No. S155160

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. IRVING ALEXANDER RAMIREZ, Defendant and Appellant.	(Alameda County Superior Court No. 151080)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Alameda

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S155160
v.	)	(Alameda County Superior Court
IRVING ALEXANDER RAMIREZ,	)	No. 151080)
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant Irving Alexander Ramirez ("appellant") replies to contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in his opening brief. In particular, appellant does not present a reply on Argument IV, his argument regarding the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the guilt phase verdicts, Argument V.B.1 arguing the coworkers' victim impact testimony exceeded the limits of *Payne*, and Argument VIII, certain challenges to the California death penalty statute. The failure to address any particular argument, sub-argument or assertion made by respondent, or to reiterate any particular

point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3; accord, *People v. Ashmus* (1991) 54 Cal.3d 932, 985 fn. 15; *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9), but reflects his view that the issue has been adequately presented and the positions of the parties are fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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ARGUMENT

I. THE TRIAL COURT ERRED IN MODIFYING CALCRIM NO. 521

In his opening brief ("AOB"), appellant challenges the language added to the instruction on first degree deliberate and premeditated murder: "it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act." (AOB 42-70 [hereafter "maturely and meaningfully reflected"].) Appellant asserts that the added language was not applicable and unnecessary to instruct the jurors on first degree deliberate and premeditated murder. Additionally, it is reasonably likely the modified instruction, combined with the prosecutor's misstatements regarding premeditation and deliberation, confused and misled the jury regarding deliberation. (AOB 39-70.) Relying on *People v. Smithey* (1999) 20 Cal.4th 936, 979-982 [hereafter "*Smithey*"], respondent contends that the trial court's modification was proper in that it was correct in law, responsive to the evidence, and that there is no reasonable likelihood the jury misapplied the instruction. (RB 30-41.) This Court's ruling in *Smithey*, however, does not apply.

A. The Trial Court Erred In Modifying CALCRIM No. 521 Because The Added Language, Although Contained In Section 189, And Approved In *Smithey*, Does Not Set Forth A Principle Of Law Applicable To This Case

The maturely and meaningfully reflected language added to the instruction on first degree deliberate and premeditated murder is inapplicable in two respects that fundamentally distinguish this case from *Smithey*, upon which respondent principally relies. First, the language is inapplicable to CALCRIM instructions. Second, the added language is

inapplicable to the facts of this case.

1. CALCRIM No. 521 May Not Be Modified With the Maturely and Meaningfully Reflected Language

Respondent argues that this Court in *Smithey* held that instructing a jury with the maturely and meaningfully reflected language from the Penal Code was not error. (RB 33; *Smithey*, *supra*, 20 Cal.4th at pp. 979-982.) It is true that the *Smithey* court made the general observation that using language from a statute is generally sufficient and, if commonly understood, requires no clarification. (*Smithey*, *supra*, 20 Cal.4th at p. 980.)[1] *Smithey*, however, did not hold that instructing a jury with statutory language is never error.[2]

It is true that *Smithey* held that CALJIC No. 8.20, the first degree deliberate and premeditated murder instruction could be modified with the statutory language. (*Smithey*, *supra*, 20 Cal.4th at p. 980.) The trial court in this case, however, instructed the jury with CALCRIM jury instructions.

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[1] Respondent argues that *Smithey* held that the words in the phrase "maturely and meaningfully reflected" are commonly understood terms which do not obligate the trial court to provide further clarification of the statutory language. (RB 37.) As explained above, appellant does not claim that the trial court had an obligation to clarify the modification, but that the instruction should not have been modified to add the statutory language.

[2] It may be error to incorporate statutory language into a jury instruction. For example, the statutory definition of implied malice is "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188.) However, when trial courts inserted the abandoned and malignant heart language into the implied malice jury instruction, this Court disapproved the language, finding that it invited confusion and unguided speculation. (See, e.g., *People v. Phillips* (1966) 64 Cal.2d 574, 587.)

It cannot be assumed that a modification of a CALJIC instruction can be made to the replacement CALCRIM instruction. The CALCRIM and CALJIC jury instructions are distinct instructional schemes. (CALCRIM (2006), vol. 1, p. viii [CALJIC and CALCRIM instructions are never to be used together].) The instructional philosophy of CALCRIM differs from CALJIC. The Judicial Council of California Advisory Committee on Criminal Jury Instructions intentionally designed the CALCRIM instructions to be accurate, easy to understand and easy to use. The drafters of CALCRIM responded to a need to address "impenetrable instructions that were often based on the language of case law and statutes written by and for a specialized legal audience and expressed in terms of art that have evolved through multiple languages." (CALCRIM (2006), vol. 1, p. v.) Thus, the drafters of CALCRIM intended to do the opposite of what happened in *Smithey* – that is, to avoid complicating instructions by inserting unnecessary language from the case law or statutes – specifically the maturely and meaningfully reflected language.

Further, the judicial council advisory committee on criminal jury instructions notes that the definitions of legal terms have been incorporated into the language of the instructions in which the terms appear. (CALCRIM (2006), vol. 1, p. viii.) Thus, as intended by the drafters, CALCRIM No. 521, given in this case, already incorporated all the language from the statute that the jury needed to find that the defendant premeditated and deliberated. Therefore, any modification was not only inappropriate, but impeded CALCRIM's goals of clear meaning and uniformity. For these reasons, *Smithey* is inapposite.

2. The Maturely and Meaningfully Reflected Language Is Inapplicable to the Facts of This Case

Both appellant and respondent are in agreement that it is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. (AOB 42; RB 33-34.) Accordingly, appellant argues that although the maturely and meaningfully reflected language added to the instruction on first degree deliberate and premeditated murder is contained within section 189, the added language does not set forth a principle of law that was applicable to this case. (AOB 42-47.)

Contrary to respondent's contention (RB 35), appellant does not argue that the maturely and meaningfully reflected language is or should be limited to cases involving a diminished capacity defense as respondent contends. (RB 35.) Rather, appellant maintains that the maturely and meaningfully reflected language states a principle of law, even if technically correct, that was not applicable in this case. (AOB 42-47.) In this case, appellant presented a mental state defense of intoxication to first degree deliberate and premeditated murder. Appellant's defense was that as a result of voluntary intoxication he did not actually deliberate. In other words, he did not engage in carefully weighing the considerations for and against his choice and, knowing the consequences, decided to kill. The maturely and meaningfully reflected language does not apply to this defense.

The maturely and meaningfully reflected language originated in *People v. Wolff* (1964) 61 Cal.2d 795, 819-822 [hereafter "*Wolff*"]. *Wolff* introduced this case-specific language to allow the trier of fact to consider

that the defendant was a 15-year old schizophrenic in determining whether he had the capacity to appreciate the gravity or consequences of his act as required for a conviction of first degree murder. (*Id.* at p. 822.) In other words, *Wolff* allowed the trier of fact to reduce first degree murder to second degree murder where there was evidence the defendant's mental condition was abnormal or his perception of reality delusional.

As explained in the opening brief, as part of its overall abolition of a diminished capacity defense, the Legislature abrogated *Wolff*. (AOB 42-45.) The legislature thus incorporated the language from the case law in order to abrogate it, and not as a basis for instruction. (*People v. Swain* (1996) 12 Cal.4th 593, 608 [the language of mature and meaningful reflection was a legislative abrogation of *People v. Wolff*].) Further, what a court says in its decision, here, the language in *Wolff*, is not proper instructional language. "[I]t is dangerous to frame an instruction upon isolated extracts from the opinions of the court." (*People v. Hayes* (2009) 171 Cal.App.4th 549, 558, citing *People v. Cavitt* (2004) 33 Cal.4th 187, 202; see also *Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 656 [judicial opinions are not written as jury instructions and may be notoriously unreliable as such].)

In *Smithey*, the defendant brought a dual defense of mental impairment and drug intoxication where three defense experts testified that *Smithey* suffered from organic brain damage, mental retardation and paranoid psychosis a the time of the murder which impaired his judgment and memory and prevented him from responding appropriately to surrounding events and understanding what was occurring around him. (*Smithey*, *supra*, 20 Cal.4th at p. 955.) Thus, under those circumstances, the instruction may have been appropriate – the defense was that the defendant

lacked the mental capacity to appreciate the consequences of his act. Here, appellant did not present this type of defense, but rather argued that because of his voluntary intoxication he did not actually deliberate, that is, carefully weigh the considerations for and against his act.

Respondent counters that this Court in *Smithey* did not approve the modified instruction because there was a risk the jury would engage in a "diminished capacity analysis" of the defendant's mental disorder. (RB 35.) Although this Court did not specify that was the reason for allowing the modification, nevertheless, based on the evidence in *Smithey*, the added language, addressing a defendant's capacity to appreciate the consequences of his act, set forth an applicable principle of law. Here, the added language did not.

Respondent makes the additional claim that the maturely and meaningfully reflected language is applicable because it distinguishes the two degrees of murder. (RB 34.) Respondent is mistaken. While the maturely and meaningfully reflected language is taken almost verbatim from section 189, and section 189 does distinguish the degrees of murder (§ 189 ["All other kinds of murders are of the second degree . . ."]), the language itself does not distinguish between first and second degree murder. And certainly the addition of the language was not designed to distinguish second degree murder. Indeed, if the maturely and meaningfully reflected language was necessary in distinguishing degrees of murder, the recommended or standard jury instructions on deliberate and premeditated murder would have included the language. Since at least 1981, when the statute was amended, they have not. (CALJIC No. 8.20; CALCRIM No. 521.) As such, the maturely and meaningfully language is completely inessential to distinguishing first from second degree.

Further, as discussed in more detail below, the maturely and meaningfully reflected language is imprecise and ultimately, confusing. A definition stating that deliberation and premeditation does not include meaningful and mature reflection may be literally true, but not in any helpful sense. There are an endless number of mental states that are not included in the definition of deliberation and premeditation. CALCRIM No. 521 specifies the mental states relevant to determining deliberation and premeditation; maturely and meaningfully reflected is not one of them.

Finally, this claim is cognizable on appeal. Respondent argues that appellant was required to request a clarifying instruction if he believed that the instruction needed elaboration and that, if the claim of instructional error is predicated upon the trial court's failure to clarify the challenged language on its own motion, it is forfeited. (RB 36.) Appellant's argument, however, is not that the instruction should have been clarified, but that the trial court should not have inserted the mature and meaningful reflection language into the instruction because it set forth an inapplicable principle of law that likely confused, rather than explained, the concept of deliberation. Defense counsel clearly objected to its inclusion (12 RT 2498), therefore, the claim is not forfeited. Moreover, this Court may review any instruction which affects a defendant's substantial rights with or without a trial objection. (§ 1259; *People v. Letner* (2010) 50 Cal.4th 99, 180 [claim that combination of instructions and other misstatements of law created reasonable likelihood of misleading jurors in violation of defendant's substantial rights is reviewable on appeal under section 1259]; AOB 40.) Accordingly, it was error to insert the extraneous statutory language into the explanation of premeditation and deliberation set forth in CALCRIM No. 521.

B. The Modified Instruction Was Ambiguous And Likely Confused And Misled The Jury About The Mental State Required For Deliberate And Premeditated Murder

As outlined in the opening brief and incorporated herein, appellant argues that the addition of the maturely and meaningfully reflected language rendered the instruction ambiguous and likely confused and misled the jury about the mental state required for deliberate and premeditated murder. (AOB 48-57.) Respondent contends that this same argument was rejected in *Smithey*, and that there is no reasonable likelihood the jury misunderstood or misapplied the modified instruction in this case. (RB 35-41.) In *Smithey*, however, in addition to modifying the instruction in a different statutory scheme, the Court addressed distinct arguments from those appellant raises in this case.

Here, the jury was instructed first that deliberation requires careful weighing of the considerations for and against his choice, and knowing the consequences, a decision to kill. The test is the extent of reflection. (CALCRIM No. 521.)[3] The jury was then told that to prove the killing was deliberate and premeditated, it is not necessary for the prosecution to prove the defendant maturely and meaningfully reflected upon the gravity of his act. Using the common understanding of these terms, maturely and meaningfully reflected upon the gravity of his act means that the defendant does not have to give the consequences of his act fully developed or serious consideration. (AOB 49-51.) The question in determining deliberation is

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[3] The instruction on first degree deliberate and premeditated murder emphasizes the "extent of reflection," but is discussing the degree of reflection rather than the duration of time. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

did the defendant seriously consider the consequences. The maturely and meaningfully reflected language says that is not necessary. Yet, how would a person carefully weigh the considerations for and against his choice and know the consequences then to give the gravity of his or her act serious thought? Thus, it is reasonably likely the jury misunderstood the mental state required for premeditated and deliberate murder.

The modified language not only confused what the deliberation determination requires, but also potentially negated the mental state defense of intoxication. The defense of diminished capacity has been eliminated. (Pen. Code, § 28 [evidence of mental disease, mental defect or mental disorder not admissible to negate the capacity to form any mental state, including deliberation].) Evidence of mental disease, mental defect or mental disorder, however, is admissible on the issue of whether or not the accused actually deliberated. (*Ibid.*) The intoxication defense in this case was that because appellant was impaired by intoxication, he did not actually deliberate and the jury was instructed accordingly. (CALCRIM No. 625; 4 CT 938; 12 RT 2573.) But, by adding the maturely and meaningfully reflected language to the instruction on first degree deliberated and premeditated murder the jury was told, in effect, that mental impairment due to intoxication was not relevant if the impact was that the defendant could not seriously consider the consequences.

Potentially exacerbating the confusion, the prosecutor conflated deliberation with simple intent to kill. During the first part of his closing argument, the prosecutor mistakenly explained to the jurors that to premeditate and deliberate: "*[t]hey just have to know what it is they're*

doing." (AOB 52-54.)[4] Respondent argues that the prosecutor's argument must be looked at as a whole and claims that the prosecutor's rebuttal argument cleared up any confusion because it did not equate mature and meaningful reflection with a rash or impulsive decision to kill, but simply told the jury that first degree murder requires a defendant to deliberate the act itself, not its seriousness. (RB 38-40.)[5]

Considered as a whole, however, both parts of the prosecutor's arguments misstated what deliberation requires. As explained in the opening brief, the prosecutor's initial argument that "[t]hey just have to

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[4] The prosecutor's closing argument, in pertinent part, as excerpted from the record:

> Gravity means the seriousness or significance of. So it's not necessary for deliberation and premeditation for the person to reflect on the seriousness of the act meaningfully and maturely. *They just have to know what it is they're doing.* They don't have to reflect on how serious. So whether it's as minor as going through a red light or as serious as killing someone, both acts are willful, deliberate, and premeditated.

(12 RT 2585, italics added.)

[5] The prosecutor's argument on rebuttal:

> Did he tell you why he shot the officer?
>
> He said that he had a search and seizure, and that if the police officer called in his name, he would be arrested, but because he had two guns and some drugs on him --
>
> He thought it through. He weighed the consequences of going to jail against killing a police officer. Maybe he didn't meaningfully and maturely reflect on the gravity of his act, but that's not necessary. He weighed the choices in his mind. He had two choices: Going to jail, or shooting a police officer. And he picked the latter.

(13 RT 2625-2626.)

know what it is they're doing" cuts against the requirement that to prove deliberation, the prosecutor must prove that the defendant carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. (AOB 53.) Weighing considerations and knowing consequences require reflection beyond just knowing what one is doing.

Further, the prosecutor's rebuttal argument equated deliberation with a simple binary choice – another way of saying the jury only needed to find intent to kill. A deliberate and premeditated murder requires proof of express malice, generally understood to mean simply an intent to kill. In order to form the intent to kill, a person must, of course, make a decision; a decision cannot be made, however, without at least a rudimentary consideration of the alternatives. This considering of the alternatives, to kill or not to kill, logically must precede the actual decision. Thus, the jurors must distinguish between the decisionmaking inherent in forming the intent to kill and the additional premeditation and deliberation necessary to elevate the crime to first degree murder. The prosecutor's rebuttal argument eliminated that distinction. By characterizing deliberation as a simple choice, aided by the maturely and meaningfully reflected language which indicated that the consideration of consequences did not need to be serious (or careful), the prosecutor was able to suggest there was no distinction between deliberation and the inherent choice of intent to kill. In sum, the prosecutor's explanation of premeditation and deliberation exploiting the language added to the instruction misled the jurors about the mental state required for deliberate and premeditated murder.

Unlike the defendant in *Smithey*, appellant does not argue that the trial court was obligated at the guilt phase to define the maturely and

meaningfully reflected language.[6] Nor does appellant argue that the statutory language can only be understood in the context of *Wolff* as the defendant in *Smithey* argued. (See *Smithey*, *supra*, 20 Cal.4th at p. 980.) Although appellant here argues that it is reasonably likely the jury misunderstood the modification and the defendant in *Smithey* made an argument that it was reasonably likely the jury misunderstood the same modification, the claims differ. In *Smithey*, the defendant argued that it was reasonably likely the jurors understood from the modification itself that they could convict the defendant of first degree murder if he simply committed the killing. (*Smithey*, *supra*, 20 Cal.4th at p. 980.) Respondent characterizes appellant's claim as the same. (RB 37.) Not so. Appellant does not contend that the language alone led the jurors to find first degree deliberate and premeditated murder if appellant simply committed the killing, but that, in its everyday meaning, the inserted phrase confused, if not contradicted, the definition of deliberation and the extent of reflection required to find deliberate and premeditated murder. (AOB 42-57.)[7] *Smithey* does not address appellant's claim.

Respondent also relies on this Court's conclusion in *Smithey* that the instructions as a whole made clear that reflection must have preceded commission of the murder. (*Smithey*, *supra*, 20 Cal.4th at p. 981; RB 37.) But here, the problem was not the sequence of reflection and act, but rather,

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[6] Appellant does argue that the trial court was obligated at the penalty phase to define the maturely and meaningfully language in claim VII.C.2, when during the penalty phase, the jurors asked the trial court for a definition of maturely and meaningfully reflected.

[7] Appellant does allege that the prosecutor's initial closing argument equated the maturely and meaningfully reflected language with simple intent to kill.

the inconsistency between the inserted language and the essential qualities of deliberation set forth in the standard instruction. Here, even if the instructions made clear that reflection must precede the act, the maturely and meaningfully reflected language rendered ambiguous the nature of the deliberation and reflection required to find first degree deliberate and premeditate murder.

Respondent argues that the trial court's other instructions demonstrate that there was no reasonable likelihood that the jury would understand that a sudden, impulsive and unconsidered murder was deliberate and premeditated. (RB 37.) No other instructions dispelled the confusion generated by the added language. As explained in the opening brief, and above, the other instructions given by the trial court did not reconcile the requirement of careful weighing of choices and consequences with the exclusion of mature and meaningful reflection on these same considerations. (AOB 50-51.)

Respondent claims that the attorneys discussed deliberation in depth and that the attorneys did not "dwell" on mature and meaningful reflection. (RB 42.) Appellant maintains that defense counsel's argument could not clear up the ambiguity in the instruction because defense counsel did not know what maturely and meaningfully reflected meant. (AOB 51-52.) Defense counsel also did not correct the prosecutor's explanation of premeditation. (AOB 51-56; 12 RT 2585, 2605-2606.) The prosecutor did not have to dwell on mature and meaningful reflection to confuse the jury; the language itself sufficed.

The inserted language, defense counsel's incomprehension, and the prosecutor's misstatement of the law support a reasonable likelihood that jurors were misled about the mental state required for deliberate and

premeditated murder.

C. The Effect Of The Ambiguous Instruction Was To Lower The Prosecutor's Burden Of Proof And Violate Appellant's Right To A Jury Trial On The Mental State Elements Of Deliberate And Premeditated Murder

Appellant asserts that the effect of the ambiguous instruction was to lower the prosecutor's burden of proof and violate appellant's right to a jury trial on the mental state elements of deliberate and premeditated murder. (AOB 57-60.) As demonstrated above, the maturely and meaningfully reflected language injected ambiguity into the definition of deliberation. As a result, the instruction likely confused the jurors and misled them to conclude that they did not need to find that appellant carefully weighed the considerations for and against his choice, and, knowing the consequences, decided to kill. No other instructions corrected the ambiguity created by the added language. Further, the prosecutor's argument exacerbated the confusion about the mental state necessary for first degree deliberate and premeditated murder. Thus, there is a reasonable likelihood that the jury convicted appellant of first degree murder without finding that appellant had the required mental state of deliberation in violation of his due process right to a jury finding beyond a reasonable doubt on every element of the crime. Therefore, the modified instruction on deliberation effectively removed a factual question from the jury, lowering the prosecution's burden and depriving appellant of an unanimous decision by the jury on deliberation, violating his constitutional right to a jury trial. (*Neder v. United States* (1999) 527 U.S. 1, 12 [addressing failure to instruct on an element of the offense].) In response, respondent argues that because the instruction was not misleading, it did not lessen the prosecution's burden of

proof. (RB 41.) Respondent also notes that the trial court instructed the jury multiple times that the People must prove their case beyond a reasonable doubt; thus there was no federal error. (RB 41.) But the modified instruction was misleading, and the general instruction on reasonable doubt, even as repeated, did not specifically address, much less cure, the dilution of the burden of proof on the deliberation element of first degree murder.

D. The Error Requires Reversal Of The Entire Judgment

Appellant argues that whether under the state law standard or federal constitutional standard, the error was not harmless. (AOB 60-70.) Respondent contends that even if the trial court erred in giving the modified instruction the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 41.) Respondent argues that if the trial court gives an inapplicable instruction, the error is not one of federal constitutional dimension and reversal is required only if it is reasonably probably that the result would have been more favorable to the defendant had the error not occurred. (*Ibid.*) To the extent that the added maturely and meaningfully reflected language was inapplicable, appellant agrees that the *People v. Watson* standard for prejudice applies. Appellant argues, however, that beyond being inapplicable, it was reasonably likely the modified instruction confused and misled the jurors about the mental state required for deliberate and premeditated murder thereby removing an element of the crime from the jury's consideration and lowering the prosecution's burden to prove every element beyond a reasonable doubt – an error of federal constitutional dimension. (AOB 57-60.) As such, the *Chapman* standard for prejudice applies – whether the guilty verdict actually rendered in this trial was surely

unattributable to the error beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 45.) Respondent does not address appellant's prejudice argument under the federal constitutional prejudice standard. (RB 41, 44.) Under either prejudice standard, the error was not harmless.

Respondent argues that the error was not prejudicial because the trial court correctly defined deliberate and premeditated murder for the jury, the attorneys discussed deliberation in depth and the jury did not express confusion with the phrase, nor with any of the guilt phase instructions. (RB 42.) Respondent misses the point. Even though the trial court correctly defined deliberation and premeditation in giving the standard instruction, the issue is whether the language added to the instruction: "[t]o prove that the killing was deliberate and premeditated, it's not necessary to prove that the defendant maturely and meaningfully reflected upon the gravity of his act" confused the concept of deliberation. While the attorneys did discuss deliberation because it was the central issue in the case, that did not mean the jurors were not confused by the inserted language. Although the jurors did not express confusion during the guilt phase regarding the modification, this is not a prerequisite for finding an instructional error prejudicial. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 ["While there is no precise formula for measuring the effect of an erroneous instruction, a number of factors are considered in measuring prejudice: (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error

[citations omitted]."].)[8]

As outlined in Appellant's Opening Brief, and incorporated herein, the court's error was prejudicial. (AOB 62-70.) The modification of CALCRIM No. 521 undercut appellant's sole articulated defense – lack of deliberation. An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless. (AOB 62, citing *People v. McDonald* (1984) 37 Cal.3d 351, 376.) The issue of deliberation was both critical and closely contested in this case.

Respondent's argument that appellant deliberated the murder rests on its contention that appellant's prior arrest in Pleasanton provides a powerful motive to kill Officer Niemi to avoid re-arrest. (RB 42.) The evidence of appellant's prior arrest, however, was inconclusive even on the issue of motive. There was no evidence of appellant refusing to go back to jail or otherwise stating *before* the crime that he hoped to avoid jail at all costs. Further, appellant was not armed purposefully to kill a police officer. Appellant had firearms on his person the day of the murder because he was prepared for a possible confrontation related to his friend's brother and gang members and also because he was retrieving a gun that he had lent to his friend. (10 RT 2043, 2045, 2048, 2051, 2074.) Even if appellant had a

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[8] The jurors asked, however, for the definition of maturely and meaningfully reflected during their penalty phase deliberations. (4 CT 1023.) This does not mean the jurors were not affected by the language, but the opposite. Not having received the guilt phase instructions at the penalty phase, the jury was impacted enough by the maturely and meaningfully reflected language that they remembered it and asked the trial court about it. While respondent hopes to characterize this as an indication the jury was not confused at guilt, it could also indicate the jurors simply applied the modified language in the manner urged by the prosecutor at the guilt phase and then wondered how it was to be used at the penalty phase.

motive to avoid arrest, motive is not the same as premeditation and deliberation.

Respondent also claims that appellant's statements to three witnesses after the murder provide powerful evidence of appellant's motive to kill Officer Niemi to avoid arrest. Respondent asserts that appellant "confessed to killing Niemi because he did not want to be arrested and sent to jail," citing to Heredia's testimony (10 RT 1986) and Arteaga's testimony (10 RT 2065). (RB 42.) Appellant's statements to Heredia and Arteaga, however, did not constitute a confession that he killed because he did not want to be arrested and sent to jail. Heredia testified at trial that once in the car, after he asked appellant why, appellant stated, "I was gone. I was gone. I was gonna go." (10 RT 1986.) Heredia's testimony, however, was directly contradicted by testimony from Officer Moreno. Officer Moreno testified that Heredia told police that when he asked appellant immediately after the shooting why he had shot Niemi, appellant responded: "I don't know" multiple times. (12 RT 2451, 2457.)

For his part, Arteaga testified at trial that immediately after the murder, as they were fleeing the scene, he asked appellant to explain why he shot Officer Niemi, and appellant stated: "I was done." (10 RT 2065.) During cross-examination Arteaga explained that he told officers that appellant stated: "I'm gonna get caught," which Arteaga said meant the same thing as "I was done." (10 RT 2088.) These statements are a far cry from a confession that appellant was motivated to kill in the first place because he wanted to avoid arrest. Rather than a confession, appellant's immediate statements after the murder indicate that he did not have a preconceived motive or plan to kill. Respondent ignores appellant's first statements: "I don't know" and "I'm gonna get caught." True, sometime

after the shooting, appellant allegedly told Ewert: "he had a search and seizure, and that if the police officer called in his name, he would be arrested, because he had two guns and drugs on him." (12 RT 2345.) But even apart from Ewert's credibility issues, as explained in the opening brief, appellant's statements to Ewert were far less probative of his actual state of mind than statements he made at the time of the shooting. (AOB 65.)

Respondent argues that the manner of killing, the fact that appellant shot Officer Niemi in the back of the head and then fired the gun six more times over Niemi's "supine" body supports appellant's conviction for first degree deliberate and premeditated murder. (RB 43.) The manner of killing, however, was also consistent with a sudden and impulsive shooting. Contrary to respondent's assertions of an execution-type killing to the back of the head, the shot to the head was imprecise. The shot was to the right side of the head, close to the lower jaw. (9 RT 1869, 1895.) Prosecution witness, Dr. Rogers testified that he could not deduce the relative position of appellant and Niemi during the initial shot and ensuing shots. (9 RT 1896.) Further, although Arteaga saw Niemi on the ground kicking appellant, he did not testify that he saw appellant shoot Niemi in that position. (10 RT 2062.) Only after turning and running away did Arteaga hear more shots. (*Ibid.*) Thus, while the jurors could have found the manner of killing indicated premeditation and deliberation, the manner of killing was also consistent with a rash, impulsive act. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626 [multiple wounds cannot alone support a determination of premeditation; absent other evidence, a brutal manner of killing is as consistent with a sudden, random "explosion" of violence as with calculated murder].)

While in some cases, a close-range gunshot to the face is arguably sufficiently "particular and exacting" to permit an inference that defendant was acting according to a preconceived design (see *People v. Cruz* (1980) 26 Cal.3d 233, 245), generally in those cases there is substantially more evidence of either planning (see, e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1050 [defendant armed himself, drove to scene, walked to site, and stalked the victims before shooting them]), or motive consistent with planning and deliberation (see, e.g., *People v. Cruz, supra*, 26 Cal.3d 233, 245 [defendant's pent-up resentment toward his victims]). Testimony from all the witnesses indicated that it was a sudden shooting rather than a purposeful execution. (9 RT 1926, 1951-1952, 1954; 10 RT 2014, 2085.) When Officer Niemi turned to collect Rangel's identification card, appellant suddenly pulled out a handgun and, without hesitation, shot Niemi. (9 RT 1913, 1915.) Arteaga testified that he had no idea anyone was going to shoot. He did not see appellant draw a gun. There was no argument. The shooting was "just out of the blue." (10 RT 2086.)

Appellant was indisputably intoxicated. All of the prosecution and defense witnesses described appellant's drinking and state of intoxication. (9 RT 1927-1928 [Gonzalez]; 9 RT 1948, 1950-1951 [Rangel]; 10 RT 2000, 2003 [Heredia]; 10 RT 2077 [Arteaga]; 12 RT 2374-2377, 2380-2381 [Ewert].) There was evidence that appellant fumbled with his identification and that Officer Niemi even noted appellant's drunkenness. (9 RT 1912, 1924, 1952; 10 R 2010; 10 RT 2080.) The defense expert, Dr. Treuting, testified that appellant was intoxicated at the time of the shooting. (12 RT 2524.) Respondent contends, however, that the evidence as a whole did not show that appellant's intoxication precluded him from premeditating and deliberating the crime. (RB 43.)

In support of this argument respondent alleges that appellant was able to disassemble a gun (RB 43), made the decision to shoot Officer Niemi rather than be arrested for drugs and guns in his possession (*Ibid.*) and took steps to eliminate evidence against him. (RB 43-44.) The only factor prior to the murder bearing on appellant's ability to premeditate and deliberate, however, was whether appellant was able to disassemble a gun. (RB 33.) At trial, Heredia testified that appellant did "something" with the gun: "And then he took it apart – he did something with it, I don't know what it was exactly. But he took it apart. He looked at it and he said this is why the gun jammed and then he put it in his pocket." (10 RT 1973, 2011.) Heredia's failures of recollection and prior inconsistent statements, however, undercut his reliability in making this statement. (See, e.g., 10 RT 1973-1974, 1978-1980, 2001-2004, 2008.) By contrast, Arteaga testified that appellant was "checking out the bullets" (10 RT 2052) and did not testify that appellant disassembled the gun. Thus, the assertion that appellant was able to disassemble a gun is not reliably supported by the record in this case.

Respondent points to appellant's actions after the murder: attempting to collect his identification, requesting Heredia to drive him to the Dumbarton Bridge, then disposing of the murder weapon in the marsh, showering himself with "Comet," swabbing himself with alcohol, giving directions to Ewert to get to Arteaga's house, borrowing money, attempting to align stories, talking about eliminating witnesses, returning to his home to retrieve a bag of bullets and then throwing them off the Dumbarton Bridge. (RB 43.) All of these events took place after the shooting; later that night. These ensuing events may reflect that appellant had a consciousness of guilt, but not that appellant deliberately planned and

weighed the consequences of his decision in the moments before shooting Officer Niemi.

Respondent agrees that appellant drank heavily the day of the murder. (RB 44.) Nevertheless, respondent claims that appellant's memory was "remarkably clear" despite his heavy drinking. Respondent argues that appellant remembered the bag of matching bullets in his house, another matching bullet lodged in his bedroom wall, where he had tossed the murder weapon and that he left his shotgun in the backseat of the white Thunderbird left at the murder scene. (*Ibid.*) While, it is true that appellant recalled these things after the murder, according to defense expert Dr. Treuting, appellant could have been experiencing a surge of adrenaline after the shooting which would have counteracted the effects of alcohol. (12 RT 2530.) Again, all of these actions and decisions took place *after* the murder and do not necessarily reflect appellant's deliberation or reflection in the moments before the shooting.

On the basis of appellant's statements immediately after the shooting, and appellant's intoxication, a reasonable juror could have had a reasonable doubt as to the essential element of deliberation. In other words, the evidence in this case did not so strongly support deliberation that, had the jury been correctly instructed, no reasonable juror could have found otherwise. Thus, under the state standard, without the error, it is reasonably probable that the result would have been more favorable to the defendant had the error not occurred. And under the federal standard, respondent has not proved the error was harmless beyond a reasonable doubt. The judgment must be reversed.

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II. THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION ON REASONABLE DOUBT AS TO THE DEGREE OF MURDER

Appellant argues that the jury should have been explicitly instructed by the trial court, as requested by defense counsel, as to reasonable doubt as to degree of murder and the jury's duty to give appellant the benefit of that doubt (the "*Dewberry*" principle). Appellant contends that the trial court's failure to instruct the jury with the *Dewberry* principle not only violated 70 years of state law, but the federal Constitution as well. (AOB 71-88.) Respondent contends that the trial court had no duty to give a *Dewberry* instruction where CALCRIM No. 521 and the other instructions essentially conveyed the *Dewberry* principle. (RB 45-52.)[9] The law and the record supports appellant.

A. The Trial Court's Refusal To Instruct That The Jury Must Give The Defendant The Benefit Of Any Reasonable Doubt Whether The Murder Was First Degree Or Second Degree Violated Both State Law And The Federal Constitution

Respondent agrees that the trial court has a sua sponte duty to give the *Dewberry* instruction in any case involving a lesser included offense. (RB 46.) Here, the jury had to choose between first degree deliberate and

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[9] At first glance, the argument advanced in claim II may seem inconsistent with appellant's argument in claim I, but these arguments address different consequences of the transition from the CALJIC to the CALCRIM instructional scheme. In this claim, the issue is that an established rule of law, which had for decades been incorporated in a sua sponte jury instruction, was not conveyed to the jury by the instruction in this case. (See CALJIC No. 8.71.) In contrast, appellant's first claim is that CALCRIM No. 521 should not have been modified with statutory language intended to legislatively "overrule" a case. That is not the issue in this claim.

premeditated murder and second degree murder. Nevertheless, respondent contends that this Court's ruling in *People v. Friend* (2009) 47 Cal.4th 1 [hereafter "*Friend*"], should control. (RB 47.) *Friend*, however, is inapposite.

Respondent cites *Friend* for the proposition that other instructions can cure the failure to instruct on the *Dewberry* principle. This Court in *Friend* held that CALJIC Nos. 17.10, 8.79 and 4.21 were adequate to convey the *Dewberry* principle where the jury was not given a *Dewberry* instruction. (*Friend, supra*, 47 Cal.4th at pp. 54-56.) In light of these instructions, the Court held "despite the court's omission of CALJIC No. 8.71, the jury would have understood that the *Dewberry* benefit of the doubt principle was equally applicable both to the choice between first and second degree murder, and the choice between murder and manslaughter." (*Friend, supra*, at p. 56.)

First, here, appellant's jury was not given any of these other three instructions. Moreover, there were no other general lesser included instructions embodying the *Dewberry* principle. (Cf. CALJIC No. 17.10.)[10]

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[10] CALJIC No. 17.10, the general lesser included offense instruction, which was not given in this case, uses the permissive term "may convict," rather than the mandatory term "shall" required by CALJIC No. 8.71 and section 1097 in describing the jury's duty to give effect to a reasonable doubt as to the degree of offense charged. (*Friend, supra*, 47 Cal.4th at p. 55.) By comparison, CALJIC No. 8.71 requires:

> If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror *must* give the defendant the benefit of that doubt and find that the murder is of the second degree.

(continued...)

Respondent claims that CALCRIM No. 220 and CALCRIM No. 225 informed the jury of the general principle that if, from all the evidence, it had a reasonable doubt whether the defendant formed a specific intent or mental state, it must give him the benefit of that doubt and find he did not have that specific intent or mental state. (RB 47-48.) As explained in the opening brief, however, the other instructions did not convey the principles expressed in a *Dewberry* instruction. (AOB 80-84.) CALCRIM No. 225 provided a form of benefit-of-the-doubt rule when the jury considers circumstantial evidence that the prosecution offers to prove a defendant's intent or mental state, but did not tell the jury to give appellant the benefit of any reasonable doubt as to the *degree of murder*. Further, CALCRIM No. 220, the general reasonable doubt instruction, did not explain to the jurors the effect of any reasonable doubt as to *degree of murder* – which is that the juror *must* give appellant the benefit of that doubt.

As outlined in the opening brief, the instruction given to the jurors, CALCRIM No. 521, did not explicitly convey the *Dewberry* principle. (AOB 75-78.) CALCRIM No. 521 did not explain that the jurors could find beyond a reasonable doubt that the defendant was guilty of murder, but still could have a reasonable doubt as to the degree of murder, and if they had such a doubt, they had to give the defendant the benefit of that doubt.

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[10] (...continued)

(CALJIC No. 8.71 (Fall 2015 ed.), italics added.) Section 1097 states:

> [w]hen it appears that the defendant has committed a public offense, or has attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees *only*.

(§ 1097, italics added.)

Respondent alleges CALCRIM No. 521 and the *Dewberry* instruction employ different language to convey the same principle – "that a jury cannot convict a defendant of first degree murder unless convinced beyond a reasonable doubt that he did not commit the lesser offense of second degree murder." (RB 48.) Respondent fails to appreciate the distinction between finding guilt of murder beyond a reasonable doubt and what to do where the jury has determined that a murder was committed, but has a reasonable doubt as to the degree of the offense. Respondent argues that the instruction properly advised the jury what to do if it had reasonable doubt regarding first degree murder because CALCRIM No. 521 instructed the jury that it may not find the defendant guilty of first degree murder unless the prosecution has met its burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. (RB 49.) Appellant disagrees. The juror needs to be explicitly told that although a juror agrees that a murder was committed by the defendant beyond a reasonable doubt, if the juror has a doubt about the degree of that murder, a separate analysis, the defendant *must* receive the benefit of that doubt.

Respondent casts this issue as one of technical hairsplitting. (RB 51.) Respondent is wrong. CALCRIM No. 521 focuses the jury first on whether the prosecutor has proved first degree murder beyond a reasonable doubt. The *Dewberry* instruction informs the jury that there is a two-step analysis: after the jury has found that the defendant has killed beyond a reasonable doubt, it must decide whether it was first or second degree murder. Further, if there is any doubt as to degree, the jury is informed, they must give the defendant the benefit of the doubt and find the defendant guilty of a lesser degree. CALCRIM No. 521, on the other hand, fails to

capture the *Dewberry* principle that where there is sufficient evidence as to a greater and lesser degree of a crime, and there is doubt as to the degree, the jury must find the lesser charge. Respondent contends that the jury must be presumed able to understand the principles as expressed in CALCRIM No. 521. (RB 49.) Even if the jurors understood CALCRIM No. 521 this does not mean the jurors understood the distinct principle conveyed in a *Dewberry* instruction that they must give the defendant the benefit of the doubt as to degree of murder.

Respondent also claims that based on the arguments of counsel it is not reasonably likely the jurors misunderstood the law regarding reasonable doubt and the degree of murder because the closing arguments focused almost entirely on whether the jury could entertain a reasonable doubt regarding the degree of murder. (RB 49-50.) As respondent well knows, regardless of the closing arguments focusing on the issue, where an instruction does not inform the jury that it has a duty to give the defendant the benefit of the doubt, the jury cannot be presumed to have that knowledge from counsel's arguments alone. Closing arguments are not a substitute for instruction on the law. (*People v. Baldwin* (1954) 42 Cal.2d 858, 871 [it is well settled the court and not counsel must explain to the jury the rules of law that apply to the case].) Jurors are keenly aware that counsel are advocating and look to the judge for instruction on the law to follow. (*Boyde v. California* (1990) 494 U.S. 370, 384.) Respondent also contends there was no error where second degree murder was the only lesser included offense available to the jury. (RB 49.) Respondent misunderstands the issue. The trial court failed to instruct explicitly on a fundamental principle – giving the defendant the benefit as to any reasonable doubt as to degree. There was no instruction or argument that

conveyed that concept to the jurors. Although the trial court gave the jurors three verdict forms, this simply informed the jurors of their verdict options and did not instruct them on how to give effect to any reasonable doubt as to degree. Therefore, it cannot be presumed that the jury understood solely from counsel's argument that it must give the defendant the benefit of the doubt if there was any doubt as to degree of murder.

Respondent contends that for the same reason the error did not violate state law, it did not violate the federal Constitution contrary to appellant's argument. (AOB 85; RB 52.) Here, however, the lack of a jury instruction on reasonable doubt as to degree of murder and the duty of the jurors to give appellant the benefit of that doubt may have led the jurors to convict appellant of first degree murder despite equivalent proof beyond a reasonable doubt of second degree murder.

B. The Error Requires Reversal Of The Entire Judgment

The trial court's error requires reversal of the entire judgment. Respondent argues that even if the trial court did err in failing to give appellant's requested instruction, the error was harmless under both the state prejudice standard (*Watson*) and the federal constitutional prejudice standard (*Chapman*). (RB 52.) As outlined in the opening brief and incorporated herein, the error was not harmless under either standard. (AOB 85-88.) The sole disputed issue at trial was the degree of murder. While respondent argues that this fact prevents a finding of prejudice, this fact reinforces the prejudice from the trial court's error. The instruction the jurors received on first degree and second degree murder mattered.

At end, respondent argues that the strength of the prosecution's evidence means that it is not reasonably probable the result would have

been different. (RB 53.) As outlined in the opening brief (AOB 60-70, 86-88), Argument I.D *ante*, and incorporated herein, there was evidence from which a juror could have had a reasonable doubt about the degree of murder. Because this instruction mattered a great deal, the trial court's refusal to instruct was prejudicial and respondent has failed to demonstrate that the error was harmless beyond a reasonable doubt.

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III. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO LIMIT UNIFORMED POLICE OFFICERS AS SPECTATORS DURING GUILT PHASE JURY INSTRUCTIONS AND CLOSING ARGUMENTS

In a trial regarding the murder of a uniformed police officer, during the guilt-phase reading of jury instructions and closing arguments, the courtroom was filled with 17 or 18 uniformed San Leandro police officers. Appellant contends that the trial court abused its discretion and erroneously denied appellant's motion to limit uniformed police officers as spectators during these proceedings. (AOB 89-98.) Further, appellant argues that the presence of uniformed officers as spectators during jury instructions and closing arguments violated the federal Constitution. Thus, reversal of the entire judgment is required. (AOB 98-107.) Respondent argues that the trial court did not err in refusing to limit the number of uniformed police officers in the courtroom (RB 53) and that the presence of uniformed officers in the gallery did not impact the fairness of appellant's trial. (RB 63-66.) Respondent minimizes the impact of the officers' presence at a critical stage of the trial.

A. The Trial Court Abused Its Discretion In Permitting 17 Or 18 Uniformed Officers As Spectators

Appellant argues that the trial court abused its discretion by failing to balance the rights of the police officers to attend trial and appellant's right to a fair trial by limiting the number of uniformed officers as spectators. (AOB 89, 92.) Respondent argues that the right to public trial is not that of the defendant alone, but that police officers also have a right to attend trial. Further, respondent argues that only if a restriction is necessary to preserve a defendant's right to a fair trial may the trial court restrict attendance by

members of the public. (RB 56.) As explained in the opening brief, appellant does not argue that the trial court should have kept San Leandro police officers from attending trial. (AOB 92.) Instead, appellant argues that the trial court should have granted the defense motion to limit the number of uniformed police officers in the gallery or direct officers attending trial to refrain from wearing police uniforms. The basis for the trial court's reasoning for refusing to limit the uniformed police officers in the courtroom was that the case involved a police officer killing and that the trial court had witnessed no misconduct. Thus, rather than consider whether there was any possible prejudice to appellant's fair trial rights, the trial court focused solely on the uniformed officers' right to attend the trial. Respondent does the same.

Appellant and respondent agree that the trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial. (AOB 92; RB 57.) Both appellant and respondent agree that this Court has held that a spectator's conduct is grounds for reversal if it is "'of such a character as to prejudice the defendant or influence the verdict.'" (*People v. Myles* (2012) 53 Cal.4th 1181, 1215; AOB 99; RB 57.) Therefore, the question under California law is whether the presence of 17 or 18 uniformed police officers during jury instructions and closing arguments was of such a character as to prejudice the defendant or influence the verdict. Appellant argues that the officers dressed in their uniforms delivered an unspoken, but not subtle, message to jurors that they should convict appellant; a message that was backed by an unmistakable symbol of official, governmental authority, the police uniform. (AOB 94.) Respondent disagrees. (RB 58.)

In support of its argument that the presence of uniformed officers was not prejudicial, respondent compares other cases addressing a similar claim. (RB 58.) All are distinguishable. Respondent points to this Court's ruling in *People v. Cummings* (1993) 4 Cal.4th 1233, in which the Court found that the trial court did not err in allowing an unspecified number of uniformed police officers to occasionally occupy seats in the front row of the audience. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1255, 1298-1299.) In *Cummings*, unlike here, the court made an attempt to accommodate the defense by suggesting that, when possible, officers wear civilian clothes and offered to revisit the issue if "more than two or three uniformed officers were present at the same time." (*Id.* at p. 1298.) Here, the trial court made no such accommodations. In this case, 17 or 18 uniformed police officers were present during the jury instructions and closing argument. (12 RT 2610-2611.)

Respondent also argues that there was no inherent prejudice in the presence of 17 or 18 uniformed police officers at appellant's trial, citing to *People v. Zielesch* (2009) 179 Cal.App.4th 731. The circumstances of *Zielesch*, however, were markedly different than those in this case. In *Zielesch*, there was an unknown number of spectators wearing commemorative buttons depicting the fallen officer. (*Id.* at pp. 734, 742-745.) The court of appeal in *Zielesch* found that the buttons did not infringe upon the defendant's right to a fair trial. (*Ibid.*) In *Zielesch*, the court of appeal found that the jurors faced with the image of a fallen officer would be able to continue to base their verdict on evidence presented at trial. (*Ibid.*) Here, compared to an image of Officer Niemi, the presence of 17 or 18 uniformed officers, however, presented a much more forceful message that prejudiced the jurors. Jurors could have avoided seeing, or not have

seen, mere buttons, but could not have avoided seeing the uniformed police officers. Indeed, in the case of at least one juror, she or he, unable to use the stairs, had to go through the gallery where uniformed officers were seated to access the jury room. (12 RT 2610.)

To be sure, buttons depicting the victim send the message to the jury that they want the jury to convict the defendant, but the presence of uniformed police officers is a display of the power of the government. (See AOB 94.) The California Government Code implicitly recognizes this. The government code directs that peace officers may not wear their uniforms while engaged in any political activity and while privately employed as private investigators, private patrol operators or repossessors. (See Gov. Code, §§ 3201, 3302; see also Gov. Code, § 1126 (b) ["An employee's outside employment, activity, or enterprise may be prohibited if it: (1) involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, *uniform*, prestige, or influence of his or her local agency office or employment . . ."], italics added.) Not just mere presence, but presence in uniform displayed a powerful symbol of authority that the jury could not have ignored.

Respondent's summary of the record supporting its argument that the presence of uniformed officers was not inherently prejudicial bears some comment because it does not give a complete picture of the seating arrangements. Respondent asserts that the "record also affirmatively shows that none of the uniformed officers sat in the front row behind the jury. [citation omitted]." (RB 61.) While there were no officers in the front row directly behind the jurors, during the trial court's instructions to the jury the row right behind the bailiff was "all uniformed officers." (12 RT 2612.) Respondent also asserts that "[t]here is no indication the 17 to 18 uniformed

officers all sat together as a group . . ." (RB 61.) Again, while there is no indication that all 17 or 18 uniformed officers sat together, the entire row behind the bailiff was fully occupied by uniformed officers. (12 RT 2612.) Further, although the trial court commented that it had not witnessed any misconduct by the officers, this is not the issue. Whatever the officers' demeanor, jurors would surely have been affected by the compelling presence of 17 or 18 uniformed police officers immediately before deliberations.

Respondent asserts that the presence of the uniformed police officers was not inherently prejudicial where the trial court instructed the jurors on the presumption of innocence and told them appellant was entitled to have his guilt determined solely on the basis of evidence introduced at trial. (RB 62.) This is a standard jury instruction which, while accurate, did not directly address the presence of uniformed police officers in the courtroom. Respondent also claims that argument from defense counsel addressing the presence of the uniformed officers meant the presence of officers was not prejudicial. (*Ibid.*) But without an admonition from the trial court, the argument by counsel was simply that, argument, which the jury was free to ignore. Respondent points out that defense counsel did not move the trial court to admonish the jurors regarding the uniformed officers, nor did he move for a mistrial based on the officers' presence. (RB 55.) Defense counsel did, however, repeatedly inform the trial court of the problem and ask the trial court to either limit the number of uniformed police officers or somehow ameliorate their effect on the jury. (12 RT 2610.) Whether defense counsel asked specifically for an admonishment rather than for the court to reduce the harm, the trial court has the duty to control the courtroom proceedings during trial in the interests of justice. (Pen. Code,

§ 1044.)[11]

B. The Presence Of The Uniformed Officers As Spectators During Trial Violated The Federal Constitution

Appellant and respondent agree that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. (AOB 98; RB 57.) Both appellant and respondent agree that the United States Supreme Court in *Holbrook v. Flynn* (1986) 475 U.S. 560, cautioned that a room full of uniformed and armed policemen might pose a risk to a defendant's chances of receiving a fair trial. (*Id.* at pp. 570-571.) Nevertheless, respondent relies on *Carey v. Musladin* (2006) 549 U.S. 70, 76, to argue that the inherent prejudice test does not extend to the conduct of independent courtroom spectators. (RB 57.) Appellant acknowledges the holding in *Carey v. Musladin* (AOB 99, fn. 35), but nevertheless maintains that, by virtue of wearing their police uniforms, the officers in this case appeared in their official capacities, not as private citizens. To be sure, the officers at appellant's trial were not present to provide security, nor, as far as the record reveals, were they present at trial at the behest of their agency. A uniform, however, is one of the visible symbols of the formidable power given to police officers. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 206.) As such, police officers in this state are cautioned against wearing their uniforms when not working in their official capacity. (See,

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[11] Penal Code section 1044, in pertinent part, states:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

e.g., Gov. Code, §§ 1126, 3201.)

Respondent notes that in *Holbrook v. Flynn*, *supra*, 475 U.S. 560, the high court found that four state troopers sitting in a row immediately behind the six defendants did not create an inherent risk of prejudice that denied the defendant a fair trial. (*Id.* at p. 572; RB 57.) Here, however, there were 17 or 18 uniformed police officers, far more than at issue in *Flynn*, and only a single defendant affected by their presence.

Respondent relies on cases from other states where the court found that the presence of uniformed police officers did not violate the defendant's right to a fair trial. (RB 59.) The cases that respondent cites are distinguishable from this case. In *Brown v. State* (Md. Ct. Spec. App. 2000) 752 A.2d 620, the Maryland Court of Special Appeals found that the presence of 10 to 40 uniformed police officers did not violate the defendant's right to a fair trial where there was no record made of the total number of spectators at trial, no showing that the officers sat together or did anything to reflect a show of solidarity or force. (*Id.* at pp. 630-631.) Here, however, there is a record that there were 17 or 18 uniformed police officers in the courtroom gallery (12 RT 2610) and that, at least in one row, the officers were seated together directly behind the bailiff until the trial court changed the seating arrangements (12 RT 2612), and that the presence of the uniformed police officers continued to be a problem such that defense counsel had to renew the motion and address the issue in closing argument. (12 RT 2596 [closing argument] 2610-2611.)

In *Howard v. State* (Tex. Crim. App. 1996) 941 S.W.2d 102 (en banc), the Texas Court of Criminal Appeals rejected the defendant's argument that the presence of police officers was prejudicial. In *Howard*, however, there was a balance of 20 officers to 81 other civilian spectators in

attendance. (*Id.* at p. 118.) In this case, defense counsel described the courtroom as full of people, including the 17 or 18 police officers. (12 RT 2610.) Defense counsel, however, also described the extent of the uniformed presence in the gallery as coercive and argued that the number of uniformed officers should have been controlled earlier in the day, indicating that there was a significant presence of uniformed police officers. (*Ibid.*) Further, defense counsel noted that at least one juror, who was unable to use to the stairs, had to go through the gallery where the officers were seated to get to the jury room. (*Ibid.*)

In *Pratt v. State* (Ga. Ct. App. 1997) 492 S.E.2d 310, the Georgia Court of Appeals held the trial court was not obligated to exclude 25 uniformed correctional officers where the officers sat toward the back of the courtroom away from the jury and where there was no evidence of pretrial publicity, a hostile community atmosphere or any other factor which would warrant the conclusion that the presence of the correctional officers was prejudicial. (*Id.* at pp. 310-311.) Here, during the trial court's instructions to the jury, there were a large number of uniformed officers sitting in the front row on the defense side of the courtroom, near the jurors. (12 RT 2611.) The trial court confirmed that the row right behind the bailiff was fully occupied by uniformed officers. (12 RT 2612.) In addition, in this case, there was significant pretrial publicity. (See 2 RT 78 [during voir dire, trial court noted the case had received a significant amount of publicity].) The murder of Officer Niemi was the first officer involved killing in San Leandro in 34 years. (13 RT 2774.) During his funeral procession the streets were lined with citizens holdings signs for Niemi. (*Ibid.*) As Niemi's wife explained, there were "so many people" and the "community isn't used to [an officer killing] . . . they support their

officers." (13 RT 2774.) The case was personally prosecuted by the elected District Attorney for Alameda County, underscoring the importance of the trial and a conviction. (2 RT 66, 78, 109, 144, 196; 3 RT 245, 339.) All of these factors in this case, unlike in *Pratt*, do warrant the conclusion that the presence of uniformed police officers was prejudicial.

Finally, respondent attempts to distinguish cases cited by appellant that the presence of uniformed officers as spectators during trial violated the federal constitution: *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454; *Shootes v. State* (Fl. Dist. Ct. App. 2009) 20 So.3d 434; and *Ward v. State* (Fl. Dist. Ct. App. 2012) 105 So.3d 3. (RB 63-66; see AOB 98-104.) Although these cases do not involve the exact same circumstances as in appellant's trial, these cases provide support for the claim that there are situations where the atmosphere in the courtroom might rise to the level of inherent prejudice and infringe on the defendant's right to a fair trial. (*Shootes v. State*, *supra*, 20 So.3d at p. 438; *Ward v. State*, *supra*, 105 So.3d at p. 5; *Woods v. Dugger*, *supra*, 923 F.2d at p. 1460.)

Respondent seeks to distinguish *Woods v. Dugger*, *supra*, 923 F.2d at p. 1454, on the grounds that Woods was tried in a hostile community and officers predominated in the courtroom gallery. (RB 63-64.) While the *Woods* case represents a more extreme example of the prejudice inherent in uniformed officers attending trial, there are parallels to appellant's case. San Leandro is a bigger community than the small rural community in *Woods*, but the murder of Officer Niemi greatly impacted the community. Although there was no unusual community economic circumstances related to law enforcement in this case and there is no record of political activity centered on Niemi's death, there was significant pretrial publicity and the case was personally prosecuted by the elected District Attorney of Alameda

County, injecting some politics into the case. (2 RT 66, 78.)

In sum, here, where the courtroom gallery was filled with 17 or 18 uniformed police officers during guilt phase jury instructions and closing argument in a case involving a slain officer, their presence exerted an impermissible outside influence on the jury and undercut appellant's presumption of innocence in violation of his right to trial by an impartial jury under the Sixth Amendment to the United States Constitution. Respondent does not expressly address this argument or appellant's argument that the presence of 17 or 18 uniformed police officers created an unacceptable risk of tainted deliberations resulting in an unreliable determination of appellant's guilt and special circumstances liability. (AOB 103-104.)

C. The Error Requires Reversal Of The Entire Judgment

Respondent argues that the police officers did not predominate in the courtroom, did not exhibit any intimidating behavior, and did not sit in the front row closest to the jury. (RB 66.) As such, respondent claims that the trial court's refusal to limit the number of uniformed officers in the courtroom or ameliorate their impact was not unreasonable nor prejudicial. (RB 66.) Respondent does not discuss harmless error. As outlined in the opening brief and incorporated herein (AOB 104-107), under the state law standard for prejudice, the error was not harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [where trial court error violates state law, reversal is required when appellant establishes a reasonable probability that he would have obtained a more favorable result in the absence of the error].) There was a reasonable probability that appellant would have obtained a more favorable result in the absence of the court's error. The

sole disputed issue for the jury was the degree of murder, which turned on whether appellant deliberated the killing. The prosecutor's case for deliberation was not overwhelming. Given the state of the evidence, the message conveyed to the jurors by the uniformed police officers in attendance was that it was their civic duty to convict appellant. The prosecutor focused on the duties of police officers in arguing that when he was killed Officer Niemi was doing what the community would want police officers to do. (12 RT 2586.) The jurors would have easily connected these points to the reality of 17 or 18 uniformed police officer in front of them. Had there been fewer officers, or not all in uniform, there is a reasonable probability that the jury would have given appellant the benefit of the doubt and voted for second degree murder. And, if the error was not harmless under the state law standard, it could not have been held harmless under the more stringent standard for federal constitutional error. (Compare *People v. Watson*, *supra*, 46 Cal.2d at p. 836 with *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required unless the State proves the error was harmless beyond a reasonable doubt].) The judgment should be reversed.

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IV. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE GUILT PHASE VERDICTS

This issue has been adequately presented and the positions of the parties are fully joined. (See Introduction *ante*.)

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V. THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY VICTIM IMPACT EVIDENCE

In his opening brief, appellant presents several claims of error with regard to the victim impact evidence admitted at his penalty trial. (AOB 111-145.) Specifically, appellant argues that Officer Niemi's coworkers' testimony should have been excluded under evidence code section 352 (AOB 122-124), that the story about the dead baby authored by Niemi should have been excluded under evidence code section 352 (AOB 124-130), that the admission of the victim impact evidence violated the federal constitution because the coworkers' testimony and the story exceeded the limits of *Payne*, and finally, that the coworkers' testimony combined with the story about the dead baby rendered the penalty trial fundamentally unfair and the death sentence arbitrary and unreliable. (AOB 138-145.) Respondent argues that under state law the victim impact evidence was relevant, not so voluminous, cumulative or inflammatory as to divert the jury's attention from its proper role or invite an irrational response, and therefore, did not violate the federal constitution. (RB 66-83.) Respondent grossly underestimates the emotional impact of this evidence.

A. The Admission Of The Contested Victim Impact Evidence Was Reversible Error Under State Law

1. The Coworkers' Testimony Should Have Been Excluded Under Evidence Code Section 352

Appellant argues that the trial court erred in admitting Officer Niemi's coworker's testimony. (AOB 122-124.) This evidence, appellant contends, should have been excluded under Evidence Code section 352 as its prejudice far outweighed its probative value. In defending the admission of the challenged victim impact evidence in this case, respondent contends

that the coworkers' testimony is typical of victim impact evidence routinely permitted. (RB 71.) As such, respondent alleges, it is not unduly prejudicial. (RB 72.)[12] In so arguing, respondent compares the victim impact evidence admitted in this case to that admitted in *People v. Brady* (2010) 50 Cal.4th 547, 573, and *People v. Ervine* (2009) 47 Cal.4th 745, 792. These comparisons fail.

In *Brady*, two of the victim's colleagues testified about how they learned of the shooting, their initial reactions to learning that the downed officer was their friend, their efforts to save his life at the scene and at the hospital, their immediate reaction to his death and the effect of his death on their lives. (*People v. Brady*, *supra*, 50 Cal.4th at p. 574.) Here, the coworkers' testimony included: coworker Barr's praying over Officer Niemi's body at the hospital; Marez's crying about his guilt in encouraging Niemi to become a police officer; and Trujillo's difficult romantic break up, being a female officer on the police force and her own feelings of guilt (and later on-the-job car accident) for not responding to the crime scene sooner. (AOB 123; 13 RT 2722-2737.) The coworkers' testimony was not restricted to their initial reactions to Niemi's death and the effect of his death, but impermissibly extended to their other personal struggles and actions.

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[12] Respondent alleges that appellant did not object to identified portions of Marez's and Trujillo's testimony, thus, forfeiting the issue on appeal. (RB 73.) Appellant, however, filed a motion to exclude victim impact testimony from Officer Niemi's coworkers Marez and Trujillo and argued the exclusion of their testimony based on the prosecutor's offer of proof which included the specifics of their testimony. (4 CT 956; 13 RT 2662-2666.)

In *Brady*, in assessing whether the victim impact evidence was inflammatory and unduly prejudicial, this Court found it noteworthy that the defendant did not object to emotional testimony from the witnesses or request the trial court to give the witnesses time to compose themselves. (*People v. Brady*, *supra*, 50 Cal.4th at p. 576.) Here, however, defense counsel noted for the record that Marez collapsed crying in front of the jury while on the witness stand and then hugged the next penalty witness, Trujillo, while they both cried in front of the jury. (13 RT 2730.) Defense counsel urged the trial court to admonish the witnesses to not engage in that type of display in front of jurors. (*Ibid.*) The trial court agreed and admonished the audience and witnesses, but not the jurors. (*Ibid.*) Further, in *People v. Burney* (2009) 47 Cal.4th 203, 258, upon which this Court in *Brady* relies, it was noteworthy to the Court that each witness's testimony was brief and delivered without undue emotion as demonstrated by the record. That was not the case here. Thus, here, unlike in *Brady* and *Burney*, the record reflects that the testimony was overly emotional, and hence prejudicially inflammatory and should have been excluded under Evidence Code section 352.

Respondent also compares the victim impact evidence admitted in *People v. Ervine*, *supra*, 47 Cal.4th at p. 792, to that admitted in this case. In *Ervine*, another law officer killing case, one witness, the sheriff testified to a general description of the reactions to the murder: that after the murder all members of his department were very close and cohesive, struggled with their vulnerability, that there were increased calls for back up, one deputy quit and the killing affected dispatchers as well. Respondent's reliance on *Ervine* is misplaced. This Court in *Ervine* held that the sheriff's testimony was not inflammatory or emotionally charged. (*Id.* at p. 793.) Again, this

Court found noteworthy that the sheriff's testimony consisted of short, matter-of-fact descriptions of the effect of the crime. (*Ibid.*) Here, at least two of the witnesses engaged in emotionally charged testimony and testimony from all three coworkers went beyond the specific effect of the crime.

Whether or not the testimony in this case is considered typical is beside the point. Not all victim impact evidence or testimony must be admitted. (*People v. Edwards* (1991) 54 Cal.3d 787, 836 ["[allowing victim impact evidence] does not mean there are no limits on emotional evidence and argument."].) The trial court still retains discretion to exclude evidence in the penalty phase. (*Ibid.* ["'[i]n each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial'" and curtail "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'"].) Even if a category of evidence has been found relevant, a trial court must still consider the unique facts of the case in balancing probative value against prejudice under Evidence Code 352.

Here, the coworkers' testimony appealed to the jurors' sense of outrage at the loss of Officer Niemi and contained discussions of issues not directly related to the loss. The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) As outlined in the opening brief, hearing from Niemi's police coworkers would have evoked an emotional bias against appellant. (AOB 122-124.) Respondent contends that the testimony was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response. (RB

73.) Seeing and hearing the testimony from the coworkers and witnessing Marez who collapsed crying on the stand, Trujillo who also cried as she hugged Marez before her testimony, and hearing about Barr praying over Niemi's dead body would have engendered sympathy for the witnesses and Niemi and outrage on the part of the jury. The abuse of discretion standard of review calls for deference, but does not and cannot require abdication. (See *People v. Lang* (1989) 49 Cal.3d 991, 1050.) Given the prejudice of this intensely emotional testimony, the trial court should have exercised its discretion and ruled the testimony inadmissible.

2. The Story About the Dead Baby Should Have Been Excluded Under Evidence Code Section 352

Appellant argues that the trial court erred in admitting as victim impact evidence the story about a dead baby authored by Officer Niemi. (AOB 124-130.) This evidence, appellant contends, should have been excluded under Evidence Code Section 352 as its prejudice far outweighed its probative value. Respondent asserts that the story served to humanize Niemi by demonstrating his uniqueness as an individual and offered a quick glimpse of his life. (RB 74, citing *People v. Kelly* (2007) 42 Cal.4th 763, 797 and RB 77.) Further, respondent argues that it is not inappropriate for a court to admit victim impact evidence in some form other than testimony. (RB 75, citing *People v. Dykes* (2009) 46 Cal.4th 731, 784.) Respondent's contentions are unpersuasive on this record.

As to respondent's first argument, both appellant and respondent agree that the story may have humanized Officer Niemi. (See AOB 124.) Appellant and respondent also agree that the prosecution is permitted to remind the jury that the victim is an individual whose death represents a

unique loss to society and in particular to his family. (AOB 124; RB 74-75.) Appellant argues, however, that the story lacked probative value because it was cumulative of other undisputed evidence that established the impact of the loss. (AOB 124.) The story about a dead baby, especially in light of the other victim impact evidence admitted, went beyond merely humanizing Niemi or offering a quick glimpse of his life. Other evidence – testimony from Niemi's brother, mother and wife, fellow officers, and photographs depicting his life – thoroughly demonstrated Niemi's sensitivity and humanity. (13 RT 2743-2778.) Added to this other evidence, the story's admission was designed to invoke a uniquely and impermissibly emotional response in the jurors.

Respondent quarrels with appellant's contention that the story would have encouraged outrage in the jury and that the jury may have misdirected that emotion toward appellant. (RB 77.) Respondent argues that the prosecutor merely encouraged the jury to use the story about a dead baby to learn more about Officer Niemi as an individual, presuming that jurors used the story for that limited purpose. (*Ibid.*) This argument, however, ignores that the prosecutor focused on the story as a basis for the jurors to give appellant the death penalty. (14 RT 2890.)

As outlined in the opening brief, and incorporated herein, not only was the substance of the story about a dead baby inflammatory, but the story also detailed what police officers suffer as part of their job. (AOB 124-128.) The story would have evoked strong and sympathetic emotion both about the dead baby and the occupational challenges that police officers face in protecting the public. Such evidence, in the absence of an instruction as to how the jury should use the story and the prosecutor's urging the jurors to read it during deliberations, would have provoked

enormous sympathy for the victim and antipathy toward appellant, not just a sense of Niemi's life. Whatever the legal theory for introducing victim impact evidence, its powerful emotional effect, which the defense counsel cannot rebut, is often the real point of using the evidence and can place an enormous, even decisive, weight, on the death side of the sentencing scale.

Further, while this Court has approved of victim impact evidence when it was produced by the victim (RB 75-76, citing *People v. Verdugo* (2010) 50 Cal.4th 263, 298), such evidence must still be assessed to determine whether it is unduly prejudicial or inflammatory. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The story about a dead baby, especially because it was written by the victim, was overly prejudicial in this case.

Respondent argues that the story was not as dramatic as a 20 minute videotape in *People v. Kelly*, *supra*, 42 Cal.4th at p. 793, or victim impact evidence allowed in other cases. (RB 78, citing *People v. Booker* (2011) 51 Cal.4th 141, 193, *People v. Hawthorne* (2009) 46 Cal.4th 67, 101-103, and *People v. Jurado* (2006) 38 Cal.4th 72, 131.) Respondent misses the point. In each of these cases, *Booker*, *Hawthorne*, and *Jurado*, the victim impact evidence was directly related to the immediate and residual effects of the murder on members of the victim's family, as well as the specific harm caused by the crime.

In *Booker*, the victim's mother's testimony about her suicide attempt and hospitalizations related to the lasting impact of the murder. (*People v. Booker*, *supra*, 51 Cal.4th at p. 193.) In *Hawthorne*, the audiotape of the 911 call made by the victim's daughter where the daughter's screams were audible related to the immediate effects of the murders. (*People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 101-103.) Finally, in *Jurado*, the

evidence that the victim was pregnant related to the specific, additional harm caused by her murder. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 131.) In contrast, the story about a dead baby in this case did not relate to the effects of the murder or the specific harm caused by appellant, as in the aforementioned cases. (See *People v. Panah* (2005) 35 Cal.4th 395, 494 [factor(a) of section 190.3 only encompasses evidence that logically shows the harm caused by the defendant].) Rather, the story went beyond a brief humanization of the victim and inserted another crime into the circumstances of this crime.

Finally, respondent argues that the evidence was not cumulative because victim impact evidence is not limited to what can be provided by a single witness. (RB 78.) As outlined previously, other evidence humanized Officer Niemi. Both his coworkers and family, aided by photographs depicting Niemi throughout his life, testified about the kind of person Niemi was. (AOB 125.) Further, the impact of the murder, the loss of Niemi, was well established by the testimony of family and coworkers. Dionne described the impact of her daughter no longer having her father. (*Ibid.*) The story admitted at penalty did not add to this substantial volume of actual victim impact evidence and went beyond "manifestations of the psychological impact experienced by the victims," and "understandable human reactions" to the nature and circumstances of the murder. (*People v. Brown* (2004) 33 Cal.4th 382, 398.)

In capital cases, the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the offense. (*People v. Belmontes* (1988) 45 Cal.3d 744, 811, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604, and *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) In accord with this rule, this state's capital sentencing

scheme requires the jury to make an assessment of the defendant's background and culpability and to make an individualized determination of the appropriate punishment. (*People v. Brown* (1985) 40 Cal.3d 512, 540-545; *People v. Fudge* (1994) 7 Cal.4th 1075, 1124.) It is true the jury can be reminded that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) The focus of the penalty determination, however, must be on the defendant's moral culpability to determine whether a defendant will receive a sentence of death or life imprisonment. By overemphasizing the loss to society and family via victim impact evidence, the focus shifts away from an individualized assessment of the defendant and to the magnitude of the loss. This shift adds nothing to the culpability analysis and dangerously increases the possibility of improper passion or prejudice. (See *State v. Carter* (Utah 1995) 888 P.2d 629, 652 [victim impact evidence shifts the focus to victim's worth].) Here, the trial court erred in admitting as victim impact evidence the story about a dead baby authored by Niemi because its prejudice far outweighed its probative value and improperly evoked an irrational or emotional response untethered to the facts of the case.

3. Because the Errors Were Not Harmless Under State Law, Reversal of the Death Sentence Is Required

As explained in the opening brief, and incorporated herein, respondent cannot demonstrate beyond a reasonable doubt that the prejudicial coworkers' testimony and story about a dead baby did not contribute to the jury's death verdict. (AOB 130-138; see *People v. Nelson*

(2011) 51 Cal.4th 198, fn. 15 [the reasonable possibility standard for errors in the penalty phase of capital trial is substantially the same as the standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18].) Respondent argues any error in admitting the coworkers' testimony or the story about a dead baby was harmless. (RB 79.) Respondent alleges that the circumstances of the murder, even without the victim impact evidence, supported the jury's verdict of death. (*Ibid.*) To support the contention that the prosecution's case in aggravation was strong, respondent focuses on certain circumstances of the crime: that appellant committed a murder to avoid arrest, appellant's determination to ensure Officer Niemi's death, and appellant's attempts to hide his culpability and eliminate evidence. (RB 79-80.) Respondent declares that appellant's early childhood years in war-torn El Salvador, unstable family life and early substance abuse were on balance not substantially mitigating in their own right or in comparison to the aggravating evidence. (RB 80.) Respondent's conclusion regarding appellant's mitigation does not mean that members of the jury would not have found the hardships of appellant's life mitigating.

It should be kept in mind that the heinous nature of a capital crime rarely, if ever, makes a death sentence a foregone conclusion (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244), and juries return sentences of life imprisonment without the possibility of parole ("LWOP") in highly aggravated cases (see, e.g., *People v. Scott* (1991) 229 Cal.App.3d 707, 710-711 [LWOP sentence returned for execution-style killing of drug dealer and three people living with him]; *People v. Brown* (1985) 169 Cal.App.3d 728, 732-734 [LWOP sentence returned for two murders during four-day crime spree that included home invasion robberies, assault, and rapes];

People v. Noble (1981) 126 Cal.App.3d 1101 [LWOP for defendant where one deputy shot to death and another wounded while in the process of arresting defendant's brother]; *People v. Scott* (Cal. Ct. App., Dec. 31, 2001, No. A088396) 2001 WL 1663224 (not published) [LWOP for defendant who shot peace officer three times from driver's seat during traffic stop and a fourth time in the head while standing over the officer as he lay wounded on the ground]; *People v. Vasquez* (Cal. Ct. App., Jan. 31, 2006, No. A102559) 2006 WL 226759 (not published) [LWOP for defendant after jury could not reach a penalty verdict where peace officer responding to a robbery shot multiple times, including while on the ground].) In this case, involving one murder, albeit aggravated because it involved the killing of a police officer, where appellant had no prior felony convictions and only one prior aggravating incident that did not include physical violence, the aggravating evidence was not so substantial that the victim impact evidence did not matter.

As outlined in the opening brief, and incorporated herein, the erroneously-admitted evidence was not harmless in light of the entire case before the sentencing jury: the aggravating evidence and mitigating evidence (AOB 130-134); the prosecutor's emphasis on the victim impact evidence in his closing argument (AOB 134-135); the questions raised by the evidence and the jury's mid-deliberation questions (AOB 136-138); and the fact that the jury did not return its death verdict quickly (AOB 136-137). This was a closely balanced case. Any error in this case could have made a difference in the death verdict. In fact, the length of the jury deliberations and concerns communicated by the jury in its questions during deliberations reflected the closeness of the penalty decision. Respondent rejects that the length of deliberations indicated that the jury had difficulty reaching a

decision. (RB 81.) In fact, respondent alleges that the length of deliberations means the jurors were not imposing death based on emotion. (*Ibid.*) But, again, in actuality, all that is and can be known, is that the jury deliberated for four days and asked ten written jury questions during penalty deliberations. (14 RT 2924; 4 CT 1002-1005, 1009, 1013-1017, 1021-1026, 1029-1036.) Insofar as the length of its deliberations and questions suggests a more reasoned decision process, it also speaks to the strength of the mitigating evidence.

Respondent contends that appellant overstates the prosecutor's reliance on the short story. (RB 80.) The record reflects, however, that the prosecutor urged the jurors to read the story as they were deliberating. While, the prosecutor did not read the whole story to the jury, he did read its final paragraph in closing. This section was probably the most affecting part – a final word from Officer Niemi from beyond the grave. (14 RT 2890-2891.)

Finally, respondent argues that the standard jury instructions conveyed the proper consideration and use of victim impact evidence. (RB 80-81.) It is undeniable that the jury received no explicit instruction on how to consider the story or the victim impact testimony in its penalty deliberations. While respondent contends that the standard jury instructions performed this task, respondent fails to clarify which jury instructions or how these instructions provided much needed guidance in this case.

A prejudice analysis with regard to error at a capital-sentencing phase deserves serious consideration. The question is whether there is a reasonable possibility that the jury would have rendered a different verdict had the errors not occurred. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The answer in this case is yes.

B. The Admission Of The Contested Victim Impact Evidence Violated The Federal Constitution

1. The Coworkers' Testimony Exceeded the Limits of *Payne*

Appellant contends that the coworkers' testimony went beyond the limitations in *Payne v. Tennessee*, *supra*, 501 U.S. at p. 827 [evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision]. (AOB 138-142.) Respondent points to this Court's repeated rejection of this claim. This issue has been adequately presented and the positions of the parties are fully joined. (See Introduction *ante*.)

2. The Coworkers' Testimony and the Story About the Dead Baby Rendered the Penalty Trial Fundamentally Unfair and the Death Sentence Arbitrary and Unreliable

Appellant argues that the testimony from Officer Niemi's coworkers and the story about the dead baby admitted in this case rendered the trial fundamentally unfair, thus, violating appellant's federal constitutional rights. (AOB 142-145.) Respondent counters that for the same reasons the challenged evidence did not violate state law, it did not infringe on appellant's constitutional rights. (RB 83.) Further, respondent contends the victim impact testimony was relevant and emotional, but did not surpass constitutional limits. (*Ibid.*) Finally, respondent asserts that because there was no possibility that admission of the challenged evidence affected the penalty verdict, any error was also harmless beyond a reasonable doubt. (RB 83, citing *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Respondent's argument not only ignores much of the record that is relevant to assessing prejudice, but also the care with which a harmless

error analysis must be conducted when the question is whether error might have affected the jury's choice between life and death. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.) Under both the state and federal standards, the harmlessness inquiry depends not on whether the evidence was "overly inflammatory," or on reweighing the aggravating and mitigating evidence, but on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It cannot reasonably be held that the admission of the contested victim impact evidence did not possibly influence the jury adversely.

In light of the aggravating and mitigating evidence, the prosecutor's closing argument, and available information about the jury's deliberations, there is reason to conclude that the victim impact evidence could have influenced or contributed to at least one juror's decision to vote for death. (See AOB 142-145; *In re Lucas* (2004) 33 Cal.4th 682, 690 [there is a reasonable probability that "at least one juror would have struck a different balance."], quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123.) As such, respondent cannot meet the heavy burden of proving the harmlessness of federal constitutional error. (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.)

Finally, respondent fails to address the constitutional concern for reliability in both the making and the review of a state's decision to execute one of its residents. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, fn. 2; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885.) Here, the testimony from Officer Niemi's coworkers and the story about a dead baby diverted the jury's attention from its proper role to determine appellant's moral

culpability and invited an irrational, hence unreliable, response based on the social and moral value of the victim's life. (AOB 144-145.) Accordingly, appellant's death sentence must be reversed.

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VI. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DENIED APPELLANT'S REQUEST TO INFORM THE JURY THAT ANY LINGERING OR RESIDUAL DOUBT A JURY HARBORED ABOUT HIS GUILT WAS A PERMISSIBLE MITIGATING FACTOR

In his opening brief, appellant challenges the trial court's refusal to give his requested instruction informing the jury that lingering or residual doubt is a relevant mitigating factor the jury can consider in selecting the appropriate penalty. (AOB 146-162.) Appellant acknowledges this Court's decisions holding that such an instruction is not required. (AOB 150.) He explains why the Court's rationale for its rule – that the instructions on factors (a) and (k) adequately cover the concept of lingering doubt and there is no federal requirement for a lingering doubt instruction – should be reconsidered. (AOB 146-162.)

A. Under State Law, The Trial Court Should Have Provided Defense Counsel's Correct, Properly-Limited Statement Of The Law To The Jury

Appellant argues that it is well established that lingering or residual doubt is a relevant mitigating circumstance for a capital jury's consideration at the penalty phase in deciding between life and death. (AOB 148.) Here, where the critical issue at trial was whether appellant had deliberated the murder, evidence admitted during the guilt phase allowed for lingering doubt as to appellant's state of mind. Respondent does not contest this. Instead, respondent notes that this Court has repeatedly held that instruction on lingering doubt is not required by state law, and that the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury. (RB 85.)

With regard to the specific instruction requested in this case, respondent fails to contest several of appellant's points, including that: (1) the trial court's reasons for rejecting appellant's requested lingering doubt instruction were mistaken (AOB 149); and (2) the requested instruction was a clear, concise and correct statement of law that was relevant to the jury's penalty decision (AOB 149).

As appellant outlines in the opening brief, under state law the trial court should have provided defense counsel's correct, properly-limited statement of the law to the jury. (AOB 148-154.) Instead, the trial court ruled it was inappropriate to invite the jury to question the verdict it had reached – disregarding the law that lingering doubt is a legitimate mitigation consideration and misconstruing the instruction. (13 RT 2686.) The trial court's reasoning was wrong and this aspect of the trial court's ruling is not addressed by respondent.

As a second reason for rejecting the proffered instruction, the trial court announced that it was not required to instruct on lingering doubt. (13 RT 2686.) It is true that a trial court does not have to instruct on lingering doubt, but a trial court still has a statutory duty to provide correct statements of law upon a defendant's request. (AOB 150; *People v. Cox* (1991) 53 Cal.3d 618; Pen. Code, §§ 1093, 1127.) Respondent relies on *People v. Hartsch* (2010) 49 Cal.4th 512, 513 for the proposition that this Court has moved away from the dictum in *People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 12, indicating that a lingering doubt instruction may be warranted under Penal Code sections 1093 and 1127. (RB 87-88.) Appellant acknowledges *Hartsch's* rejection of the specific dictum in *Cox*, *supra*, 53 Cal.3d at p. 678, fn. 12. That being said, however, this Court has never held that the language of sections 1093 and 1127 is no longer in effect. Currently, Penal

Code section 1093 states that the judge may charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party. (Pen. Code, § 1093, subd. (f).) Further, Penal Code section 1127 states that the court may instruct the jury regarding the law applicable to the facts of the case. (Pen. Code, § 1127.) And, under Penal Code section 1127, any party may present to the court any written charge on the law and request that it be given. (*Ibid.*) If the court thinks the instruction is correct and pertinent, it must be given. (*Ibid.*) Defense counsel presented a straightforward instruction that correctly stated a point of law relevant to the issues. Based upon defense counsel's request and the evidence in the case, from which a juror could have harbored a lingering doubt as to appellant's state of mind, the trial court should have granted appellant's request.

Respondent contends that factors (a) and (k), on which the jury was instructed, properly convey the concept of lingering doubt. (RB 87; 4 CT 1043, 1050-1053; CALCRIM No. 763.) However, as outlined in the opening brief and incorporated herein, the plain language of CALCRIM No. 763 regarding factors (a) and (k) does not actually convey the concept of lingering doubt in relation to the facts of appellant's case. (AOB 151-152.)

It is true that defense counsel was allowed to argue lingering doubt to the jury. (13 RT 2686; 14 RT 2914.) The argument, however, did not compensate for the omission of the requested instruction. The jury was also instructed that the argument of counsel is not evidence. (4 CT 1045.) Further, it is the duty of the trial court, not the parties, to instruct the jury about the applicable law by defining its terms and stating what the law requires or allows. (Pen. Code, §§ 1093, subd. (f), 1127; *People v.*

Breverman (1998) 19 Cal.4th 142, 154.) On this record it cannot be assumed that arguments of counsel were sufficient to present the jury with the applicable law especially where, as here, the jury was not instructed that the argument was legally relevant. (See *People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14 [the reviewing court presumes the jury followed the court's instructions, not the argument of counsel].) When the trial court leaves the jurors to decide whether the defense attorney's interpretation of the law is correct, the contest is not a fair one: defense attorneys are known to be advocates for the defendant. Where the trial court does not explicitly instruct on lingering doubt, defense counsel's argument can be easily ignored.

Finally, appellant argues that there was a reasonable likelihood the jurors did not understand they could consider lingering doubt in deciding the appropriate punishment for appellant. (AOB 153-154.) Respondent does not address this critical point.

The question posed here is significant. At the penalty phase, the jury is asked to decide between life and death for the defendant. Under California law, lingering doubt is, and for 50 years has been, a relevant mitigating factor that the jury may consider in making this decision. Further, lingering doubt is known to be a powerful mitigator. (*People v. Gay* (2008) 42 Cal.4th 1195, 1227 ["'residual doubt is perhaps the most effective strategy to employ at sentencing'"].) However, the concept of lingering doubt and its definition are not necessarily self-evident to those who sit on capital juries. A clear, straightforward instruction, like the one appellant requested, would have provided this important information. Giving the instruction, when requested, is not burdensome or difficult for the trial court. Some trial courts give the instruction; others, like the court

in this case, do not. If capital penalty trials are to result in reliable verdicts about who should live and who should be executed, then the Court should ensure that all jurors understand, where applicable as in this case, the role lingering doubt may play in their penalty deliberations. Appellant urges this Court hold that, upon request, where relevant, a trial court must instruct on lingering or residual doubt and to reverse the death judgment in this case.

B. The Trial Court's Failure To Give Any Instruction On Lingering Or Residual Doubt Violated The Federal Constitution

Respondent contends that appellant's argument is that the instruction on lingering doubt was constitutionally compelled. (RB 88.) This is incorrect. Rather, appellant argues that the trial court's failure to give the requested instruction on lingering doubt violated the federal constitution in multiple ways: (1) by denying his right under state and federal constitutional law to have the jury exercise its discretion and fix punishment based on both statutory and judicially-recognized mitigating factors (AOB 155); (2) by failing to instruct on an applicable principle of law in contravention of the statutory mandate in Penal Code sections 1093 and 1127 and the due process clause of the Fourteenth Amendment (AOB 155); (3) by denying appellant's right to instructions that would have allowed the jury to give meaningful consideration and full effect to his evidence, theory and argument – without which there is a reasonable likelihood the jurors did not understand they could consider lingering doubt (AOB 157); and (4) by depriving appellant of his due process right to present a defense. (AOB 156-157).

Addressing only some of appellant's federal arguments, respondent contends that appellant cannot claim a protected liberty interest under the

Fourteenth Amendment because he is not entitled under state law to an instruction on lingering doubt at the penalty phase. (RB 88.) Respondent misses the point. As appellant outlines in the opening brief, here, the jury's sentencing discretion was unfairly cabined by the trial court's failure to let the jurors know that under state law lingering doubt was a mitigating factor and a basis for choosing life over death. This deprived appellant of federal due process under *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346. (AOB 155.) In this case, appellant was not entitled under state law to an instruction at the penalty phase regarding lingering doubt, although the court certainly could have instructed on lingering doubt. But, appellant was entitled to have the jury exercise its sentencing discretion based on both statutorily and judicially recognized mitigating factors – including lingering doubt. Here, the jury was not informed by the trial court that under state law it could consider lingering doubt as a mitigating factor or a basis for choosing life without parole. Therefore, appellant's jury was hindered from exercising its sentencing authority to the full extent allowed under state law. (AOB 155.) This is a federal constitutional violation.

In the alternative, respondent notes that every state law error does not automatically result in a violation of the federal Constitution under *Hicks*, citing *People v. Bryant* (2014) 60 Cal.4th 335, 413, fn. 34. (RB 88.) While this may be true, here, appellant has explained how failing to give the requested jury instruction left the jurors without a basis to consider the judicially recognized mitigating factor of lingering doubt in exercising its sentencing authority under state law. Respondent offers no viable argument as to how this did not violate the federal Constitution.

Appellant argues that lingering doubt is a mitigating factor that he was entitled to have his jury consider under state law. Thus, he was entitled

to instructions that allowed the jury to give meaningful consideration and full effect to his evidence, theory and argument explaining and applying that factor. (AOB 157.) Respondent does not address this aspect of appellant's federal claim, but instead counters that CALCRIM No. 763, given to the jurors, allowed them to consider any relevant mitigating factor. (RB 89.) Appellant's federal claim, however, is not that the jury was not allowed to consider any relevant mitigating factors, but that without an instruction on lingering doubt, the jury would not be able to give full effect to the lingering doubt evidence. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 254; *Penry v. Lynaugh (Penry I)* (1989) 492 U.S. 302, 321.) Further, as argued in the opening brief, the plain language of factors (a) and (k) of CALCRIM No. 763 does not convey and define the concept of lingering doubt. (AOB 151-152.)

Finally, respondent argues that where the trial court allowed the defense to argue lingering doubt and defense counsel did so, appellant was not denied the right to present a defense of lingering doubt. (RB 89.) While it is true that defense counsel was able to present an argument about lingering doubt, as outlined in the opening brief, that in itself did not cure the error. (AOB 157-158.) This was a case where the jury was instructed specifically that counsel's argument was not evidence and that the trial court would instruct them on the law. (4 CT 1026; 14 RT 2956; 4 CT 1043 [court's instructions are controlling].) Further, when asked about counsel's argument later, the trial court effectively told the jurors they could not consider it. (AOB 169-178.)

Respondent does not respond to appellant's other federal claims. (AOB 156-159.)

C. The Error Requires Reversal Of The Death Judgment

As outlined in the opening brief and incorporated herein, appellant argues that whether the error is considered one of state law or federal constitutional law, it is not harmless. (AOB 159-162.) Respondent contends that under either standard the error was harmless. (RB 89.) Both state and federal penalty phase error is reviewed under the same standard. (*People v. Pearson* (2013) 56 Cal.4th 393, 472 [penalty phase state law error standard is the same in substance and effect as the reasonable doubt test under *Chapman*].) Respondent asserts that the error was harmless because the trial court instructed the jurors that they must consider the circumstances of the crime and any other circumstance that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification. (RB 89.) While there is case law to support respondent's contention that the instructions were sufficient to encompass the concept of residual doubt, the circumstances of this case merit revisiting this conclusion. Of course, legally, the trial court and perhaps counsel understand that the instructions include the concept of lingering doubt, but a lay juror most likely would not. First, the juror would have to understand exactly how lingering doubt is defined. Something not addressed in this case. But even if defined, the instructions do not make clear that lingering doubt can be considered and may even form the basis of a penalty decision. Second, the trial court repeatedly emphasized in the penalty instructions and its responses to juror questions that the penalty decision had to be based on the evidence and that counsels' argument was not evidence. (CALCRIM No. 222 [nothing the attorneys say is evidence]; 4 CT 1034-1035, 1043 [court's instructions are controlling], 1050.) This meant that although

defense counsel was allowed to argue lingering doubt, the jurors were not allowed to base their penalty determination on counsels' argument.

Respondent returns to the argument that any error was harmless because the case in aggravation was strong and the defense case in mitigation was not compelling. (RB 90.) As outlined in the opening brief (AOB 160-162), and incorporated herein, the error was not harmless where residual doubt was likely to be a question on the jurors' minds because of evidence regarding appellant's state of mind. Moreover, the jurors wrestled with their sentencing decision; the attorneys' closing arguments did not cure the error; and the aggravation did not so far outweigh the mitigation – there was no extensive history of violence, no prior felony convictions, appellant's youth and state of intoxication at the time of the crime – that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty had the error not occurred. (*In re Lucas* (2004) 33 Cal.4th 682, 690 [there is a reasonable probability that "at least one juror would have struck a different balance."], quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123.) The death judgment must be reversed.

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VII. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS IN RESPONSE TO THE JURY'S MID-DELIBERATION QUESTIONS UNDERCUT THE JURY'S CONSIDERATION OF THE MITIGATING CIRCUMSTANCES

A. The Trial Court's Definition Of Circumstances Of The Crime Was Incomplete, Imbalanced And Favored The Prosecution

Appellant argues that the trial court's response to the deliberating jury's request for the definition of circumstances of the crime was erroneous because it was incomplete and singled out an aggravating aspect of the circumstances of the crime that necessarily favored the prosecution. (AOB 165-168.) Respondent counters that the trial court's response was a generally correct statement of the law (RB 93) and that this Court has approved an instruction similar to the one at issue in *People v. Harris* (2005) 37 Cal.4th 310 and *People v. Souza* (2012) 54 Cal.4th 90. (RB 94-95.) *Harris* and *Souza*, however, are distinguishable and not dispositive of appellant's claim.

In *Harris*, this Court approved an instruction, as requested by the prosecution, that it was proper to consider the impact of the murder on the victim's family under factor (a) when determining penalty. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 358-359.) This, however, is not the issue in this case. Here, rather than determining initial jury instructions, the trial court was responding to a question from the deliberating jury about a commonly understood term, circumstances of the crime. Appellant does not argue that the trial court should not have instructed the jury that victim impact evidence is included within factor (a). Rather, appellant argues that once the trial court had fully instructed the jury on aggravating and

mitigating factors, it should not have given them additional instructions that highlighted only an aggravating factor. (AOB 167.)

The trial court had already instructed the jurors with CALCRIM No. 763. Defense counsel reminded the trial court that it had also instructed the jurors that words and phrases not specifically defined should be applied using their ordinary everyday meaning. (14 RT 2941.) There was no reason for the trial court to give the response specifying only certain aggravating circumstances of the crime. The duty to clarify the law does not mean the court must always elaborate on the standard instructions, especially where the original instructions are "full and complete." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, as modified on rehearing, 53 Cal.3d 1179A.) Here, rather than merely clarifying, the effect of the trial court's response was that it ended up suggesting, by highlighting only an aggravating factor, that the circumstances of the crime were exclusively aggravating. The trial court would have acted properly in directing the jury back to the original instructions or indicating that circumstances of the crime may be aggravating or mitigating.

Respondent also relies on *People v. Souza, supra*, 54 Cal.4th 90. In *Souza*, the trial court gave the prosecutor's proposed instruction pinpointing victim impact evidence as a circumstance of the crime within the meaning of factor (a). (*People v. Souza, supra*, 54 Cal.4th at p. 138.) This Court held that the pinpoint instruction in that case conveyed the proper consideration and use of victim impact evidence. Here, however, the issue is not whether the instruction properly conveyed the use of victim impact evidence, but that the trial court's response to the deliberating jury improperly emphasized one aggravating aspect of the circumstances of the crime to the exclusion of other potentially mitigating circumstances. (AOB 166-169.)

Respondent contends (1) that the trial court properly informed the jury of the law regarding victim impact evidence, and (2) informed the jury that victim impact evidence was not the sole circumstance of the crime under factor (a), but that the manner in which the crime was committed and the events immediately surrounding its commission, as well as those leading up to its commission, were also circumstances of the crime. (RB 95.) Respondent misunderstands appellant's argument. Appellant's argument is not that the trial court's original instruction failed to inform the jury of the law regarding victim impact evidence, but rather that, the trial court's response to the jury's question asking for a definition of the circumstances of the crime improperly highlighted victim impact evidence, one aspect of the circumstances of the crime. Further, in doing so, the trial court unfairly favored the prosecution's case for death. Although in essence correct, wording of the supplemental instruction nevertheless emphasized only one pro-death aspect of the circumstances of the crime. (AOB 166-169.)

Respondent points to other instructions the trial court gave to the jurors to argue that based on these other instructions, (CALCRIM Nos. 761 [court not suggesting anything about facts from a particular instruction], 763 [some factors aggravating, some mitigating], and 766 [assign value you believe is appropriate]), the jury would have understood factor (a) could be either aggravating or mitigating. (RB 96.) It is not clear, however, the jury would have understood from these instructions that circumstances of the crime could be mitigating as well as aggravating once the court had highlighted only an aggravating aspect.

Respondent does not address appellant's argument that the definition provided by the trial court improperly supported the prosecution's penalty phase argument that the jury could impose the death penalty based on the

victim impact evidence alone. (AOB 167.) Rather, respondent points to the trial court's assumption that the jury was asking specifically about victim impact evidence (RB 96), although there was nothing in the record to support the trial court's statement. (14 RT 2915-2916.) Finally, respondent's contention that the trial court's response did not mislead the jurors in light of defense counsel's penalty phase arguments is belied by the fact that the jurors asked their question after having heard defense counsel's argument. In sum, the trial court abused its discretion in giving the jury an incomplete, hence imbalanced response to a neutral question.

B. The Trial Court's Instruction About Arguments Of Counsel, Taken In Context With The Other Instructions, Was Ambiguous And Likely Misled The Jurors To Believe They Could Not Consider The Quality Of Counsels' Argument In Deciding The Appropriate Penalty

As outlined in appellant's opening brief, the jurors asked, "[f]rom section 766 (weighing process) can the quality of 'the arguments of counsel' be considered as a mitigating circumstance?" (4 CT 1025.) The trial court responded to the jurors' question as follows: "In reaching your decision you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence. [¶] Statements of counsel are not evidence. [¶] *The answer is no.*" (4 CT 1026; 14 RT 2956; AOB 169-178, italics added.) Appellant argues that the trial court's response was susceptible to an erroneous, misleading interpretation that the jury could not consider counsel's argument in reaching the penalty decision. (AOB 170.) Respondent argues that from the instructions as a whole the jury would have understood its duty to consider counsels' argument to the extent they assisted it in identifying and weighing the mitigating and aggravating

factors shown by the evidence. (RB 99.) Respondent ignores the significance of the jury's question.

In asking its question, the jury referenced CALCRIM No. 766. Thus, contrary to respondent's argument, it is likely that the instruction generated confusion, rather than clarity, about how to use or consider counsel argument. (4 CT 1056-1057.) As explained in appellant's opening brief, the jury was instructed with CALCRIM No. 766 that they must *consider* counsel argument, but that they must be *guided* by the aggravating and mitigating circumstances. Further, CALCRIM No. 766 told the jurors that they were to determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. (AOB 173-175.) CALCRIM No. 222 told the jury that nothing the attorneys say is evidence. The instructions thus failed to inform the jury how attorney arguments fit into the weighing process. The combination understandably created confusion. The trial court's response echoed what the jury had already been instructed according to CALCRIM No. 766 and CALCRIM No. 222, the genesis of the confusion.

Appellant argues that the trial court's response to the deliberating jury's question, although not a misstatement of the law, likely misled the jury to understand that because the arguments by counsel were not evidence, they could not consider the quality of counsels' argument in reaching the penalty decision. (AOB 169-178.) Respondent argues that the trial court's response repeated correct legal principles: the jury must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence and statements of counsel are not evidence. (RB 98.)

Respondent further argues that defense counsel should have offered a modification to the instruction and because defense counsel did not, the claim is forfeited. (RB 98.) While appellant in his opening brief suggested a potential response by the trial court, appellant does not contend that the trial court was under an obligation to give that response. (See AOB 172.) Appellant's claim is not that the trial court should have modified the instruction, but that it is reasonably likely the jury misunderstood or misused the trial court's response to not consider the quality of counsels' argument as a mitigating factor. Moreover, it is clear that defense counsel and the trial court interpreted the jury's question differently. (14 RT 2955-2957.) For counsel to offer a modification would have been futile in light of the difference in interpretation. (See *People v. O'Connell* (1995) 39 Cal.App.4th 1182, 1190 [applying "the principle of law that excuses parties for their failure to raise an issue at trial where to do so would have been an exercise in futility" where defendant failed to request clarifying modification of challenged pattern instruction after trial court had unequivocally rejected legal argument supporting the clarification].)

Respondent asserts that the jury's question was reasonably understood as referring to how good or bad the argument was and not the points raised by the argument. (RB 98.) This is how the trial court interpreted the jury's question. (14 RT 2957 [trial court concluded the jury's question was not directed at content, the issues raised, or points raised in the argument].) Defense counsel, however, interpreted the jury's question as referring to her argument and that there might have been something she said that caused them to feel sympathy or mercy for appellant. (14 RT 2956.) It is difficult to separate quality from substance. If the argument is good – it is because its substance is compelling; if bad,

the opposite. Whether termed "quality" or not, the jury, after the trial court's response, was left with the same instruction they had already received and did not understand. Although generally "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), by asking whether it could consider the quality of counsels' argument as a mitigating circumstance, the jury clearly indicated that it had not understood the instructions that the court had already provided. (CALCRIM Nos. 222, 763, 766; 4 CT 1017.)

The trial court ended its response with "[t]he answer is no." (4 CT 1026.) This response, properly understood, meant the jurors could not consider the quality of the arguments of counsel as a mitigating circumstance. Although the jurors must weigh and consider the aggravating and mitigating factors, the jurors must also engage in a normative analysis about whether the death penalty is appropriate. In making this ultimate determination, the jury is allowed to consider such things as mercy and sympathy, which could be generated by the persuasiveness of counsels' argument or its substance.

The instruction on factor (k) tells the jury that they are allowed to take into account anything they consider to be a mitigating factor. They were specifically instructed by the trial court as to factor (k). (4 CT 1017.) The trial court's direct response limiting what the jury could consider likely led the jurors to believe they could not consider the relevant qualities and content of counsels' argument. Because the jury is entitled to consider the persuasiveness of counsels' argument, the trial court's response precluded the jury from considering a mitigating circumstance in this case.

C. The Trial Court Erred In Failing To Define The Phrase: "Maturely and Meaningfully Reflected Upon The Gravity Of His Act," As The Jury Requested, And Likely Misled The Jurors To Believe They Could Not Consider This Aspect Of Appellant's Mental State In Deciding The Appropriate Penalty

1. The Claim Is Cognizable on Appeal

Respondent argues that appellant's claim is forfeited on appeal because he did not object or request clarification at trial, but instead agreed with the trial court. (RB 101-106.)[13] In support of its forfeiture argument respondent relies upon *People v. Dykes* (2009) 46 Cal.4th 731, 802 and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193. Both *Dykes* and *Rodrigues*, however, are inapposite.

In *People v. Dykes*, the jury, which had based its verdict on a felony murder theory, asked during the penalty phase whether it could consider malice theories of first degree murder in determining the appropriate penalty. The trial court correctly answered in the affirmative. Defense counsel did not object. This Court concluded that it was appropriate to apply the forfeiture rule because the trial court's formulation was genuinely clarifying and specifically pertinent to the jurors' inquiry. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802.) Here, however, although defense counsel failed to object or request clarification, the trial court's response differed

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[13] The trial court and counsel initially discussed the trial court's response off the record and then memorialized their conversation for the record at a later date. During that memorialization the trial court asked defense counsel her position on what he sent to the jury. Defense counsel responded by stating, "submitted." The trial court recalled defense counsel had concurred with him, but did not elaborate beyond that. Defense counsel stated that she was not trying to say anything different. (14 RT 2958-2959.)

from that in *Dykes* and, as explained further below, was not correct. Thus, where the trial court misadvises the jury in responding to a question during deliberations, the defendant's failure to object or request an elaboration of the response does not forfeit the claim. (AOB 191-193; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 [no waiver where court incorrectly responded to the jury's question].)

In *Rodrigues*, defense counsel expressly suggested responses to the jury's questions. Thus, this Court held that the claim of error was waived because the defendant not only consented to but actually drafted the responses given by the trial court. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1193.) Respondent contends that, as in *Rodrigues*, any error in this case was invited. (RB 103; 14 RT 2958.) Respondent is mistaken.

Here, the trial court had initially proposed to give the jurors a response that mature and meaningful reflection is not one of the elements of murder. Defense counsel asked the trial court not to so instruct the jurors, and the trial court agreed. This request by defense counsel, however, did not constitute invited error because it was directed to a different response than the one subsequently at issue. Defense counsel expressed a tactical reason for objecting to one proposed response to the jury's question, but did not follow the same strategy as to the other, and instead "submitted" as to the trial court's actual response. (14 RT 2959.)

Finally, the lack of an objection does not prevent review because the trial court's instructional error affected appellant's substantial rights, in this case, the right to have the jury consider all relevant mitigating circumstances in its penalty decision. (§ 1259; *People v. Hill* (1992) 3 Cal.App.4th 16, 24 [applying § 1259 to review of trial court's response to jury question where counsel did not object]; *People v. Thompkins* (1987)

195 Cal.App.3d 244, 249-251, fn. 4 [same].) Thus, the claim is not forfeited.

2. The Trial Court Abused its Discretion in Instructing That the Jury Could Not Consider, as Part of Appellant's Mental State During the Murder, Whether He "Maturely and Meaningfully Reflected Upon the Gravity of His Act" and in Failing to Define "Maturely and Meaningfully Reflected"

The trial court's response to the jury's request for a definition of maturely and meaningfully reflected effectively instructed that the jury could not consider whether appellant maturely and meaningfully reflected upon the gravity of his act, an abuse of discretion. (AOB 183-188.) Respondent contends that the jury did not ask the court if it could consider whether appellant maturely and meaningfully reflected on the gravity of his act and therefore, would not have understood the court's response as directing it not to do so. (RB 103.) From the trial court's response, refusing to define maturely and meaningfully reflected, and telling the jurors to disregard instructions where they were initially instructed with the language, the jury would naturally have concluded that they were not to consider the absence of mature and meaningful reflection as mitigating.

Appellant concedes that the trial court's instruction was correct in a literal sense. The new instructions given at the penalty phase did not include the instruction regarding mature and meaningful reflection and the court had previously instructed the jurors to disregard instructions given at the guilt phase. (4 CT 1024 ["you must disregard all of the instructions I gave you in the earlier phase of the trial, and follow only the new instructions given in this phase of the trial."].) The trial court's instruction was misleading, however, because the lack of meaningful and mature

reflection could be considered mitigating in this case. The jury had received in the guilt phase an instruction on first degree murder with the inserted maturely and meaningfully reflected language. It is reasonably likely the trial court's response led the jurors to believe that they could not consider appellant's state of mind as part of its evaluation of appellant's culpability and its moral and normative decision concerning the appropriate penalty. As this Court indicated in *Dykes*, a jury is able to consider the defendant's mental state, although not required in a guilt finding, to determine penalty. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802.) Here, unlike in *Dykes*, it is highly unlikely that the jury would have understood from the trial court's response, telling them to only follow the new instructions, that they could nevertheless consider whether appellant maturely and meaningfully reflected on the gravity of his act. In fact, just the opposite.

Respondent claims that the trial court's response would not have precluded the jury's consideration of intoxication and age because the jurors were also instructed to consider appellant's age at the time of the crime and whether appellant's capacity to appreciate the criminality of his conduct or follow the requirements of the law was impaired as a result of intoxication. (RB 103; 4 CT 1052.) While it is true the jury received these other instructions, they did not address all morally relevant aspects of appellant's mental state during the crime. As outlined in the opening brief, whether appellant maturely and meaningfully reflected on the gravity of his act was critical to the jurors' assessment of appellant's moral culpability based on his immaturity, rashness and impulsivity – important mental state factors in this case that may negate personal depravity. (AOB 183-188.)

Respondent relies upon *People v. Murtishaw* (1989) 48 Cal.3d 1001 to argue that the definition of maturely and meaningfully reflected was not a general principle of law necessary to the jury's proper understanding of the case. Therefore, the trial court did not abuse its discretion in giving its response. (RB 105.) As explained in appellant's opening brief (AOB 190-191), *Murtishaw* is inapposite. *Murtishaw* was a penalty retrial where the jury was not charged with deciding whether the defendant had committed the murder. Thus, this Court concluded that the definition of first degree murder was not a general principle of law necessary to the jury's understanding of the case and penalty determination. (*Murtishaw*, *supra*, 48 Cal.3d at p. 1023.) Here, the trial court, at the prosecutor's request, inserted the principle of mature and meaningful reflection, undefined, at the guilt phase – where this jury was charged with determining guilt. The court then refused to define the phrase at the penalty phase where the jury was entitled to consider it in assessing appellant's state of mind as a circumstance of the crime and potential mitigation. Moreover, unlike *Murtishaw*, whether appellant maturely and meaningfully reflected on the gravity of his act was directly relevant to appellant's moral culpability – the core assessment in the jury's penalty determination. (AOB 190-191.)

Respondent asserts that the trial court did not err in refusing to define maturely and meaningfully reflected because the phrase – that is, appellant's reflection on the crime – is not a circumstance of the crime that the jury could consider. (RB 105.) Respondent is mistaken. Notwithstanding that a jury has convicted the defendant of a crime, at the penalty phase the jury still must make an individualized determination of the moral culpability which attaches to the circumstances of the crime, including the defendant's mental state. (*People v. Dykes*, *supra*, 46 Cal.4th

at p. 802 [a defendant's culpable mental state may be considered as a circumstance of the crime under section 190.3, factor (a)].) Thus, a jury might properly consider a defendant who maturely and meaningfully reflects on his decision before committing murder as more morally culpable, hence more deserving of death, than a defendant who acts without such reflection. In combination, the court's refusal to define "maturely and meaningfully reflected," and admonition to disregard guilt phase instructions (4 CT 1024), would have conveyed to the jury that it could not consider any moral mitigation based upon the lack of this degree of reflection. In so instructing, the court abused its discretion.

Finally, respondent asserts that the trial court's failure to define maturely and meaningfully reflected is unlike the trial court's erroneous failure to define certain terms for the jury in *People v. Miller* (1981) 120 Cal.App.3d 233 and *People v. Solis* (2001) 90 Cal.App.4th 1002. (RB 105.) Respondent distinguishes those cases by claiming that the jury's request for clarifying instructions in those cases was pertinent to an issue the jury was directly required to decide. (RB 105.) Here, however, the jury was directly required to decide the appropriate penalty. Where the prosecutor introduced the concept of maturely and meaningfully reflected into the definition of first degree murder, maturely and meaningfully reflected became a relevant consideration in assessing appellant's moral culpability in determining penalty. In refusing to define the phrase as the jury requested, the trial court did not fulfill its duty to help the jury understand a legal principle relevant to its penalty determination. As explained in appellant's opening brief and incorporated herein, the trial court has a duty to attempt to resolve the jury's uncertainty with a correct and considered response. (AOB 188-191.) "A definition of a commonly used term may nevertheless be required if the jury

exhibits confusion over the term's meaning." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015, quoting 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 633, p. 906.) Further, appellant's failure to provide the correct answer to the jury's question did not excuse the trial court from its primary duty to do so. The duty to instruct the jury, whether prior to or during deliberations, is not delegable to the parties or counsel. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 755 [trial court has the primary duty to help the jury understand the legal principles it is asked to apply].)

Respondent concludes that the jury did not indicate it was unable to reach a verdict without a definition of maturely and meaningfully reflected and made no further request for that definition. (RB 105.) Respondent's contention, however, is not the standard for error. The jury would not have responded to the trial court's refusal to clarify with further futile requests for exactly the same information. In short, the trial court abused its discretion, and failed in its duty to help the jury understand the point of law on which it desired to be informed and which was highly relevant to the individualized, normative assessment they were required to perform. (*People v. Luna* (2017) 10 Cal.App.5th 1004, 1016; *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

D. The Trial Court's Instruction Regarding The Lack Of Prior Felony Convictions Was Confusing, And Likely Misled The Jury To Think That It Could Not Consider And Give Effect To The Absence of Prior Felony Convictions

As discussed in the opening brief, the jury asked how to deal with the lack of evidence of prior felony convictions. Based on the trial court's response: "[y]ou may attach whatever significance you find appropriate to

the lack of evidence of a prior felony conviction under factor (c)", there was a reasonable likelihood that the jurors did not understand they could (and must) consider, and potentially give mitigating effect to, the absence of prior felony convictions. (AOB 194-204.) Respondent counters that the trial court's instructions regarding the absence of felony convictions, combined with counsels' arguments, would not have led the jury to believe it could disregard factor (c). (RB 107.) Respondent's contention fails because the instruction was confusing and counsel's argument is no substitute or cure for a court's instructional error.

Section 190.3, factor (c) directs jurors to consider the presence *or absence* of any prior felony conviction. CALCRIM No. 763, as of 2016, instructs the jurors to consider whether or not the defendant has been convicted of any prior felony. (CALCRIM No. 763, subd. (c).) CALCRIM No. 763 was revised in June 2007, shortly after the conclusion of this case. (Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Approve Publication of Revisions and Additions to Criminal Jury Instructions (May 1, 2007) pp. 3, 16, 92.) The jury in this case, however, received a previous version of CALCRIM No. 763, instructing under factor (c) that it must consider any prior felony of which a defendant has been convicted. (4 CT 1051; 14 RT 2882; AOB 194-197.) The instruction did not tell the jurors that they must consider the *absence* of any prior felony conviction. Here, the jurors were also instructed that they must consider, weigh, and be guided by specific factors, and that if they found there was no evidence of a factor, they should *disregard* that factor. (CALCRIM No. 763.) In addition, the trial court explicitly told the jurors: "[t]here is no evidence of prior felony convictions. You must therefore assume there are none." (4 CT 1030.) It comes as no surprise that the jury then asked, "[m]ust we

dismiss factor (c) due to the lack of evidence of other felony convictions?" (4 CT 1031.) There is a difference between telling the jurors, as the court did, to give factor (c) whatever significance they wanted, including, presumably, no significance whatsoever, and instructing them that they should not disregard it, but must consider factor (c).

Respondent argues that the jury in deciding whether or not to ascribe significance to appellant's lack of felony convictions would necessarily have had to consider the fact that appellant had no felony convictions. (RB 107.) Although the trial court told the jury there was no evidence of prior felony convictions and that they should assume there were no felony convictions, the trial court did not make it clear that the jury must consider the absence of prior felony convictions. Instead, by telling the jurors that they could ascribe whatever significance they wanted to factor (c), the trial court was giving the jury permission to disregard factor (c) if they wanted to when the jury actually had a duty to consider factor (c).

Respondent does not dispute that the version of CALCRIM No. 763 given to the jury did not explicitly state under factor (c) that the jury must consider the absence of a prior felony conviction. Nevertheless, respondent contends that because defense counsel did not object to the wording of CALCRIM No. 763 below, the claim is forfeited. (RB 108.) CALCRIM No. 763, however, was the prescribed, official instruction at that time, on which the jury had to be instructed. Trial counsel's failure to detect a later-recognized flaw in the standard instructions and to request a modification therefore cannot forfeit the claim. Further, Penal Code section 1259 exempts jury instruction claims affecting appellant's substantial rights from the customary rules relating to forfeiture by failure to object, and thus respondent's forfeiture argument is without merit. (See *People v. Casares*

(2016) 62 Cal.4th 808, 831 [reaching instructional claim that there was a reasonable likelihood the jury understood the instructions in a way that undermined the requirement of proof beyond a reasonable doubt despite defendant's failure to object].)

Respondent also claims that the trial court's response telling the jury it could ascribe whatever significance it wanted to the absence of a felony conviction clarified any potential confusion resulting from CALCRIM No. 763. (RB 108.) Appellant disagrees. As explained in the opening brief, the trial court's response did not dispel the confusion stemming from CALCRIM No. 763 and probably, compounded by the trial court's response to the jury's question about counsels' arguments and its final instruction on factor (k), led the jurors to believe that it could not consider and give effect to the absence of prior felony convictions. (AOB 194-204.)

Respondent states that the jury did not ask for further clarification regarding factor (c) or any of the penalty phase instructions after the court gave its response regarding factor (c). (RB 108.) This, in fact, is not how events unfolded. As outlined in appellant's opening brief, and incorporated herein (AOB 199-201), the jury asked yet another question after asking about factor (c). The jury asked about factor (k). (4 CT 1034.) In its initial factor (k) response the trial court told the jurors they were not limited to considering mitigating circumstances proven by the evidence. (4 CT 1034.) If that had been the final word from the trial court, the confusion would have been cleared up.

The jurors asked their questions on a Thursday afternoon. The trial court gave its responses and the jurors read them without deliberating further. The proceedings were continued until the following Monday. On Monday morning, the trial court met with the jurors before they began their

deliberations. The trial court then gave the jurors a new factor (k) response which told them, you must consider and weigh the aggravating and mitigating circumstances *shown by the evidence*. The trial court's instruction was italicized and thus, emphasized "shown by the evidence." (4 CT 1028, 1034-1036; 14 RT 2963-2966.) The trial court's final directive stated that they must consider and weigh the aggravating and mitigating circumstances *shown by the evidence*. In thus limiting mitigation to circumstances *shown by the evidence*, the supplemental instruction effectively excluded from the jury's consideration mitigation based on the absence of evidence – specifically, the absence of prior felony convictions.

Respondent argues that the trial court's final instruction regarding factor (k) did not negate its instruction to the jury that it could ascribe whatever significance it found appropriate to appellant's lack of felony convictions under factor (c). (RB 108.) Nevertheless, the trial court's final instruction did not make clear that the jury still had to consider factor (c) if there was no evidence to support it. Although, as respondent contends, the trial court need not instruct that the absence of prior felony convictions is mitigating, the trial court cannot leave the jury with the belief that it can disregard a mitigating factor – which is exactly what the court did.

E. The Trial Court's Instructional Errors Had The Additional Legal Consequence Of Violating Appellant's Federal Constitutional Rights

1. All the Trial Court's Responses Violated the Heightened-Reliability Requirement and the Mitigating-Evidence Principle of the Eighth and Fourteenth Amendments

As outlined in the opening brief, the trial court's responses to the jury's mid-deliberations questions violated his Eighth and Fourteenth

amendment rights to a fair and reliable sentencing determination. (AOB 205-209.) An instruction that erects a barrier to the jury's ability to consider and give full and meaningful effect to relevant mitigation violates the Eighth and Fourteenth Amendments. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The trial court's responses regarding circumstances of the crime, the quality of counsels' arguments, mature and meaningful reflection and prior felony convictions did just that. With each response it is reasonably likely the jury applied the trial court's instruction in a way that prevented the consideration of relevant mitigating evidence.

Respondent, conceding that appellant's federal constitutional claims are cognizable on appeal, answers this argument by insisting that for the same reasons the trial court's responses did not violate state law, they did not violate the Eighth and Fourteenth Amendments. (RB 110.) Respondent is wrong in its premise because the trial court's responses to the juror questions were erroneous under state law. Nevertheless, even if somehow proper under California law, this would not mean there could be no federal constitutional error. Independent of California law, appellant has a federal constitutional right to a fair and reliable penalty phase trial. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Whether the trial court's responses violated state law is a separate question from whether they violated appellant's federal constitutional rights.

Here, the trial court's responses amounted to a violation of appellant's federal constitutional rights under both the Eighth and Fourteenth Amendments. The trial court's response regarding the definition of the circumstances of the crime unduly favored the prosecution by

highlighting the victim impact evidence, an aggravating factor, but failed to also highlight that circumstances of the crime could also be mitigating. Similarly, the trial court's response regarding the quality of counsels' arguments likely prevented the jury from considering and giving effect to the persuasiveness and substance of defense counsel's closing argument which emphasized mitigating factors. In addition, the trial court's refusal to define maturely and meaningfully reflected, impeded the jurors from considering a potentially mitigating mental state, that appellant did not maturely and meaningfully reflect on the gravity of his act, in assessing the circumstances of the crime and appellant's moral culpability in making the penalty determination. Finally, the trial court's response regarding the lack of prior felony convictions prevented the jury from considering and giving effect to an important mitigating factor, the absence of any such prior convictions. (AOB 205-209.)

With each response, the trial court directed the jury away from considering a mitigating factor in a closely balanced case. Either individually or in combination, based on the four responses regarding important mitigating factors, it cannot be said that appellant received a fair and reliable sentencing determination.

2. The Trial Court's Responses Also Violated the Other Federal Constitutional Guarantees: Due Process, Right to Counsel, Right to Present a Defense

Appellant contends that the trial court's incomplete and one-sided instruction on the circumstances of the crime violated appellant's due process right to a fair trial. (AOB 210.) Respondent argues that the trial court's response defining circumstances of the crime did not violate due process principles because the trial court's response did not highlight victim

impact evidence or favor the prosecution and for that reason, appellant failed to establish federal constitutional error. (RB 110.) It is difficult to read the trial court's definition of circumstances of the crime and not see how one of the aggravating circumstances of the crime – victim impact – was not emphasized. (4 CT 1012 [Court: ". . . [t]his includes the harmful impact of the crime on the victim's family and friends"].) The court's explanation, highlighting an aggravating circumstance of the crime, improperly benefitted the prosecution whose case for death relied so heavily on victim impact evidence.

Appellant also claims that the trial court's instruction on quality of the argument of counsel infringed upon appellant's Sixth Amendment right to counsel. (AOB 211.) Respondent counters that defense counsel was able to make a full closing argument and therefore, appellant's right to have counsel participate fully and fairly in the factfinding process was not significantly diminished nor his Sixth Amendment rights violated. (RB 110.) Respondent is mistaken. Even though defense counsel was allowed to make a closing argument, the court's supplemental instruction deprived counsel's argument of any meaningful impact on the penalty determination. Not being able to consider counsels' argument was akin to not having argument by counsel – a violation of the Sixth Amendment.

Finally, appellant additionally argues that the trial court's instruction precluding consideration of mature and meaningful reflection violated his due process right to present a defense. (AOB 212.) Respondent claims that the jury was never prevented from considering the mitigating circumstances shown by the evidence, nor was the jury directed not to consider appellant's age and intoxication at the time of the murder. (RB 111.) Respondent has misconceived the claim. In failing to define maturely and meaningfully

reflected, the trial court prevented the jurors from considering appellant's mental state, his degree of deliberation, not just his age and intoxication, which was directly related to his moral culpability. This struck at the heart of appellant's main defense at the penalty phase.

F. The Trial Court's Instructional Errors Require Reversal Of The Death Judgment

As outlined in appellant's opening brief, and incorporated herein, appellant asserts that the trial court's errors, whether considered under either the harmless error standard for a federal constitutional violation (*Chapman v. California* (1967) 386 U.S. 18, 24), or the standard for state-law error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), were not harmless. (AOB 212-219.) In the weighing of aggravating and mitigating factors, this was a closely balanced case. Appellant came from an unstable background, was young, a high-school dropout, had no prior felony convictions, and on the day of the shooting, was heavily intoxicated. The evidence of appellant's statements immediately after the shooting, initially saying he did not know why he committed the murder, permitted the jurors to entertain a lingering doubt about appellant's mental state during the murder. As for aggravation, the prosecution's case consisted of the circumstances of the crime, victim impact evidence and one prior aggravating incident – an uncharged threat of violence by an intoxicated appellant after arrest that was not taken seriously by the arresting officer. (13 RT 2711, 2714.) It is reasonably likely that based on each of the trial court's responses, the jurors believed they could not consider a mitigating factor or consider a factor as mitigating: the circumstances of the crime, the quality of counsels' arguments, mature and meaningful reflection and the lack of prior felony convictions. This

impermissibly tipped the scales toward aggravation and resulted in a death verdict. Had the trial court properly instructed the jury in response to even one of the questions in such a closely balanced penalty case, there is a reasonable probability that "at least one juror would have struck a different balance." (*In re Lucas* (2004) 33 Cal.4th 682, 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123.) The death judgment should be reversed.

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VIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court's decisions rejecting these claims, but asks that they be reconsidered. (AOB 220-236.) Respondent cites decisions of this Court that have rejected these claims. (RB 111-118.) After appellant filed his opening brief, and after the State filed its respondent's brief, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereafter "*Apprendi*"] and *Ring v. Arizona* (2002) 536 U.S. 584 [hereafter "*Ring*"] because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616, 624 [hereafter "*Hurst*"].)[14] *Hurst* supports appellant's request in Argument VIII.C.1 and VIII.C.3 of his opening brief that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously

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[14] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for argument in VIII.C.1 and VIII.C.3 of the opening brief. To the extent this Court considers this not to be true, appellant asks this Court to deem this argument a supplemental brief. Appellant has no objection to a supplemental brief by the Attorney General if this Court believes it necessary.

and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See AOB 222-228; see also RB 112 [respondent argues that the Court has repeatedly rejected this argument].)

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring*, *supra*, 536 U.S. at p. 589; *Apprendi*, *supra*, 530 U.S. at p. 483.) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Id.* at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination

required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *id.* at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Id.* at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Hurst*, *supra*, at p. 620.)[15]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597,

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[15] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "*each fact necessary to impose a sentence of death.*" (*Id.* at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[16] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of

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[16] See *Hurst*, *supra*, 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated Apprendi's rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating

circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[17]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this

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[17] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4, and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did

not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[18]

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[18] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___, 134 S.Ct. 405, 410-411 (dis. opn. from denial of certiorari, Sotomayor, J.).)

C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 [hereafter "*Brown*"] (revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (40 Cal.3d at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Brown, supra*, 40 Cal.3d at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a

> mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*Brown*, *supra*, 40 Cal.3d at p. 541, fn. omitted.)[19]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e., in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to

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[19] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown's* gloss on the sentencing instruction.

reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Id.* at p. 540.) This is the "normative" part of the jury's decision. (*Ibid.*)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory

> verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect Brown's interpretation of section 190.3.[20] The requirement that the jury must find that the

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[20] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of Brown, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each

(continued...)

aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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[20] (...continued)
side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

). This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, at p. 621 [the facts required by *Ring* must be found beyond a

reasonable doubt under the due process clause].)[21] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, at p. 433 (per curiam opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[22] One reason the court invalidated

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[21] The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

[22] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, 145 A.3d at pp. 433-434 (per

(continued...)

Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Rauf, supra*, at p. 434; see *id.* at p. 487 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Rauf, supra*, 145 A.3d at p. 485.) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See, e.g., *State v. Whitfield, supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People, supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama, supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the

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[22] (...continued)
curiam opn.) [addressing Questions 1-2] and at pp. 482-485 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at p. 434 (per curiam opn.) [addressing Question 3] and at pp. 485-487 (conc. opn. of Holland, J.)).

mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

On remand following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in a capital sentencing. The Florida court began by looking at the terms of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Hurst v. State* (Fla. 2016) 202 So.3d 40, 53; Fla. Stat. (2012) § 921.141(1)-(3).) Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, at p. 54.) The Florida court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdict must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven

> beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Hurst v. State*, *supra*, 202 So.3d at p. 57.) There was nothing that separated the capital weighing process from any other finding of fact.

Since *Hurst*, this Court has stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16; *People v. Jackson* (2016) 1 Cal.5th 269, 374.) Both *Rangel* and *Jackson* were decided before the decisions of the Florida Supreme Court in *Hurst v. State*, *supra*, 202 So.3d 40, and the Delaware Supreme Court in *Rauf*, *supra*, 145 A.3d 430. (But see *People v. Becerrada* (2017) 2 Cal.5th 1009.) The issue before this Court, however, is not the role of the jury in imposing death, but the factual determinations that must be made.

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt.

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IX. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF PENALTY ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

As outlined in appellant's opening brief (AOB 237-238), and incorporated herein, appellant argues that the cumulative effect of the penalty errors undermines confidence in the fairness of the trial and the reliability of the death judgment. Respondent simply counters that appellant has not established that any prejudicial error has occurred at either phase of the rial. (RB 119.) Again, respondent misses the point. Even if any one claim of error is found not to be prejudicial, appellant is asking the Court to evaluate the penalty claims cumulatively. When looked at cumulatively, it is apparent that the jury was very focused on following the instructions, but in each instance, the trial court either gave them an incomplete response, telling them only about the aggravating factors, or left the jurors without guidance about what to do with mitigating factors. This was not fair. To contend that it did not affect the penalty is untrue. A closely balanced case such as this case was affected by the erroneous direction and guidance given to the jurors. At end, the errors, viewed separately or in combination, deprived appellant of a fair penalty trial and reliable penalty determination. Reversal of the death judgment is required.

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CONCLUSION

For the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on automatic appeal, the entire judgment of conviction, special circumstance findings, and sentence of death should be reversed.

Dated: July 14, 2017

Respectfully Submitted,
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State Public Defender

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Attorneys for Appellant

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

I, MARIA MORGA, am the Deputy State Public Defender assigned to represent appellant IRVING ALEXANDER RAMIREZ, in this automatic appeal. I conducted 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, excluding tables and certificates is 30,250 words in length.

Dated: July 14, 2017

MARIA MORGA
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Irving Alexander Ramirez* California Supreme Ct. No. S155160
(Alameda County Superior Ct. No. 151080)

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

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

The envelopes were addressed and mailed on **July 14, 2017**, as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Signed on **July 14, 2017**, at Oakland, California.

DECLARANT