No. S067394

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEO CAPISTRANO,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ANDREW C. KAUFFMAN, JUDGE

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN LEO CAPISTRANO, Defendant and Appellant.	No. S067394 (Los Angeles County Superior Court No. KA 034540)

APPELLANT'S REPLY BRIEF

I

TWENTY-TWO PROSPECTIVE JURORS WERE EXCUSED IN VIOLATION OF *WITHERSPOON-WITT*; REVERSAL IS REQUIRED

Capistrano argues that twenty-two prospective jurors were excused without substantial evidence that their position regarding the death penalty would substantially impair their ability to carry out their duties as jurors. (AOB 30-60.) Without the benefit of any meaningful questioning sans hardship, without asking whether they could put aside their feelings and follow the law, and without instructing the jurors about the capital sentencing process or telling them anything about this case other than it was charged as a capital homicide, the trial court improperly excused 22 people who did not evidence substantial impairment in their ability to impose the death penalty. (*Ibid.*) Respondent argues that the claim was waived for failing to object at trial and alternatively that the claim is meritless. (RB 54-78.) Respondent is incorrect on both counts.

A. Waiver Does Not Apply

Respondent first argues that "[a]ppellant's challenge to the adequacy of the court's questioning has been waived" because Capistrano's counsel failed to make state a timely and specific objection. (RB 71.) Respondent argues that "appellant did not articulate a constitutional basis for his objection and never professed any dissatisfaction with the *inquiry* made by the court prior to the excusal for cause of these 22 prosecution jurors and, instead, noted that the death qualification has been 'accomplished' by the procedure used." (RB 71, emphasis in original.) Respondent argues this despite the fact trial counsel objected, stating: "Your Honor, for the purpose of the record, we ask that the jurors not be excused, object to their being excused and ask in the alternative that they be allowed to participate in a pool of jurors that determine the guilt phase, at least, of the trial" and then indicated his continuing objection. (2RT 1268, 1283, 1397.) Given these circumstances, Capistrano neither forfeited (i.e., the failure to invoke a right) nor waived (i.e., the express relinquishment of a known right) his right to a fair and impartial jury. (*People v. Romero* (2008) 44 Cal.4th 386, 411.)

In any event, at the time of the voir dire in Capistrano's case in 1997, the law did not require an objection or opposition to the erroneous dismissal of a juror for cause under *Witherspoon-Witt* in order to preserve the error for appeal. In *People v. Velasquez* (1980) 26 Cal.3d 425, 443, this Court rejected the Attorney General's argument that the defendant waived a *Witherspoon* error by failing to object to the juror's dismissal. As this Court stated, "the decisions of the United States Supreme Court and of the California courts have unanimously ruled that *Witherspoon* error is not waived by mere failure to object." (*Ibid.*, citing, inter alia, *Maxwell v.*

Bishop (1970) 398 U.S. 262, *People v. Risenhoover* (1968) 70 Cal.2d 39, 56, and *In re Anderson* (1968) 69 Cal.2d 613, 618-619.) Thereafter, in *People v. Lanphear* (1980) 26 Cal.3d 814, 844, this Court relied on *Velasquez* in again rejecting the Attorney General's argument that the defendant waived *Witherspoon* error for failing to object. In *People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4, this Court again cited *Velasquez* in noting with respect to a claim that the trial court erroneously dismissed a juror for cause that "*the failure to object does not waive the issue for appeal . . .*, italics added." However, in a 1997 footnote, this Court curiously observed that – despite *Velasquez*'s clear reliance on California authority – "[w]e have not decided whether 'nonopposition' to a *Witherspoon-Witt* challenge for cause waives any claim of error on appeal. . . . We recognized controlling federal precedent holds that *Witherspoon* error is not waived by 'mere' failure to object in *People v. Velasquez* . . . ." (*People v. Holt* (1997) 15 Cal.4th 619, 651, fn. 4.)

More recently, the Court observed that it is now "unclear" as to whether an objection is required to preserve an erroneous challenge for cause; because the question is a "close and difficult" one, it should be resolved in favor of preservation. (*People v. Lewis* (2006) 39 Cal.4th 970, 1007, fn. 8, and authorities cited therein.) Hence, because the law did not impose an objection requirement at the time of voir dire in this case – and indeed because the only cases directly on point held that no such objection was required – defense counsel's failure to object or oppose the court's dismissal of prospective jurors for cause did not waive his right to challenge the errors on appeal. (Cf. *People v. Weaver*, *supra*, 26 Cal.4th at pp. 910-911 [where law in state of flux at time of voir dire as to whether expression of dissatisfaction necessary to preserve erroneous denial of for-cause

challenge, absence of expression did not waive error for appeal]; accord, *People v. Boyette*, *supra*, 29 Cal.4th at p. 416; see also *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required"]; *People v. Collins* (1986) 42 Cal.3d 378, 384-385, 388 [declining, on fundamental fairness grounds, to apply waiver rule that did not exist at time of trial despite possibility lack of trial objection was strategic sandbagging]; *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1151-1152.)

Further, contrary to respondent's contention, the record does not establish that trial counsel had been informed of or had agreed to the substance of the trial court's death-qualification inquiry. The record shows that, prior to the start of voir dire, the court and counsel met in chambers and off the record for a "short discussion" about the "procedures" to be used that morning. (2RT 1287.) The trial court asked Capistrano's counsel whether he approved, or at least agreed with, the court's proposed "procedure," to which both trial counsel and the prosecutor replied "Yes." (*Ibid.*) Since trial counsel each time explicitly objected to the trial court's excusal of the prospective jurors, the content of the brief in-chambers discussion is clear: the trial court informed the attorneys that it would conduct its own death qualification sans attorney voir dire, and trial counsel agreed as long as the court allowed Capistrano's counsel to state his objections for the record. But Capistrano certainly did not waive the substantive issue of whether the trial court had before it the requisite evidence of the prospective jurors' substantial impairment sufficient for excusal under *Witherspoon-Witt*.

Indeed, the record reflects that trial counsel did not agree to the procedures employed by the trial court. Immediately after the trial court placed on the record that counsel had agreed in chambers to the "procedure" used during voir dire that morning, the court next entertained Capistrano's motion for sequestered death-qualification voir dire. (*Ibid.*) Trial counsel replied that he thought death-qualification was going to be done in sequestered voir dire, but that the issue was moot since the trial judge had already "accomplished" its death-qualification questioning in the presence of all prospective jurors. (2RT 1287-1288.) In this context, and given trial counsel's explicit objections to the excusal of the jurors after the trial court's truncated death-qualification voir dire, the word "accomplished" means "done" or "finished" rather than connoting any agreement with the sufficiency of evidence adduced from the trial court's inquiry.

Respondent cites but one case in support of its argument that Capistrano has waived the constitutional claim presented herein, *People v. Hernandez* (2003) 30 Cal.4th 835, 855 (*Hernandez*). (RB 71-72.) Respondent's reliance on this case is misplaced. Hernandez claimed on appeal that his right to an impartial jury had been denied because the trial court conducted inadequate voir dire. In that case, trial counsel was permitted to question prospective jurors regarding their views on the death penalty. This Court held that, "[T]o the extent defendant contends *the trial court* inadequately questioned prospective jurors on their attitudes toward the death penalty, he has not preserved the issue for appeal because he did not object on this ground at trial." (*Hernandez, supra,* 30 Cal.4th at pp. 855-856, citing *People v. Avena* (1996) 13 Cal.4th 394, 413.) The Court nonetheless found that since the trial court conducted sufficient voir dire on the matter and that trial counsel had been afforded the opportunity for

follow-up questions, "there was no constitutional violation in this procedure." (*Id.* at p. 856.) The focus of the defendants' claims in *Hernandez* and *Avena*, upon which *Hernandez* relies, is whether the defendant's constitutional rights were violated by the process of excluding or limiting the attorney's participation in the death-qualification process.

In contrast, Capistrano's claim is substantive, not procedural. State law and the federal Constitution prohibit the dismissal of prospective jurors for cause based solely on their personal opposition to the death penalty absent substantial evidence that their personal feelings would "'prevent or substantially impair' the performance of his duties as a juror" (*Wainwright v. Witt, supra*, 469 U.S. at p. 424) or their ability or willingness to set aside their personal feelings and "follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law" (*People v. Stewart* (2004) 33 Cal.4th 425, 447). (Accord, *Lockhart v. McCree* (1986) 476 U.S. 162, 176; *Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Ghent* (1987) 43 Cal.3d 739, 767; *People v. Heard, supra*, 31 Cal.4th at p. 963.) Capistrano's state and federal constitutional rights were violated when the trial court excused 22 juror without adducing evidence that any of the 22 were substantially impaired. Trial counsel objected to each and every excusal. Thus, there was no waiver of the substantive issue. (See also *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1269-1270, followed in *People v. Stewart, supra*, 33 Cal.4th at pp. 449-450 [recognizing distinction between procedural challenge to trial court's failure to conduct live voir dire and dismissing jurors on questionnaires alone and substantive challenge to sufficiency of the evidence in the questionnaires to support the court's dismissal of the jurors under the *Witt* standard; declining to resolve

procedural question because resolution of substantive question demanded reversal].) This Court must reach the merits of Capistrano's claim.

B. The Excusal Of The Prospective Jurors Was Unconstitutional

Respondent asserts that an affirmative response to the singular question, given without any explanation of the applicable law or of the specific charges and special circumstances alleged, of whether the prospective juror would be "unable to vote to impose a punishment of death regardless of the evidence" was constitutionally sufficient under *Witherspoon/Witt*, citing *Darden v. Wainwright* (1986) 477 U.S. 168. (RT 72-73.) That case is plainly distinguishable. The single question in that case was asked of a prospective juror who was present throughout an entire series of questions posed orally by the trial court to other prospective jurors. Specifically, the prospective jurors were asked:

> Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence *even though the facts presented to you should be such as under the law would require that recommendation?* Do you understand my question?

(*Id.* at p. 177, emphasis added.) Prior to voir dire, defense counsel had objected to any questioning by the prosecution regarding a potential juror's feelings about the death penalty. The judge denied the motion, stating:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, *even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law . . . .*

(Id. at p. 177, fn.2, emphasis added.) The United States Supreme Court agreed that the trial court in *Darden v. Wainwright* stated the correct standard for dismissal (*ibid.*) and it held that, under those circumstances, "[t]he trial court, 'aided as it undoubtedly was by its assessment of [the potential juror's] demeanor,' " "could take account of the fact that [the prospective juror] was present throughout an entire series of questions [posed orally by the court to other prospective jurors] that made the purpose and meaning of the *Witt* inquiry absolutely clear." (*Darden v. Wainwright*, 477 U.S. at p. 178, citation omitted.) In addition, the high court observed, "[n]o specific objection was made to the excusal of [the prospective juror] by defense counsel...." (*Ibid.*)

In contrast, in this case, the excused prospective jurors were never asked if they would follow the law, nor had they witnessed any *Witt* voir dire. In fact, they were told nothing about the applicable law or the specific charges and special circumstances alleged, and the jurors excused after the question were never given a questionnaire. A reviewing court must examine the context surrounding the juror's exclusion to determine whether the trial court's decision that the juror's views regarding capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath was fairly supported by the record. (*People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) This case is devoid of any *Witt* context , ergo the trial court's decision is unsupported by the record. Also in contrast to *Darden*, in this case defense counsel did object to the removal of the prospective jurors.

Capistrano contends in part that the question asked by the trial court was insufficient to support the excusal for cause because it had been "given

without the benefit of the trial court's explanation of the governing legal principles." (*People v. Heard,* (2003) 31 Cal.4th 949, 965; see also AOB 42-57.) Curiously, respondent argues that the instant case is distinguishable from *Heard*, but then it fails to state how that is so. (RB 76.) Respondent argues that the "trial court had the opportunity to assess the demeanor of the individual excused jurors and could best gauge the persistence of the view expressed by the excused jurors." (RB 77.) However, raising one's hand from the galley hardly provides the trial court with a meaningful opportunity to observe and make an informed judgment of demeanor – and the trial court here asked more questions in hardship voir dire than it did its truncated "death qualification" questioning. (Compare 2RT 1249-1265 with 2RT 1267-1271; 2 RT 1275-1281 with 2RT 1282-1285; 2RT 1390-1395 with 2RT 1395-1403; 2RT 1446-1449 with 2RT 1450-1453.)

The prospective jurors were not given enough explanation of the law honestly answer whether they could follow the law or not. A lay person, unfamiliar with our capital sentencing laws, might assume that moral opposition to the death penalty would render him or her "unable" to impose a death sentence; once informed of the governing legal principles, such a lay person might nevertheless be able to follow the law. The evidence adduced by trial court's question in this case at best provided a *preliminary indication* that the juror might be subject to challenge for cause, but it was not constitutionally sufficient to establish a basis for exclusion. (*Stewart, supra*, 33 Cal.4th at p. 448.) The trial court's question revealed only that the prospective jurors who answered in the affirmative were opposed to the death penalty, which is not a disqualifying criterion. It did not discern whether the jurors in question could put aside those feelings and follow the law in this case. That the trial court misunderstood the proper inquiry is

further illustrated in its questioning of prospective juror who was excused immediately after stating "I just don't believe in the death penalty." (2RT 1268-1269.) The constitutional violation is clear.

Respondent argues, correctly, that the question is not whether another procedure could have been used, but whether the excusals were constitutionally adequate. (RB 71.) Again, Capistrano's claim is substantive, not procedural. Capistrano does argue that the procedure used failed to elicit evidence of substantial impairment, but that does not make the claim procedural in nature. The constitutional violation occurs because the record of voir dire does not evidence substantial impairment.

C. Reversal Is Required

Respondent concedes that if error is found, reversal of Capistrano's judgment of death is required. (RB 77-78.) The error is patent and reversal is indeed required.

Capistrano further asserts, for reasons stated in Argument IV in his AOB and herein, that the error requires reversal of his capital conviction.

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II

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR No. 2361 REQUIRES REVERSAL OF CAPISTRANO'S DEATH JUDGMENT

Capistrano argues that the trial court erred in determining that prospective juror No. 2631 was excludable for cause under *Witherspoon/Witt* because the record did not evidence that his disdain for the death penalty would substantially impair his ability to follow the law in this case. (AOB 61-80.) Respondent counters that "Despite his oral vacillations and self-contradictions, Prospective Juror No. 2361 consistently stated a firmly-held belief the death penalty should not be used as a penalty." (RB 79.) In addition to containing an inherent contradiction – that No. 2361 vacillated but yet maintained a consistent position – respondent's assertion is incorrect. Prospective juror No. 2361 was consistent in his opposition to the death penalty, no doubt. However, in voir dire he was also consistent in his belief that he could put aside those feelings and follow the law. The prosecutor in this case essentially conceded this point, as he challenged No. 2361 based not on No. 2361's in-court answers, but rather based on one answer he gave in his questionnaire. (2RT 1349-1357.)

In response to the prosecution's cause challenge, the trial court then erred by applying the incorrect standard of exclusion: the trial court ruled that No. 2361's responses in voir dire showed that "his basic decision hasn't changed from what he wrote down on the questionnaire, which he indicated he did not believe in the death penalty." (2RT 1357.) As this Court has said, "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as juror in capital cases so long as they clearly state that

they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*People v. Stewart* (2004) 33 Cal.4th 425, 446.) As evidenced by the trial court's stated basis for its excusal of No. 2361, as well as by its truncated and insufficient death-qualification voir dire described in Argument I, the trial court erroneously ruled that opposition to the death penalty, did, in and of itself, warrant excusal. Since the trial court failed to apply the correct constitutional standard and to make the proper factual determination – i.e., whether the prospective juror could put aside opposition to the death penalty and defer to the rule of law – its ruling is not entitled to deference. (See *Uttecht v. Brown* (2007) ___ U.S. ___, 127 S.Ct. 2218, 2230 [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].) Because the trial court wrongfully excluded a prospective juror who was opposed to the death penalty but who did not waiver in his stated ability to abide by the rule of law, Capistrano's death judgment must reversed and his case must be remanded for a new penalty trial before a properly selected jury. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 (opn. of the court); id. at pp. 669-672 (conc. opn. by Powell, J.); *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Heard* (2003) 31 Cal.4th 946, 966; *People v. Stewart, supra*, 33 Cal.4th at p. 454.)

Capistrano further asserts, for reasons stated in Argument IV in his AOB and herein, that the error requires reversal of his capital conviction.

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III

THE TRIAL ERRONEOUSLY FAILED TO GRANT THE PARTIES' MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Capistrano's maintains that the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated Capistrano's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict, and his right under California law to individual juror voir dire where group voir dire is not practicable. (AOB 72-80.) Respondent argues that the requested voir dire was not constitutionally compelled, that the trial court properly exercised its discretion when it decided not to conduct individual sequestered voir dire of the jurors' attitudes toward the death penalty, and that, in any event, Capistrano suffered no prejudice as a result of the manner in which the trial court conducted voir dire in this case. (RB 88-94.)

However, this Court has long recognized that group voir dire on death qualification issues is inherently problematic and often insufficient to test whether the jurors' views on capital punishment would impair their abilities to determine the case. (See AOB 247-249, citing *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 74-80; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) Indeed, in this case, the People joined in Capistrano's motion for sequestered *Hovey* voir dire and acknowledged that that process produced "more candid answers." (2RT 1287-1288.) Given the substantial risks inherent in group voir dire during the death qualification process, as recognized in *Hovey*, any restriction on individual

and sequestered voir dire on death qualifying issues, including that imposed by Code of Civil Procedure section 223, cannot withstand constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois* (1992) 504 U.S. 719, 736 [the risk that jurors are not impartial is unacceptable in light of the ease with which that risk can be minimized].) Nor can such restriction withstand Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) And, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois, supra,* 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel. Reversal is required.

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VI

CONSTITUTIONAL FLAWS IN THE SELECTION OF A DEATH PENALTY JURY REQUIRE REVERSAL OF CAPISTRANO'S CONVICTION AND DEATH SENTENCE

Capistrano argues that California's method of selecting a death qualified jury is unconstitutional and that his motion to allow the jurors who were excused because of their opposition to the death penalty to remain in the pool of jurors eligible to be selected for the guilt phase of his trial was erroneously denied. (AOB 81-95.) Respondent argues in part that the federal constitutional claim has been waived by defense counsel's "failure to state a timely and specific objection on federal constitutional grounds in the trial court." (RB 95) However, (1) the appellate claim is of a kind that required no trial court action by the defendant to preserve it, or (2) the new argument does not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as erroneous for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, Capistrano's constitutional arguments are not forfeited on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Yeoman* (2003) 31 Cal.4th 93.) "On the merits, no separate constitutional discussion is required, or provided, where rejection of a claim that the trial court erred on the issue presented to that court necessarily leads to rejection of any constitutional theory or 'gloss' raised for the first time here." *(People v. DePriest* (2007) 42 Cal.4th 1, 19, fn. 6.)

With regard to the substantive issue, respondent does not respond to Capistrano's argument that death qualification also violates California's

Constitution; nor does it respond to the argument that *Lockhart v. McCree* (1986) 476 U.S. 162, 176, is no longer good law. (RB 95-96.) Respondent cites *People v. Lenart* (2004) 32 Cal.4th 1107, 1120), for the proposition that this Court has rejected Capistrano's contention that empirical studies showing that death qualified jurors are more inclined to find an individual guilty require reversal in this case. (RB 96.) *Lenart* reiterates the holding of *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199, to the effect that this Court was unpersuaded by the empirical material the defendant in that case offered. *Jackson* was decided in 1996. Much of the empirical material cited by Capistrano post-dates 1996. In light of this new material, Capistrano urges this Court to revisit the issue and reverse his conviction and judgment of death.

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V

RESPONDENT CONCEDES THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF GLADYS SANTOS REGARDING HER PRIOR MISDEMEANOR CONDUCT AND IT FAILS TO ARGUE, BECAUSE IT CANNOT, THAT THE ERROR WAS HARMLESS AS TO THE CAPITAL HOMICIDE

With regard to the capital homicide of Koen Witters, Capistrano argues at length the prejudice flowing from the trial court's restrictions on the cross-examination of crucial prosecution witness Gladys Santos. (AOB 96-120.) Respondent concedes that proof of impeaching misdemeanor conduct may be elicited from the witness and that the trial court erred in restricting cross-examination of Santos regarding the conduct underlying her two prior convictions for petty theft and in ruling that the defense was required to present and question witnesses other than Santos to elicit that conduct. (RB 102.)

Respondent argues, however, that the Sixth Amendment is not violated unless the defendant can show that the prohibited cross-examination would have produced "'a significantly different impression of the witnesses' credibility,'" citing *People v Frye* (1998) 18 Cal.4th 894, 946, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680. (RB 101.) A close examination of the quoted passage from *Van Arsdall,* however, shows the bar for a Sixth Amendment violation is not so high:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska* [1974] 415 U.S. [308], 318, 94 S.Ct., at 1111. Respondent has met that burden here: A reasonable jury

> might have received a significantly different impression of [the witnesses's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

(*Van Arsdall, supra*, 475 U.S. at p. 680.) This passage shows the criteria for a Sixth Amendment violation is set out in *Davis v. Alaska, supra*, 415 U.S. at p. 318, and it describes the way that Van Arsdall met the standard for that violation. It does not, however, set the bar for a Sixth Amendment violation as high as the one met by Van Arsdall or as high as respondent claims. To the extent this Court has held otherwise, Capistrano respectfully requests the Court reconsider its holding in *Frye*.

Capistrano has stated a Confrontation Clause violation. As set forth above, respondent concedes that cross-examination of Santos into conduct underlying her prior petty theft convictions was proper. And respondent takes no issue with Capistrano's argument that theft crimes involve moral turpitude which are relevant to a witnesses' "willingness to lie." (AOB 102-103.) It is thus undisputed that Capistrano was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of impeachment evidence, i.e., prior crimes involving moral turpitude, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska, supra*, 415 U.S. at p. 318.)

With the constitutional violation established, the issue then become that of prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24. *Van Arsdall, supra*, 475 U.S. at p. 684, lists numerous factors a reviewing court should considering in assessing prejudice resulting from this type of error, and since Capistrano argues those factors at length in his opening brief, he will not reiterate them here. In its section arguing lack of prejudice,

respondent completely fails to argue that the error was harmless as to Capistrano's conviction of capital homicide. (RB 112-115.) Respondent makes detailed arguments as to why the error was harmless as to the non-capital crimes, but it simply baldly asserts harmless as to the capital crime. (*Ibid.*) It makes no argument because there is none to be had. The improper restriction of cross-examination into matters relating to Santos's veracity simply cannot be held harmless as to the murder of Koen Witters. No forensic or eyewitness identification evidence linked Capistrano to that crime. Capistrano was not seen nor found with any of the items purportedly taken from the Witters residence. The prosecution's case against Capistrano for that crime depended upon Santos's testimony that Capistrano had confessed to her. The trial court's error precluded the jury from hearing relevant evidence regarding Santos's willingness to lie. They were precluded from assessing the value of that evidence in determining her credibility. (See CALJIC No. 2.20 (6th ed. 1996) [character of the witness for honesty or truthfulness is a factor to be considered in determining the believability of a witness].) Respondent is correct that other evidence at trial showed that Santos was "no stranger to the criminal justice system." (RB 105.) But that is not the point. The point is that Capistrano, on trial for his life, was constitutionally entitled to confront his accuser and show her to be liar. Given the weakness of the state's case against Capistrano for capital murder, prohibiting him from doing so was deadly error. A jury should decide whether they believe Gladys Santos after full vetting. Capistrano's conviction and judgment of death must be reversed.

VI

PREJUDICIAL *ARANDA/BRUTON* ERROR REQUIRES REVERSAL OF CAPISTRANO'S CAPITAL CONVICTION

Capistrano argues the trial court committed prejudicial *Aranda/Bruton*[1] error in allowing the prosecution to elicit testimony from Gladys Santos that informed Capistrano's jury that codefendant Drebert told her that he was present when Capistrano allegedly killed Koen Witters. (AOB 121-135.)

Respondent argues there was no error because the challenged testimony did not facially incriminate Capistrano. (RB 120-124.) Alternatively, respondent argues that any error in the elicitation of Drebert's comments to Santos was harmless. (RB 124-126.) Not so on either count.

As a general matter, respondent is incorrect on the law when it argues that only facially incriminating confessions of a codefendant violate *Bruton* and its progeny. (RB 120-121.) Rather, as this Court explained in *People v. Lewis* (2008) 43 Cal.4th 415, the application of *Bruton*'s depends in significant part upon the kind of, and not the simple fact of, the inference made:

> [In *Gray v. Maryland* (1998) 523 U.S. 185 (*Gray*)] . . . the defendant and his codefendant were jointly tried for murder. Admitted into evidence was the codefendant's edited confession in which a blank space or the word "deleted" was substituted for the defendant's name wherever it appeared in the confession. The high court concluded that the admission of the edited statement violated *Bruton, supra*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, because "[r]edactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration ... leave statements that, considered as a

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[1] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

> class, so closely resemble *Bruton's* unredacted statements that ... the law must require the same result." (*Gray, supra*, at p. 192, 118 S.Ct. 1151, italics added; see *id.* at p. 197, 118 S.Ct. 1151.) That was because in context such statements operate just like a confession that names the defendant-they point an accusatory finger at the person "sitting at counsel table," i.e., the defendant on trial. (*Id.* at p. 193, 118 S.Ct. 1151.) The court acknowledged that a jury had to use inference to connect the blanks in the redacted statement to the defendant, and that "*Richardson* placed outside the scope of *Bruton's* rule those statements that incriminate inferentially." (*Id.* at p. 195, 118 S.Ct. 1151.) The court concluded, however, that *Richardson's* application depended "in significant part upon the *kind* of, not the simple fact of, inference." (*Id.* at p. 196, 118 S.Ct. 1151.) When, despite redaction, the statement "obviously refer[s] directly to someone, often obviously the defendant, and ... *involve[s] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial* " (*id.* at p. 196, 118 S.Ct. 1151, italics added) the *Bruton* rule applied and introduction of the statement at a joint trial violated the defendant's rights under the confrontation clause. (*Gray, supra*, at pp. 196-197, 118 S.Ct. 1151.)

(*People v. Lewis, supra*, 43 Cal.4th at pp. 454-455.) In this case, as shown in the opening brief and below, Santos all but expressly testified that Drebert told her that Capistrano killed Koen Witters.

Respondent next argues that no *Bruton* violation occurred because "Santo's testimony did not identify Drebert as the source or appellant as the killer." (RB 122.) Respondent argues that Santos's testimony amounted to nothing more than a statement by Capistrano himself rather than a statement by his codefendant. (RB 122-123.) Not so. The prosecution was allowed to elicit from Santos that a civilian person who was present at a homicide told Santos about the killing, and that she then "confronted" Capistrano "with what [she] had been told." (5RT 2435.) Santos testified that she asked Capistrano, "Is it true? Did you really kill someone with a belt?" (5RT 2436.) Without any doubt, the jurors understood the question to

contain the information Santos had received from the person with whom she first spoke, and not from Capistrano. Thus, the question containing that person's accusations directly, and not inferentially, informed the jury that that person told Santos that Capistrano had killed someone with a belt.

And contrary to respondent's contention that Drebert "was not expressly or directly identified as the course fo the information" (RB 123), the jurors were left with no doubt that Drebert as the source. Noting Santos's testimony that Capistrano told her that Drebert and Pritchard were present at the homicide, respondent asserts that the "uncontradicted testimony at Capistrano's trial served to suggest that Pritchard – not Drebert – was the source who prompted Santos to inquire of defendant."[2] (RB 123, fn. 26.) This could not be further from the truth. The evidence before Capistrano's jury was such: Santos testified that, at around Christmastime, the "person" came over to her house late at night, that he had been out drinking for his birthday, that he was very drunk, that she made him stay with her so that he would not get arrested, and that he left to go to his girlfriend's house. (5RT 2547-2549, 2552.) During the relevant time period, Drebert, who was an adult, having turned 18 years old on Christmas day (3CT 790), had access a car belonging to his girlfriend, Jessica Rodriguez. (6RT 2622-2623; 8RT3115-3133, 9RT 3292-3293.) In contrast, Eric Pritchard, born in July, 1981 (4SUPPCT 23), was 14 year old in December, 1995 and lived with his mother in Baldwin Park, which is several miles from Santos's apartment in West Covina. (4RT 2146-2151.)

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[2] It strains credulity for respondent to assert that Pritchard was the source given that the prosecution at trial elicited testimony from Santos before Drebert's jury that Drebert was the person who first spoke to Santos regarding the Witter's homicide. (5RT 2462-2478.)

Only Drebert was old enough to be out, driving around at night, thus risking an arrest for driving under the influence. Far from being "uncontradicted" that Pritchard was the source, the evidence before Capistrano's jury clearly pointed to Drebert as the source of the accusation that Capistrano killed Witters. The *Bruton* violation is clear.

Respondent further argues that "the admission of *appellant's* own statement identifying Drebert as the possible provider of the information did not violate the confrontation clause or other constitutional protection," citing *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049 and Evidence Code section 1220 (emphasis in original). (RB 123.) However, Capistrano has shown above that it was not *his own* statement that identified Drebert as the source, but rather, in the context of the trial, it was Drebert's statements to Santos that did so.

Assuming arguendo that Capistrano's statement, "That pussy Mike told you, huh?" was admissible under Evidence Code section 1220,[3] in order to preserve Capistrano's *Aranda/Bruton* rights, the statement should have been redacted and admitted in a different context, and not one which pointed to Drebert as the source of the accusation that Capistrano was a killer. For example, the trial court could have limited the prosecution to inquiring of Santos whether she had heard from someone else – and not specifically someone who had been present at the homicide – that Capistrano had killed someone, to which Capistrano replied, "That pussy told you, huh?" The prosecution thus would have been able to elicit the content of Capistrano's statement without compromising his Confrontation

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[3] Respondent correctly does not contend that Capistrano's statement would have been admissible as a declaration against interest under Evidence Code section 1230.

Rights.

Respondent argues in the alternative that, even it the error is extant, that it was harmless because "[a]ppellant made a detailed and self-corroborating confession to the murder of Koen Witters" and his confession "provided details that could only have been known by the killer or someone present when the murder occurred." (RB 125.) Respondent misses the point of trial counsel's cross-examination of Santos into the details of the homicide that Drebert provided to her. (RB 124 and fn. 27.) The point is, Santos learned details of the homicide from Drebert, who was clearly present at and guilty of that homicide. She did not need to actually speak to Capistrano to put those words in his mouth. The prosecution's case against Capistrano for the Witters homicide was so weak, it needed to bolster Santos's testimony with Drebert's confession. That it managed to do so does not make it right. The constitutional error is certain, and the state has not and cannot carry its burden of proving the error harmless beyond a reasonable doubt as to the Witters homicide. For all the reasons stated here and in Capistrano's opening brief, his conviction of capital homicide must be reversed and his judgment of death necessarily vacated.

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VII

THE IMPROPER AND PREJUDICIAL JOINDER OF COUNTS REQUIRES REVERSAL OF CAPISTRANO'S CONVICTIONS AND DEATH JUDGMENT

Capistrano argues at length in his opening brief that the trial court erred in joining the non-capital cases together and then joining the non-capital cases to the capital case involving the homicide of Koen Witters, and that the errors deprived Capistrano myriad constitutional rights. (AOB 136-183.) Respondent again argues no error and that, assuming error, Capistrano failed to show that joinder of counts resulted in "gross unfairness." (RB 127-155.) The issues relating to the joinder of the non-capital cases to each other require no further briefing. Capistrano will only address the error of joining the non-capital cases to the capital case.

A. The Trial Court Abused Its Discretion In Granting Consolidation

The first consideration in judging a severance or consolidation issue is whether the trial court abused its discretion in permitting a joint trial of the charges. This assessment is made by examining the record at the time of the trial court's ruling. (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

Respondent argues that the trial court did not abuse its discretion in joining the Witters offenses to the non-capital cases because "common elements between these three incidents [the non-capital offenses] and the Witters murder made each incident cross-admissible to the Witters incident." (RT 143-144.) As will be shown below, respondent's position finds no support in the record below.

The common elements respondent proffers are two in number. First, respondent proffers for the first time on appeal a theory of cross-admissibility of the non-capital charges to the capital case (RT 143-144)

that should not be credited by this Court. This Court has held that parties upon appeal are confined to the same theories advanced below, and that an opposing party should not be called upon to contest for the first time on appeal a new theory that contemplates a factual situation different than that litigated in the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118, fn. 3.) At trial the state advanced specific theories for consolidation that were addressed and considered by the trial court. The trial court set forth specific factual bases for ordering consolidation, and they were not the factual bases now proposed by respondent. The record does not support a belief that in making this fact-specific determination the trial court gave any credence to the theories newly proposed by respondent, and not having availed itself of the opportunity to present these theories to the trial court, respondent should not be allowed to advance them now.

Apart from the fact there is no reason to believe the trial court considered these belated reasons to be a valid basis for joinder, they are not in fact a valid basis for joinder. Respondent first argues that the Weir and J.S./E.G. crimes were admissible in the capital case to show a common modus operandi, i.e, that victims were accosted outside their homes, forced inside and then robbed. (RB 144.) To make the Witters crime similar in M.O., respondent proffers the theory that Witters was wearing swim trunks, and that he must have gone to the pool and been accosted on the way back to his apartment. (RB 144) Not only was this never argued below, the evidence adduced and argued by the prosecution at trial showed the opposite – i.e, the perpetrators saw Witters shaving in his bathroom when they entered the apartment. (5RT 2441-2442, 10RT 3591.) Indeed, the only mention of "swim trunks" in the entire record is by the investigating detective whose *impression* – i.e., his guess – was that the victim was

wearing swim trunks. (5RT 2371.) However, testimony from the medical examiner who testified regarding the autopsy of Witters does not support that speculation. (7RT 2824-2842.) Nor is there any evidence in the record of the existence of a swimming pool in the apartment complex where Witters resided. This "theory" of cross-admissibility proffered for the first time on appeal by respondent is made up of whole (swim trunk) cloth.

The only other theory of cross-admissibility argued by respondent is, again, one not proffered by the state below, i.e, that the victims in the Witters, Martinez and J.S./E.G. crimes were bound with ties from the victims' homes and that "the placement of the gags and ligatures in the various incidents strongly suggested the same perpetrator(s) committed all of the offenses." (RB 144.) Respondent cites no precedent for this proposition, because is it not legally supportable. This "feature" was not common among all the crimes (as the Weirs were not bound) and can it cannot seriously be considered "distinctive" that victims of residential robberies are bound with items found in the home. (See also AOB 153-156.) Trial counsel's argument in this regard was not contested by the prosecution below. Rather, the prosecution only rebutted trial counsel's assertion that the capital case against Capistrano was weak. (1RT 176-179.) Thus, respondent's contention that the evidence of the non-capital offenses were cross-admissible as to the Witters homicide fails.

Since cross-admissibility is not the "sine qua non" of consolidation, this Court must consider other factors in determining whether the trial court erred in consolidating the cases for trial. (AOB 147-169.) One of those factors is whether a weak case has been joined with a strong case so that the spillover effect of aggregate evidence on several charges "might well alter the outcome of some or all of the charges." (*People v. Sandoval* (1992) 4

Cal.4th 155, 172-173.) With regard to the Witters homicide, respondent does not contest Capistrano's assertion that the capital case against him consisted solely of his admissions to Gladys Santos. (RT 145.) Rather, respondent asserts that "it was not for the trial court, or for this Court, to assess Santos's credibility in determining whether joinder was appropriate." (*Ibid.*) Respondent cites no supporting authority, again because is cannot, that the trial court had no duty to assess Santos's credibility. It is well-established that "determinations of credibility and demeanor lie '"peculiarly within a trial judge's province"' [citations]." (See *Snyder v. Louisiana* (2008) ___ U.S. ___ 128 S.Ct. 1203, 1208.) Of course the trial court here gave no reasons for its ruling and appears to have ruled erroneously that since Penal Code section 954.1 did not require cross-admissibility, that there was no legal reason barring consolidation. (AOB 142, 147-148.)

Assuming arguendo the trial court credited Santos's testimony regarding Capistrano's alleged admissions for purposes of its decision to consolidate the charges, the ruling remains incorrect. Capistrano was on trial for his life for a crime for which there existed no extrinsic evidence of his guilt other than alleged admissions made to a single witness of doubtful veracity. Capital cases do not get much weaker than that. Consequently, the state sought to shore up this weakness by consolidating the cases to try and give the jury the impression that the crime was simply the type of thing that Capistrano engaged in. This constitutes shoring up a weak case with a stronger case.

The evidence before the trial court at the time of its ruling, and the reasons proffered at that time by the state, were insufficient to justify consolidation of these offenses. The trial court abused its discretion by ordering consolidation.

B. Joinder Of These Charges Rendered The Resulting Trial Fundamentally Unfair

Capistrano maintains that even if the trial court's ruling on consolidation was correct at the time it was made, it resulted in a trial that amounted to a denial of due process of law. (See *People v. Arias* (1996) 13 Cal.4th 92, 127 [reversal required if joinder order which was correct at time it was made resulted in gross unfairness amounting to denial of due process].) Respondent counters that no "gross unfairness" resulted from the joinder. (RB 146-151, citing *People v. Ochoa* (1990) 19 Cal4th 353, 409.)

It is difficult to conceive of something more grossly unfair as convicting someone of capital murder who did not commit the crime. As the United States Supreme Court has succinctly stated "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." (*Schlup v. Delo* (1995) 513 U.S. 298, 324, fn. omitted.) Avoiding execution of the innocent is of "paramount importance" in American criminal law. (*Id.* at pp. 325-326; see also *Herrera v. Collins* (1993) 506 U.S. 390, 419, conc. opn. of O'Connor, J. [the execution of a legally and factually innocent person would be a constitutionally intolerable event]; *id.* at pp. 430-431, dis. opn. of Blackmun, J.; *In re Clark* (1993) 5 Cal.4th 750, 796-798.)

To be sure, Capistrano was not new to the criminal justice system, but the fact remains that the capital case against him was extremely weak. The prosecution needed to shore up the capital case by joining it with other cases in which evidence of his guilt was strong to over-whelming. The prosecution did this all while conceding, by not contending, that the evidence of the non-capital cases was cross-admissible against Capistrano as to the Witters homicide. In fact, *the only theory of cross-admissibility argued by the prosecution at trial related to codefendant Drebert.* (3CT

722-733 [the participation of Drebert in the Witters and Weir crimes was admissible to show that Drebert shared the felonious intent of Martinez's attackers when he entered the apartment].) Respondent's theories of cross-admissibility as to Capistrano, offered for the first time on appeal fail, for the reasons stated above.

Respondent contends that the prejudice flowing from the joinder and from the prosecution's misconduct[4] did not result in an unfair trial on the capital charge because "[a]ppellant made a detailed and self-corroborating confession to the murder of Koen Witters. His confession provided details that could only have been know by the killer or someone present when the murder occurred." (RB 148-149.) However, the undisputed evidence shows that Santos first learned the details of the homicide from codefendant Drebert. This fact undermines respondent's contention that Capistrano said things only the killer or someone present at the homicide could know, since Santos was neither the killer nor present at the homicide and she knew these details from Drebert, as did the person who was with Drebert when he told Santos of his involvement. The confession was self-corroborating only to the extent that the jurors believed Santos when she attributed the confession to Capistrano. To make up for the weakness in the capital case that turned

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[4] Respondent implies that Capistrano should have separately complained of instances of error and prosecutorial misconduct at trial. However, in each instance, no objection was made by trial counsel below. This Court has held that, "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion-and on the same ground-the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Neither was done in this case, and Capistrano believes precedent dictates that these particular issues be raised in post-conviction litigation rather than on appeal.

on the testimony of a single witness, the prosecution made sure the jurors heard of irrelevant and prejudicial evidence of other crimes, thus ensuring Capistrano's fate in the capital case.

If this case – a death penalty case in which evidence of the non-capital charges was not cross-admissible to the capital charge, where the capital case turned on the testimony of a single witness, and where joinder served to impute guilt of other crimes to guilt in the capital case – does not establish a substantial danger of prejudice requiring that the charges be separately filed (*People v. Carter* (2005) 36 Cal.4th 1114, 1153-1154, then it is difficult to image a case in which joinder of charges would be considered improper. If there is no error in this case, then the doctrine of improper joinder of counts exists in theory, but not in practice.

Because of joinder of the non-capital charges, the trial on the capital charge was not even a little bit fair. The joinder of the non-capital charges to the capital charge was grossly unfair and denied Capistrano due process of law. Reversal for a new trial on the capital charge is required.

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VIII

CAPISTRANO WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW DUE TO THE ABSENCE OF AN INSTRUCTION ADVISING THE JURY THAT IT SHOULD CONSIDER ONLY THE EVIDENCE PERTAINING TO EACH SPECIFIC COUNT OF THE INFORMATION WHEN CONSIDERING CAPISTRANO'S GUILT OF THAT PARTICULAR COUNT

The trial court instructed the jury in accordance with CALJIC No. 17.02 that it should consider separately the question of Capistrano's guilt as to each count alleged against him. Capistrano believes it was error to not also sua sponte instruct the jury that evidence of one crime could no be used to convict Capistrano of a crime to which the evidence did not pertain. (AOB 184-194.) Respondent believes this claim is waived because of a failure to object to the jury instruction given by the court, and that in any event the claim is without merit. (RB 152-154.)

Capistrano's claim is not that CALJIC No. 17.02 was faulty in some fashion; indeed, Capistrano believes the instruction should have been given to the jury worded as it was. Rather, as reflected in the argument heading, Capistrano asserts that the due process denial arises from the fact that there was not an additional instruction relating to the proper utilization of the evidence in assessing his guilt of each separate charge. The claim here is not that the instruction was inadequate because the words actually used needed to be defined, altered, or modified in some way, but that an additional instruction relating to an entirely different principle of law needed to be given to the jury. Capistrano acknowledges that this Court recently rejected this argument, instead holding that is was incumbent upon defendant to request a modification to the existing instruction or to request an additional instruction. (*People v. Geier* (2007) 41 Cal.4th 555, 599-600.)

However, Capistrano maintains that, for the reasons set forth in his opening brief, that his counsel's failure to do so did not waive Capistrano's rights to challenge the instruction because its provision violated his substantial rights (Pen. Code, § 1259 ["an instruction given, refused, or modified" is reviewable notwithstanding absence of trial court objection if "the substantial rights of the defendant were affected thereby"]; see also *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7 [rejecting Attorney General's waiver argument where defendant's claim was that instruction violated his right to due process of law, which "is not of the type that must be preserved by objection"].)

As to the merits of the claim, respondent asserts there was no error in failing to instruct adequately the jury that they were required to decide each count separately because "evidence as to each count was cross-admissible pursuant to Evidence Code section 1101."[5] (RB 152.) This is a somewhat startling proposition with regard to the evidence of the Witters homicide, since this claim was not made by the prosecutor at trial and no one seems to have held this belief with regard to those charges prior to now. Since Capistrano has thoroughly refuted that contention in his opening brief and herein (Argument VII), he will not re-argue the issue here.

Respondent also asserts that any error in failing to provide this instruction was harmless. Respondent bases its harmless error assertion on the claim that the evidence adduced to support guilt for each crime was strong. (RB 154.) The fact that the evidence may have been sufficient to

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[5] The precise analysis, of course, if "whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1316.)

prove guilt of each offense does not address the issue of whether the error can be considered harmless beyond a reasonable doubt.[6] As the Court of Appeal held in *People v. Armistead* (2002) 102 Cal.App.4th 784, 795:

> Even though there was considerable evidence pointing to Armistead's guilt on counts 4, 5 and 9, it is impossible to know whether the court's response contributed to the convictions on those counts. Thus under the *Chapman* harmless-beyond-a-reasonable-doubt standard (*Chapman, supra,* 386 U.S. at p. 24 [87 S.Ct. at p. 828]), we cannot say the error was harmless.

Similarly here, assuming arguendo that the evidence may have been legally sufficient to convict Capistrano of each offense, it does not show beyond a reasonable doubt that the error in failing to require that the jury segregate the evidence so that appellant was convicted only upon evidence relating to the particular crime under consideration was harmless beyond a reasonable doubt. Reversal is required.

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[6] Respondent does not contest that the standard set forth in *Chapman v. California* (1967) 368 U.S. 18 is the correct standard to use in this context.

IX

GUILT PHASE INSTRUCTIONS IMPERMISSIBLY LIGHTENED THE PROSECUTION'S BURDEN OF PROOF AND DENIED CAPISTRANO HIS RIGHT TO A JURY TRIAL, TO DUE PROCESS OF LAW AND TO A RELIABLE CAPITAL TRIAL

Capistrano argues in his opening brief that a series of guilt phase jury instructions, individually and collectively, impermissibly reduced the prosecution's burden of proof and prejudicially violated Capistrano's constitutional rights. (AOB 198-236.) Capistrano further notes and argues this Court's previous rulings to the contrary, and asks the Court to reconsider its previous rulings and hold in accordance with Capistrano's argument. (AOB 232-233.) Rather than attempt to refute the arguments Capistrano sets forth in his opening brief, respondent merely notes that this Court has previously rejected the claim as to each instruction urges the Court to decline Capistrano's invitation to reconsider its prior rulings.[7] (RB 155-163.) As explained at length in the opening brief, the cases relied upon by respondent were wrongly decided, and this Court should reverse Capistrano's conviction for the reasons stated in his opening brief.

With regard to CALJIC No. 2.15 (6th ed. 1996), Capistrano argued that it: (1) created an improper permissive inference and it reduced the prosecution's burden of proof; (2) improperly allowed the jury to use evidence of possession as to one crime to convict on an unrelated crime and

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[7] This Court should reject respondent's contention that Capistrano has waived his complaints with regard to CALJIC Nos. 2.51 and 2.15 for failing to request clarification at the time of trial. (RB 159 and 161, respectively.) Each of these claims are cognizable on appeal because each instruction is incorrect and implicates Capistrano's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

(3) should not have been given in this case because the evidence of such possession was insufficient to warrant the instruction. (AOB 212-232.) In addition to arguing that this Court has rejected the burden-shifting component of Capistrano's argument, respondent argues that no jury could have convicted Capistrano of murder based on a finding that he possessed stolen property from one of the incidents because the instruction specifically limited its application to the crimes of robbery, home invasion robbery and carjacking, thus excluding all other types of offenses. (RB 162.)

The limitation is specious, however, as applied to the Witters robbery, first degree felony-murder with robbery as the underlying felony, and the robbery-murder special circumstance. The prosecution adduced no evidence that Capistrano was in possession of any item allegedly stolen from Witters or his residence. Since the instruction did not preclude its application to these counts and allegation, *the jury was free to infer guilt of same from Capistrano's possession of stolen property from any of the other charged crimes.* For example, the home invasion robbery in concert of Martinez (Count 16) was one of the crimes to which CALJIC No. 2.15 was applicable. (3 CT 800, 5 CT 1259.) Capistrano had a prior relationship with and was known to Michael Martinez, who identified Capistrano as a participant in the crimes against him. (4 RT 2172, 2206-2207.) A backpack belonging to Martinez was located in a search of Santos's apartment where Capistrano, Drebert, Pritchard, Vera, and Santos were arrested, about four hours after the arrest. (5 RT 2302-2305.) Assuming that the jury found that Capistrano possessed items stolen from Martinez, under the terms of CALJIC No. 2.15, they were permitted to use that possession to find Capistrano guilty of all of the offenses listed in the instruction, including the Witters robbery and ergo his homicide. This error was compounded by the prosecution's argument

that Capistrano's association with his codefendants provided a basis to identify him as a participant in crimes where he was not otherwise identified. (See e.g. 10 RT 3599-3600, 3613-3614.) In short, the jury was told that any evidence connecting Capistrano to one of four crimes would be the corroboration sufficient to infer guilt of all of the crimes. Allowing CALJIC No. 2.15 to be applicable to multiple crimes at once provided a vehicle for the jury to give effect to the prosecutor's improper guilt by association theory and allowed Capistrano to be convicted based on his association with known participants rather than his own culpability.

Respondent further argues that CALJIC No. 2.15 was supported by the evidence presented because it first instructed the jury to that it must resolve any factual dispute regarding the possession of stolen property as a prerequisite to considering the presumption of guilt of robbery, home invasion robbery in concert or carjacking. (RB 162-163.) Assuming for the sake of argument that that rescues CALJIC No. 2.15 from being unconstitutional, the instruction nonetheless should have been delimited from application the charges associated with the Witters homicides. CALJIC No. 2.15 is constructed to be used for a single crime. As applied to this case, the instruction allowed the jury to presume Capistrano's guilt of Witters robbery, and thus his homicide, if the jury found that Capistrano possessed property stolen from one of the other crimes, (AOB 223-224) and this error requires reversal of Capistrano's capital conviction and death sentence.

X

REVERSAL IS REQUIRED BECAUSE CALJIC NO. 17.41.1 VIOLATED CAPISTRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO TRIAL BY A FAIR, IMPARTIAL AND UNANIMOUS JURY

Capistrano contends that CALJIC No. 17.41.1, which encouraged deliberating jurors to complain to the trial court about other jurors who were believed to be not deliberating or not following the law, prejudicially violated his federal constitutional rights as guaranteed by the Sixth and Fourteenth Amendments. (AOB 237-244.)

Respondent first argues that the issue is not preserved for appeal because Capistrano did not object to its reading at trial. (RB 164.) This claim is cognizable on appeal because the instruction is incorrect – which respondent does not contest – and implicates Capistrano's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

Respondent also argues the claim lacks merit because this Court has rejected similar constitutional challenges to the instruction. As explained in the opening brief, Capistrano acknowledges this Court's contrary authority but argues the error remained as a matter of federal constitutional law. (AOB 237-244.) Since respondent does not refute the argument, Capistrano will not re-state the opening brief arguments herein.

Respondent further argues, without any supporting authority, that Capistrano's claim should be rejected because he "does not cite to anything in the appellate record indicating the jurors in this case were improperly influenced by the instruction in their deliberations." (RB 164.) Capistrano also argued, with supporting precedent, that no such showing was warranted or proper. (AOB 237, 239-240.) The Court should pass this assertion

without consideration. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may pass without consideration "argument" made without citation to supporting authority].)

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XI

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED CAPISTRANO'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED CAPISTRANO ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

Capistrano asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 245-252.) Respondent asserts that this claim has been rejected by this Court in the past. (RB 106-108.) The cases cited by respondent rely upon faulty analysis.

According to respondent, and some of the cases on which respondent relies, malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. However, this position embodies a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are different crimes or the same crime. The question first arose as an issue of statutory construction in *Blockberger v. United*

States (1932) 284 U.S. 299, when the Capistrano asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections did describe different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.)

People v. Dillon (1983) 34 Cal.3d 441, the controlling interpretation of the felony murder rule at the time of Capistrano's trial, properly applied the *Blockberger* test for determining the "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p. 476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code, § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code

section 189 and the specific intent to commit that felony; malice murder does not.

Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which Capistrano relies meant "only that the *elements* of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones* v. *United States*, *supra*, 526 U.S. at p. 232.) In this case, where Capistrano was charged with one crime, but the jury was instructed that it could convict him of another, that rule was breached as well, violating Capistrano's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair

and reliable capital guilt trial.

Accordingly, Capistrano's conviction for first degree murder must be reversed and his death judgment vacated.

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XII

CAPISTRANO'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Capistrano argues that California's imposition of the death penalty for felony murder *simpliciter* is out of step with the nation and violates the Eighth Amendment and international law. (AOB 253-271.)

Respondent answers that this Court already has rejected similar claims, but does not meet Capistrano's arguments. (RB 169.) Respondent ignores Capistrano's reliance on *Hopkins v. Reeves* (1998) 524 U.S. 88, without even attempting to refute or discuss that the United States Supreme Court in that case assumed that the *Enmund/Tison*[8] requirement of a culpable mental state applies to the actual killer in a felony murder. Respondent similarly avoids Capistrano's argument that even if the United States Supreme Court's decisions do not already require a finding of intent to kill or reckless indifference to human life in order to impose the death penalty on defendant who actually kills, the Eighth Amendment's proportionality principle would dictate the same requirement. (See AOB 257-263.)

Respondent argues Capistrano "articulates no new or persuasive reason for this Court to revisit its prior repeated rejections of his Eighth Amendment claim," citing three cases from the last century. (RB 169.) The United States Supreme Court's Eighth Amendment jurisprudence has evolved significantly since that time, however, as set forth in Capistrano's opening brief. In addition, a recent study provides empirical evidence that

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[8]*Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137.

imposing the death penalty on ordinary robbery-burglary murderers in California is unconstitutional under both the narrowing and proportionality principles the Eighth Amendment. (Shatz, Steven F., *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murders: A California Case Study* (2007) 59 Fla. L. Rev. 719.)

Capistrano asserts a significant challenge to his own death sentence and to the California's felony-murder special circumstance. Respondent disputes the claim but does not respond to, let alone refute, the arguments presented. This Court should revisit its previous decisions upholding the felony-murder special circumstance and should hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant, whether the actual killer or an accomplice, had an intent to kill or acted with reckless indifference to human life. Because that factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 602-603; see also *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 2537-2538; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 493-494.) There is no jury finding in this case that Capistrano intended to kill Koen Witters or acted with reckless indifference to human life. Therefore, Capistrano's death sentence must be reversed.

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XIII

CALJIC NO. 2.90 IS CONSTITUTIONALLY DEFECTIVE

Capistrano claims that CALJIC No. 2.90 as read to the jury was constitutionally deficient in many ways. (AOB 272-285.) Respondent argues that "[t]o the extent appellant argues that CALJIC No. 2.90 was simply inadequate, he has waived the claim" by failing to bring the complaint to the trial court's attention. (RB 170.) This claim is cognizable on appeal because Capistrano argues that CALJIC No. 2.90 contained myriad legal errors and was incorrect, thus implicating Capistrano's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

With regard to the merits of the claim, respondent correctly argues that this Court has previously rejected it. However, Capistrano respectfully requests this Court to reconsider and disapprove those cases for the reasons stated in his opening brief.

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XIV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Capistrano believes that his trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is Capistrano's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 286-288.)

Respondent asserts that there was no error, and if there was error Capistrano has failed to show prejudice. (RB 177.) It is axiomatic that if this Court finds no error, the cumulative error doctrine would not come into operation. Consequently, if respondent is correct about the total lack of error, the Court will obviously deny this claim. As to respondent's assertion that Capistrano has failed to show prejudice, it is a mere assertion based upon no reasoning or argument. As such, it does not merit a response, and Capistrano merely reiterates what he has set forth in his opening brief.

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XV

IF THE CONVICTION PURSUANT TO ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

Capistrano believes that he is entitled to a new penalty determination if this Court vacates a conviction as to any count of the information upon which he was convicted or sets aside any special circumstance that was found to be true. (AOB 289-290.) Respondent incorrectly asserts that "appellant does not argue the penalty evidence was weak or insubstantial and, therefore, does not dispute this fact." (RB 178.) Capistrano has consistently maintained, in both this opening brief and herein, that the capital case against him was extremely weak. Since the circumstances of the capital crime is a factor to be considered at the penalty phase (Pen. Code, § 190.3, subd. (a)), a weak case for guilt ipso facto means a weak case in aggravation at the penalty phase. In addition, respondent asserts that a "retrial of the penalty phase is not precluded" under *Ring* and *Apprendi*[9] because this court has previously rejected this argument. (RB 179.) Capistrano does not argue that a penalty retrial is precluded, but rather that a reversal on any count or finding as to any special circumstance would require reversal without harmless error analysis. Capistrano acknowledges this Court has previously rejected his claim in the cases set forth in respondent's brief (*ibid.*), but respectfully asks this Court to reconsider its holdings for the reasons stated in his opening brief.

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[9] *Ring v. Arizona* (2002) 536 U.S. 584, 607 and *Apprendi v. New Jersey* (2004) 530 U.S. 466, 483.

XVI

THE REMAINING ARGUMENTS ARE FULLY BRIEFED

Capistrano believes that Arguments XVI through XXIII in his opening brief fully address the claims therein and require no reply, because as to the merits of most of the remaining claims, respondent does not address Capistrano's contentions other than to state that this Court has previously rejected the arguments advanced. Capistrano is aware of this Court's decisions, as noted in his opening brief, but respectfully requests this Court to reconsider and disapprove them for reasons that will not be re-stated here.

Capistrano notes respondent's concession to the correctness of Argument XVIII in the opening brief and requests this Court modify the abstract of judgment to reflect a sentence of life with the possibility of parole on count 15 (the attempted premeditated murder of Michael Martinez).

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

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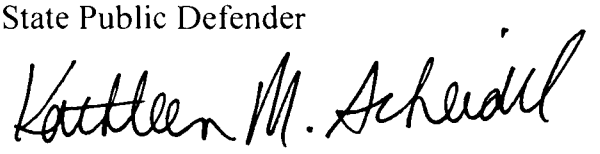
CONCLUSION

For all of the reasons stated above, as well as for the reasons stated in Capistrano's opening brief on appeal, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: October 14, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



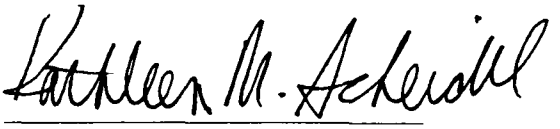
KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630 (b)(B))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant John Capistrano in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 12,695 words in length.



KATHLEEN M. SCHEIDEL
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano* No.: KA 034540
Calif. Supreme Ct. No. S067394

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on October 14, 2008 I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Margaret Maxwell, D.A.G
300 South Spring St., 5th Floor
Los Angeles, CA 90013

John L. Capistrano
(Appellant)

Addie Lovelace
Death Penalty Coordinator
Los Angeles County Superior Court
210 West Temple, Room M-3
Los Angeles, CA 90012

Each said envelope was then, on October 14, 2008, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2008, at San Francisco, California.

Glenice Fuller
DECLARANT