No. S072161

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THOMAS J. POTTS,<br><br>Defendant and Appellant. | Kings County<br>Superior Court<br>No. 97CM2167<br><br>**CAPITAL CASE** |

# APPELLANTS SUPPLEMENTAL OPENING BRIEF

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

HONORABLE LOUIS BISSIG, JUDGE

Michael P. Goldstein
Cal. State Bar No. 60358
PMB 9122
5000 MacArthur Blvd.
Oakland, CA 94613
(510) 910-7220
mpgoldstein@earthlink.net

Attorney for Appellant

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**APPELLANTS SUPPLEMENTAL OPENING BRIEF**

## INTRODUCTORY NOTE

Appellant's opening brief was filed April 30, 2009; his reply brief was filed May 2, 2012. Six and one-half years have passed since the briefing in this case was completed. Appellant now submits this Supplemental Opening Brief to provide this Court with additional authorities supporting arguments raised in the opening brief and to raise new arguments that were not presented in the prior briefing, including arguments that could not previously have been included because they are based on cases and other matters not available when the initial briefing was completed. For the Court's convenience, new arguments are flagged with an asterisk.

Appellant's submission of this brief is not intended to constitute abandonment of any arguments made in the prior briefs.

## ARGUMENT

### III. THE PROSECUTOR DENIGRATED THE REASONABLE-DOUBT STANDARD, IN VIOLATION OF APPELLANT'S RIGHTS[1]

In her rebuttal argument, directly addressing defense counsel's unexceptionable explanation of reasonable doubt, Deputy District Attorney Gayle Helart stated,

> But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but— Don't do that." If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you.

(RT 11: 2448.) As explained in prior briefing, this was reversible error.

#### A. The Prosecutor's Explanation of the Reasonable-Doubt Standard Misled the Jurors

##### 1. Inadvisability of "Explanations" of Reasonable Doubt

This Court has recently re-emphasized the perils of attempting to explain the reasonable-doubt standard to jurors:

> The case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard. [Citations.] We have recognized the "difficulty and peril inherent in such a task," and have discouraged such "'experiment'" by courts and prosecutors. [Citation.]

*People v. Centeno* (2014) 60 Cal.4th 659, 667. And again, "[J]udges and advocates have been repeatedly admonished that tinkering with the explanation of reasonable doubt is a voyage to be embarked upon with great care." (*Id.* at p. 671.)

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[1]See AOB 99 et seq., RB 45 et seq., ARB 83 et seq.

### 2. Recent Cases Further Demonstrating That There Was Error Here

#### a. *People v. Centeno*

In *People v. Centeno*, *supra*, this Court also reaffirmed that the standard for assessing whether there was error in a prosecutor's remarks purporting to explain the standard for finding guilt is whether there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*Id.* at p. 667; see also p. 674.) This standard requires "more than speculation" that an instruction could somehow have been interpreted as requiring less than proof beyond a reasonable doubt, but it does not require that such an interpretation be "more likely than not." (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 6 [citing the discussion of *Boyde* in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & n. 4].)

#### b. *People v. Cortez*

*People v. Cortez* (2016) 63 Cal.4th 101 is also instructive, albeit primarily in how it should be distinguished from this case. The *Cortez* appellant interpreted remarks of the prosecutor as an attempt to define *beyond a reasonable doubt* to mean that any belief in guilt based on the evidence, not imagination, is sufficient. While this Court was divided on whether there was a reasonable likelihood that jurors understood or applied the remarks in that manner, all of its members agreed that the overall context either meant that (as the majority held) no reasonable juror could have taken them as the defendant contended or (per the minority) any error was harmless.

The Court found that the prosecutor, replying to defense counsel's inaccurate version of its burden, gave an incomplete statement of the principles involved, having stopped after an interruption by a defense objection. In context, his dropping the subject at that point and moving on, with the inartful statement, "That's proof beyond a reasonable doubt" could only be understood

as a further reference to complete instructions to which he had already referred the jurors, not as meaning that he had just defined *reasonable doubt*. (*Id.* at pp. 131, 133.)

Here there were two similarities to *Cortez*, but the differences are what are significant. As in *Cortez*, appellant's counsel did read the definition of *reasonable doub*t, and he referred to "an abiding conviction" at several points. (See RT 11: 2417–2421; cf. *People v. Cortez*, *supra*, 63 Cal.4th at p. 133.) And the trial court gave the usual instructions about arguments of counsel and reasonable doubt. (RT 11: 2332–2333, 2345–2346 [CALJIC Nos. 100, 290]; cf. *People v. Cortez*, *supra*, 63 Cal.4th at p. 132.)

But other factors prevented any cure of the prosecutor's explanation that there was nothing in the reasonable-doubt standard to prevent them from convicting a defendant whom they would still believe to be guilty a week later. In *Cortez*, defense counsel had provided his own, highly overstated version of the prosecutor's burden. Responding, the prosecutor began by "directing the jury's attention to the court's reasonable doubt instruction" before making the statements at issue. (*Id.* at p. 132.) Neither prosecutor did so here. Second, appellant's attorney conceded, in a somewhat startling error, "It doesn't mean that the People are held to a burden of proving Mr. Potts guilty to a moral certainty, to any kind of certainty."[2] (RT 11: 2420.) Third, he failed to object

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[2]Cf. *Jackson v. Virginia* (1979) 443 U.S. 307, 315 ("the factfinder . . . must reach a subjective state of near certitude of the guilt of the accused"); *In re Winship* (1970) 397 U.S. 358, 364 ("utmost certainty" is required); *People v. Hall* (1964) 62 Cal.2d 104, 112 ("the trier of fact must be reasonably persuaded to a near certainty").

Counsel also volunteered that the television-drama concept that circumstantial evidence cannot procure a conviction is mistaken, "because circumstantial evidence is every bit as good as direct evidence. . . . The only difference is . . . you know a fact and from that fact you draw a reasonable inference." (RT 11: 2423.) Neither there nor anywhere else did he refer to the more critical difference: that such evidence can only prove guilt beyond a

(continued...)

to the prosecutor's statement, so, in contrast to the *Cortez* situation (see 63 Cal.4th at p. 130), nothing alerted the jurors to a need to see if the prosecutor's remarks deviated from the instruction, as opposed to properly explaining it.[3] Fourth, in *Cortez* the court twice responded to objections that one or the other side was explaining *reasonable doubt* incorrectly by saying that the jurors could compare the statements to the court's verbal and written instructions. (63 Cal.4th at p. 132.) Here there were no contemporaneous reminders by the court that jurors should use the instructions they were given to resolve any differences between what the attorneys said about the law.

In sum, the prosecutor simply made her point about not interpreting the concept of reasonable doubt as one that would interfere with convicting a defendant whom jurors believed was guilty. The silence of the court and defense counsel left the jury to believe that they could accept her guidance on what the concept meant and how it should be applied. There was more than a reasonable likelihood that they did so.

**B. This Court Should Reach the Merits**

**1. In General**

*People v. Centeno*, *supra*, is also instructive on the question of the effect of defense counsel's failure to object to the argument. In a word, in that case, the right to appellate review was forfeited, but the omission amounted to ineffective assistance of counsel.

*Centeno* held that the error in prosecutorial argument in that case would have been curable by judicial admonition, and therefore the right to appellate

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[2](...continued)
reasonable doubt if it rules out other hypotheses as unreasonable. (See *People v. Sandoval* (2015) 62 Cal.4th 394, 421.)

Counsel provided a context that validated the prosecutor's forthcoming remarks far more than he contradicted them.

[3]As to whether the failure to object should prevent this Court from reaching the merits, see the next argument, III.B.

review of the error directly was forfeited. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) Appellant has propounded three reasons why exceptions to the forfeiture doctrine should apply (futility, pure question of law, fundamental constitutional right). He also argued two bases for the Court's discretionary suspension of the judicially-created forfeiture doctrine (vindication of the state's interest in a fair and reliable death judgment, as well as appellant's; inappropriateness of upholding tainted death judgment because one of the four people who should have prevented the error was appellant's counsel). Respondent addressed only one of those five contentions. (See AOB 104–107, RB 47–48, ARB 97–100.) The opinion in *Centeno* gives no indication that any of these reasons for reaching the merits were urged upon the Court in that case. Appellant urges the Court to consider them now, because of the gravity of permitting conviction of capital offenses upon a weakened standard of proof.

That being said, however, *Centeno's* analysis supports reversal here even under the prejudice standard of *Strickland v. Washington* (1984) 466 U.S. 668.

***2. Sixth Amendment Deprivation**

Appellant's attorney's omission amounted to ineffective assistance of counsel. (U.S. Const., 6th Amend.) This Court recently addressed a similar omission in *People v. Centeno*, *supra*.

In *Centeno*, this Court found inadequate performance because argument diminishing the burden of proof could be of no conceivable value to the defense, and it came in rebuttal, when the defense had no chance to respond other than by objecting. (*People v. Centeno*, *supra*, 60 Cal.4th at pp. 675–676.) Counsel's "only hope of correcting the misimpression was through a timely objection and admonition from the court. Under these circumstances, we can conceive of no reasonable tactical purpose for defense counsel's omission." (*Id.* at p. 676.) The same analysis applies here.

**C. Regardless of the Standard Chosen, the Error Requires Reversal**

Two points should be noted preliminarily. First, if the Court treats the matter directly, rather than via ineffective assistance of counsel, creating a reasonable likelihood of a juror operating under a lower burden of proof is structural error, requiring no prejudice analysis. (See AOB 107–109, ARB 90–91 [arguing that the unobjected-to elaboration on CALJIC No. 2.90 was equivalent to an infirm instruction on the standard of proof] and cases cited.) Second, in the next argument appellant seeks relief because of the prosecutor's suggestion that the jury would need to explain an acquittal to her, a suggestion intimately bound up with her imprecation not to get hung up on reasonable doubt and to convict if they believed he was guilty and expected to so believe the next week. If it is necessary to reach the question of prejudice, the two sub-claims should not be considered in isolation. Nevertheless, it is useful at this point to look at case law on the effect of the particular error briefed here.

In *Centeno*, prosecutorial comment reducing the standard of proof was prejudicial under the constitutional standard of *Strickland v. Washington*, *supra*, 466 U.S. 668, despite the usual presumption "that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 676, quoting *People v. Osband* (1996) 13 Cal.4th 622, 717) But the prosecutor's remarks did not directly contradict the court's instructions and were "the last word on the subject." (*Id.* at p. 677; see also *Baer v. Neal* (7th Cir. 2018) 879 F.3d 769 [Sixth Amendment violation in failure to object to prosecutorial error of law where no later events clarified that prosecutor was wrong].) "Given the closeness of the case and the lack of any corrective action, there is a reasonable probability that the prosecutor's argument caused one or more jurors to convict defendant based on a lesser standard than proof beyond a reasonable doubt." (*Ibid*.)

Each of those factors was present here. The court read the instructions

prior to argument. (See (RT 11: 2345–2346 [reading of CALJIC No. 2.90].) In her rebuttal argument the prosecutor told the jurors that an "abiding conviction," which the instructions equated to the state induced by proof beyond a reasonable doubt, meant merely a belief in guilt, as long as it was one which would last a week. (RT 11: 2448.) This comment explained the court's instructions, rather than contradicting them. This explanation was the last word on the subject. And the case was so weak on whether there was a robbery (as opposed to theft as an afterthought), and thus on the degree of the homicides, that appellant submits that the prosecution case was insufficient (Argument I in the prior briefs). The prosecution case was far from compelling even on whether appellant was the perpetrator. (See, e.g., AOB 90–94, ARB 186–192.)

The opinion in *People v. Centeno* contrasted its facts with those in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, where the prosecutor offered an example of proving something circumstantially that lowered its burden. The error was harmless where "[d]efense counsel had argued vigorously against the prosecutor's analogy, and the trial court reread the reasonable doubt instruction to "'clarify'" the issue. . . . Additionally, evidence of the defendant's guilt was strong." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 668.) Again, none of these bases for finding the error cured or harmless was present here.

Rather, the situation is remarkably akin to that in *People v. Cowan* (2017) 8 Cal.App.5th 1152, where the court reversed because of a statement that the presumption of innocence ended after the jury heard the evidence, as well as for a forfeited claim comparing the choice of a verdict to ordinary daily decision-making. There, too,

> [t]he trial court read to the jury the proper instruction concerning reasonable doubt, among other numerous instructions. The court told the jury that its instructions prevail if there are conflicts between its instructions and counsel's arguments. But this was before the prosecutor argued to the jury her misguided version

> of reasonable doubt. The court's earlier instruction was insufficient to overcome the prejudice the prosecutor's grossly improper argument brought to the minds of the jurors. The prosecutor's definition was the last explanation of reasonable doubt the jury heard.

(*Id.* at p. 1154.)

Appellant has acknowledged that there was no objection here but argued that he should not pay for a prosecutor's mistake, her colleague's failure to intervene as an officer of the court, and the trial court's own failure to say something, along with his attorney's inattention. In *Cowan* the court similarly noted, "[a]t that moment the trial judge would have been well advised to inform the jurors that the prosecutor had misstated the law and to again read to the jurors the reasonable doubt instruction." (*Ibid*.)

Moreover, as explained next, the error here did not stand alone.

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## *IIIA. THE PROSECUTOR VIOLATED APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS BY SUGGESTING THAT JURORS WOULD BE ACCOUNTABLE TO THE PROSECUTORS

### A. Appellant Seeks Consideration of the Error on Direct Appeal

As noted in the previous argument, Deputy District Attorney Helart stated,

> But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but— Don't do that." If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you.

(RT 11: 2448.) In his opening brief, appellant stated that he was postponing—for a possible future habeas corpus petition—a complaint that, in addition to misdefining reasonable doubt (per Argument III, above), the remark impermissibly suggested that jurors would be accountable to the prosecution after they reached their verdict. (AOB 103–104.)

Upon reflection, appellant seeks review in this appeal. The error was integrally tied to the other prosecutorial error. In one sentence Ms. Helart suggested that the jurors would be answering to the prosecutors for the verdicts, while also urging them not to come back and say "We believed he was guilty, but —," and in the next she redefined *reasonable doubt* so that they would not have to come back and say that. (See Argument III, above.) Other than the futility exception to the forfeiture doctrine,[4] all the reasons for reaching the lowering-the-standard error on appeal despite the absence of objection apply here. (See AOB 104–107, citing the exceptions for a deprivation of fundamental constitutional rights and for a question that presents a pure question of law on undisputed facts, along with two reasons for this Court to exercise its discretion to reach the issue.) Moreover, for all the

[4]Presumably a strong statement by the trial court that the jurors would not have to explain their decisions to anyone would have obviated the error.

reasons stated in the previous argument, with regard to lowering the standard of proof, failure to object to the idea of accountability to prosecutors fell below professional standards for constitutionally effective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. 668.)

### B. The Statement Was Serious Error and a Deprivation of Due Process

The issue rarely arises, but in *Sheppard v. State* (Miss. 2000) 777 So.2d 659, "the prosecutor stated that if the jury voted to acquit, he wanted them to call him and explain their rationale of finding the defense witnesses credible, so he could explain it to the victim's family." (*Id.* at p. 661.) The Mississippi Supreme Court noted that the remark

> had nothing to do with the evidence presented during the trial, nor with any reasonable conclusions or inferences to be drawn from the evidence presented in the case. The purpose of the remarks was to prejudice the defense, as well as to give the jurors the impression that if they did not convict, the prosecutor was going to subject them to personal ridicule, embarrassment, and questioning.

(*Id.* at pp. 661–662.) Because the natural and probable effect of the statement was "the creation in the minds of the jurors of an extra-legal burden of accountability to the State prejudicial to the rights of the accused," the court overruled a lower-court holding that the error was harmless, and it reversed. (*Id.* at p. 662.)

Although here Ms. Helart did not invoke the victims, her remarks were actually more potent than those of the *Sheppard* prosecutor, for she was not leaving it to the jurors to respond or not to a request to telephone her. The predictable effect of "Don't ever come back and tell a prosecutor, we believed he was guilty, but —" was to create the impression that there likely would be a post-deliberations conversation with the person standing in front of them, not that it would be up to them to initiate contact later.

Regarding quite similar arguments, the North Carolina Supreme Court

has held that argument suggesting accountability to a victim, witnesses, or the community is improper. (*State v. Boyd* (N.C. 1984) 319 S.E.2d 189, 197.)

*Trillo v. Biter* (9th Cir. 2014) 769 F.3d 995, a habeas corpus action, also involved a comment extremely similar to the one at issue here. The prosecutor in a California proceeding had

> suggested that each of the members of the jury would explain to his or her neighbor "gosh, we got the instructions about reasonable doubt, and we walked him. Your neighbor's going to be, you did what? And you're going to be very uncomfortable.

(*Id.* at p. 1000.) The court found this to be constitutional error.

> [C]learly established federal law from the Supreme Court bars the government in a criminal trial from pressuring the jury to convict the defendant. *United States v. Young*, 470 U.S. 1, 18, . . . (1985); [additional citation]. As we have recognized, "[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." [Citation.]

(*Id*. at p. 1001.) In *United States v. Young*, *supra*, the High Court held it improper even "to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice." (470 U.S. at p. 18.) The Court cited A.B.A. Standards for Criminal Justice 3-5.8(c) (now 3-6.8(c)) which provides, "The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty."[5]

Suggesting that jurors would have to explain a decision to acquit to the prosecutors was no different from suggesting they would have to explain it to

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[5]See also these authorities (also cited at AOB 103–104, fn. 70) concerning an analogous issue: *People v. Freeman* (1994) 8 Cal.4th 450, 517 (even addressing jurors by name during argument is to "be condemned"); Annotation, Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument (1957) 55 A.L.R.2d 1198, § 2[a] (reason for rule: attempts to establish extra rapport with jurors can introduce extraneous considerations into deliberations).

their neighbors. Each applied "pressure" to the jurors; each was calculated to divert the jury from its duty to decide the case based on the evidence. And each "involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

### C. The Error Was Prejudicial Under Any Standard, Especially in Conjunction With Diluting the Standard of Proof (Argument III)

As in the previous claim, where the burden of proving prejudice or harmlessness lies, as well as the level of that burden, depends on whether the Court reaches the merits directly or via the Sixth Amendment. Appellant maintains that respondent should have to show harmlessness beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18), but that even if he must show a reasonable probability of a different outcome absent the error (*Strickland v. Washington*, *supra*), reversal is required.

As noted previously, the Mississippi Supreme Court overruled a Court of Appeals holding of harmlessness in error of the type involved here. It did so because the likely effect of the remarks was to taint the deliberations with a consideration other than the evidence and the law. (*Sheppard v. State*, *supra*, 777 So. 2d at p. 662.) On the other hand, in *Trillo v. Biter*, *supra*, 769 F.3d 995, the prosecutorial error's impact did not reach a federal habeas petitioner's high burden of showing prejudice in an attack on a state judgment. This was because the evidence of guilt was overwhelming and the remark was an isolated one in a long summation. (*Id.* at pp. 1001–1002.) In addition, in *Trillo* defense counsel had objected to the comment as improper when made. " . . . [T]he judge 'noted' the objection [and] . . . told [the prosecutor] to 'relate to the evidence,'" although he "did not specifically rule on the objection or admonish the prosecutor." (*Id.* at p. 1000.) Here nothing happened to call into question the validity of the statement; the prosecution's case was extremely weak on the degree of the homicides and less-than-compelling on identity; and

the statement at issue was not made in isolation, but was part of a similarly reprehensible explanation of reasonable doubt and a suggestion not to let it get in the way.

Appellant submits that the *Trillo* court was correct in naming the tactic a federal due-process violation (769 F.3d at p. 1001), and that the *Sheppard* court was correct in implicitly treating it as one. Just as with the prosecutor in *Sheppard*, her enthusiasm tainted the jury's deliberations with a powerful outside consideration that should not have been introduced into their psyches. Given the absence of anything in the proceedings that would have neutralized the impact of what she said, the weaknesses in the prosecution case on identity (see AOB 90–94, ARB 186–192), and extremely weak evidence tending to show that there was premeditation or robbery-murder (see, e.g., AOB 89–90), this error alone would be prejudicial under any standard.

Moreover, as noted previously, it should not be considered in isolation. In the remarks quoted above (p. 19), Ms. Helart seamlessly integrated the concept that the jurors should not let the reasonable-doubt standard get in the way of convicting a man whom they believed was guilty with the idea that they would have to answer to the prosecutors if they did. Even if these were only state-law errors or had to be considered under the ineffective-assistance-of-counsel rubric, there would be "a reasonable chance, more than an abstract possibility," that one or more jurors might have voted differently. (*Richardson v. Superior Court* (2008) 43Cal.4th 1040, 1050 [noting explanations of both the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836, and that of *Strickland v. Washington*, *supra*, 466 U.S. 668 ]) In any event, respondent cannot show that the error was not one which "might have contributed to" jurors voting the way they did (*id.* at p. 23), one "which possibly influenced the jury adversely . . ." (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Regardless of her intentions, Ms. Helart created a situation where the judgment cannot stand.

## V. RECENT AUTHORITY REJECTING THE CONTENTION THAT CALJIC 2.15 INVITES CONVICTION OF ROBBERY (AND THUS FIRST-DEGREE FELONY MURDER) ON INSUFFICIENT EVIDENCE RESTS ON ERRONEOUS PREMISES[6]

The trial court told appellant's jury that it could convict him of robbery if it found he was in conscious possession of recently stolen property and there was slight corroboration of the crime.[7] The issue has been extensively briefed in appellant's and respondent's prior briefings, with important points made that will not be reiterated here. However, this Court has recently reaffirmed prior holdings that instructing on robbery in the terms of CALJIC No. 2.15 does not affect the burden of proof, nor offer an irrational permissive inference. (*People v. Grimes* (2016) 1 Cal.5th 698; *People v. Rogers* (2013) 57 Cal.4th 296.) Both rely heavily on a prior case, *People v. Parson* (2008) 44 Cal.4th 332, which neither party cited previously. Appellant respectfully submits that these holdings depend on a strained interpretation of the instruction—one that jurors would never adopt—and a serious misreading of an important 1962 precedent.

### A. The Instruction Explained How to *Convict* of Robbery; It Did Not Just Make the Obvious and Superfluous Point That Possession Was Evidence That Could Tend to Show Guilt

*People v. Rogers*, *supra*, 57 Cal.4th 296, summarily rejected a contention that the instruction lowers the prosecution's burden by citing several prior authorities so holding, including *People v. Parson*, *supra*, 44

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[6]See AOB 119, RB 53, and ARB 110.

[7]"If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of robbery and grand theft. Before guilt may be inferred[,] there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt."

A second paragraph gave many examples of what the slight corroboration could be. (RT 11: 2338–2339.)

Cal.4th 332. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 336.) *Parson* asserted, "there is nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt," citing *People v. Prieto* (2003) 30 Cal.4th 226, 248. (*People v. Parson*, *supra*, 44 Cal.4th at pp. 355–356.) Appellant addressed *Prieto* on this point previously. (ARB 113–114.)

Appellant has, respectfully, always found the statement puzzling: how can giving the jury a sufficient basis for finding guilt not definitively, if indirectly, address the prosecution's burden?

On rereading the statement, two potential answers appear. One is that *burden of proof* is being understood in the sense in which it is sometimes contrasted to the standard of proof. Thus—while a contrary argument can be made—it is arguable that the instruction does not shift the burden from the prosecution to the defendant. But appellant's complaint relates to the standard of proof, because, as he has argued previously,[8] possession and slight corroboration can be present in many ways without meeting the reasonable-doubt standard. Stating effectively that guilt may be inferred whenever those two facts are shown eviscerates the standard.

The other possibility is that the *Prieto* court was reading the word *inference* in the instruction in the sense of recognizing a fact's tendency to prove another fact, rather than treating it as sufficient proof. Thus guidance on how guilt may be inferred from a certain kind of evidence would not be equivalent to telling the jury what is sufficient to permit it to convict.[9] The Court in *Parson* seemed to interpret the word in this way:

Moreover, the instruction did not create a permissive

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[8]AOB 122–126, ARB 111–112.

[9]This reading would not overcome appellant's objection that the instruction is unfairly argumentative, under this Court's precedents concerning proper and argumentative pinpoint instructions. (See ARB 110, fn. 1.)

> presumption that violated due process, because "'reason and common sense'" justified the suggested conclusion that defendant's conscious possession and use of recently stolen property *tended to show his guilt* of robbery and burglary.

(*People v. Parson*, *supra*, 44 Cal.4th at p. 356, emphasis added.) A similar interpretation of *infer* in this context appears in *People v. Moore* (2011) 51 Cal.4th 1104, 1131 (quoted at ARB 115).

While the word is sometimes used in this sense in everyday conversation, it is not reasonable to assume that appellant's jury understood it in that manner. In fact, the first definition of *infer* in the Merriam-Webster Dictionary is to "derive as a conclusion from facts or premises," and none of the others either fit the context of CALJIC No. 2.15 or is equivalent to *tend to show*. (Merriam-Webster Dictionary (online edition) <https://www.merriam-webster.com/dictionary/infer?utm_campaign=sd&utm_medium=serp&utm_source=jsonld>, viewed October 30, 2018.)

Moreover, as appellant has argued previously,[10] the instruction would be nonsensical if it were using *infer* only to mean "find that those facts tend to show" guilt. There would be no reason to prohibit the jury from using possession of stolen property as evidence tending to show commission of a theft offense without further corroboration. It does, by itself, *tend* to show that. It just doesn't prove it.

### B. The Argument That the Inference of Guilt Is Rational Depends on a Distortion of Precedent on the Probative Value of Possession

*People v. Grimes*, *supra*, 1 Cal.5th 698, rejected a contention that applying CALJIC No. 2.15 to a robbery-murder special circumstance permitted finding guilt without finding each element of robbery proven and that it unconstitutionally lightened the state's burden. In doing so, it primarily relied on precedents like those discussed above and in the previous briefing in this

[10]ARB 116.

case. (*Id.* at p. 730.) However, it also distinguished cases holding unconstitutional an instruction sometimes used in federal conspiracy prosecutions, one that permitted one element of that offense to be proved by "slight evidence." (*Id.* at p. 731.) This Court explained,

> We have recognized that "[p]ossession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People v. McFarland* (1962) 58 Cal.2d 748, 754.)

(*Ibid.*) *People v. Rogers*, *supra*, 57 Cal.4th 296, also relied on *McFarland*, explaining,

> CALJIC No. 2.15 is based on the long-standing rule allowing a jury to infer guilt of a theft-related crime from the fact that a defendant is found in possession of recently stolen property when such evidence is accompanied by slight corroboration of other inculpatory circumstances tending to show guilt. (See *People v. McFarland* (1962) 58 Cal.2d 748, 754–758.

(*People v. Rogers*, *supra*, 57 Cal.4th at p. 335.)

*McFarland* did, indeed, have an extensive discussion of proof of certain theft offenses, although under narrower circumstances. More significantly, it involved only theft crimes that did not include the additional elements required to prove robbery. Thus it concluded,

> The rule may be stated as follows: Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence. As shown by the California cases cited above, this rule is applicable *whether the crime charged is theft, burglary, or knowingly receiving stolen property*. (See also 9 Wigmore on Evidence (3d ed. 1940) § 2513, pp. 422–423.)

(58 Cal.2d at p. 755, emphasis added.) Thus the case is not authority for a

linchpin of the *Grimes* rationale about possession evidence being "so incriminating" on robbery that it takes only slight corroboration to prove that crime beyond a reasonable doubt. Nor does it support the *Rogers* characterization of a long-standing rule relating to *any* theft-related offense. It provides no support for an attempt to avoid the fact that CALJIC No. 2.15 permits conviction of robbery under circumstances where there might be no evidence whatsoever relating to critical elements of that offense.

Here, for example, there were two scenarios involving simple theft that reasonable jurors could have found consistent with the evidence. Appellant pawned only two items of jewelry, and there was no evidence that he possessed or disposed of any of the other some 200 items stolen (despite a consensual search about 30 hours after the homicides). (See RT 5: 1309–1310; 10: 2123–2125.) Thus he may have taken them on a prior occasion, just as he had earlier stolen one ring from Viola Bettencourt's collection, perhaps hoping neither loss would be noticed. Indeed, defense counsel argued that possibility to the jury. (RT 11: 2429–2433.) It would take more than slight corroboration to prove beyond a reasonable doubt that the pawned pendant and ring were taken by force or fear. (The timing of the pawning—the day after the homicides—might have convinced some jurors, but it cannot be known that it would have inevitably convinced all, if they were not given a shortcut around this element of the crime.)

Similarly, and more significantly, the instruction permitted jurors who believed that appellant killed the Jenkses and stole the jewelry on that occasion to avoid the element of an intent to steal having arisen by the time of the use of force on the victims. As pointed out previously, there were various forms of "slight corroboration" of the robbery charge that had nothing to do with disproving the possibility of after-acquired intent. (See AOB 125, 127.)

### C. The Instruction Could Only Work as This Court Has Suggested If, Like the Comparable CALCRIM Instruction, It Clarified That Proof Beyond a Reasonable Doubt Is Still Required

*People v. Rogers*, *supra*, 57 Cal.4th 296, reiterated this Court's understanding that CALJIC No. 2.15

> is a permissive, cautionary instruction "generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.]" [Citation.]

(*Id.* at p. 335.) Appellant respectfully submits otherwise, for the reasons set forth in the prior briefing. (See especially ARB 110 & fn. 1; AOB 126, fn. 1; see also AOB 127–129, describing the differences between the truly cautionary instruction given in *McFarland* and CALJIC No. 2.15's reinterpretation of the rule, as well as between the CALJIC and CALCRIM instructions.) Basically, a truly cautionary instruction would simply state that conscious possession of recently stolen property does not in itself prove the relevant crime: although it may be considered as evidence tending to show guilt, each element of the offense must still be proved beyond a reasonable doubt. Such an instruction would not go on to give an alternate method for finding guilt proven.

### D. Persuasive Federal Authority Shows That the Error Was Constitutional

This Court holds that it is error to apply CALJIC No. 2.15 to proof of murder. In doing so, it apparently recognizes that—among the crimes in which a taking of property may have been involved—a line must be drawn somewhere, beyond which evidence of possession cannot be assumed to go virtually all the way towards excluding reasonable doubts on every single element. The instruction must not be worded to apply to a charge of murder, even if there was a related robbery or theft charge. (*People v. Rogers*, *supra*, 57 Cal.4th 296, 335, and cases cited.) However, the court has held that going beyond that line is only state-law error. (*Id.* at p. 336 and cases cited.)

The United States Court of Appeal for the Ninth Circuit recently held otherwise. It ruled, in habeas corpus review of a murder conviction upheld by the California Court of Appeal, that the error is a violation of the Due Process Clause of the Fourteenth Amendment. This is because it involves a permissive inference in which the presumed fact is not more likely than not to flow from the proved one. The effect of the error, the court held, therefore should have been analyzed under the *Chapman* standard. The California court's contrary holding was an unreasonable application of federal law under AEDPA. (*Hall v. Haws* (9th Cir. 2017) 861 F.3d 977, 990–991, 992.) After conducting a harmless error review under the appropriate standard, the court affirmed a lower court's grant of a writ of habeas corpus. (*Id.* at pp. 993–994.)

The *Chapman* standard for respondent's proving harmlessness applies here, for the same reasons.

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## VI. THE JURY WAS WRONGLY INSTRUCTED THAT INTENT ELEMENT OF ROBBERY NEED ONLY HAVE ARISEN BY THE TIME OF THE TAKING, (VS. WHEN FORCE WAS APPLIED)[11]

A wrongful taking is not a robbery if the intent to steal arose only after the homicide or other use of force that permitted the theft. CALJIC No. 9.40.2, however, states that robbery requires only that the wrongful intent exist at the time of the taking itself, which often will be after the assaultive action. Any juror relying on that instruction could have, therefore, not only voted to convict appellant of robbery, but have found first-degree murder on a robbery-murder theory, as well as the robbery-murder special circumstance.

A recent opinion of this Court validates appellant's reading of the instruction: "CALJIC No. 9.40.2 specifically advised the jury that in order to convict [defendant] of robbery, it must find evidence that the intent to steal was formed prior to the taking of property from [the victim]." (*People v. Jackson* (2016) 1 Cal.5th 269, 344.)

*Jackson's* reasoning about the issue before it is similar to that relied on by respondent, although the opinion did not consider the contention raised here. Respondent contends that, because of other instructions, "the jury could not convict appellant unless they found that the intentional taking of the property 'was accomplished either by force or fear . . .'" (RB 59.) The question in *Jackson* was whether there was error in refusing to specifically instruct that the special circumstance of murder during the commission of a robbery required an intention to rob to have arisen by the time of the infliction of the fatal wound. (*People v. Jackson*, *supra*, 1 Cal.5th at p. 344.) The contention was rejected on the basis of prior holdings that the temporal element of the robbery-murder special circumstance was adequately expressed when a jury was given the CALJIC instructions on the crime of robbery, first-degree felony

[11]See AOB 137, RB 57, and ARB 125.

murder in the commission of a robbery, and the robbery-murder special circumstance, which required the murder to have been carried out to advance the commission of the robbery. (*Ibid.*) There was no discussion of the impact of CALJIC No. 9.40.2's statement of the wrong rule, an issue apparently not brought up by the defendant.

This Court should revisit the issue because neither *Jackson* nor the cases on which it relies deal with the fact that the instruction offers an invalid basis for conviction of robbery, a basis jurors were likely to have relied on for the reasons expressed in appellant's prior briefing. and with it robbery as a basis for first-degree felony murder and the robbery-murder special circumstance. There is no way of knowing whether appellant was convicted by one or more jurors who were not persuaded that he took items of Shirley Jenks's jewelry opportunistically, after flying into a murderous rage (as the state of the crime scene suggested) for other reasons.

Appellant explained in his reply brief why no combination of instructions could cure the error here. Basically, "jurors could not reasonably have been expected to discard the rule given by the court, in favor of their own penetrating analysis of other instructions which arguably implied a different rule." (ARB 125–126; see also ARB 127–129 for an analysis of cases cited in *Jackson*.)

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## XII. THE TRIAL COURT IMPROPERLY EXCUSED JURORS FOR BEING DEATH-SCRUPLED

### *D. Improper Discharge of Prospective Jurors Based on Their Possible Discomfort with the Death Penalty Violated Appellant's Eighth Amendment Right to Reliable Guilt-Phase Procedures, Requiring Reversal of His Conviction

As discussed in Argument XII of appellant's opening and reply briefs, the trial court improperly discharged three prospective jurors for being death-scrupled, when voir dire was required to acquire sufficient information to determine whether discharge was appropriate, and four others after voir dire, even though the state had not carried its burden of showing that these jurors were properly subject to a for-cause challenge. Under established law, these errors require reversal of the death sentence.

The purpose of this additional argument is to explain that the errors also require reversal of the convictions themselves. What appears to be settled law to the contrary is based on principles that predate the High Court's determination that the Eighth Amendment is relevant to capital trials and, specifically, that it requires heightened reliability in every aspect of such trials. That heightened reliability is absent because death-qualified jurors are more prone to convict.

#### 1. Limits to Precedents Based on Pre-Eighth-Amendment Jurisprudence

Appellant acknowledges that this Court's precedent holds that improper discharge of jurors for opposition to the death penalty requires reversal of the death penalty alone. (E.g., *People v. Stewart* (2004) 33 Ca1.4th 425, 455; *People v. Heard* (2003) 31 Ca1.4th 946, 966.) The limitation of *Witherspoon/Witt* relief to the penalty phase in such cases stems directly from a series of cases this Court decided shortly after the United States Supreme Court decided *Witherspoon v. Illinois* (1968) 391 U.S. 510. *(*See, e.g., *People v. Vaughn* (1969) 71 Ca1.2d 406, 422; *People v. Osuna* (1969) 70 Ca1.2d

759,768–769.)

At that time these cases these cases were on firm footing. In *Witherspoon* itself, the United States Supreme Court held that while the improper discharge of prospective jurors based on their opposition to the death penalty required reversal of any death sentence imposed, it did not require reversal of the conviction. (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 517–518.) Thus in the only *post-Witherspoon* cases in which the Supreme Court found error in discharging jurors for their death-penalty views, defendants only sought—and only received—penalty reversals. (See, e.g., *Gray v. Mississippi* (1987) 481 U.S. 648; *Adams v. Texas*, *supra*, 448 U.S. 38; *Davis v. Georgia* (1976) 429 U.S. 122; compare *Gray v. Mississippi*, Brief for Petitioner, 1986 WL 727623 at **1–23; *Adams v. Texas*, Brief for Petitioner, 1980 WL 339980 at **1–26.)

Significantly, the unsuccessful claim in *Witherspoon* was based on the Sixth Amendment right to a jury trial and the Equal Protection Clause, but not the Eighth Amendment. (See *Witherspoon v. Illinois,* Brief for Petitioner, 1968 WL 112521 at **39–40.) This is no surprise: the case preceded the development of the Supreme Court's capital Eighth Amendment jurisprudence by four years. (See *Furman v. Georgia* (1972) 408 U.S. 238.) In *Furman,* the Court first held that the imposition of death under several state death-penalty schemes constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

The pre-Eighth-Amendment analysis of *Witherspoon's* holding on the validity of guilty verdicts cannot be considered controlling. The shift to an Eighth-Amendment paradigm transformed claims that were previously unavailable under the more limited doctrinal framework under which *Witherspoon* was decided into meritorious ones. Thus *Furman* struck down statutory schemes that were upheld the year before—without considering the Eighth Amendment, in *McGautha v. California* (1971) 402 U.S. 183. (See

*Furman v. Georgia, supra,* 408 U.S. 238, 310 n.l2 [Stewart, J., concurring]; see also *id.* at pp. 329–330 and n.37 [Marshall, J., concurring]; *id.* at p. 400 [Burger, J., concurring].) Similarly, in applying an Eighth Amendment analysis in the years after *Furman,* the High Court has found some procedures unconstitutional in capital cases even when those procedures did not violate the constitutional provisions that protect all criminal defendants. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 636–638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though due process may not]; see also *Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between due process and the "more particular guarantees of . . . reliability based on the Eighth Amendment"].)

In summary, *Witherspoon* decided that improper discharge of prospective jurors based solely on their opposition to the death penalty violated neither the Equal Protection clause nor the Sixth Amendment. But the *Witherspoon* Court was not presented with, and did not therefore resolve, the distinct question of whether such discharge of prospective jurors violated the Eighth Amendment. In fact, neither this Court nor the United States Supreme Court has been confronted with the issue of whether Eighth-Amendment reliability constraints invalidate convictions by juries from which death-scrupled jurors have been excluded. (See *People v. Evans* (2008) 44 Ca1.4th 590, 599 [opinions are not authority for an issue not presented by the parties].)

**2. Later Holdings Requiring Heightened Reliability in Guilt Proceedings That Could Lead to a Death Judgment**

Given the current state of the law, the question then becomes whether the unlawful discharge of prospective jurors because of their opposition to the death penalty requires reversal of appellant's conviction under the Eighth Amendment. It does.

In the years after *Furman*, the United States Supreme Court repeatedly recognized that death was a unique punishment, qualitatively different from

all others. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 181–188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (197) 438 U.S. 586, 604; *Beck v. Alabama, supra,* 447 U.S. 625, 637.) Relying on this fundamental premise, the Court held that there is a corresponding Eighth Amendment need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (See, e.g., *Herrera v. Collins* (1993) 506 U.S. 390, 407 n. 5 ["To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance"]; *Beck v. Alabama, supra,* 447 U.S. 625 [guilt phase]; *Gardner v. Florida, supra,* 430 U.S. at p. 357 [penalty phase].)

The Eighth Amendment issue presented here, therefore, is whether improperly discharging jurors because of their opposition to the death penalty—when those jurors could in fact fairly consider imposing death as a sentence in the case—renders a conviction reached in the absence of such jurors less reliable. The starting point for this analysis is the Court's longstanding recognition that it is "effective group deliberation[,] . . . appl[ying] . . . the common sense of the community to the facts," which allows a jury to reach a reliable determination. (*Ballew v. Georgia* (1978) 435 U.S. 223, 232.) "The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." (*Allen v. United States* (1896) 164 U.S. 492, 501.)

### 3. Reduced Reliability of Guilt Determination Via Exclusion of Death-Scrupled, But Qualified, Jurors

Jurors, like jurists and people in general, have a wide variety of ways of looking at the world. Including in a jury those whose take on reality leaves them less likely to convict fosters the exchange of different views leading both to "effective group deliberation" and a guilt-phase verdict based on a reliable

and robust deliberation. By the same token, a process which removes jurors who are entirely eligible to serve, but who are less likely to convict, removes this view from the deliberative process, and makes any ensuing conviction less reliable. But that is what the trial court did here.

In this regard, numerous scientific studies show that a trial court's *proper* discharge of jurors under *Witherspoon/Witt* —excusing jurors who are opposed to the death penalty and who will not consider execution as a sentencing option—results in a jury more significantly prone to convict in the guilt phase. *(See, e.g.,* Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544, 551 [concluding that excluding those who would automatically vote for death and those who would automatically vote for life results in a "distinct and substantial anti-defense bias" at the guilt phase]; Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115, 119; Seltzer, *The Effect of Death Qualification on the Propensity of jurors to Convict: The Maryland Example* (1986) 29 How. LJ. 571, 604; Haney, *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622,631.) This is because this group of jurors discharged has certain basic attitudinal perspectives which make them less easy to convince of guilt. Nevertheless, courts are apparently willing to accept this impact on the jury pool because there are two important countervailing considerations: (1) trial courts are also discharging jurors who will not consider life as a sentencing option and (2) there is a strong systemic interest in having a single jury decide both guilt and penalty, and this would not be feasible absent death qualification.

But when a trial court *improperly* discharges jurors under *Witherspoon/Witt*—releasing qualified jurors where the record does not show they were unable to follow the law—there are no countervailing considerations at all. After all, the courts are not also similarly discharging prospective jurors

simply because they are in favor of the death penalty. And there is no systemic interest in permitting trial courts to improperly discharge jurors. Significantly, the social science research shows that jurors who oppose the death penalty, but are nevertheless willing to impose it, "share the pro-defendant perspective of [properly] excludable jurors." (Finch and Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Reflection*, 65 Neb. L. Rev. 21, 63 (1986) [summarizing studies].)

In sum, the trial court's improper discharge of jurors unfairly eliminated from the jury an entire group of jurors with attitudes making them less likely to convict. Removing such jurors from the case directly impacted the guilt-phase deliberative process, undercut the reliability of the guilt phase, and "led to a jury uncommonly willing to [convict]." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 521.) Because the unnecessarily unreliable guilt trial was what made appellant eligible to be sentenced to death, the guilt-phase verdicts must be reversed.

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

### *I. Appellant's Prolonged Incarceration Under Sentence of Death Constitutes Constitutionally Cruel and Unusual Punishment and Should Be Relieved by Reversal of His Death Sentence

When this matter is argued, appellant, who is 70 years old, will have been living under a sentence of death for 20 years, 3 months, and 15 days. (CT 10: 2928–2936.) He has yet to be appointed counsel for state habeas corpus proceedings. If this Court affirms the conviction and sentence, state habeas proceedings will take an undetermined additional amount of time, and—if they are unsuccessful—it is likely that federal proceedings will occupy at least another 10 years.

The psychological brutality that results from such a prolonged expectation of being executed does not comport with the "evolving standards of decency that mark the progress of a maturing society" from which the Eighth Amendment draws its meaning. (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

Some might argue that there is no prejudice because appellant remains alive and in prison and is therefore no worse off than a prisoner serving life without parole. The cruel and unusual punishment, however, does not arise merely from the period of incarceration, but from the psychological brutality that inevitably results from spending those long years expecting a premature death by execution. For those of us not in that situation, and who have seen executions halted for a dozen years, the possibility may seem abstract. It is unlikely that this is so for one who has had 20 years to contemplate being taken into a special chamber and killed, and who has seen fellow inmates

being led away to that fate.[12]

As a result, California's system results in the infliction of cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution *before* the sentence of death is ever executed. (See memorandum on denial of certiorari in *Lackey* v. *Texas* (1995) 514 U.S. 1045; *Jones v. Chappell* (C.D.Cal. 2014) 31 F.Supp. 1050, rev'd on other grounds *sub nom. Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, and the reasoning set forth therein.)

Moreover, a death-row prisoner is subject to much more severe conditions of confinement than one sentenced to life. This includes lack of programming available to other prisoners, and it frequently means a heart-breaking degree of privation from not being able to work, and thus have funds to supplement a substandard diet and buy basic health and hygienic necessities. This in itself constitutes cruel and unusual punishment for a prisoner who, like appellant, receives precious little in funds from outside. (See the part of the argument on the excessive restitution fine printed at AOB 222–227 and cited portions of the record.)

This is not to say, of course, that the state has the option of executing appellant immediately to put him out of his misery. Nor does it mean that the California system for at least attempting to ensure the fairness and reliability of its frequent judgments that citizens should die at the hands of the state should be jettisoned. Perhaps the broader implication is that those who still

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[12]Parenthetically, and ironically, this extended process—which virtually never brings "closure" to murder victims' surviving loved ones even when it ends—is hard on them as well as well, in comparison to those harmed by perpetrators who receive the finality of life sentences. (See, e.g., Armour & Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two-State Comparison* (2012) 96 Marquette L.Rev. 1; PBS News Hour, "Does the death penalty bring closure to a victim's family?" (April 25, 2017) <https://www.pbs.org/newshour/nation/death-penalty-bring-closure-victims-family>, viewed October 29, 2018.)

favor a method of punishment rejected in much of the world simply cannot get what they want, consistent with our Constitution and the values it embodies. But broader implications are not at issue here. Appellant's cruel and unusual punishment should end with the vacating of his death sentence.

## CONCLUSION

For the reasons stated above and in appellant's opening and reply briefs, the convictions on counts I through IV must be reversed, along with the death judgment; retrial on the murder counts should be permitted only on charges of second-degree murder; the purported elderly-victim enhancements must be stricken; and—should any judgment of guilt stand—the restitution fine should be reduced to $200.

DATED: October 31, 2018.

Respectfully submitted,

/s/

Michael P. Goldstein,
Attorney for Appellant

**CERTIFICATE OF COUNSEL**
**(CAL. RULES OF COURT, RULE 8.630(b)(2))**

I, Michael P. Goldstein, am the attorney appointed to represent Thomas J. Potts in this automatic appeal. I conducted a word count of this brief, using the word-processing program used to prepare the brief. On the basis of that count, I certify that this brief is 9433 words in length, excluding the tables and certificates.

Dated: October 31, 2018

/s/

_____

Michael P. Goldstein

## CERTIFICATE OF SERVICE

Re: People v. Thomas Potts No. S072161

I, MICHAEL P. GOLDSTEIN, certify that I am an active member of the California State Bar, and not a party to the within cause; that my business address is PMB 9122, 5000 MacArthur Blvd., Oakland, California 94613; and that I served a true copy of the foregoing

**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

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Thomas Potts
(Appellant)

Keith Fagundes
Office of the District Attorney,
County of Kings
1400 W. Lacey Blvd.
Hanford, CA. 93230

Superior Court,
County of Kings
1640 Kings County Dr.
Hanford, CA 93230

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In addition, I served the following through the TrueFiling system:

Sally Espinosa, Deputy Attorney General
California Appellate Project.

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

Signed on October 31, 2018, at Oakland, California.

/s/

Michael P. Goldstein,
Attorney for Thomas Potts

**STATE OF CALIFORNIA**
Supreme Court of California

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Law Office of Michael P. Goldstein
Law Firm