19 [96 S.Ct. 2240, 49 L.Ed.2d 91], which holds that it is fundamentally unfair and a deprivation of due process to use a defendant's silence against him at trial. The argument also relates to, and incorporates, the denial of the severance motion, which itself was based on the due process right to a fair trial. (AOB at 86, 192.) Therefore, this Court must address this claim on the merits, and the question is whether the trial court erred in failing to protect Mr. Beck's constitutional rights by denying the

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[21]See Respondent's Argument XXII.

requested mistrial after co-defendant's counsel made improper reference to Cruz's right to remain silent.

Respondent's central argument is that a court has great leeway in finding that a defendant's constitutional rights were not violated by the arguments or statements of co-counsel, and these protections primarily limit the statements of the prosecutor, as the representative of the state. (RB at 477-78.) Although conceding that a defendant's rights can be violated by a co-counsel's attorney, Respondent relies on dicta from this Court that "a comment alluding to the silence of a defendant that would require reversal if made by a prosecutor may be deemed harmless – or even not error – if made by a co-defendant's attorney." (*People v. Hardy* (1992) 2 Cal.4th 86, 157 [5 Cal.Rptr.2d 796, 825 P.2d 781].) (RB at 477).)

But almost all courts recognize that a defendant's right to remain silent and right to a fair trial can be violated by either the prosecutor *or* counsel for a co-defendant. (See, e.g. *People v. Greenberger* (1997) 58 Cal.App.4th 298 [68 Cal.Rptr. 2d 61]; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1102-03 [75 Cal.Rptr.2d 17]; *People v. Jones* (1970) 10 Cal.App.3d 237, 243-244 [88 Cal.Rptr.

871]; *United States v. Castro* (9th Cir. 1989) 887 F.2d 988, 997; *United States v. Mena* (11th Cir. 1989) 863 F.2d 1522, 1533-1534; *Hayes v. United States* (1964 8th Cir.) 329 F.2d 209, 222; *United States v. Patterson* (1987 9th Cir.) 819 F.2d 1495, 1506; *Commonwealth v. Vallejo* (2009 Mass.) 455 Mass. 72 [914 N.E.2d 22]; *Webb v. Texas* (1989 Tex.Cr.App.) 763 S.W.2d 773.)

In fact, this principle was so clear that the Attorney General in the *Estrada* case conceded that the co-defendant's counsel "committed misconduct" by commenting on the silence of the defendant. (*People v. Estrada*, *supra*, 63 Cal.App.4th at p. 1102.)[22] Moreover, where as here, the co-counsel has acted identically to the role of the prosecutor in attempting to prove that Beck and Cruz, not his client, Willey, were guilty of the offenses, the analysis of the harm from the error should be identical and reversal is therefore required. Additionally, the nature of the comment here must be considered. Mr. Miller, a defense attorney, told the jury there is only one reason

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[22] While the *Estrada* opinion noted that *Hardy* had been decided four years before the trial in that case, this Court decided *Hardy* a month before the issue first arose in this case; and moreover, *Hardy* itself was based on well-established legal principles.

defense counsel does not call his client – fear about cross-examination of the client solely because of what the client has to hide. Thus, the harm from the improper comment, even though made by co-counsel, is heightened by the very nature of the comment.

Here, the comments by Willey's counsel were improper and constituted misconduct. In front of the jury, Willey's counsel stated, "If Mr. Amster didn't want his client questioned, he shouldn't have put him on the stand." Mr. Amster responded: "Well, let's knock it off." (RT 5220.) Mr. Beck's counsel *immediately* requested a side-bar conference outside the presence of the jury. He then moved for a mistrial:

> I want to move for mistrial on the basis of (sic) that Mr. Miller has contaminated the jury by his gratuitous comments regarding if Mr. Amster didn't want his client examined, he shouldn't have put him on the stand. And the reason I'm going to ask for a mistrial is because it seriously affects the way I handle my case.
>
> If I decide not to put my client on the stand, implicit in Mr. Miller's remarks in the hearing of the jury is the assumption that I don't want my client questioned and he has something to hide. I think that's extremely prejudicial and contaminating statement, and I think that a mistrial is appropriate.

> I don't think I can run my case at this point because I think the jury has been – has been instructed by Mr. Miller that if you don't want your client to – if you're afraid of what your client's going to say, you don't put him on the stand.

(RT 5222-5223.)

Respondent attempts to downplay the seriousness of the comments by calling them "silly," "inconsequential," "merely a snide comment," and "that little remark." (RB at 474, 476, 478.) But trivializing adjectives cannot negate the prejudicial impact of the comments which implicitly suggested, from one defense attorney to another: if you don't put your client on to testify, it is because you don't want him questioned and you are hiding something.

Respondent further argues that because Beck's counsel referred to the comments as "gratuitous," they are somehow less damaging. (RB at 479.) Gratuitous, however, is defined as "uncalled for, unwarranted and not based in reason." (*Merriam-Webster Dictionary* and *Dictionary.com.*) In essence, Beck's attorney noted the serious nature of the statement, precisely because it was unwarranted and in fact was prejudicial to his client's constitutional rights. As Mr. Faulkner informed the trial court, he was uncertain that he could

"run" the case at this point and that he would be forced to put his client on the stand to overcome the argument made by the co-defendant's counsel. Since Beck had not yet been called to testify, the harm to him should properly have been remedied by the grant of the mistrial for him. In contrast, a curative instruction may have remedied the error for Cruz as he had already made the decision to testify.

Respondent also argues that the jury had been informed by the trial court during voir dire that a defendant had a right not to testify, and thus any error was harmless. (RB at 475-76.) Yet, similar preliminary comments during voir dire are routinely provided in almost all criminal trials; reversible error is often found where a defendant's right to remain silent has been violated during the ensuing trial. Moreover, the general instruction informing the jurors that a defendant has the right not to testify and a failure to do so is not to be held against him, does not dispel or cure the harm done by Miller's remark which in essence told the jurors that a non-testifying defendant is taking that route in order to avoid cross-examination. As trial counsel pointed out, that is an extremely contaminating

statement, which waves a neon sign that such a defendant has something to hide.

Finally, Respondent asserts that any error was waived when Beck testified later at trial. (RB at 476.) Thus, Respondent asserts no harm could have resulted from the improper comments made before the jury in this case. Respondent has no answer for the dilemma which was created for Beck and his counsel by Willey's counsel's misconduct in front of the jury. Once the proverbial cat is out of the bag – that a defendant could avoid damaging cross-examination by simply not taking the stand – Beck's counsel was severely impacted in his decision on whether to put his client on the stand. Moreover, a defendant's right to silence can be violated even during his testimony by reference to his prior silence, and reversal can be required in those circumstances. (See, e.g *Doyle v. Ohio*, *supra*.) The harm to Beck was not cured by his testifying in the case.

VIII.

THE TRIAL COURT'S RE-OPENING OF WILLEY'S CASE-IN-CHIEF TO ALLOW EVIDENCE PREVIOUSLY EXCLUDED IF INTRODUCED BY THE STATE VIOLATED BECK'S STATE AND FEDERAL RIGHTS TO DUE PROCESS[23]

A trial court's order reopening a case is usually reviewed for an abuse of discretion. An abuse of discretion may result in a violation of a defendant's due process rights. A trial court's procedural or evidentiary rulings violate a criminal defendant's due process rights when the ruling renders the trial fundamentally unfair. (*Kealohapaule v. Shimoda*, (9th Cir. 1986) 800 F.2d 1463, 1466; *Walters v. Maass*, (9th Cir. 1995) 45 F.3d 1355, 1357.) In this case, the court's decision to reopen Willey's case solely to permit Willey to introduce the photograph of Ritchey's stab wound to the stomach was both an abuse of discretion and a violation of Beck's due process rights.

Respondent argues that the reopening was neither an abuse of discretion nor a violation of due process because the photograph was offered by a *defendant* as opposed to the prosecution, and because it

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[23]See Respondent's Argument XXIII.

was relevant to that defendant's defense. (RB at 485.) Additionally, Respondent argues there was no prejudice because the jury received no further evidence between the time Willey rested and the time the photograph was admitted. (RB at 486.) Respondent is incorrect.

Contrary to Respondent's assertions, the factors to be considered in analyzing whether the trial court committed an abuse of discretion are strongly in favor of Beck. (*People v. Jones* (2003) 30 Cal.4th 1084, 1110 [135 Cal.Rptr.2d 370, 70 P.3d 359] ["Among the factors to be considered are (1) the stage of the proceedings when the motion is made, (2) the moving party's diligence in presenting the new evidence, (3) the risk that the jury might accord the new evidence undue emphasis, and (4) the significance of the evidence."].)

While the first factor, the stage of the proceedings, is neutral in this case, the other three factors demonstrate that the decision to reopen was both an abuse of discretion and a denial of Beck's due process rights. (RB at 486-492.) Respondent is incorrect that Willey's counsel satisified the obligation of due diligence because "it was a long, complicated trial with multiple defendants and numerous exhibits," and Willey's counsel overlooked the photograph in his

case-in-chief. (RB at 487-488.) Because he was obviously aware of the existence of the photograph, Willey's counsel's failure to attempt to admit the photograph during his case-in-chief cannot be justified in any manner. Negligence is not a factor warranting reopening.

The third factor also weighs in favor of Beck. Respondent overlooks the unique and atypical circumstances presented by the multi-defendant prosecution. Because four defendants with competing theories of defense were being tried together, Willey was in an adversarial position to Beck, and the introduction of this photograph was for the sole purpose of incriminating Beck. The 24-hour delay following the closing of Willey's case-in-chief and the introduction of the photograph placed undue emphasis on the significance of the photograph and likely created the impression for the jury that the photograph was critical evidence demonstrating Willey's innocence and Beck's guilt.

Regarding the fourth factor, the significance of the evidence, Respondent argues that the photograph was relevant and probative of Willey's defense and that there is no prejudice to Beck. (RB at 490-491.) This argument overlooks the fact that the photograph was

cumulative and, consequently, unnecessary to Willey's defense. Because the photograph was graphically gruesome and highly inflammatory, this otherwise insignificant evidence likely had a powerful impact on the jury.

Finally, Respondent makes a type of "invited error" argument claiming that the delay which emphasized this evidence was the direct result of Beck's objection and refusal to stipulate to its introduction. (RB at 489.) Respondent ignores the fact that Beck objected to the photograph because he did not want it to go to the jury. Respondent's circular reasoning would have the absurd result that any objection and refusal to stipulate to evidence would be held against a defendant. This is not the state of the law.

IX.

THE TRIAL COURT'S DENIAL OF BECK'S REQUEST FOR REBUTTAL VIOLATED BECK'S STATE AND FEDERAL RIGHTS TO DUE PROCESS, TO A FAIR TRIAL, TO PRESENT A DEFENSE AND TO RELIABLE VERDICTS[24]

Respondent argues that there was nothing unusual about a multi-defendant prosecution, or unfair about the order of the closing arguments, and contends that the only thing "unusual" was Beck's request for rebuttal argument. (RB at 494.) Respondent ignores the fact that three of the four defendants joined the prosecutor in arguing to the jury that Beck was guilty. Beck was forced to defend himself not only against the state, but against Cruz, LaMarsh and Willey. The cumulative effect of the procedural order of closing arguments, placing Beck after the prosecutor and Cruz but before LaMarsh and Willey, meant that the jury was exposed to four closing arguments against Beck. This meant four different attorneys stood up in front of the jury attempting to prove Beck's guilt, but Beck was able to respond only to the arguments of the prosecutor and Cruz. Under these circumstances, the request for rebuttal argument after the

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[24]See Respondent's Argument XXIV.

closing of co-defendants LaMarsh and Willey was not unusual. Moreover, given the multiple closings against Beck, fundamental fairness dictates that Beck be given the opportunity to defend himself against this onslaught by allowing him a rebuttal argument against LaMarsh and Willey.

Respondent claims that the trial would have been extended ad nauseam had Beck been given the requested rebuttal argument. (RB at 496.) This is incorrect. Beck asked for rebuttal following the closing of the prosecutor, LaMarsh, and Willey. Because, given the order of closing argument, LaMarsh and Willey had the opportunity to hear Beck's closing argument and to rebut it. All Beck was asking for was the same opportunity that the order of closing arguments necessarily provided to LaMarsh and Willey. There was no need to offer this opportunity to any co-defendant other than Beck and Cruz.

The court's denial of Beck's request for rebuttal, given the unusual circumstances of this case, was an abuse of discretion which rendered his trial fundamentally unfair, thus violating Beck's state and federal rights to due process, as well as his rights to a fair trial, to present a defense and to reliable verdicts. A trial court's procedural

ruling which renders the trial fundamentally unfair violates a criminal defendant's due process rights. (*Kealohapauole v. Shimoda*, *supra*, 800 F.2d at p. 1466; *Walters v. Maass*, *supra*, 45 F.3d at p. 1357.)

X.

THE EVIDENCE SUPPORTING THE CONSPIRACY TO COMMIT MURDER CHARGE WAS CONSTITUTIONALLY INSUFFICIENT[25]

Respondent argues that the trial court properly denied Beck's motion for acquittal because Evans's testimony was credible, reliable and corroborated by other evidence. (RB at 497.) Respondent also argues that there was sufficient evidence of the conspiracy independent of Evans's testimony. (RB at 497.)

A. Reliability

The crux of Respondent's argument that Evans's testimony was reliable was that she stood to lose her plea bargain if she lied. (RB at 509.) This rose-colored view blindly disregards the problems inherent in snitch testimony. It is well known that when a witness testifies in exchange for deals, special treatment, or the dropping of charges, that testimony is inherently suspect. Unfortunately, our criminal justice system relies all too often on witnesses with these strong motivations to lie. Perhaps unsurprisingly, the use of

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[25]See Respondent's Argument XXV.

incentivized witnesses has proven to be a significant cause of wrongful convictions, and such testimony is the number one cause of wrongful convictions in death penalty cases. (See, e.g., *Frontline: Snitch* - PBS Frontline (1999); *How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions at Northwestern University (2005); *Comment: Beyond Unreliable: How Snitches Contribute to Wrongful Convictions* (Alexandra Natapoff) Golden Gate University Law Review, Vol. 37, p. 107 (2006).) "While the law in its anxiety to prevent the guilty from escaping punishment for their crimes permits an accomplice who confesses his own infamy to be a witness, it also recognizes the strong motive that *undoubtedly actuate such a witness to prove the defendant on trial to be guilty of the offense, . . .*" (*People v. Reingold* (1948) 87 Cal.App.2d 382, 394 [197 P.2d 175] (emphasis added).)

Evans's testimony was unreliable because she was facing capital charges which could only be avoided if she testified that Beck and the other co-defendants were guilty of the charges the State was pursuing. It was also unreliable because, contrary to Respondent's

arguments, it was *the only* evidence of an agreement to kill. All the other evidence Respondent enumerates, including the eye-witness testimony of neighbors, the physical evidence of weapons, masks and stealth, the closeness of the defendants, their gathering together before the killings, etc., does not corroborate the agreement *to kill.* Without Evans's critical "agreement" testimony, the evidence equally supported the theory that the defendants planned to venture into hostile territory to help one of their members retrieve belongings, and that they disguised themselves with masks and under the cover of darkness and took weapons for the purpose of defending themselves from potential physical assault.

Respondent argues that the jury verdict is proof that Evans's testimony was credible. (RB at 510.) This contention is specious and ignores the reality in the criminal courtroom. Studies have shown that prolonged exposure to discussion of the penalty at the outset of jury qualification suggests that the defendant's guilt is presumed by the attorneys and judge, increases the acceptability of pro-death penalty attitudes, and has been shown to increase both the likelihood that jurors will convict and their willingness to vote for the death

penalty in hypothetical cases. (See Craig Haney, *Juries and the Death Penalty*: *Readdressing the Witherspoon Question*, Crime and Delinquency 1980 Vol, 26, No. 4, 512-527.)

Respondent attempts to bolster Evans's testimony by rationalizing her inconsistencies as innocent (e.g., RB at 507 [Evans "thought Cruz would not follow through . . ."]; faded memories which were the product of a stressful situation (RB at 506 [Evans's testimony "covered numerous events that took place during a stressful and shocking event two years earlier"; RB at 509, 510 [Evans's inconsistencies were "errors in memory" and resulted from testifying "years after the events"], and by claiming that witness who gave testimony inconsistent with Evans must be lying because Evans was so very, very credible (See e.g., RB at 507-508 [Mercer *had to be* lying because she disliked Evans and testified for Cruz; RB at 509 [Beck and the others were lying to avoid the death penalty].) Yet, the record speaks for itself as to who Evans was: an immature, self-serving young woman facing capital murder charges who, convicted of stealing, and, in her use and selling of drugs, failed to care for her own children. The reality is that had she insisted to authorities that

she and the others went to Raper's to retrieve her sister's belongings, and that when things got out of control and fighting broke out, she too would likely be on death row.

B. Corroboration

Respondent concedes that there is no evidence to corroborate Evans's testimony about the meeting in the trailer and the agreement to go into the house and kill everyone, but argues that because "numerous other aspects of [Evans's] testimony were corroborated, Evans's entire testimony must be considered in evaluating whether there was substantial evidence of the conspiracy."[26] (RB at 515.) Taking this argument at face value, had Evans testified that Beck was wearing a blue shirt on the night of the homicides, and Beck was later arrested wearing a blue shirt, Respondent would be asking this Court to sustain the conspiracy verdict on this fact alone. Such is not the state of the law. "[T]o be of any avail, the corroboration, however

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[26]In footnote 75 of Respondent's Brief, Respondent attempts to mitigate its concession of no corroborative evidence by referencing evidence from the trial record of *People v. Vieira* (2005) 35 Cal.4th. 264, 276 [25 Cal.Rptr.3d 337, 106 P.3d 990]. This evidence is not before Beck's jury, and Respondent's attempt to have this Court consider it is improper.

strong on all other respects, must point to the connection of the defendant with the commission of the crime." (*People v. Reingold*, *supra*, 87 Cal.App.2d at p. 393.)

In this instance, the crime is not homicide, because Beck did not deny that the victims were killed; it is *conspiracy (an agreement) to kill.* It bears repeating here that the corroborative evidence is "not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value; second, that the corroborative evidence to be sufficient and of the required *substantial* value *must tend to directly and immediately* to connect the defendant with the offense charges against him; and third, that the corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused." (*Id.* at p. 393.)

Respondent contends that evidence of the closeness of the group corroborated Evans's testimony of a conspiracy; however, evidence that two co-defendants are friends or have similar interests is simply not enough corroborative evidence to sustain a conspiracy to kill. For example, in *People v. McDerrmott* (2002) 28 Cal.4th 946 [123 Cal.Rptr.2d 654, 51 P.3d 874], one of the cases cited by

Respondent, the reviewing court found sufficient corroborative evidence, in a murder-for-hire case, in the phone records of the co-defendants. The co-defendants, who did not live together, called each other and spoke for over one hundred minutes shortly before the murder. In contrast here, there is not unusual activity, and the evidence therefore is not corroborative of a conspiracy. The co-defendants actually lived together in the same camp and frequently gathered together in the evening to barbecue and socialize. Otherwise, every homicide involving two co-defendants who know each other or have similar interests would automatically be a conspiracy to murder.

Similarly, evidence of the ongoing hostilities between the two groups is not the kind of corroborative evidence needed for the conspiracy theory. Respondent may be correct that this evidence may be relevant to motive, but it does not tend to prove the agreement between to co-defendants to kill.

Finally, Respondent argues that the following is also corroborative evidence that the murders were planned: (1) the arming and disguising of identities; (2) traveling to Elm Street; (3) entering

the house from multiple locations; (4) stabbing Raper to death; (5) killing Ritchey; (6) fleeing after the fact; and, (7) extrajudicial statements. (RB at 516-526.) While there is no question that this litany of evidence is corroborative of the defendants' participation in the deaths of the victims, it does not, for the reasons explained above and in appellant's opening brief, corroborate Evans's testimony at trial about an agreement to kill, which she alone testified about. The fact remains that without this essential piece of evidence – Evans's testimony about the planning in the trailer – the State is left without proof of its conspiracy theory of liability, and Beck is guilty at most for the murder of Colwell, not for all four murders under the conspiracy theory.

XI.

REVERSAL OF THE DEATH SENTENCE ON THE CONSPIRACY TO COMMIT MURDER CHARGE IS REQUIRED[27]

Respondent concedes that error was committed and that this Court must reverse the death sentence on the conspiracy count imposed on Mr. Beck. (RB 534.)

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[27]See Respondent's Arguments XII and XXVI.

XII.

THE IMPROPER JURY INSTRUCTIONS REQUIRE REVERSAL[28]

A. The Failure to Instruct that Defendant Was Required to Have a Specific Intent to Kill to Be Guilty of Conspiracy to Murder Was Not Harmless

Respondent concedes that the trial court misinstructed the jury on the specific intent element, but argues that this error was harmless for the following reasons the jury necessarily found Beck guilty of harboring a specific intent by: (1) finding him guilty of conspiracy to murder (RB at 263-264, 266-270); (2) guilty of four counts of first degree murder (RB at 264-265); and (3) there was overwhelming evidence that the murders were carried out as part of a preconceived plan (RB at 273). Respondent is incorrect on all claims.

The fact that the jury found Beck guilty of conspiracy to commit murder does not resolve the issue of harmlessness. The guilty verdict on the conspiracy charge is anchored by the term "murder." Because this target offense was erroneously defined by the trial court, the jury's verdict on this charge is flawed and therefore unreliable.

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[28]See Respondent's Arguments VII, VIII, IX, X, and XXVII.

Respondent claims that it "does not make sense that the jury found [Beck] guilty of conspiring to commit murder, but did not think [he] harbored an intent to kill." (RT 263.) See also, "No jury could believe that [Beck] drive to the crime scene . . . , killed four people in the furtherance of the conspiracy; but did not actually have the intent to kill." (RB at 271.)

Where, as in this case, an implied malice definition of murder is given to the jury, a reasonable juror could conclude that a defendant conspired to commit an "intentional act," such as arming oneself before going into a hostile situation, the "natural consequences of which were dangerous to human life," and the act was "deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."[29] Accordingly, the fact

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[29]The trial court gave the following definition to the jury:

"Malice" may be either express or implied.
Malice is express when there is manifested an intention unlawfully to kill a human being.
Malice is implied when:
1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

that the jury found Beck guilty of the conspiracy begs the question, "Did the jury find that Beck had the specific intent to kill?" Given the instructional error, the *only* answer to this question is that it is not possible to discern what the jury found.

Respondent's second argument regarding the guilty verdict on the first degree murder charges is similarly unpersuasive. Respondent argues that even though the jury may have found Beck guilty of first degree murder as an aider or abettor or conspirator, there was no error, since "the target crime was murder, and the jury was instructed that to find [the defendants] culpable as aiders and abettors or accomplices, the defendants had to share the intent to commit the "target crime" of murder. Thus, Respondent argues, "there is no possibility that the jury based its first degree murder verdicts on

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When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

(CT 1896-97.)

vicarious liability absent an intent to kill." (RB at 267.) The flaw in this argument is the court's use of the term "target crime," which was defined as "murder" and which was then defined as either "express or implied."

As explained above, a reasonable juror could conclude that the defendants needed only to share the intent to commit any "target crime" in order to be guilty of first degree murder.[30] Thus, the jury's verdicts on these counts shed no light on the question of whether the jury found that Beck had the specific intent to kill.

Respondent claims that the trial court's instructions regarding the elements of first degree murder cures any error. As noted in Beck's Opening Brief, the errors in the conspiracy instruction allowed the jury to bootstrap its findings on the first degree murder counts to its finding on the conspiracy count. The trial court instructed the jury that if they found Beck liable for one murder he was liable for all of the murders committed that night, even in the absence of a finding

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[30]For example, the jury could have found Beck guilty of an "intentional act," (i.e., assault) the "natural consequences of which were dangerous to human life," and the act was "deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."

that he had the requisite specific intent to kill at the time of the alleged agreement.[31] The improper instruction combined with the trial judge's response to the jury questions, as explained in Beck's opening brief, allowed the jury to convict Beck of all the murders,

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[31]The trial court instructed:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if such act or such declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy even though such crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of such crime or act.
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged in Counts I, II, III, and IV was perpetrated by co-conspirators in furtherance of such conspiracy and was a natural and probable consequence of the agreed upon criminal objective of such conspiracy.

(CT 1916-17.)

even those for which there was absolutely no evidence of his actual participation. The prosecution argued that Beck was directly connected to only one of the victims, and in that instance the evidence was that Beck's actions could not have been the cause of death. It is therefore reasonably probable that the jury convicted Beck on all counts solely on the basis of the erroneous conspiracy instruction and the prosecutor's reliance on that instruction.

Respondent's third argument, that the jury finding of the overt acts and the "weight" of the evidence of a conspiracy (RB at 271) constitute overwhelming evidence of specific intent, is undermined by the nature of the state's evidence. Virtually all of the evidence that Cruz *planned to kill* the victims and that Beck agreed to this plan came from Michelle Evans, the sole witness to testify about the alleged agreement. Her testimony was riddled with contradictions, and her incentive to lie was great. The evidence of the overt acts could be interpreted by a reasonable juror as evidence supporting implied malice killings. A juror could have found present the overt acts necessary to convict for conspiracy: that the co-defendants armed themselves and drove to the house; that they concealed their

identities; that they entered the house and four people were killed; that their acts were conducted in furtherance of implied malice killings that resulted from a misguided plan to help Michelle Evans, not to commit premeditated murder, the "natural consequences of which were dangerous to human life"; and that the acts were "deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."

Because the jury was not informed of the specific intent to kill element of the target crime of the conspiracy charge, because the jury was allowed to bootstrap its first degree murder convictions to its finding on that charge, and because the evidence about Beck's intent at the time of the alleged meeting at the camp was conflicting, the error was not harmless beyond a reasonable doubt. Therefore, reversal on all counts is required.

B. The Trial Court Erred in Failing to Instruct the Jury Pursuant to CALJIC 8.40 that There Is No Malice Aforethought if a Defendant Acts with Imperfect Self-Defense

Respondent contends that this claim is waived due to Beck's failure to join Cruz's request for an unreasonable self-defense instruction. (RB at 296-97.) But waiver is not applicable because the

trial court had a duty to instruct properly on imperfect self defense. "[W]hen a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises *whenever* the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 200–201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

This obligation requires such instruction regardless of defense request or strategy. In *Barton*, this Court found that the trial court was correct in instructing on unreasonable self-defense even where the defendant requested that the instruction *not* be given because it contravened his theory that he acted accidentally. "[R]egardless of the tactics or objections of the parties, or the *relative* strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on *any and all* lesser included offenses, or theories thereof, which are *supported* by the evidence. In a murder case, this means that both heat of passion and unreasonable self-defense, as

forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 160 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)[32]

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[32]As *Barton* explained,

> '[t]he trial court must instruct on lesser included offenses . . . [supported by the evidence] . . ., regardless of the theories of the case proffered by the parties.' (*Barton, supra,* 12 Cal.4th 186, 203, 47 Cal.Rptr.2d 569, 906 P.2d 531.) *Barton* confirmed at length that there was substantial support for both heat of passion and unreasonable self-defense in the confused circumstances surrounding the shooting at issue. (*Id.* at pp. 201–203, 47 Cal.Rptr.2d 569, 906 P.2d 531.)
>
> Under *Barton,* heat of passion and unreasonable self-defense, as forms of a lesser offense included in murder, thus come within the broadest version of the California duty to provide sua sponte instructions on *all the material issues presented by the evidence.* (*Sedeno, supra,* 10 Cal.3d 703, 715, 112 Cal.Rptr. 1, 518 P.2d 913.) In the interests of justice, this rule demands that when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to "consider the *full range* of possible verdicts— not limited by the strategy, ignorance, or mistakes of the parties," so as to "*ensure* that the verdict is no harsher or more lenient than the evidence merits." (*Wickersham, supra,* 32 Cal.3d 307, 324, 185 Cal.Rptr. 436, 650 P.2d 311, italics added; see also *Barton, supra,* 12 Cal.4th 186, 196, 47 Cal.Rptr.2d 569, 906 P.2d 531.) The inference is inescapable that, regardless of the tactics or objections of the parties, or the *relative* strength of the evidence on

This Court specifically rejected the State's argument that this rule "allows a defendant to remain silent about instructions, pursue only the strongest line of defense, gamble that the court's 'incomplete' lesser offense instructions will produce an acquittal or conviction of the lesser offense, then complain on appeal if convicted of the charged offense." (*Id.* at p. 160.)

Thus, waiver does not apply here, and in fact the State cites little authority for its argument. The only case Respondent cites, *People v Andersen* (1994) 26 Cal.App.4th 1241, 1249 [32 Cal.Rptr.2d 442], provides no support for this position.[33]

> alternate offenses or theories, the rule requires sua sponte instruction on *any and all* lesser included offenses, or theories thereof, which are *supported* by the evidence. In a murder case, this means that both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support.

(*People v. Breverman, supra*, 19 Cal.4th at pp. 159-60.)

[33] If anything, *Andersen* rejects the State's argument. *Andersen* merely stated:

> It is said that the failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e.,

Respondent next contends there was no evidence at trial to support a request for an imperfect self defense instruction (RB at 287-288, 306-312) and that Beck was not entitled to the imperfect self-defense instruction because Beck did not testify that he was personally attacked or threatened by any of the victims. (RB at 288.) Respondent's assertions are incorrect and are not supported by the record. The law is clear that in determining whether there is substantial evidence to require a sua sponte instruction on a lesser-

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> resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. (Pen. Code, § 1259; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978 [125 Cal.Rptr. 419]; accord, *People v. Rivera* (1984) 162 Cal.App.3d 141, 146 [207 Cal.Rptr. 756].) Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim-at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was. Accordingly, it seems far better to state straightforwardly, as we now do, that an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.

(*People v. Andersen, supra* 26 Cal.App.4th at p. 1249.)

included instruction, the court must examine the entire body of evidence presented at trial, not just the defendant's testimony; and that substantial evidence may exist even in the face of inconsistencies presented by the defense itself. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-63.)

While Respondent is correct that Beck testified that he did not kill anyone, case law is well-settled that a defendant may raise inconsistent defenses. (*People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].) The law is also settled that where the evidence is such that a jury could reasonably conclude that a defendant killed a victim in the unreasonable but good faith belief that he must act in self-defense, the trial court has a sua sponte duty to instruct on voluntary manslaughter. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201.)[34]

Respondent spends a great deal of effort depicting the facts to support its claim that there was no evidence that Beck acted in self-

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[34]Respondent concedes this in its brief. (See RB at 307 ["[I]f there had been sufficient evidence of unreasonable self-defense at the Elm Street house, the trial court would have been obliged to instruct the jury on that theory."].)

defense. (RB at 312-313.) However, the standard for giving the instruction is not that Beck *acted* in self-defense, but that he believed he had a need to act in self defense. Here, despite the absence of Beck's testimony that he was attacked, the record contains substantial evidence supporting the imperfect self-defense claim.

Respondent argues however that none of this evidence warrants the instruction, because Beck did not testify that he was under attack and that there was no evidence of imminent peril. (RB at 309.) Nevertheless, all four defendants testified that they were concerned for their safety. They testified that this fear was a result of their history with Raper and the threats he had made against them. (RT 5059-5116, 5287-5296, 5635-5644, 5978-5986, 5691-5705.) Beck testified that he heard a girl scream and he thought it was Evans. Once inside the house, he feared for his life. (RT 5124-5125, 5368.) Beck's defense theory was that while there was no conspiracy to kill the Elm Street residents and that he accompanied the other defendants to the house in response to Evans's request for protection, the killings resulted not from a premeditated plan to commit murder, but because

fighting erupted between Colwell and Vieira, Ritchey and Willey, and LaMarsh and Raper.[35]

Respondent claims Beck's testimony of fear was a "hollow claim" which did not support the self-defense instruction. However, regardless of whether there was a question of Beck's credibility, it does not prove that there was no evidence of Beck's imminent fear. In deciding whether there is substantial evidence of a lesser offense, courts must not evaluate the credibility of witnesses. That is a task for the jury. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

Respondent claims that Beck cannot rely on the fighting between Raper and LaMarsh, Ritchey and Willey, and Colwell and Vieira to support his self-defense claim because there is no evidence that he was present when the violence occurred. (RB at 309.) The trial evidence and diagrams introduced showing the layout of the Elm Street house make it clear that the house was not large, and anything

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[35]Indeed, Respondent agrees that the evidence detailed in Beck's opening brief of the ongoing hostilities between Raper and his followers and the defendants and of a fight breaking out among the groups at the Elm Street house would have been "a perfectly reasonable basis for an instruction on unreasonable self-defense." (AOB at 240-241.)

happening in the living room would have been visible and audible to Beck, who was in the kitchen and dining room area.

The trial court should have instructed on imperfect self-defense given the state of the trial testimony of numerous witnesses. As long as there was substantial evidence supporting the theory that Beck felt his life was threatened by the fighting around him, even if this belief was objectively unreasonable, there was sufficient evidence for the imperfect self-defense instruction.

Respondent argues that Beck's voluntary presence at the Elm Street house was somehow "wrongful conduct" which "created circumstances under which his adversary's attack or pursuit [was] legally justified," thus, Beck was not entitled to the instruction. (RB at 307.) This is not so.

Given the evidence of animosity and mutual fear that existed between the two groups prior to the homicides, it is not unreasonable that some of the defendants would arm themselves before accompanying Evans to the house. This act is not the type of "wrongful conduct" that would prevent an imperfect self-defense instruction.

Finally, Respondent argues that the error was harmless[36] because "there is no possibility the jury would have found appellants acted in unreasonable self-defense" given the absence of Beck's testimony or any other evidence that he acted in self-defense. (RB at 288, 313-319.) As explained above, because there was ample evidence in the record to support a finding of at least an unreasonable belief of danger, Respondent's argument lacks merit.

Respondent argues that the jury findings that Beck conspired to commit murder, participated in five overt acts in furtherance of the conspiracy, and committed four first degree murders demonstrate that the jury "necessarily found that appellants made a calculated decision to commit murder – as opposed to an emotional response to an imminent threat." (RB at 316.) As explained in Argument XII, A., *supra*, because these verdicts were flawed by instructional error, they do not demonstrate that the failure to give the imperfect self-defense instruction was harmless. Under the flawed instructions, the jury

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[36]Respondent impliedly agrees that the standard for harmless error when the trial court fails to instruct sua sponte in a capital case is governed by *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See RB at 314.)

could have concluded that Beck was guilty of the conspiracy and first degree murders under a theory of implied malice – a theory which would be consistent with Beck's defense that the killings were the result of his unreasonable fear of imminent danger to his life.

C. The Trial Court Erred in Denying Beck's Request for Special Instructions on the Definition of Sudden Quarrel and Heat of Passion, Thus Depriving Beck of His Sixth, Eighth and Fourteenth Amendment Rights to Present a Defense and to Reliable Guilt and Penalty Verdicts

1. Defendant's Requested Instruction FFF

Respondent is correct that CALJIC 8.42 *did* instruct that provocation may occur over a considerable period of time.

2. Defendant's Requested Instruction DDD

Respondent argued that the heat of passion instruction given to the jury was adequate because CALJIC 8.44 provided that "any or all of such emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness."[37] (RB at 539.) This

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[37]Respondent further suggests that CALJIC 8.42 and 8.43, in combination with CALJIC 8.44, were sufficient to adequately inform the jury of the full nature and scope of heat of passion. (RB at 539.) Not so. Neither instruction provides any description of the type of emotion necessary to support a heat-of-passion defense and neither dispells the common belief that "heat of passion" must require rage or anger. CALJIC 8.42 merely provides, in pertinent part:

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."

(CT 1903.)

And CALIC 8.43 merely provides:

To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of such quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused **and sufficient time has elapsed for angry passion to end and for reason to control his conduct**, it will no longer reduce an intentional killing to manslaughter. The question as to whether the cooling period has elapsed and reason has returned is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable

argument fails to address the weaknesses inherent in CALJIC 8.44 as set forth in Beck's opening brief. (AOB at 245-247.) Because Beck's requested instruction was a correct recitation of the law, and would have cured the confusing ambiguity of CALJIC 8.44 and the erroneous suggestion of CALJIC 8.43 that heat of passion is predicated on the emotional state of anger, the trial court erred in refusing Beck's requested instruction.

The error was not harmless beyond a reasonable doubt in light of the state of the trial evidence. And Respondent is incorrect when it claims that the giving of Beck's requested jury instruction rested solely on whether Beck testified that he was experiencing an emotion relevant to the heat of passion instruction. (See *Matthews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54] ["[A] defendant is entitled to an instruction as to any recognized defense for

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> person to have cooled such passion and for that person's reason to have returned."

(CT 1904 (emphasis added).)

If anything, CALJIC 8.43 suggests, and reinforces the common belief, that heat of passion must be predicated on the emotion of anger.

which there exists evidence sufficient for a reasonable jury to find in his favor."].)

3. Requested Instruction EEE

Respondent contends that because "quarrel" means "verbal argument," the trial court did not err in giving Beck's requested instruction explaining verbal provocation. (RB at 540.) While "quarrel" may have a technical definition of "verbal argument," the lay understanding of this term is less narrow, and Beck contends a reasonable juror may well have believed that "quarrel" was synonymous with a physical altercation, or required at least two parties verbally sparing. Beck's requested instruction would have clearly conveyed to the jury that the words of the alleged victim alone would have been enough to reduce the charge to manslaughter.

CALJIC 8.40 does not suffice to replace the necessary language in EEE because 8.40's inclusion of "quarrel" is modified by "sudden."[38] Thus, even if the jurors understood "quarrel" to mean a verbal argument as the State contends, this language directs that the

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[38]"[T]here is no malice aforethought if the killing occurred upon *sudden quarrel* . . . ."] CALJIC 8.40.

quarrel, or verbal argument between two parties, must have occurred suddenly, i.e., just before the murders. That conveys a misleading picture given that under the law provocation can occur over a prolonged period of time. For this reason, CALJIC 8.40 does not cover the type of provocation evidenced in this case – the ongoing aggression, harassment and verbal threats by Raper. Thus, 8.40 is insufficient for two reasons: (1) it suggests that the provocation, if verbal, must include at least two parties arguing; and (2) the verbal argument must occur immediately before the homicides.

This error was not harmless given the ample evidence that Raper and his group had verbally provoked Beck over a prolonged period of time. A review of the record reveals that the evidence enumerated by the prosecution in closing argument to prove Beck's premeditated intent to commit murder also could have supported Beck's defense of manslaughter had the jury been properly instructed.

For example, Rosemary McLaughlin's testimony that Cruz called her on the night of the killings and said that he "and the guys were going to go even a score, get in a fight" (RT 5547) is evidence that Beck only intended to fight but that things got out of hand.

Additionally, some testimony that the defendants armed themselves before going to the Elm Street house can be explained by Beck's fear of Raper and Raper's gang and of Beck's concern for his own safety and protection. Finally, Beck's alleged post-killing statement to McLaughlin that they "had to do them" (RT 5553-5554) also supports a manslaughter defense in that it conveys that Beck viewed the homicides as not planned or premeditated but resulted as the fight progressed.[39]

Because there was evidence of ongoing provocation and verbal threats by Raper, Beck was constitutionally entitled to have the jury consider his manslaughter defense. Without the proper instruction, the jury could not consider the long-term verbal taunting Raper inflicted on Beck. The trial court's improperly narrow definition of provocation denied Beck his Sixth and Fourteenth Amendment rights to present a defense. A reversal of the guilt verdict is required.

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[39]Statements such as "We got them all," "We nailed them," or "We took them out" would more tellingly convey a sense of premeditation.

D. The Trial Court Erred by Mis-Instructing the Jury in the Middle of Deliberations Regarding the Order of Considering the Charges and Regarding the Jury's Ability to Consider Lesser Charges Before Acquitting on the Greater Offenses

Respondent argues that the trial court did not confuse the jury when it responded to a jury question and instructed on the order of deliberations because the court did not use the term "consider" in its instruction, but instead told the jury it could not find Beck "guilty" of voluntary manslaughter until it had unanimously acquitted of first degree murder. (RB at 544.) While Respondent is correct in its reading of the record, it is unrealistic that the jury understood this post-verdict reading. The question the jury asked was whether it could *consider* the lesser charges before finding Beck not guilty of first degree murder. When the trial court responded as it did, the jury very likely reasonably concluded that the court was responding directly to its question. Thus, the only plausible interpretation the jury could glean from the court's instruction was that it could not *consider* the lesser charges during their deliberations of the first degree murder charges.

Respondent also argues that Beck forfeited this claim. (RB at 545-546.) For the reasons set forth in Beck's opening brief (AOB at 259-262), Beck submits Respondent is incorrect.

Respondent's argument that the trial court error did not rise to a federal constitutional error is incorrect. Because the trial court limited the "applicable" lesser included offenses to assault with a deadly weapon notwithstanding the evidence of an imperfect self-defense, the trial court did in fact erect an "artificial barrier" to lesser offenses and thereby implicated federal constitutional law. (See *People v. Rundel* (2008) 43 Cal.4th 76, 142 [74 Cal.Rptr.3d 454, 180 P.2d 224].) Accordingly, reversal is required unless the error is harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. 18.)

Respondent argues that even if the supplemental instruction failed to clarify the law, there is no error because the jury would have gone back to instruction 17.10. The jurors obviously misunderstood 17.10 the first time they read it; accordingly, it defies logic that they would subsequently understand the instruction even if they returned to it for assistance. Moreover, there is nothing in the instructions to

direct the jurors back to 17.10, particularly since the trial court apparently answered their question with its erroneous supplemental instruction.

This instructional error is analogous to that found in *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833. There, the Ninth Circuit found Eighth and Fourteenth Amendment violations where the trial judge's subsequent direction to refer to the original instructions failed to identify and cure the exact problem confounding the jury. A supplemental instruction to reread the instructions does not cure the error when the jury has already misunderstood the applicable law at the point it asked for instructional guidance, and when the jury's deliberations are already "constitutionally flawed" at the point that they asked the judge for help. The Ninth Circuit recognized that even though the instructions themselves were "technically flawless," this fact did not cure the error when the jury "for some unknown reason" did not correctly understand the instructions in the first place.

> "There is no point in reiterating language which has failed to enlighten the jury." [Citation omitted.]
>
> [E]ven presuming that the jurors read the instructions after returning from their attempt to obtain guidance from the court, the record gives us no assurance

> whatsoever that they then understood the law. All we know for sure is that the eleven jurors who initially did not understand that the law required them to consider McDowell's mitigating evidence eventually voted as they had while under the influence of their initial error.
>
> [Even if] 'there is nothing complicated about the instruction to which they were referred," even if this characterization is correct, it is irrelevant. The fact is that this jury did not comprehend it. Under these circumstances, it would be filly to presume – as we usually do - that in the end they got it right and followed the law.

McDowell, supra, 130 F.3d at pp.838-839.

E & F. The Trial Court Denied Beck His Constitutional Right to Present a Defense by Instructing the Jury that It Could Only Consider Certain Defenses as to Beck, and the Denial of Self-Defense Instructions Denied Beck His Right to Present a Defense

Respondent claims Beck was not entitled to an instruction on conspiracy to commit assault with a deadly weapon and to self-defense instructions because there was no trial evidence that Beck conspired to commit assault or that Beck was ever threatened or attacked.[40] (RB at 549.) This is incorrect.

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[40]Respondent's contention that Beck asserts that he was entitled to instructions on self-defense *merely* because LaMarsh and Willey received such instructions misconstrues Beck's claim. Beck contends that to avoid improperly commenting on the evidence, the trial court should have instructed on lesser included offenses without assigning such instructions to a particular defendant. (RB at 550.)

Given that the State's entire conspiracy theory rested on the testimony of Michelle Evans and the fact that she did not even know the meaning of "do them all," there was more than sufficient evidence in the record upon which to instruct on conspiracy to commit assault with a deadly weapon. Moreover, there was more than sufficient evidence to warrant imperfect self-defense instructions, and a criminal defendant is entitled to raise inconsistent defenses.

Evidence from both the prosecution and the defense demonstrated the ongoing hostilities between Raper and his followers and the defendants. Numerous witnesses testified about several angry and sometimes violent encounters between members of the two groups. For example, Lisa Messinger testified about signing a petition circulated by Cruz and Starn to have Raper removed from the Camp because of his drug use. (RT 3553-3559.) Kevin Brasuell testified about the day Raper's trailer and car were towed from the Camp when Raper refused to leave. (RT 3585-3591.) David Jarmin also testified about the removal of Raper from the Camp. (RT 4069-4083.) James Smith, a friend of Raper's, testified about LaMarsh's violent confrontation with Raper, Smith and Fat Cat at the Camp.

(RT 4036-4040.) LaMarsh corroborated the details of this encounter. (RT 5618-5624, 5682-5691.)

Evans, LaMarsh and Willey testified about the fight between LaMarsh and Raper at the Elm Street house that occurred when the defendants accompanied Evans on May 18th to help her move her sister's possessions. (RT 4185-4198, 4319-4321, 5624-5629, 5682-5691, 5967-5975.) Cruz, LaMarsh and Willey also testified about the defendants' confrontation with Colwell on May 18th when they suspected Colwell of spying. (RT 5054-5059, 5707-5718, 5971-5974.)

Cruz and LaMarsh testified about Cruz calling the police to inform them of the death threats Raper made against Cruz and his family, and reporting that Raper had broken his fence. Raper was arrested as a result. (RT 5033, 5624-5629.) LaMarsh testified about death threats Raper made against LaMarsh and Evans. (RT 5707-5719.) All four defendants testified they were concerned for their safety as a result of their history with Raper and the threats he had made against them. (RT 5059-5116, 5287-5296, 5635-5644, 5978-5986, 5691-5705.) Beck testified that he had gone to the aid of

Vieira, who was being attacked by Colwell. (RT 5296-5311). LaMarsh testified that he struck Raper in self-defense after Raper threatened to kill him and attacked him with a knife. (RT 5644-5661, 5725-5726). A stipulation was entered that police found a knife on the floor near the chair where Raper's body was found. (RT 5591.) Willey testified that he and Ritchey were engaged in mutual combat in the street. (RT 5986-6002.)

The killings resulted not from a premeditated plan to commit murder, but as a result of the fighting that erupted between the two groups at the Elm Street house. In light of the evidence of animosity and mutual fear that existed between the two groups prior to the homicides, it is not unreasonable that the defendants would arm themselves before accompanying Evans to the house; nor is it unreasonable that the alleged conspiracy was to commit assault if necessary to retrieve Evans's sister's possessions rather than murder; and that once the fighting started, it is equally possible that the victims' deaths were the result of an actual belief among the defendants that the acts which caused the victims' deaths were acts of

self-defense necessary in order to avert their own deaths or physical injury.

While Beck may not have testified that he killed in self-defense, he was entitled, based on the state of the evidence as explained above, to have the jury instructed on self-defense and imperfect self-defense. The plain truth here is that the trial court refused to instruct on self-defense (actual or imperfect) without a defendant, in his own testimony, admitting to killing. That, as demonstrated in appellant's opening brief, is not the state of the law, and Respondent has not argued otherwise. The trial court cannot deny self-defense instructions simply because a defendant does not admit to killing. The court has an obligation to look at all the evidence introduced at trial to determine whether there is a basis to support a defense of actual or imperfect self-defense. The trial court failed to do so here. Its limitations on the jury's consideration of the lesser included instructions requested by Beck resulted in an improper trial court comment on the evidence, effectively placed greater culpability on Beck in the overall criminal offense, and denied Beck his constitutional right to present a defense. Because the State cannot

demonstrate that this error was harmless beyond a reasonable doubt, reversal of the guilt verdicts is required.

G. The Trial Court Erred in Instructing the Jury on Personal Use of a Dangerous Weapon Sentencing Enhancements in Counts II and IV; the Jury Finding of "True" on These Counts Is Not Supported by the Evidence; and the Trial Court Erred in Imposing Sentencing Enhancements on These Counts

Respondent relies on the theory of vicarious liability in contending the trial court did not err in instructing the jury on personal use of a dangerous weapon sentencing enhancements in Counts II and IV, and there was sufficient evidence to support the jury findings that the 12022(b) enhancements were true on these counts. (RB at 558-560.) This theory is not applicable.

In *People v. Lee* (2003) 31 Cal.4th 613 [3 Cal.Rptr.3d 402, 74 P.3d 176], this Court carefully explained the analysis needed to determine whether the imposition of a sentencing enhancement requires that the defendant *personally* acted with the enumerated culpability:

> In *Walker*, we considered former section 12022.5, which constituted a penalty provision establishing a sentence enhancement for "[a]ny person who uses a firearm in the commission or attempted commission of"

any one of several specified felonies (Stats. 1969, ch. 954, § 1, p. 1900). We concluded that former section 12022.5 required, by implication, that a person who uses a firearm had to use the firearm *personally*. (*People v. Walker, supra,* 18 Cal.3d at pp. 238-242.) We dismissed as inapplicable the law of criminal liability for direct perpetrators and aiders and abettors, on which the People relied in arguing to the contrary. (*Id.* at p. 242.) We reasoned that the underlying principles of the law of criminal liability bore on whether a person might be guilty of a crime, and not on how a person guilty of a crime might be punished. (*Ibid.*) Hence, we declined to employ such principles to remove from former section 12022.5 its requirement of personal use of a firearm. (*People v. Walker, supra,* 18 Cal.3d at p. 242.)

Next, in *Cole* we considered section 12022.7, which constitutes a penalty provision establishing a sentence enhancement for "[a]ny person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony" (Stats. 1979, ch. 145, § 17, p. 341). We concluded that for the section 12022.7 enhancement to apply, the statute expressly requires that a person who personally inflicts great bodily injury had to inflict such injury *personally*. (*People v. Cole, supra,* 31 Cal.3d at pp. 572-579.) In the course of our discussion, we suggested that, had the Legislature intended section 12022.7 not to require personal infliction of great bodily injury, it would have included language so indicating, as by speaking in terms of "[a]ny person ... who inflicts great bodily injury, *whether or not he or she inflicts such injury personally.*" (See *People v. Cole, supra,* 31 Cal.3d at p. 576.) Following our reasoning in *Walker*, we declined to employ the law of criminal liability to remove from section 12022.7 its requirement of personal infliction of

great bodily injury. (*People v. Cole, supra,* 31 Cal.3d at pp. 575-576.)

Lastly, in *Piper* we considered section 1192.7, subdivision (c) (section 1192.7(c)), which, in conjunction with section 667, constituted a penalty provision establishing a sentence enhancement for any defendant who commits any one of several specified felonies, including "any felony in which the defendant use[d] a firearm" (Prop. 8, as approved by voters, Primary Elec. (June 8, 1982) § 7, adding § 1192.7(c)(8)) and "any felony in which the defendant personally used a dangerous or deadly weapon" (Prop. 8, as approved by voters, Primary Elec. (June 8, 1982) § 7, adding § 1192.7(c)(23)). We concluded that section 1192.7(c) requires, expressly, that a defendant who commits a felony in which he or she personally used a dangerous or deadly weapon had to have used such a weapon *personally.* (*People v. Piper, supra,* 42 Cal.3d at pp. 475-476.) We likewise concluded that section 1192.7(c) requires, by implication, that a defendant who commits a felony in which the defendant used a firearm had to have used the firearm *personally.* (*People v. Piper, supra,* 42 Cal.3d at pp. 476-478.) In the course of our discussion, we suggested that, had the Legislature intended section 1192.7(c) *not* to require personal use of a firearm, it would have included language so indicating, as by speaking in terms of "any felony in which the defendant used a firearm, *whether or not he or she used a firearm personally,*" or at least in terms of "any felony *in which a firearm was used.*" (See *People v. Piper, supra,* 42 Cal.3d at pp. 476-477.)

Following our reasoning in *Walker* and *Cole*, we declined to employ the law of criminal liability to remove from section 1192.7(c) its requirement of personal use of a firearm. (*People v. Piper, supra,* 42 Cal.3d at pp. 476-477.)

> Here, by contrast, section 664(a) does *not* require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated. Contrary to the provisions that we considered in *Walker*, *Cole*, and *Piper*, which required certain personal conduct on the part of a person committing a crime, that is the person's use of a firearm, infliction of great bodily injury, or use of a dangerous or deadly weapon, section 664(a) requires only a certain quality characterizing the crime itself, that is that the attempted murder was willful, deliberate, and premeditated. In *Piper*, we implied that if the Legislature had included language in section 1192.7(c) referring to "any felony in which a firearm was used," instead of "any felony in which the defendant use[d] a firearm," it would have revealed an intent not to require personal use. Here, in our view, the Legislature's inclusion in section 664(a) of language referring to the murder attempted as willful, deliberate, and premeditated, instead of to the attempted murderer as personally acting with willfulness, deliberation and premeditation, reveals an intent not to require personal willfulness, deliberation, and premeditation.
>
> Just as we refused in *Walker*, *Cole*, and *Piper*, to *remove*, at the People's behest, personal-conduct requirements imposed by the statutory provisions considered in those cases, here we similarly decline defendants' invitation to *insert* a personal-mental-state requirement not imposed by section 664(a).

(*People v. Lee*, *supra*, at pp. 625-27.)

Because section 12022, subd. (b) clearly and unambiguously requires that Beck *personally* use the dangerous weapon, the trial

court erred in instructing the jury that it could find this enhancement on all four murder counts when even the prosecution argued that Beck, despite his denial, only personally used a deadly weapon against Colwell. Accordingly, three of the four sentence enhancements must be vacated.

Respondent cites to Evans's testimony that Beck held out his knife when he went down the hall towards the living room where the victims were, and relies on *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr. 77, 898 P.2d 391] to argue its vicarious liability theory that all that is required for a jury finding of a personal use enhancement is that the defendant "used [a] weapon during the commission of – and in aid of – all the crimes." (RB at p. 559.) This is incorrect. *Bland* does not support vicarious liability for personal use weapon enhancements. While *Bland* holds that actual infliction of harm is not required, it discusses facts involving a defendant who engages in conduct which produces a fear of harm or force by means or display of a weapon in aiding the commission of an enumerated felony committed *by the defendant*. Not only is vicarious liability not mentioned, nothing in *Bland* remotely holds that a personal use

enhancement is satisfied if the defendant's display coincidentally aids another in the commission of a different felony. Because it is obvious that the *personal use* enhancement refers to the defendant himself using a weapon to help himself commit a felony, the evidence cited to by Respondent here is insufficient to support the use enhancement. Any suggestion by Respondent that *Bland* allows a personal use enhancement merely by aiding another in his/her commission of a crime is an incorrect over-extension of *Bland.*

Even under Respondent's theory of vicarious liability, Beck's "holding out a knife as he went down the hall towards the living room" does not constitute personal weapon use towards Raper and Paris. There was no evidence that Beck displayed his knife in a threatening manner toward either victim, or that they were even aware of Beck's presence in the house.

In *People v. James* (1989) 208 Cal.App.3d 1155, 1162-63 [256 Cal.Rptr. 661], the court noted that cases in which a finding of a use enhancement was upheld fell into two categories. In the first category, the defendant uses the weapon to intentionally inflict injury. In the second category, the defendant holds the weapon or exposes it

in a menacing fashion accompanied by words which threaten violent use. Mere passive display of a weapon alone is not sufficient.

In this case, no evidence supports a finding of weapon use against Raper or Paris under the first category; thus, the finding would have to come within the second category to be affirmed on appeal. However, there is no evidence that Beck made any threats or used any words which produced fear in either Raper or Paris. Accordingly, the use enhancements for Counts II and IV are not supported by the evidence.

XIII.

THE TRIAL COURT ERRED IN PERMITTING IMPROPER AND HIGHLY PREJUDICIAL REBUTTAL EVIDENCE IN THE PENALTY PHASE TRIAL, THEREBY DENYING BECK HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS[41]

Respondent asserts that the trial court did not err in admitting the audio recording of Beck screaming at Starn's infant daughter Alexandria as she was drifting off to sleep, because the recording was proper rebuttal evidence which was not admissible in the People's case-in-chief. (RB at 568.)

The record reveals that the prosecutor elicited in his case-in-chief ample evidence of Beck's tangential participation in Cruz's child abuse activities. For example, Starn testified at length on direct examination about the relationship between Cruz, Beck and her young daughter Alexandria. (RT 7754, 7766.) The prosecutor asked Starn if she had ever "seen anything done to your daughter Alexandra by Dave Beck that you considered to be out of line?" (RT 7766.) She responded, "I don't remember him ever actually abusing

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[41]See Respondent's Argument XXVIII.

Alexandra, okay? He never actually hurt her; but like if Gerald wanted her, you know, he'd say, 'Hey, Dave, get me Alexandra,' and Dave would pick her up Alexandra and . . . take her to him." (RT 7766.) Starn described to the jury how Cruz punished the baby by putting her in a closet and informed the jury about the use of a wooden device, referred to as the "rack," in which the infant was placed to strengthen her legs. Starn saw Dave put the baby in the device more than once. (RT 7766.)

As with the audiotape of the screaming baby, none of this evidence was unequivocally admissible as "aggravating evidence" of criminal activity, yet the prosecutor deliberately chose to elicit it in his case-in-chief. As noted in Beck's opening brief, there was no reason for the failure of the prosecutor to present this evidence at the time he was attempting to portray Beck as an observer and participant of acts of child abuse with Starn's infant daughter. (AOB at 286-288.)

Indeed, the prosecutor's decision to introduce this evidence undercuts Respondent's argument that the prosecutor withheld the audiotape evidence solely because it was proper only for rebuttal.

(RB at 561.) It also reveals the disingenuousness of the prosecutor's argument to the trial court for the admission of the evidence in rebuttal. The fact that the prosecutor possessed but did not introduce the audiotape of the men and Starn yelling at the baby along with this other evidence sheds light on the prosecutor's motive in withholding this evidence: he wanted to maximize the dramatic impact of the screaming Alexandria at the hands of Beck in his closing opportunity to portray Beck in a negative way to the jury.

While Beck's trial attorney may have conceded the tape was proper rebuttal evidence, he nevertheless correctly argued that its probative value was outweighed by its prejudicial effect. (RT 8247-8248, 8267.)

Respondent argues that the evidence was not unduly prejudicial (RB at 568), but fails to address the fact that the trial court did not address the weighing requirement. The failure to weigh the probative value against the prejudice is error. (*People v. Green* (1980) 27 Cal.3d 1, 24 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Leonard* (1983) 34 Cal.3d 183, 188 [193 Cal.Rptr. 171, 666 P.2d 28].)

Respondent argues that the delayed introduction of this evidence was "not intended to evoke an emotional bias," (RB at 573), an argument which is absurd. Evidence suggesting that an adult man would apparently psychologically torture an innocent infant introduced to the jury at this vulnerable moment is most assuredly calculated to inflame the passions of the jury. It is precisely because this evidence was so particularly emotional, and so marginally relevant to the purpose of the penalty phase, that it should have been excluded under Evidence Code § 352. Because it was the very last thing the jury heard before going into deliberations, the prejudicial impact of this evidence cannot be underestimated. Nor can it be deemed harmless.

XIV.

THE TRIAL COURT ERRED IN EXCLUDING THE TAPE OF THREATENING PHONE CALLS FROM STEVE PERKINS TO JENNIFER STARN[42]

Respondent argues that the trial court did not abuse its discretion in excluding the Perkins tape, which contained threats Perkins made against Jennifer Starn, because its relevance was unclear given the poor quality of the recording, and the probative value was outweighed by the risk of undue consumption of time. The arguments are unpersuasive.

Immediately prior to closing argument in Beck's penalty phase, the prosecution disclosed a number of phone calls containing threats from Cruz and Perkins which Starn had taped. None of these recordings generated any concern for either the prosecution or the defense. No threatening phone call from Beck was on the tape. The trial court excluded the Perkins calls solely because of Evidence Code § 352, not because the evidence was irrelevant to the issues at the penalty phase.

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[42]See Respondent's Argument XXIX.

Respondent is correct that trial counsel moved for a continuance in order to listen to and transcribe the audio tapes submitted by Starn. When it was clear that the trial court was not going to grant a continuance, trial counsel obviously elected to introduce the Cruz audio tapes without transcripts. And there is no doubt trial counsel would have done the same with the Perkins tape. Respondent's argument that there was a continuing threat of a continuance to delay the trial is specious.

The continuance argument is nothing but a red herring. Even had Beck's attorney continued to press for a continuance, all the trial court had to do was deny the continuance, but grant Beck's motion to introduce the telephone call. This is why it is clear that although the trial court relied on section 352 – time consumption outweighs any probative value – the real reason here was the Court's favoring of prosecution evidence over evidence which would have benefitted the defense. Similarly, even if the prosecutor would then have wanted to call Perkins to testify that he wasn't being controlled by Cruz, the trial court would have had the authority to limit or deny any and all

time consuming requests and still admit tape of telephone calls, whose authenticity and relevance was not disputed.

Because Perkins, a long-abused victim and pawn of Cruz's, was obviously acting on Cruz's behalf despite his victimization, this audio tape was relevant as corroborating evidence of Beck's presentation at the penalty phase. Respondent argues that threats are difficult to perceive. (RB at 582.) Not so. The State itself concedes that Perkins said if Starn did not visit Cruz the next day, Hill would receive a visit from him; and that Perkins also said, "We know where he lives," it was stupid of Starn "to relinquish that information," and Starn could make a clean break with Cruz by seeing him the next day or things would get messy very quickly. Moreover, according to Starn's introductory comments on the tape, Perkins left his **threatening** phone message on 1/26/92. (RB at 579 (emphasis added).)

Respondent also argues that "the threat against Starn, if any, is vague. But it is clear that Perkins is mad at her for not communicating with Cruz." (RB at 583.) But Perkins is not merely "mad" at Starn; he is threatening her that if she does not see Cruz the

next day, things will get "messy." This, in combination with his statement that they will visit Hill if Starn doesn't visit Cruz next day, they know where he lives, is a clear threat.

When the Perkins' telephone call to Starn is viewed in conjunction with Cruz's various calls to Starn in which he demands that she visit him, it is clear that Perkins is acting under Cruz's domination in making the call. The State, in its analysis, ignores this evidence.

The trial court's decision to exclude this evidence as unduly consumptive of time is not supported by the record. The trial court erred in excluding this evidence.

Reversal is required because the error was not harmless beyond a reasonable doubt. It is well-settled that state evidentiary rules are subordinate to a criminal defendant's federal constitutional rights. (*Rock v. Arkansas* (1987) 483 U.S. 44, 55-56 [107 S.Ct. 2704, 97 L.Ed.2d 37]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297]; see *In re Martin* (1987) 44 Cal.3d 1, 29 [241 Cal.Rptr. 263, 744 P.2d 74].) "Few rights are more fundamental than that of an accused to present witnesses in his own defense.

[Citations.]" (*Chambers v. Mississippi*, *supra*, at p. 302; see also *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636] ["[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"].) "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019].) Restrictions on a defendant's right to present evidence are constitutionally permissible only where they accommodate other legitimate interests in the criminal trial process and are not arbitrary or disproportionate to the purpose they are designed to serve. (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 55-56.)

Thus, it is clear that limitations on a defendant's right to present a defense implicate his federal and state constitutional rights. (U.S. Const., amends. V, VI, XIV; Cal. Const., art. I, § 15; *Taylor v. Illinois* (1988) 484 U.S. 400, 407-409 [108 S.Ct. 64, 98 L.Ed.2d 798]; *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 51-52; see *In re Martin*, *supra*, 44 Cal.3d at p. 29.) When the exclusion of defense evidence

impermissibly infringes on these rights, the error requires reversal unless the state can show that the jury's verdict was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182]; see *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 690-691; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674].)]

XV.

THE PROSECUTOR ENGAGED IN MISCONDUCT DURING THE PENALTY PHASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRING REVERSAL OF THE DEATH SENTENCE[43]

A. Biblical References

Respondent concedes, as he must, that the prosecutor's Biblical references were "likely" improper (RB at 594) but argues that any error was not prejudicial. (*Ibid.*) The Biblical reference was not merely a brief passing comment during an otherwise proper closing argument. The Biblical allusion lasted for approximately three pages of the penalty phase argument and was obviously crafted to be an essential theme presented in the prosecution's closing.

Contrary to Respondent's argument, the "general gist" of the prosecutor's argument was not merely that "the Bible allowed capital punishment." (RB at 591.) The prosecutor told the jurors that the Bible required imposition of a death sentence here and exhorted the jurors to follow that Biblical teaching: "But the Lord goes on to say, 'If a man has a presumption to kill another by treachery, you shall

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[43]See Respondent's Argument XXX.

take him even from My altar to be put to death.' 'Taken from My altar.' There is no haven, there is no sanctuary, for an intentional, treacherous killer. That's exactly what you have here." (RT 8311.) Moreover, the prosecutor clearly intended his argument to negate the central mitigation offered by Beck, so the argument here was doubly prejudicial – it diminished Beck's mitigation while constituting improper aggravation.

Respondent argues that Beck's attorney introduced evidence of his own religious background and lifestyle; therefore the prosecutor's remarks that the Bible sanctions capital punishment were warranted in order to "allay" any concerns religious jurors might have had about capital punishment and were therefore "less prejudicial." (RB at 596.) However, the opposite result is more likely. By piggybacking on the presentation of evidence of Beck's religious beliefs, the prosecutor was able to use quotes from the Bible to argue to the jury that Beck's *own beliefs* mandated that the jury sentence him to death. This kind of closing argument was highly prejudicial.[44]

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[44]Respondent argues in a "tit for tat" fashion that any misconduct committed by the prosecutor was justified by defense counsel's rebuttal argument to the prosecutor's Biblical references.

Finally, this argument is a continuing theme used by this particular prosecutor time and again in capital cases. (See, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1208–1209 [120 Cal.Rptr.2d 477, 47 P.3d 262]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 309, Kennard, J., dissenting, and during the Cruz penalty phase closing argument. (RT 7530-7531).) Respondent completely ignores the fact that this prosecutor has made this argument part of his standard closing argument.[45] While the other cases did not result in reversal, this case warrants a new penalty trial because the prosecutor's misconduct went directly to undercut some of Beck's most significant mitigation evidence – his religious upbringing.

B. Use of Shame

Respondent contends the prosecutor's argument to the jury, when taken as a whole, was merely an argument that the purpose of the criminal justice system was to punish offenders in proportion to

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(RB at 596.) However, Beck has no constitutional duty to refrain from relying on religious principles to argue for a sentence of less than death.

[45]See, AOB at 294, n. 68, where Beck cited the prosecutor's continuing pattern of misconduct.

the severity of their crimes and that the jury didn't have to worry that its imposition of the death penalty in this case would be shameful. (RB at 599-600.) Respondent's spin on this closing argument is less than persuasive. The prosecutor's argument speaks for itself and is particularly prejudicial in light of his other improper arguments.

C. Comparisons to Lesser Crimes

Respondent concedes that the prosecutor used examples of non-first degree homicide as a basis of comparison to argue for death for Beck, but asserts this is proper. (RB at 600-601.) Respondent is incorrect.

A prosecutor has a duty to refrain from improper methods calculated to produce wrongful conviction . . . ." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 70 L.Ed. 1314].) The misconduct in comparing a death-eligible homicide to a second degree non-capital homicide is the same type of misleading the jury that was condemned by the Supreme Court in *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [108 S.Ct. 1981, 100 L.Ed.2d 575] and *Napue v. Illinois* (1959) 360 U.S. 267, 269 [79 S.Ct. 1173, 3 L.Ed.2d 1217]. In each case the Supreme Court found error in the

prosecutor's misleading of the jury with false evidence. Here, the prosecutor abused its position by misleading the jury with an incorrect application of the law.

When the prosecutor, a seasoned attorney in a unique position of power and armed with a refined knowledge of the law, compares a capital murder defendant's acts to those which the law has deemed unworthy of a death sentence (here acts of second degree murder), the prosecutor risks misleading the jury into believing the two very different acts are equally punishable by death. Under the California death penalty sentencing law, only certain homicides are death-eligible, and those cases are further winnowed in the penalty phase by aggravating and mitigating evidence. Here, the acts described by the prosecutor as "understandable" and unlike the acts attributed to Beck, were never eligible for a capital sentence. Had the prosecutor explained this fact to the jury there may not have been misconduct. However, the prosecutor's arguments left the jury with the impression that Beck's crimes warranted the death penalty *because* the murders were unlike justifiable homicide. This is simply not the state of the law. (*People v. Hill* (1988) 17 Cal.4th 800 [72 Cal.Rptr.2d 656, 952

P.2d 673] [prosecutor's closing campaign to mislead the jury on key legal points was misconduct].)

Because the prosecutor improperly relied on non-capital homicides to argue that death was warranted for Beck, his comparison was improper and prejudicial.

D. Appropriate Punishment Argument

Respondent argues that there was no misconduct because the prosecutor was consistent in his theory, and that it is not improper to argue that any one theory the jury might be relying on would also support the requested punishment. (RB at 603.) Respondent might be correct if the record demonstrated that this was actually the case. However, the record is clear that the prosecutor changed his theory of the case to obtain his immediate objective. When seeking a death sentence for Beck the prosecutor argued, "The testimony of Ron Willey that this is the man right here [Beck] that came out and knocked him off of Richard Ritchie and cut his throat while he lay in the street pleading for his life." (RT 8303.)[46] When arguing for a

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[46]The prosecutor then commented that the jury could accept or reject this testimony (RT 8303-8304), but the damage had already been done.

guilt verdict against Willey, the prosecutor argued, "In fact, I would submit to you that it was Gerald Cruz that cut Mr. Ritchey's throat after Mr. Willey stabbed him a bunch of times." (RT 6739.) Moreover, the prosecution produced an independent witness who testified that he saw two men he identified as Cruz and Willey assaulting Ritchey, and that Cruz cut Ritchey's throat. (RT 3409-3436.)

Because these theories are clearly inconsistent, it was highly prejudicial to argue that Beck personally killed Ritchie as an argument for a death sentence. (See, *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1051-1053 ["Even if our adversary system is 'in many ways, a gamble,' [citation], that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." Due process is violated where, in two separate trials, the prosecutor utilized mutually inconsistent statements by a witness as to the timing of the murder in order to secure convictions of both defendants. "[T]he State's zeal to obtain multiple murder

convictions on diametrically opposed testimony renders [petitioner's] convictions infirm." In finding that the error was not harmless, the appeals court rejected the argument by the state that petitioner could have been convicted of felony-murder on the evidence presented at the other defendant's trial. "The State proved its case against [petitioner] under the Bowman-as-murderer theory, and speculation regarding what the jury might have done under different circumstances is not a basis upon which to dispense with the State's due process duty of fair prosecution. Our analysis involves the fairness and outcome of the trial at issue, [petitioner's] trial."].)

Thus, reversal of the death sentences is required.

XVI.

THE TRIAL COURT'S ERRONEOUS ADAPTATION OF CALJIC 8.87 REQUIRES REVERSAL OF THE DEATH SENTENCE[47]

Respondent argues that this claim is waived because Beck failed to object and failed to request that the trial court include a list of criminal activities for the jury's consideration or otherwise failed to augment the trial court's adaptation of CALJIC 8.87. (RB at 609.) Beck concedes that this Court has held that the trial court has no sua sponte duty to list the criminal activities to be considered by the jury and that it is incumbent on defense counsel to request a more complete instruction if the one provided by the trial court is incomplete. (*People v. Lewis* (2001) 25 Cal.4th 610, 666 [106 Cal.Rptr.2d 629, 22 P.3d 392].) However, Beck contends his proposed instructions satisfied this requirement, and this claim is *not* waived.

Assuming, arguendo, this case is controlled by *Lewis,* this Court should revisit that decision to determine if it was correctly decided. It is a well-established principle of instructional law that a

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[47]See Respondent's Argument XXXI.

court which elects to give a particular instruction where there is no *sua sponte* duty to so instruct, nevertheless must give the jury a correct instruction. (*People v, Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [44 Cal.Rpt.3d 632, 136 P.3d 168] *People v. Nottingham* (1985) 172 Cal.App.3d 484, 496-497 [221 Cal.Rptr. 1]; and *People v. Key* (1984) 153 Cal.App.3d 888, 898-899 [203 Cal.Rptr. 144].) In *People v. Clark* (1993) 5 Cal.4th 950, 1021 [22 Cal.Rptr.2d 689, 857 P.2d 1099]; and *People v. Hughes* (2002) 27 Cal.4th 287, 342[116 Cal.Rptr.2d 401, 39 P.2d 432], this Court reviewed instructions on the merits which omitted specification of all relevant mental states in the context of voluntary intoxication instructions, rather than applying a procedural default for the failure to object.

Given these cases, *Lewis* cannot readily be distinguished and appears to be an aberration from the general principle on the necessity to instruct the jury completely and correctly. For these reasons, this Court should reconsider its holding in *Lewis*, if this Court finds a waiver as Respondent argues.

Nor is the doctrine of invited error applicable here. "[I]nvited error is designed to prevent an accused from gaining a reversal on

appeal because of an error by the trial court at his behest." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330[185 Cal.Rptr. 436, 650 P.2d 311].) Merely acceding to the ruling of the trial court in rejecting the proposed defense instruction does not rise to the level of invited error.

> The test for invited error is not whether the appellate court can infer from the record as a whole that failure to object to the error was a deliberate tactical decision. Invited error cannot be found even if counsel's silence was the result of a tactical decision, since the court's duty to apply the correct law is not dependent upon counsel and is not waived by counsel's failure to object to the error. Nor does the issue center on whether counsel subjectively desired a certain result. (*People v. Wickersham*, supra, 32 Cal. 3d at pp. 330-335.) Error is invited only if defense counsel affirmatively causes the error and makes "clear that [he] acted for tactical reasons and not out of ignorance or mistake" or forgetfulness. (*Id.* at p. 330.)

(*People v. Lara* (2001) 86 Cal. App. 4th 139,165 [103 Cal. Rptr. 2d 201].)

In this case, trial counsel neither waived the objection nor invited any error; therefore, this Court must reach the merits of the issue.

Respondent contends that to the extent that a lot of "other criminal activity" was necessary for the jury to avoid confusion over

the other crimes evidence the prosecution was relying on as aggravating evidence, there was no error because the prosecutor told the jury which criminal activities he wanted the jury to rely on for aggravation. (RB at 613.) While Respondent is correct that the prosecutor conceded in closing argument that the tape of Beck screaming at baby Alexandra, "probably doesn't come in under an act of violence per se[]," (RT at 8290), the prosecutor's choice of words left open the prospect that the jury could consider this evidence if it elected to do so. The trial court's rejection of Beck's proposed instructions combined with the prosecutor's misleading reference to the highly inflammatory audio tape of Beck's screaming at baby Alexandra resulted in an unconstitutional broadening of the type of evidence the jury could consider in aggravation. This error undermines the reliability of the jury's death verdict in that there is a reasonable probability that the jury was influenced in its death verdict by evidence that was not criminal and therefore not proper 190.3 evidence. Accordingly this error was not harmless.[48]

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[48]Beck acknowledges that this Court has held that the asserted instructional omission is a matter of state law, and is not imposed by the federal Constitution. (*People v. Pinholster* (1992) 1 Cal.4th 865,

XVII.

BECK'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF HIS MOTION FOR NEW TRIAL[49]

A. Standard of Review

Respondent contends the denial of a motion for new trial is reviewed for an abuse of discretion. (RB at 625 citing *People v. Hovarter* (2008) 44 Cal.4th 983, 999, fn.4 [81 Cal.Rptr.3d 299, 189 P.3d 300]) rather than *de novo* review (Cruz's Joinder, citing *People v. Ault* (2004) 33 Cal.4th 1250 [17 Cal.Rptr.3d 302, 95 P.2d 523].) The correct standard of review was clarified in *People v. Collins*

965, fn. 1 [4 Cal.Rptr.2d 765, 824 P.2d 571].) Nevertheless, Beck contends that the federal Constitution is applicable. Where the trial court's erroneous instruction permitted the jury to consider as aggravation evidence which is not permitted under California's statutory scheme, this error violated the Eighth Amendment's prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth Amendment. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673.) In permitting the jury to consider such impermissible aggravating evidence, the error violated the Eighth and Fourteenth Amendments by creating a risk that the jury's verdict was not a reliable determination that death is the appropriate punishment. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. 320; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 587.)]

[49]See Respondent's Argument XXXII.

(2010) 49 Cal.4th 175 [110 Cal.Rptr.3d 384, 232 P.3d 32], a juror misconduct case. There this Court explicitly rejected Respondent's argument that it must apply a deferential standard in reviewing a trial court's decision on a motion for new trial. (*Id.* at p. 242) The court held that while it accepts "the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence," (*Id.*, citing *People v. Nesler* (1997) 16 Cal.4th 561, 582 [66 Cal.Rptr.2d 454, 941 P.2d 87]) . . . "the inquiry is whether those facts constitute misconduct, a legal question we review independently." (*Ibid.*) While Respondent argues that a *de novo* standard of review applies only in juror bias and misconduct cases, the *Collins* court indicated otherwise: "[W]e need not and do not consider whether a more stringent standard of review might apply to a trial court's determination of *error* leading to its decision to grant a new trial, where the claim of error involved a mixed law and fact issue." (*Id.* at p. 242, fn. 31.)

B. Newly Discovered Evidence

Respondent argues that the trial court's denial of the motion for new trial was not error because Beck did not produce a sworn

affidavit as required by section 1181, subdivision 8, and because McDonnell's letter[50] did not make it reasonably probable that Appellant would receive a better result in a new trial. (RB at 629.)

Beck agrees no sworn affidavit was produced, but argued in his opening brief that the trial court should have made an exception to the sworn affidavit requirement in light of the fact that this was a capital case, and the new evidence testimony supported Beck's defense because it impeached the prosecution's only witness to the conspiracy, Michelle Evans. A new trial was therefore critical to his constitutional right to present a defense.

Respondent chose not to respond to these points, but instead merely insists that constitutional concerns must take a back seat to the statutory mandate of section 1181 and *People v. Pic'l* (1981) 114 Cal.App.3d 824, 878-879 [171 Cal.Rptr. 106] [concluding that section 1181 required sworn affidavits in the place of testimony and

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[50]Alfred Kip McDonnell, who was housed at the county jail with LaMarsh and Willey, wrote a letter dated September 23, 1992, stating that LaMarsh confessed to him that he tricked Beck into going to the Elm Street house to create a distraction for the Raper gang so that Evans could retrieve drugs she had hidden at the house. (CT 2600.)

therefore disallowed an evidentiary hearing at which witnesses would be permitted to testify.] Respondent argues that "[Beck] offers no authority which contradicts *Pic'l*'s holding that affidavits are a prerequisite under section 1181, subdivision 8 . . . ," and since no sworn affidavit could be produced by Beck, the trial court made the correct ruling in denying the motion. (RB at 630-631.)

Respondent is incorrect. *Chambers v. Mississippi*, *supra*, 410 U.S. 284 relied on in Beck's opening brief, is authority for the exception which should have been applied in Beck's case: the setting aside of a rule of procedure in order to ensure that a capital defendant obtains a fundamentally fair trial. Clearly, the preference for sworn affidavits in lieu of live testimony as set forth in section 1181 is simply a time saving measure aimed at reducing the amount of court time allocated to a motion for new trial, and is therefore a procedural, rather than a substantive rule. This legislative attempt to conserve judicial resources cannot defeat a capital defendant's constitutional right to fundamental fairness, the right to present a defense, and the right to a reliable sentence determination. (See, e.g., *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114 [Trial court's ruling that

testimony by a defense expert to rebut state medical examiner's opinion about cause of death would open the door to the admission of the codefendant's inadmissible "*Bruton* infected" hearsay statement of the codefendant, violated defendant's right to present a defense under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment]; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997 [Trial court's exclusion of reliable evidence of defendant's innocence – the codefendant's hearsay statements to police that Chia was not involved in the offense – violated due process]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862 [exclusion of expert testimony regarding whether the key prosecution witness had been hypnotically influenced in various interviews with police investigators violated petitioner's due process right to a fundamentally fair trial and to present witnesses in his defense]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057 [state trial court violated petitioner's federal due process right to defend against the charges by excluding evidence of the victim's journal and all references to it, where the petitioner presented evidence at trial of imperfect self-defense and the journal in which the victim had

detailed his acts of violence against others provided corroboration for petitioner's belief that she was in imminent danger; "given the subjective element of imperfect self-defense, the erroneous exclusion of this evidence was not mere evidentiary error"]; and *Gonzalez v. Lytle* (10th Cir. 1999) 167 F.3d 1318 [trial court's rulings permitting the prosecution to introduce the preliminary hearing testimony of an unavailable witness but refusing to admit her sworn recantation deprived petitioner of his Fourteenth Amendment right to a fundamentally fair trial].)

Respondent attempts to minimize the constitutional concerns presented by the trial court's blind adherence to the procedures of section 1181 by insisting that the content of McDonnell's letter was "not credible," was "fabricated," and was "manifestly unreliable" because McDonnell was a "convicted and incarcerated murderer"[51]

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[51]Indeed, given the frequency in which the state relies on jail-house informants and snitches with criminal records and pending criminal charges to prove its cases, the fact that a potential witness is a "convicted and incarcerated murderer" should not in itself cause Respondent to discount McDonnell's letter. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1008 [95 Cal.Rptr.2d 377, 997 P.2d 1044] ["[W]e consistently have rejected the contention, made in connection with capital appeals, that informant testimony is *inherently* unreliable"].)

who would not sign a sworn affidavit and who stated he would invoke his right to remain silent if summoned to court. (RB at 631.) However, because no evidentiary hearing was allowed, the record is silent as to McDonnell's reasoning for refusing to sign a sworn affidavit, and Respondent's assertions are merely self-serving speculation.[52] There could be any number of reasons for McDonnell's sudden recalcitrance having nothing to do with the veracity of this letter, and had the trial court conducted an evidentiary hearing those reasons may have been discovered.

For example, McDonnell may have had concern for his safety in the county jail and may have been willing to testify if he were to be moved to a different section of the jail or to a different jail. Without conducting an evidentiary hearing, however, the trial court could not make a reasonable credibility determination. The Eighth Amendment's requirement of heightened reliability in a capital case requires more than the dismissal of potentially meritorious claims on the basis of a mechanical application of state evidentiary rules.

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[52]Respondent provides no evidence from the record to support its contention that McDonnell "essentially recanted his story when asked to verify it under oath." (RB at 633.)

Given the seriousness of the charges against Beck, the nature of the state's case, its heavy reliance on the testimony of Michelle Evans, and the severity of the sentence Beck was facing, the trial court erred in its denial of Beck's motion for a new trial on the ground that Beck failed to produce a sworn affidavit.

Similarly, the trial court erred in finding that there was not a reasonable probability[53] that Beck would have received a better result had the jury heard McDonnell's testimony.[54]

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[53] Respondent argues, "implicit in the trial court's ruling was that McDonnell's assertions were not credible enough to undermine the other substantial evidence of [Beck's] guilt" and that this Court "owes the trial court's credibility determinations deference." (RB at 633.) However, the trial court made no such finding, but merely denied the motion stating, "in view of the evidence presented at trial . . . no different result would have occurred . . . [as] [h]is letter deals only with the testimony of co-defendants Mr. LaMarsh and Mr. Willey." (RT 8402.)

[54]Respondent contends as a preliminary matter that McDonnell's testimony was inadmissible under *Aranda-Bruton* and the rules of evidence (hearsay.) (RB at 632.) However, *Aranda* and *Bruton* stand for the proposition that a "nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120–1121 [240 Cal.Rptr. 585, 742 P.2d 1306].) Because both LaMarsh and Willey testified, *Aranda-Bruton* does not apply. Also, as previously explained, the rigid application of state

Respondent argues that since the evidence against Beck was overwhelming and McDonnell was a convicted and incarcerated murderer, the jury would not have believed the McDonnell evidence, and thus the trial court made the correct ruling. (RB at 633.) However, as explained in Beck's opening brief, since Beck never denied his presence at the Elm Street house, and his defense was that he was at most guilty of assault with a deadly weapon, voluntary manslaughter or second degree murder, because he participated in a fight with the residents once there, Michelle Evan's testimony about the conspiracy was critical to the state's case. Beck testified that he did not go to the residence intending harm or kill anyone. Rather he went there to provide requested protection for Evans, who insisted that she needed help and protection in retrieving her sister's property from the house, because Raper had threatened her. The McDonnell evidence would have provided strong independent corroborative evidence in support of Beck's defense.

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evidentiary rules in a manner that deprives a criminal defendant of his right to present a defense violates that defendant's Sixth, Eighth and Fourteenth Amendment rights. *Chambers v. Mississippi*, *supra*, 410 U.S. 284.

Evans was the state's key witness and the only witness to supply evidence of a conspiracy to commit murder. It was on the basis of her testimony that Beck and Cruz were convicted of capital murder. Had the McDonnell evidence been given to the jury, there is a reasonable likelihood that the jury would have doubted Evans and been more inclined to return convictions of the lesser included second degree murder, voluntary manslaughter, or assault with a deadly weapon, even though Beck denied he had a weapon.

The trial court's denial of the motion for new trial on this ground was error.

C. Exculpatory Evidence

Respondent argues that Cruz's statements to Starn that things did not go well and that things got out of hand would not have undermined Evans's conspiracy testimony. Respondent claims this evidence was subject to the interpretation that the homicides did not go as planned and was also cumulative to Willey's testimony that he told his girlfriend that "nothing went right." (RB at 635-636.)

But the testimony from a prosecution witness strongly rebuts the State's conspiracy theory, because Cruz told Starn they had gone

to Elm Street, that something had gone wrong and a fight broke out. The whole event "just like took on a life of its own." These statements undercut the argument that the killings were planned, as Respondent attempts to suggest. The statements provide no hint of a plan to kill but rather suggest that the violence just erupted as the defendants contended.

Whether the evidence was subject to different interpretations is a question for the jury, not a question of admissibility. It was for the jury to decide whether or not Cruz's statements to Starn were indicative of a conspiracy. Moreover, because Starn, a state witness, was the recipient of Cruz's statements, this evidence had more credibility and would have carried more weight with the jury than Willey's testimony about what he told his girlfriend. Accordingly, Cruz's statements were not cumulative. The same is true for Respondent's assertion that Starn's other statements about LaMarsh's motive to lie and Raper's threats to kill Cruz were cumulative and thus not of assistance to Beck's defense. (RB at 636-637.) Because this evidence would have come from Starn, and not from the defendant on trial for murder, this evidence was not cumulative.

Respondent argues that Beck could not introduce this evidence because Starn was a state witness who would not agree to testify for Beck. (RB at 638.) This assertion ignores the subpoena power possessed by all parties to litigation. Similarly, Respondent argues that Starn's testimony would be inadmissible hearsay. (RB at 639.) It is not possible to know how the statements would have been admitted due to the fluid nature of trial testimony. However, under Respondent's argument that Cruz's statements were indicative of a murder conspiracy, they were admissions of a defendant and thus fall under an exception to the hearsay rule. If Starn denied that Cruz made the statements to her, she could be impeached by her statements to Detective Deckard. While Respondent might be correct that Cruz knew what he said to Starn and was thus aware of the existence of these statements during trial (RB at 639-640), this prior knowledge cannot be attributed to Beck.

Because the erroneous denial of Beck's motion for a new trial resulted in the exclusion of exculpatory evidence essential to Beck's defense, the denial of the motion violated Beck's constitutional rights to due process (*Boykin v. Wainwright* (11th Cir. 1984) 737 F.2d 1539,

1544) and to his right to offer testimony. (*Taylor v. Illinois*, *supra* , 484 U.S. at p. 409.)

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, this Court should reverse the convictions and death sentences in this case.

Dated: May 14, 2012.

Andrew Parnes
Attorney for Defendant/Appellant
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CERTIFICATION PURSUANT TO RULE 8.360(b)(1)(C)

I hereby certify that the foregoing brief contains 31,827 words, based upon the computer word count.

Dated this 14th day of May, 2012.

Andrew Parnes
Attorney for Appellant
James David Beck

CERTIFICATE OF SERVICE

I, Andrew Parnes, hereby certify that I am employed in the County of Blaine, Idaho; I am over the age of eighteen years and not a party to this action; my business address is 671 First Avenue North, Ketchum, Idaho 83340; on May 14, 2012, I served a true and correct copy of **Appellant Beck's Reply Brief** to the following persons by depositing copies of the same in the United States mail, postage prepaid, at the post office in Ketchum, Idaho, addressed as follows:

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

Executed on May 14, 2012, at Ketchum, Idaho.

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