No. S049596
(Los Angeles Co. Sup. Ct. No. A711739)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STANLEY BRYANT, LEROY WHEELER, AND DONALD FRANKLIN SMITH

Defendants and Appellants.

**APPELLANT BRYANT'S REPLY BRIEF**

On Automatic Appeal from a Judgement of Death
Rendered in the State of California, Los Angeles County

(HONORABLE CHARLES E. HORAN, JUDGE, of the Superior Court)

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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>STANLEY BRYANT, ET AL.,<br><br>Defendants and Appellants | No. S049596<br><br>(Los Angeles Co. Superior Ct. No. A711739) |

**APPELLANT BRYANT'S REPLY BRIEF**

**INTRODUCTION**

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

Further, as specifically stated in this reply brief, *post*, appellant Bryant hereby joins in certain of the appellate arguments in the opening and reply briefs of coappellants Donald Franklin Smith and Leroy Wheeler. (Cal. Rules of Court, rule 8.200(a)(5).) However, appellant Bryant does not join in in any characterization of facts by coappellants that are adversarial to appellant Bryant's defense.

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## ARGUMENT

## I

## THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE ABANDONED ITS ROLE AS A DISINTERESTED PROSECUTOR IN THIS CASE, AS IT SUFFERED FROM A DISQUALIFYING CONFLICT OF INTEREST

Appellant Bryant argues in his opening brief that the trial court, the Honorable J.D. Smith, ultimately ruled correctly that the entire Los Angeles County District Attorney's ("LADA's") office needed to be recused in this case because of a conflict of interest so extensive that it reached from the District Attorney himself down through the ranks to the trial deputy district attorney. (AOB:81-120.)[1] Respondent argues that the trial court did not abuse its discretion when it first denied appellant Bryant's motion to recuse the LADA's office. (RB:150-152.) Respondent also argues that the Court of Appeal's reversal of the trial court's subsequent order recusing the LADA's office is not reviewable under the doctrine of law of the case. (RB:153-154.) Respondent is wrong in both respects.

### A. Independent Review Of The Recusal Issue Is Required

The issue of the applicable standard of review of a trial court's ruling on a motion to recuse a prosecuting agency due to a conflict of interest is currently pending before this Court. (*People v. Hollywood*, S147954; *People v. Haraguchi*, S148207.) For the reasons stated herein, appellant

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[1] Appellant Bryant uses the following abbreviations for the brief on appeal in this case: "AOB" for appellant Bryant's opening brief; "SAOB" and "SARB" for coappellant Smith's opening and reply briefs on appeal, respectively; "WAOB" and "WARB"for coappellant Wheeler's opening and reply briefs on appeal, respectively; and "RB" for respondent's brief.

Bryant believes this Court will find that independent review of such decisions is warranted.

The standards of review for questions of pure fact and pure law are well settled. Trial courts and juries are deemed better situated to resolve questions of fact, while appellate courts are deemed more competent to resolve questions of law. Traditionally, therefore, an appellate court reviews findings of fact under a deferential standard (substantial evidence under California law, clearly erroneous under federal law), but it reviews determinations of law under a nondeferential standard, which is independent or de novo review. (See *People v. Lawler* (1973) 9 Cal.3d 156.)

Selecting the proper standard of appellate review becomes more difficult when the trial court determination under review resolves a mixed question of law and fact. Mixed questions are those in which the "'historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" (*Ornelas v. United States* (1996) 517 U.S. 690, 696-697, *quoting Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19; see also *Townsend v. Sain* (1963) 372 U.S. 293, 309, fn. 6 ["mixed questions of fact and law . . . require the application of a legal standard to the historical-fact determinations"].)

In its 1995-1996 term, the United States Supreme Court considered the appropriate standard for review of mixed question determinations in two cases in which the mixed question went to the heart of a federal constitutional right: *Thompson v. Keohane* (1995) 516 U.S. 99 (*Thompson*) (involving the Fifth Amendment right against self-incrimination), and

*Ornelas v. United States, supra*, 517 U.S. 690 (*Ornelas*) (involving the Fourth Amendment right against unreasonable searches and seizures). The high court concluded in both cases that appellate courts should use independent, de novo review, for the mixed question determinations that implicated these constitutional rights.

In reviewing a trial court's denial of a recusal motion, this Court has generally determined whether there is substantial evidence to support the trial court's factual findings, and, based on those findings, whether the trial court abused its discretion in denying the motion. (*People v. Vasquez* (2006) 39 Cal.4th 47, 56 (*Vasquez*); *People v. Breaux* (1991) 1 Cal.4th 281, 293-294.) However, last year in *Vasquez, supra*, 39 Cal.4th at p. 59, this Court clarified that Penal Code section 1424 allows recusal whenever a conflict creates a *likelihood* of unfair treatment, thus providing trial courts with a tool to prevent potential constitutional violations from occurring. "Thus, the failure to recuse when required under section 1424 may lead to the denial of a fair trial or other unfair treatment, but does not necessarily do so." (*Ibid.*) Appellant Bryant presents not only a claim of a violation of section 1424, but also the claim that the failure to recuse deprived him of due process. Thus, the inquiry presented in the instant case presents a mixed question of law and fact: This Court must examine the historical facts, i.e., the evidence presented to the trial court in proceedings relating to the motion to recuse, and in this factual light, decide whether the trial court's denial of the motion deprived appellant Bryant of his federal and state due process rights. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

Since the determination of whether the denial of a motion to recuse the prosecutor implicates a defendant's right to fundamental fairness and

due process (*Vasquez, supra*, 39 Cal.4th at p. 59), this Court must review the issue de novo. That the trial court's determination to recuse is subject to independent review comports with this Court's usual practice for review of mixed question determinations affecting constitutional rights. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901 [due diligence determination]; *People v. Majors* (1998) 18 Cal.4th 385, 417 [juror misconduct]; *People v. Jones* (1998) 17 Cal.4th 279 [voluntariness of confession]; *People v. Alvarez* (1996) 14 Cal.4th 155 [reasonableness of search]; *People v. Mickey* (1991) 54 Cal.3d 612, 649 [validity of *Miranda* waiver]; *People v. Leyba* (1981) 29 Cal.3d 591, 597 [reasonableness of detention].)

In sum, appellate courts should independently review a trial court's determination that the prosecution's conflict deprived a defendant's constitutionally guaranteed right to a fair trial and due process of law. Without independent review, in the words of the high court in *Ornelas, supra*, 517 U.S. at page 697, "[a] policy of sweeping deference would permit, '[i]n the absence of any significant difference in the facts'" the application of the Fourteenth Amendment "'[to] tur [n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute'" due process. No less than in the case of the Fourth Amendment question considered in *Ornelas*, "[s]uch varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable. [¶] . . . Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." (*Ornelas, supra*, 517 U.S. at p. 697, 116 S.Ct. 1657.)

### B. Under Either De Novo Review Or The Abuse Of Discretion Standard, The Trial Court's Initial Denial of The Motion To Recuse The LADA's Office Constituted Prejudicial Error

At trial, appellant Bryant argued that recusal was necessary because either: (1) the LADA's office had failed to police itself regarding charges, leveled by its own employee, that members of its office were engaged in a criminal enterprise as agents of the Bryant "Family;"[2] or (2) Deputy District Attorney ("DDA") Maurizi had made misrepresentations regarding such "infiltration" in the press in order to taint the jury pool. (41CT:11898-11967.) After taking evidence, both public and in camera, from various employees of the LADA's office and including then-District Attorney Ira Reiner himself, the trial denied the motion to recuse, finding: (1) no evidence of infiltration; and (2) no support in precedent for recusal on the grounds that the district attorney made misrepresentations or failed to provide discovery. (38RT:4479-4480.)

In his opening brief, appellant Bryant contends that the trial court erroneously denied appellant Bryant's motion to recuse the LADA's office because there existed substantial evidence of a disqualifying conflict of interest in that the LADA's office failed to investigate allegations of infiltration put forth by DDA Maurizi and because it failed to provide discovery to the defense regarding the alleged infiltration. (AOB:82-93.)

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[2] Appellant Bryant refers to the "Family" or the "Bryant Organization" herein to refer to the entity whose existence was proffered by the prosecution. In so doing, appellant Bryant does so for the sake of argument and does not concede the "Family" existed in any form that is inconsistent with appellant Bryant's testimony at trial.

Respondent argues that "there is nothing in the record to support the allegation that the DA's Office was shielding its own members from prosecution, while pursing convictions against appellants." (RB:151.) Respondent further argues that the record establishes that DDA Maurizi informed the trial court that the evidence supporting her allegation of infiltration was privileged and that the trial court held seven in camera hearings to determine whether recusal was warranted. (RB:151-152.) Respondent further submits that "a review of the sealed proceedings by this Court will support the trial court's finding." (RB:152.)

Appellant Bryant cannot fully address the trial court's findings nor the historical facts upon which the findings are based because appellant Bryant has been denied access to the sealed copies of the transcripts of the seven hearings held by the trial court and at least one relevant exhibit provided to the trial court by the prosecution. (See Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record at pp. 72, 76-77, denied in relevant part on January 11, 2006.) As such, appellant Bryant has been denied meaningful appellate review and his federal constitutional rights to a fair trial, to due process of law, to present a defense, to confrontation and to the effective assistance of trial and appellate counsel. (See Argument XXXIV of AOB and *post*, incorporated by reference as if fully set forth herein.)

The record to which appellant Bryant has access shows that: (1) the trial court erred under section 1424 because there existed a conflict of interest that bore an actual likelihood of leading to unfair treatment (*People v. Eubanks* (1996) 14 Cal.4th 580, 591-592 (*Eubanks*)); and (2) the failure to recuse resulted in the denial of appellant Bryant's right to due process and a fair trial. (*Vasquez, supra*, 39 Cal.4th at pp. 58-66.)

Contrary to the trial court's finding, there was substantial evidence before it that the LADA's office suffered from a disqualifying conflict of interest. Regarding the allegations of "infiltration" made by DDA Maurizi, it had before it evidence that two employees of the LADA's office had been referred to the Attorney General's office for prosecution for leaking confidential information, presumably relating to the instant case.[3] (36RT:4330-4331.) DA Reiner testified that there was a continuing "inquiry" over the course of several years by the LADA's office regarding allegations of "infiltration" by the Bryant Family, and that a formal "investigation" into same had been opened on about October 20, 1992. (37RT:4363-4373.) Appellant Bryant again does not know the subject matter of the latter investigation, which was based upon the information from a confidential informant. (37RT:4388-4401.) It may very well be that the allegations of infiltration based on the informant were baseless.[4] Since appellant Bryant has not been provided access to the relevant record, he has been denied the ability to make a fully-informed appellate argument in this regard. Assuming arguendo the trial court was correct and that there was no evidence of "infiltration," then there existed substantial evidence that the LADA's office made the misrepresentations of alleged "infiltration" to the press in order taint the jury pool, thus denying appellant Bryant due process and his right to a fair trial.

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[3] Since appellant Bryant does not have access to the relevant records he cannot know if the LADA's employees referred for prosecution in fact leaked information relating to this case at the behest of any alleged member of the Family.

[4] One of the matters taken up in camera was whether this confidential informant was a "raving lunatic." (37RT:4402.)

However, the fact remains that the prosecution asserted that it possessed evidence of "infiltration" in its writ to the Court of Appeal, evidence which had not been disclosed to the defense. Assuming arguendo the that there had been no misrepresentations made by the prosecution regarding "infiltration," then the LADA's office had attempted to shield its employees engaged in criminal activities while simultaneously prosecuting appellant Bryant for allegedly related criminal activities (i.e., narcotics trafficking).

No matter which way you look at it, the LADA's office abandoned its role as an impartial prosecutor. There existed substantial evidence before the trial court that LADA's office suffered from a conflict – i.e., that the LADA's office was either attempting to shield its own employees from criminal prosecution while prosecuting appellant Bryant on related charges or the lead prosecutor made misrepresentations in the press to taint the jury pool against appellant Bryant – such that there was a "reasonable possibility that the LADA's office may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148; *Eubanks, supra,* 14 Cal.4th at pp. 593-594.) Further, its severity required the LADA's office to be disqualified – i.e., that the conflict was "so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid.*) The trial court's failure to recuse the partial prosecutor's office also violated appellant Bryant's state and federal constitutional right to due process and a fair trial (U.S. Const. 5th & 14th Amends.; Cal Const. art. I, §§ 7, 15) and that such violation is a structural error admitting of no harmless error analysis. (See AOB:118-120.)

### C. The Doctrine Of The Law Of The Case Does Not Bar This Court's Review Of The Propriety Of The Trial Court's Order Recusing The LADA's Office From Prosecuting This Case

Respondent asserts that the doctrine of law of the case precludes review of the Court of Appeal's reversal of the trial court's recusal of the LADA's office from prosecuting this case. (RB:153-154.) The Court of Appeal ruled that the trial court had abused its discretion in so ordering. (11CT:3091-3121.) As stated above, the issue of the proper standard of review is currently before the Court. (*People v. Hollywood*, S147954; *People v. Haraguchi*, S148207.) Should this Court find that independent review of a decision relating to recusal is appropriate, the doctrine of law of the case is inapplicable because "the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellant determinations." (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787.)

Assuming arguendo the standard of review remains unchanged, the doctrine of law of the case should not be adhered to because its application will result in an unjust decision in that there was a "manifest misapplication of existing principles resulting in substantial injustice." (*Id.* at p. 787 [citation omitted].) The Court of Appeal declined to review the issues raised in the "first" recusal motions filed, the basis of which were allegations that DDA Maurizi had wrongly tainted the jury pool by publicizing her claim that the LADA's office and other agencies had been infiltrated by the Family. (11CT:3119.) The Court of Appeal found it

> apparent that the trial court did not rely on the issues of infiltration raised in the first motions in making his order recusing the Office. Instead, the court made passing reference to its efforts during the in camera proceedings in conjunction with the first recusal motion to

> find out if the prosecutors were aware of any other problems in the case which would have an impact on his decision.

(11CT:3118, emphasis in original.)

The trial court, in order to make its findings, was required to consider the totality of the circumstances to determine whether fair treatment of the defendant was likely in the case before it. (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 847.) Contrary to the Court of Appeal's conclusion, the trial court's recusal order was supported by the totality of circumstances before it. First, the trial court's recusal of the LADA's office arose out of a motion for reconsideration based on new information, i.e., the discovery of allegations of witness tampering and additional allegations of infiltration. (1SUPPCT2:242.)[5] Second, the trial court clearly indicated that it found the new information relevant to the matter that had previously been before it, i.e., the issue of the LADA's investigation into the criminal activities of its own deputies. The trial court did not make a "passing reference" to find out if there were any "other" problems in the case. In recusing the LADA's office, the trial court clearly indicated that it thought the new evidence was relevant to the problem that had been before it previously:

> The conflict is so obvious to this court that I can't even articulate all the things that are wrong with this case. When we first talked about the in-camera hearings, we talked about what was germane to me, what I needed to know to grant or deny the recusal motion.

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[5] There are 10 Supplemental Clerk's Transcripts on Appeal, many which contain multiple volumes. "1SUPPCT2:242" refers to the Clerk's First Supplemental Transcript, volume 2, page 242. Subsequent references to the supplemental transcripts are denoted using the same method.

> Then they sat on it and they looked at it, talked about it; and then two years later again they come up with that information that does have an impact on these defendants for a fair trial. They sat on it four years.

(42RT:4816.) Any doubt that the trial court had found the new evidence relevant to the original recusal motion was erased when the case returned to the trial court after the Court of Appeal ("CCA") reversed the recusal order. While the defendants' petitions for review were pending, counsel for then-codefendant Andrew Settle asked the trial court to clarify its ruling on the recusal motion, asking whether, contrary to the CCA opinion, the court considered the motions and evidence received, including the evidence taken in the in camera hearings, in granting the defense recusal motions. (46-53RT:4935.) The trial court replied that it thought it was clear that the ruling related back to the prior recusal hearings, that it believed it stated that the denial of recusal based on what it heard in camera was a very close call, and that the decision to recuse the LADA's office was based on all the prior hearings and motions. (46-53RT:4935-4936.) Since the Court of Appeal either misread the record or erroneously declined to consider all of the evidence the trial court relied upon in making its decision, it rendered an unjust decision in that there was a "manifest misapplication of existing principles resulting in substantial injustice." (Compare *People v. Stanley, supra*, 10 Cal.4th 788-789 [since appellate court did not misread the trial record, the "unjust decision" exception to the law of the case doctrine did not apply].) Thus, the law of the case doctrine does not bar review in this Court.

### D. Upon Receiving Evidence That The LADA's Office Failed To Investigate And Disclose Evidence of Witness Tampering, The Trial Court Was Correct To Recuse The LADA's Office From Prosecuting Appellant Bryant's Case

The record as a whole contains substantial evidence that the LADA's office suffered from a conflict of interest that deprived appellant Bryant of due process. The concept of due process does not describe discrete events in a prosecution but the entire unfolding procedure. (*People v. Lyons* (1956) 47 Cal.2d 311, 319.) The seminal case regarding prosecutorial conflicts make it clear that the prosecution of a defendant by a conflicted prosecutor implicates the due process right to a trial that is "fair and impartial" at every stage of the proceeding. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 (*Greer*).) To fulfill this due process obligation, the prosecutor's exercise of discretion must be "born of objective and impartial consideration of each individual case." (*Id.* at p. 267.) As this Court stated in *Greer*, "[i]ndividual instances of unfairness, although they may not separately achieve constitutional dimension, might well cumulate and render the entire proceeding constitutionally invalid." (*Greer, supra*, 19 Cal.3d at p. 265.)

Applying these principals to this case, that point was reached by the time of the second motion to recuse because by then there was demonstrable evidence that the prosecutor's had abandoned all impartiality in this case by first attempting to manufacture evidence to make appellant Bryant a shooter and then by covering up charges of witness tampering brought by a trial deputy DA who witnessed it. DDA Abele also reported that, during the 1991 interview in question, Rosa Hernandez changed her statement and became the sole crime scene witness to corroborate James Williams

regarding the direction he walked away from the house after the homicides.[6] (48CT:13823-13824.) DDA Abele, if credited, alleged the crime of witness tampering and of manufacturing false evidence against a capital defendant. However, the LADA's office never investigated Abele's allegations. (42RT:4680.) Detective Vojtecky himself reported that the LADA's office "did their normal investigation, interviewing Abele only, failing to interview either DDA Maurizi or myself, or heaven forbid, the actual witness." (1SUPPCT3:589-590.)

Conversely, the LADA's office dismissed without inquiry or investigation Detective Vojtecky's assertion that DDA Abele made the accusation because he was being "paid off." (42RT:4680.) Detective Vojtecky was so concerned about the safety of the integrity of the instant case files that he locked them away from the prosecuting attorneys. (1SUPPCT3:591.) Yet no investigation was made into Detective Vojtecky's allegations of corruption in the LADA's office. (43-45RT:4860.) Assuming arguendo that the Director Hecht was correct in dismissing Detective Vojtecky's claim as the product of anger (42RT:4681), it remains that DDA Abele's report that Detective Vojtecky and DDA Maurizi worked together to manufacture evidence by manipulating a juvenile percipient witness to say that appellant Bryant was a shooter was never investigated by the LADA's office, and that the office allowed Detective Vojtecky, and for two years DDA Maurizi, to continue, respectively, as the chief investigator and lead prosecutor in this case.

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[6] Since Rosa Hernandez did not testify at appellant Bryant's trial, the testimony of Williams in this regard remains uncorroborated.

The trial court found that the information relating to the subject-matter of the Hernandez interview and its aftermath "does have an impact now because the court grants recusal . . ." (42RT:4819.) The trial court was not referring simply to the failure to disclose DDA Abele's notes, but rather to the broader implications of the actions and inactions of the prosecuting agency as a whole. The allegations against members of the LADA's office and its agents were serious, and perhaps criminal, and the trial court's recusal of the office was based upon the evidence supporting those allegations and not some minor discovery violation. As Director Hecht noted, the allegations involved in the Hernandez interview "call[ed] into question [the credibility of] all witnesses" in the case who had been interviewed by Detective Vojtecky. (42RT:4678.)

Indeed, Hernandez was not the only witness who, after being interviewed by Detective Vojtecky and the prosecution team, suddenly "recalled" information that tended to corroborated the testimony of James Williams and inculpate appellant Bryant: for the first time at trial, Jennifer Daniel, testified that she saw a blue Hyundai back out of the garage after the shootings, corroborating Williams' account that appellant Bryant was present and drove away in his car after the shooting.[7] (94RT:11853-11855.) Daniel testified a number of times prior to appellant Bryant's trial. (See, e.g., CT:4052-4144 and 9SUPPCT2:292-307.)[8] The first time she recalled

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[7] As noted by trial counsel, Daniel smiled at and non-verbally communicated with Detective Vojtecky while she was on the witness stand. (94RT:11900-11901.)

[8] Appellant Bryant does not have possession of all of the transcripts from the all of the proceedings relating to one-time codefendants in this case.

this "fact" was at trial. (94RT 11897-11899.) Similarly, Dr. James Ribe testified a number of times prior to appellant Bryant's trial regarding the cause of death of the victims in this case. However, it was not until meeting with the prosecutors in this case -- also in 1991, and, like Hernandez, in preparation for codefendant Settle's grand jury proceeding -- that Dr. Ribe testified that he had "discovered" that James Brown had been shot with a .45 caliber handgun, the same caliber gun Williams claimed that appellant Bryant picked up upon his arrival at the Wheeler Avenue house and which was found a month later in appellant Bryant's home. (76RT:8407-8411.)[9]

Additional evidence of the LADA's impartiality case from Deputy Attorney General ("DAG") Tricia Bigelow when she moved to recuse Detective Vojtecky because he was not acting with impartiality.[10] DDA Abele testified that he believed that DDA Maurizi had become "obsessed" with the case and that her discretionary function had been impaired in that he

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[9] Since the time of appellant Bryant's trial, Dr. Ribe's willingness to conform his testimony to the prosecution's theory has been examined in other cases. (See *People v. Salazar* (2005) 34 Cal.4th 1031, 1043-1053 [LADA's office compiled a "Ribe box" containing discovery from various cases in which Dr. Ribe changed his testimony to be more favorable to the prosecution's theory of the case]; *In re Sakarias* (2005) 35 Cal.4th 140, 148-168 [prosecution's questioning of Dr. Ribe deliberately omitted examination of key issue in order to obtain convictions of two defendants based on inconsistent prosecutorial theories] .)

[10] Contrary to respondent's assertion, DAG Bigelow did not offer to recuse Detective Vojtecky as an alternative to recusal of the LADA's office. Rather, she said that while she did not believe recusal of that office was warranted, she believed Detective Vojtecky needed to be removed from the prosecution for several reasons, one of which was his lack of impartiality. (42RT:4740.) The issue of the propriety of the trial court's later denial of appellant Bryant's motion to recuse Detective Vojtecky will be addressed in Argument II, *post*.

believed charges against several of the defendants in this case should have been dropped. (42RT:4752-4753.) He also said that he had other concerns, beyond case strategy, about "basic fairness" that were not investigated by the LADA's office. (57CT:16600.)

Further, due process cannot be served when the prosecutors have a vested interest in securing convictions in order to preserve their careers. (See *Tumey v. Ohio* (1927) 273 U.S. 510, 523 ["direct, personal, substantial pecuniary interest in reaching a conclusion against" a defendant deprives the defendant of due process]; accord, *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.) The trial court found that the "careers of some of these fine people (LADAs), in the twilight of their careers, challenged." (43-45RT:4819.) The court was referring to the various supervisors and trial deputies in the LADA's office who were involved this matter. The trial deputies that took over the prosecution of appellant Bryant's case could not help but be influenced by having to save the careers of their superiors and peers by securing a conviction against appellant Bryant in this case.

Respondent argues that "[t]he issue of whether members of the Bryant Family had 'infiltrated' the DA's Office, litigated in the first recusal motion, was sufficiently distinct from the issue of DDA Abele's notes to make the decision of the DA's Office to withhold them, until seeking further guidance from the trial court, reasonable." (RB:158.) The wrong here was not simply late disclosure of one sentence of discovery. It is about evidence that the LADA's office failed to investigate a claim brought by a DDA assigned to this case that the lead trial DDA and the lead DA investigator attempted to manufacture evidence to make appellant Bryant a shooter and to corroborate the testimony of accomplice James Williams. It is about the fact that the LADA's office failed to investigate the lead DA investigator's

claim that the DDA who made the witness tampering allegations was corrupt. It is about how they overlooked all of this to ensure that the prosecution of appellant Bryant could proceed apace, and perhaps thus save the careers of any number of senior prosecutors in the LADA's office.

This is a death penalty case. As the United States Supreme Court and this Court have said, " '[d]eath is different.' " (E.g. *Ring v. Arizona* (2002) 536 U.S. 584; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430.) "[I]n striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (Citations.)" (*Id.*, at p. 431.) Thus death penalty cases require strict scrutiny. Where a prosecutor seeks the ultimate penalty, the prosecutor should be held to the highest standards of the legal profession. In *Greer, supra,* this Court observed that a prosecutor is held to the "highest degree of integrity and impartiality" (19 Cal.3d at p. 267), and the prosecutor must be free of "personal or emotional involvement." (*Id.*, at p. 267, fn. 8.) Here, the conduct of the LADA's office cannot reasonably be equated with any degree of "integrity and impartiality," much less the highest. Reversal is required.

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## II

## THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY PERMITTED A BIASED AND ARMED INVESTIGATING OFFICER TO SIT AT THE PROSECUTION'S TABLE

Evidence before the trial court showed that the prosecution's designated investigating officer, Detective Vojtecky, attempted to manufacture evidence by convincing juvenile witness Rosa Hernandez that she saw appellant Bryant at the scene of the homicides with a .45 caliber handgun in his hand. (AOB:100-101.) Evidence before the trial court also showed that Detective Vojtecky opened up his jacket to display his holstered handgun to the DDA who reported the witness tampering, while the DDA was testifying in court about the event, and that respondent actually requested that Detective Vojtecky be recused from the case. (AOB:121-122.) Yet the trial court declined to do so. Instead, Detective Vojtecky sat at counsel table, armed, throughout trial.

Appellant Bryant argues in his opening brief that: (1) the trial court erroneously and prejudicially permitted conflicted Detective Vojtecky to remain at counsel table during appellant Bryant's trial; and (2) respondent is estopped from opposing this claim because respondent itself requested Detective Vojtecky's recusal during proceedings relating to the motion to recuse the prosecutor's office. (AOB:121-130.) Respondent has countered by arguing that: (1) the trial court did not abuse its discretion because "[t]he basis of appellant Bryant's motion to recuse Detective Vojtecky was the same as that for the second motion to recuse the entire DA's Office – the January 1991 interview of witness Rosa Hernandez . . . [and] the Court of Appeal did not find that the facts surrounding the Hernandez interview warranted the recusal;" and (2) respondent never took the position that

Detective Vojtecky had a disabling conflict of interest which warranted his recusal. (RB:166-172.) Respondent is incorrect in both respects.

### A. The Trial Court Abused Its Discretion In Denying Appellant Bryant's Motion to Recuse Detective Vojtecky

The Court of Appeal's opinion simply did not reach the issue respondent clings to in support of its position. The Court of Appeal ("CCA") characterized the issue before it as simply a discovery violation involving DDA Abele's notes of the Hernandez interview and the CCA confined its review to that claim of error. (11CT:3104.) Contrary to respondent's assertion, the CCA made no finding whether the circumstances of the Hernandez interview warranted reversal; rather, it left that matter to the trial court:

> Respondents will have an opportunity to explore the conduct of the Hernandez interview at trial, if Abele, Maurizi, Vojtecky or others testify. In addition, [. . . ] the trial court may consider motions for other sanctions related to the conduct of this interview.

(*Ibid.*)

Respondent also asserts that "even though the Court of Appeal was well aware of *Merritt*[11] and had the record of the extensive hearings on the second recusal motion before it (including DDA Abele's allegation regarding Detective Vojtecky's conduct at the Hernandez interview), the CCA did not tailor the order to apply to Detective Vojtecky." (RB:169-170.) However, there is no reference in the CCA opinion to the declaration Detective Vojtecky filed during the recusal hearing, nor is there any reference to DAG Bigelow's request to recuse Detective Vojtecky or the trial court's response to that request. (11CT:3091-3121.) In fact, the CCA, in discussing *Merritt's* application to this case, focused only on the narrow

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[11] *People v Merritt* (1993) 19 Cal.App.4th 1573 (*Merritt*).

discovery issue presented by the late disclosure of the unedited notes of the interview of Hernandez. (11CT: 3108.) The CCA specifically declined to consider the issues attendendant to the witness tampering allegations. (11CT:3104.)

Respondent further argues that the trial court properly found that "appellant Bryant has pointed to nothing which showed that Detective Vojtecky's alleged conduct was likely to preclude any defendant from receiving a fair trial" and that "appellant Bryant has not adequately explained how Detective Vojtecky's mere presence in the courtroom would bolster the People's case." (1-5RT:170.) Respondent relies directly on *People v. White* (1950) 100 Cal.App.2d 836, 838, to support its assertion that the trial court's decision to allow Detective Vojtecky to remain at counsel table was "well within the court's discretion." In that case, the appellant argued that the trial court abused its discretion in allowing the investigating officer to remain in the courtroom even though all other witnesses had been excluded:

> Appellant says that the mere presence of this officer who had had close contact with all the prosecuting witnesses and some defense witnesses was prejudicial to his case and prevented a fair trial. We cannot sustain this contention. The code sections permitting exclusion of witnesses are couched in permissive language and it is well settled that the entire matter is one within the discretion of the trial court. Appellant does not point out in what way the presence of this witness prejudiced his case other than to say it did, and from the record it cannot be said that appellant's case was in fact prejudiced. The contention rests on speculation and no abuse of discretion appears.

(*Ibid.*) Thus, this case stands simply for the well-established rule that a trial court may allow an investigating officer to sit at counsel table even though

that officer may be called as a witness at trial. (*People v. Chapman* (1949) 93 Cal.App.2d 365, 374 [exclusion of witnesses at trial lies with the discretion of the court and it is common practice that at least one peace official remain during the presentation of evidence during the entire case]; see also Evid. Code, § 777.) However, unlike counsel in *People v. White, supra*, appellant Bryant's trial counsel did not baldly assert that the presence of Detective Vojtecky would deny him a fair trial; rather, trial counsel informed the trial court that Detective Vojtecky had shown a willingness to intimidate testifying witnesses in that he displayed his holstered handgun to DDA Abele during Abele's testimony. (48CT:13804-13832.) The trial court dismissed those claims, stating that although it had no doubt Detective Vojtecky behaved unusually and in a way that defense counsel found "distasteful, odd or frightful," it found that nothing in Detective Vojtecky's behavior would deny appellant Bryant a fair trial because his behavior was likely to damage the prosecution. (60RT:6122.) The trial court also declined to order Detective Vojtecky to check his gun at the door or to order him to submit to a psychiatric examination. (60RT:6123.)

If the presence of an armed, paranoid police officer who has no qualms about intimidating testifying witnesses is insufficient to show that appellant Bryant was unlikely to receive a fair trial, then it is difficult to imagine how that burden would be met. Appellant Bryant did meet that burden in the trial court, and that court abused its discretion in allowed Detective Vojtecky to remain armed and at counsel table during appellant Bryant's trial.

## B. Respondent Is Estopped From Opposing Appellant Bryant's Claim Of Error

Respondent first argues that appellant Bryant's claim fails because the prosecution was not "successful" in obtaining the limited recusal of Detective Vojtecky because the trial court recused the entire DA's office. (RB:171.) Surely, since Detective Vojtecky was working for the DA's office at the time, appellant Bryant was successful in recusing him as well.

Respondent next argues that appellant Bryant's claim fails because the positions taken by the People were not "totally inconsistent" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986) in that the DAG requested Detective Vojtecky's recusal as an alternative to the recusal of the entire LADA's office. Respondent also asserts that "the People never took the position that, in light of Detective Vojtecky's conduct during the Hernandez interview or its aftermath, Detective Vojtecky had a disabling conflict of interest." (RB:172.) These contentions are revisionist. The record reflects that DAG Bigelow stated that, while she did not believe the recusal of the office was warranted, she affirmatively believed that Detective Vojtecky needed to be removed from the prosecution for several reasons: (1) because he was not impartial; (2) because he disagreed with the new administration's recent recommendation regarding case dismissals; and (3) because he appeared to be directing the prosecution. (42RT:4740.) She clearly proffered her reasons in the conjunctive – she gave several reasons for Detective Vojtecky's recusal, and none of them were stated as an alternative to the recusal of the LADA's office. Respondent's request to remove Detective Vojtecky came on the heels of his introduction into evidence, without the knowledge or with the permission of the prosecution, of an ill-tempered, rambling declaration where, inter alia, he called DDA Abele

"stupid and confused," asserted that there were "CONNECTIONS" between the LADA's office and the Bryant organization; it also reflected that he had locked the prosecutors from access to his original case files and that he derogatorily referred to the prosecutors as a "group of speed readers." (1SUPPCT2:576-580.) Clearly, respondent wanted to rid itself of a belligerent and uncooperative investigating officer.

Certainly, Detective Vojtecky's behavior has strikingly similar components to the behavior found worthy of recusal in *Merritt*: like the DA's investigator in *Merritt*, Detective Vojtecky engaged in impropriety toward a material witness in that he tried to convince a juvenile witness to change her testimony to make appellant Bryant a shooter; Detective Vojtecky withheld his witness tampering from the defense; and he was guilty of "gross misconduct" in many regards, not the least of which was attempting to intimidate DDA Abele by showing his holstered weapon while Abele was testifying. (See *Merritt, supra*, 19 Cal.App.4th at p. 1577.)

Further, Detective Vojtecky's armed presence in the courtroom during appellant Bryant's testimony had the additional consequence of denying appellant Bryant due process of law and a fair trial for the same reasons wearing the REACT belt did – the fear associated with the risk of a hostile and armed officer is at least as great, if not certainly greater, than the fear caused by wearing a REACT belt. Appellant Bryant incorporates by reference Argument V in the AOB and *post* as if set forth fully herein. The negative effects of Detective Vojtecky's armed presence upon appellant Bryant's demeanor in front of the jury and during his testimony cannot be reflected in the record. In this case, respondent bears the burden of establishing beyond a reasonable doubt, inter alia, that Detective Vojtecky's

armed presence in the courtroom did not effect appellant Bryant's ability to assist counsel, to assist in this own defense, and to follow trial proceedings. Respondent bears the burden of establishing beyond a reasonable doubt that the content of appellant Bryant's testimony and his demeanor before the jury was unaffected by same. Respondent bears the burden of establishing the jury's penalty phase verdict was not influenced by the effect of Detective Vojtecky's armed presence on appellant Bryant.

Under *Chapman v. California* (1967) 386 U.S. 18, 24, respondent must show beyond a reasonable doubt that the error was harmless beyond a reasonable doubt in this case. Respondent did not, indeed cannot, carry this burden. Reversal of appellant Bryant's conviction and death judgment are required.

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## III

## APPELLANT BRYANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW AS A RESULT OF THE TRIAL COURT'S ERRONEOUS DENIAL OF HIS MOTIONS TO SEVER HIS TRIAL FROM THAT OF HIS CODEFENDANTS

Appellant Bryant was forced to stand trial with: (1) a pro per codefendant, Jon Settle, who succeeded in manipulating the trial to his own advantage and, unburdened by any regard for the truth and motivated to save his own skin, manufactured evidence through his own testimony that was at once self-exculpatory and inculpating of appellant Bryant; (2) codefendant and triggerman Leroy Wheeler, whom percipient witnesses positively identified as that man who shot child victim Chemise English execution-style in the back of the neck; and (3) codefendant Donald Smith, whose joinder in this case put before appellant Bryant's jury highly prejudicial evidence that would not have been admissible against appellant Bryant had he been tried alone. Had appellant Bryant been tried alone, the relevant and admissible evidence of his alleged prior knowledge of the plans for, and his participation in, the instant homicides would have turned on a credibility contest between appellant Bryant, a drug dealer who denied he was involved in the homicides, and James Franklin Williams IV, a man who was originally charged with the homicides who admitted he would lie to save himself from the death penalty. Appellant Bryant would not have had his credibility damaged by codefendant Wheeler's conflicting testimony or codefendant Settle's inculpatory testimony that appellant Bryant allegedly purchased from Settle on the day of the homicides the car matching the description of the one seen carrying away the bodies of two of the victims. Joinder with his codefendants denied appellant Bryant a fair trial and due process of law.

### A. The Trial Court Erred In Denying Appellant's Motion To Sever His Trial From That Of Pro Per Codefendant Jon Settle

With regard to the initial motion to sever appellant Bryant's case from codefendant Settle's, respondent argues the trial court did not err, despite repeated assurances from pro per codefendant Settle that his defense would be antagonistic to appellant Bryant's, because Settle's allegations of an adversarial defense were not borne out by concrete evidence. (RB:181-182.) The trial court assumed that Settle's claim that he was not present at the scene of the homicides was not one susceptible of implicating appellants. (61RT: 6143.) The trial court made no inquiry of Settle as to the nature of his defense. (60RT:6128-6151, 61RT:6192-6196.) Given that the trial court was dealing with a pro per defendant unfamiliar with the substance and practice of law, the trial court should have made an in camera inquiry into the nature of Settle's antagonistic defense. If it had, it would have discerned then what it found out later – that its assumption was wrong. Settle managed to both claim he did not do it and finger appellant Bryant by claiming that he sold appellant Bryant the car which carried away the two bodies. The jury simply could not believe appellant Bryant's testimony that he had nothing to do with the planning or commission of the homicides and Settle's testimony that appellant Bryant made arrangements before the homicides for the disposal of the bodies.

Respondent's position that Settle's defense was "not irreconcilable" with appellant Bryant's is wrong and inconsistent with the prosecution's position at trial, who emphasized the value of Settle's testimony to the prosecution's case against appellant Bryant. (12RT:16526, 16531 [arguing that Settle's testimony establishes that appellant Bryant "set all of this up" and corroborates Williams' testimony, while it undermines appellant

Bryant's testimony that he was alone at his girlfriend's house when the homicides occurred].) A defense does not get more antagonistic than that.

Respondent argues in the alternative that that error, if found, was harmless because appellant Bryant has not demonstrated a reasonable probability of a more favorable outcome had severance been granted (RB:182, citing *People v. Coffman* (2004) 34 Cal.4th 12, 43) because the prosecution had "compelling independent evidence of each appellant's guilt, apart from anything codefendant Settle had to say." (RB:183.) In support of this part of its argument, respondent cites to another section of its brief in which it argues that Williams' testimony was corroborated by independent evidence. (RB:183.) Since that issue dovetails into the prejudice component of this argument, those claims will be addressed here.

The prosecution did not have relevant, properly admissible evidence of appellant Bryant's guilt to corroborate the self-serving testimony of accomplice Williams. Respondent argues in part that appellant Bryant's alleged statements to Ladell Player and Alonzo Smith after the homicides support the prosecution's theory that appellant Bryant planned and participated in the homicides. (RB:366-367.) Those statements do such thing. First, Alonzo Smith did not testify that appellant made an admission. (See Argument IX, *post*, incorporated by reference as if fully set forth herein.) Secondly, the statements attributed to appellant Bryant simply do not show prior knowledge of the homicides – the statements show that, after the fact, appellant Bryant agreed that Armstrong and Brown were "problems" and that he was not unhappy that they were dead. While that may not be kind, it is not illegal and does not show prior knowledge of, nor participation in, the homicides. Similarly, the phone calls after the homicides (RB:368) were just that – phone calls after the homicide. While

they could indicate that appellant Bryant was an accessory after the fact, they do not establish independent evidence of his involvement in the homicides before the fact.

Likewise, that appellant Bryant's signature matched that of the person who sent money orders to Brown did not establish appellant Bryant's guilt of the instant homicides, since appellant Bryant admitted that he sent the money orders and provided an explanation for doing so that did not implicate him in the homicides – appellant Bryant admitted he was involved in the sale of narcotics and did so as part of his duties, directed by his brother Jeff or at the request of the recipient. (114RT:15191-15204, 15336-15339, 15384-15385.)

Similarly, the presence of a .45 casing in the garbage of the Wheeler house and appellant Bryant's fingerprints on various items located on the premises establish only that appellant Bryant frequented the house, which he admitted, and that at some point the gun was fired by someone, ejecting the casing. There is no evidence that the gun was fired at the Wheeler house during the homicides. While the prosecution presented suspect evidence that one of the male victims was shot with a large caliber handgun in addition to suffering shotgun wounds (see AOB:10-11), there was no evidence that the victim was shot at the Wheeler house as opposed to en route to, or at, the Lopez Canyon location where his body was found. In addition, there was no evidence that the handgun found in appellant Bryant's home was the weapon used to inflict the wounds on the decedent, and there was evidence that James Williams also carried a .45 caliber handgun regularly in 1988. (111RT:14896-14897.)

While some of the above evidence may tend to connect appellant Bryant to the crimes *after* the fact, the evidence hardly constitutes

"overwhelming" corroboration of Williams' testimony that appellant Bryant was the instigator of the attack.

Another component of the independent evidence against appellant Bryant relied upon by respondent is Jennifer Daniel's testimony that she saw a dark blue Hyundai, similar to appellant Bryant's, pulling backward out of the Wheeler house. (RB:367.) As discussed earlier, Daniel for the first time "recalled" seeing the blue Hyundai after non-verbally communicating with Detective Vojtecky during appellant Bryant's trial. (See Argument I, *ante*.) No other percipient witness testified to seeing a blue Hyundai leave the Wheeler house after the homicides. And no one, not even Daniel, testified that appellant Bryant was the driver of the blue car. (AOB:6-7.) This hardly constitutes "overwhelming" independent evidence of appellant Bryant's guilt. Nor does the fact that appellant Bryant sold his car a week after the homicides or that blood of some ilk (it was not necessarily human blood) was found on the driver's side floorboard (AOB:45) establish overwhelming independent evidence that appellant Bryant was involved in the homicides.

Finally respondent argues that "appellant Bryant's modus operandi of handling people who were contrary to the Bryant Organization (e.g., Goldman, Gentry, Curry) was consistent with quadruple murder." (RB:368.) Respondent's assertion actually supports appellant Bryant's argument for severance. The evidence of the shootings of Goldman and Gentry were introduced for the limited purposes of proving motive and intent to commit the instant homicides – the theory being that Armstrong committed both shootings for the Bryant Organization and was killed because he wanted to collect for his misdeeds. (78RT:8786-8787, 92RT:9226.) The Curry shooting evidence was deemed admissible to show

codefendant Smith's identity as a shooter in this case, as someone who committed a violent act for appellant Bryant in the past, although the alleged motive for the prior shooting was domestic in nature. (91RT:11293-11301, 11314.) Contrary to respondent's assertion, the shootings were not legally admissible to show that appellant Bryant was a bad person who killed people who crossed him. That respondent makes this error only emphasizes the fallacy that lay jurors could properly limit the use of such evidence in this case, and thus it is another reason the failure to sever appellant Bryant's case from that of his codefendant constituted prejudicial error. (Compare *People v. Ervin* (2000) 22 Cal.4th 48, 69 [no error in severance denial where record did not show the jurors were confused by the limiting instructions regarding the restrictions on admissibility of evidence to certain of the joined codefendants].)

The relevant, admissible, independent evidence against appellant Bryant, aside from the testimony of former codefendant Williams, was hardly "overwhelming."

With regard to the renewed motions for severance made by appellant Bryant during trial, respondent characterizes Settle's cross-examination of appellant Bryant in which he elicited testimony to set up Settle's self-serving testimony implicating appellant Bryant and Settle's own brother, Frank, in the homicides as "some bizarre tangent." (RB:189.) The record shows the examination was hardly a tangent. Settle's testimony directly implicated appellant Bryant in the planning of the homicides. Respondent argues that Settle's defense was not irreconcilable with appellant Bryant's because Settle's testimony was "that he was not at the Wheeler Street residence on August 28, 1988, but was, instead, at home working on cars" and that "codefendant Settle did not blame, point the finger at, or implicate

any appellant in the murders." (RB:190; see also RB:191 and 194 for repeated assertion that Settle did not implicate any of the defendants in the homicides].) This assertion strains credulity. Appellant denied participating in the planning and commission of the homicides. Settle testified that appellant Bryant called him and purchased a car matching the description of that seen fleeing the murder scene with bodies in the back seat. His testimony clearly implicated appellant Bryant in the homicides. Settle's defense – despite his protestations claiming that he was not implicating his brother – was that it was Frank Settle, who looked just like codefendant Settle (see People's Exh. 117C; 97RT:12471-12475), who was sent over by appellant Bryant to pick up the car used for the body dump and whom Williams must have mistaken for Settle. With regard to appellant Bryant, Settle explicitly argued that "it's Stanley Bryant calling the shots on August 28, 1988 . . . ." (123RT:16592.) This defense was certainly irreconcilable to appellant Bryant's defense that he was not involved in the homicides.

The relevant, admissible evidence that corroborated Williams' testimony did not clearly implicate appellant Bryant in the homicides. If appellant Bryant's case had been severed from Settle's, it is reasonably probable that appellant Bryant would have received a more favorable outcome. Trial with Settle also deprived appellant Bryant of a fair trial and due process of law; a new trial is required because the prosecution cannot meet its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

### B. The Trial Court Erred In Denying Appellant's Motion To Sever His Trial From Codefendants Wheeler and Smith

Respondent appears to assert that appellant Bryant waived this claim of error for failing to sever his case from codefendant Smith by failing to

assert a renewed motion to sever when the trial court precluded him from presenting evidence that appellant Smith had a motive independent of appellant Bryant's for shooting Keith Curry. (RB:198.) When faced with the upcoming testimony of Keith Curry, appellant Bryant's counsel said:

> Your honor, to lay that to rest and not to revisit the motion to sever, but the independent motives on the part of Mr. Smith would clearly be available to Mr. Bryant in a severed trial, and they are not available to us in this setting.

(90RT:10951.) The only fair reading of counsel's statement is that he was objecting in a supplicant way so as not to garner the ire of the trial court, who had previously denied numerous requests to sever on the same grounds (See AOB:134-137) and who had shown hostility to counsel throughout the proceedings, including going so far as to call one of counsel's line of inquiry "ridiculous" in front of the jury. (101RT:13200-13201.) There are other reasons waiver should not be found in this case. Any effort to review the motion would have been futile. (*People v. Williams* (1997) 16 Cal.4th 153, 255; *People v. Whitt* (1990) 51 Cal.3d 620, 655, fn. 27; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1.) In addition, California courts often examine constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved (here Penal Code section 1098), the asserted error fundamentally affects the validity of the judgment or when the error may have adversely affected the defendant's right to a fair trial (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn.8), all factors here.

In addition, the fact that a state court may refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain form reaching the federal constitutional questions. (*Orr v. Orr*) (1979) 44 U.S. 268, 275, fn. 4.) Furthermore, as the

facts relating to the contention raised on appl appear to be undisputed and there would likely be no contrary showing at a new hearing, the appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d736, 742.)

Moreover, a failure to object does not preclude an appellate court from resolving that issue should it feel the need to do so. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) "A matter normally not reviewable on direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153.)

For the same reasons as set forth above, waiver should not be found in any other instance relating to the issue of the trial court's failure to sever appellant Bryant's case from that of his codefendants. (See, e.g., RB:184-185.)

With regard to the substance of appellant Bryant's claim that he was precluded from showing that Smith had an independent motive for shooting Curry, respondent asserts the claim fails because Curry denied the independent reason for the shooting. (RB:198.) However, the transcript pages cited by respondent do not contain any testimony from Curry, only argument of counsel. (*Ibid.*) Even if Curry said that he did not believe Smith had an independent motive for shooting him, that does not address the fact that appellant Bryant was prevented from presenting other evidence of the independent motive. It is fallacious to say that the result would have been no different had appellant Bryant been able to present that evidence.

Respondent argues that appellant Bryant's claim that his case should have been severed from Wheeler's case because of conflicting testimony regarding who was responsible for the homicides fails because neither

Bryant nor Wheeler implicated the other; rather, Bryant implicated William Settle and Wheeler implicated James Williams. (RB:198.) Respondent cites *People v. Hardy* (1992) 2 Cal.4th 86, 168, for the proposition that antagonistic defenses do not "per se" require severance, even if the defenses are hostile or attempt to cast blame on each other." (RB:198-199.) This is a red herring. Appellant does not assert per se error; rather, appellant Bryant has argued all the reasons why severance was required in this case, including the factor of antagonistic defenses and it includes the analysis that this was not an "overwhelming" case of appellant Bryant's guilt *of the homicides*. The reality is that had appellant Bryant been afforded a separate trial, appellant Wheeler's incredible and self-serving testimony would not have been before appellant Bryant's jury, and appellant Bryant's credibility would not have been impeached by Wheeler's account of events which conflicted with appellant Bryant's account. In the absence of that testimony and that of codefendant Settle, and given the lack of real evidence that tied appellant Bryant to the homicides before the fact, it is reasonably probable that the outcome fo the guilt phase would have been more favorable had severance been granted.

Likewise, had severance been granted it is more likely that appellant Bryant would not have been sentenced to death if convicted. Appellant's case in mitigation was meager in comparison to Wheeler's and Smith's. Respondent asserts this did not matter because Wheeler and Smith also received the death penalty and thus "appellant Bryant's defense at the penalty phase was hardly coupled with two 'more powerful' and 'more compelling' penalty phase defenses." (RB:201.) Respondent seems to suggest that individualized sentencing is not required during the sentencing phase of multi-defendant capital trials. The fact remains that in this case

there exists no record evidence that appellant Bryant was a shooter, unlike Wheeler, whom neighbors saw shoot a woman and her two small children at point blank range, and Smith, in whose hands Williams placed a shotgun. There exists no evidence that appellant Bryant, unlike Smith and Wheeler, ever shot anyone. In the absence of a joint trial, it is reasonably probable that one juror, hearing the case in mitigation that was presented at appellant Bryant's trial, would have voted for a sentence less than death. (*Wiggins v. Smith* (2003) 539 U.S.510, 537.)

For the foregoing reasons, as well as those stated in his opening brief, forcing appellant Bryant to be tried with his codefendants denied him due process and a fair trial in violation of his rights under the Fifth, Eighth and Fourteenth Amendments and requires reversal of his conviction and judgment of death. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 162 [even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process]; *People v. Arias* (1996) 13 Cal.4th 92, 127 [same].)

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## IV[12]

## THE TRIAL COURT'S FAILURE TO CONTROL THE CONDUCT OF THE TRIAL DENIED APPELLANT BRYANT A FAIR TRIAL AND DUE PROCESS OF LAW

Appellant Bryant joins in Argument II of coappellant Wheeler's opening and reply briefs on appeal (WAOB:151-169, WARB:9-12), and incorporates those by reference as if fully set forth herein.

In addition, appellant Bryant has the following reply to respondent's contention that pro se codefendant Settle's right to testify on his own behalf when facing capital charges trumps all other considerations. (RB:486-489.) The trial court also considered codefendant Settle's right to testify so inviolate that it believed it had no discretion to prevent him from testifying "unless the case had been argued to the jury." (110RT:14787-14788, see also 116RT:15473.)

In addition to the abundant authority illustrating that the right to testify is not absolute, cited in appellant Bryant's and Wheeler's briefs, it is likewise well-established that a pro se defendant is not entitled to special privileges because of his pro se status. A defendant who knowingly and intelligently elects to proceed pro se does so at his own peril and acquires as a matter of right no greater privilege or latitude than would an attorney acting for him. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1225.) "It is a principle deeply rooted in the law that a 'defendant who chooses to represent himself assumes the responsibilities inherent in the role which he has undertaken,' and 'is not entitled to special privileges not given an attorney. . . .'" (*Id.* at p. 1221, citations omitted; see, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1039 [defendant no more entitled to a continuance

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[12] This is designated Argument XXIII in respondent's brief.

when he became his own counsel than he was entitled to a continuance at former counsel's request]; *People v. Robinson* (1965) 62 Cal.2d 889, 894 [the fact that defendant rejected the services of a court-appointed attorney cannot vitiate the rule that requires timely objection].)

In this case, to be sure, if appellant Bryant's counsel had pulled such a stunt the trial court, always on the alert for "gamesmanship" from the attorneys, would have prohibited the requested testimony. (See, e.g., 108RT:14406, 14498, 109RT:14521, 117RT:15795, 15818.)

The trial court's erroneous belief that it did not have the authority to stop Settle from testifying after he had rested his case and the trial court's failure to exercise discretion because it erroneously believed it had no discretion denied appellant Bryant a due process and a fair trial. (See, e.g., *People v. Bigelow* (1983) 37 Cal.3d 731, 743 [court's failure to exercise discretion because it erroneously believed it had no discretion was "itself serious error"]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise of this discretion"].) Reversal is the only remedy.

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## V[13]

## THE IMPROPER USE OF A REACT BELT RESTRAINT ON APPELLANT BRYANT DURING THE COURSE OF HIS CAPITAL TRIAL REQUIRES REVERSAL OF HIS CONVICTION AND DEATH JUDGMENT

Appellant Bryant joins in Argument IV of coappellant Wheeler's opening and reply briefs (WAOB:209-238 and WARB:34-40) and Argument IX of coappellant Smith's opening and reply briefs. (SOAB:27-262 and SARB:107-110.) In addition to those arguments and those raised in appellant Bryant's opening brief, he adds the following:

Appellant Bryant argues in his opening brief that the trial court prejudicially erred in forcing appellant Bryant to wear a REACT belt during his trial in the absence of the requisite showing of "manifest need" as defined by precedent. (AOB:175-201.) Respondent erroneously argues that the showing of "manifest need" was met in that "it was anticipated that the evidence at trial would show" that: (1) appellant Bryant was responsible for the pipe-bombing of "witness Curry" and that appellant Bryant was running the Bryant Organization while Jeff Bryant was in prison;" and (2) appellant Bryant's possession of "contraband" showed he was still exerting influence and engaged in "illicit activity" as the head of the Bryant organization. (RB:502.)

The record is devoid of the requisite showing of "manifest need." After announcing its decision to require restraints, the trial court gave the defendants time to decide which to wear. (61RT:6206.) At the time it made its decision to require restraints, the court stated that restraints were necessary "because a case like this, this many defendants and these kinds of

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[13] The relevant argument in the respondent's brief is designated Argument XXXIII, generally, and subsections A, B and D, specifically.

[unspecified] allegations floating around, we will have a lot of security here." (RT:6202.) The record does not reflect what the trial court relied upon in making its decision to order restraints, or the source of the "allegations" that were "floating around." Simply stated, rumors do not substitute for the requisite showing of "manifest need." A trial court is "'obligated to base its determination on *facts*, not rumor and innuendo [. . .].'" (*People v. Mar* (2002) 28 Cal.4th 1201, 1218, quoting *People v. Cox* (1991) 53 Cal.3d 618, 651-652 [italics added in *Mar*].) Indeed, in *People v. Cox, supra,* 53 Cal.3d at pp. 649-653, defense counsel reported to the court that his investigation had led him to believe that the defendant might attempt to escape. This Court held that this was not a sufficient showing of "manifest need:"

> While the instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of violence on the part of the accused.

(*Id.* at p. 652.)

Nor did the prosecution in the instant case proffer evidence of "manifest need" for restraints. After appellant Bryant filed written opposition to the imposition of restraints, the trial court allowed counsel to argue. The prosecution made no written motion for the restraints. When asked why it believed restraints were necessary, the prosecution cited the alleged membership of each of the defendants in a criminal organization. With regard to appellant Bryant individually, the prosecution conceded appellant Bryant himself evidenced no acts of aggression. The prosecution argued that since jail records showed appellant Bryant possessed too many toiletries, including razor blades, and cookies and candy bars in his cell, that constituted evidence appellant Bryant was still engaged in illegal activities

of the type he was alleged to have engaged in before he was incarcerated. (63RT:6348-6349.) Contrary to respondent's contention, there was no evidence that any of the items constituted contraband, only that appellant Bryant possessed more than the normal quantity of permissible items in the county jail, and thus implying only appellant Bryant's ability to barter with the items.

None of these facts constitute "manifest need" for restraints to be imposed. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 749 [in all cases in which shackling has been approved, there existed evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities]; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825-1826.) No such factor was present in the instant case as to appellant Bryant. To the extent the trial court imposed a restraint upon appellant Bryant because of the violent acts of his codefendants, that only underscores the trial court's prejudicial error in refusing to sever appellant Bryant's case from that of his codefendants. (See Argument III in AOB and *ante*.)

Respondent's assertion that "a showing of 'manifest need' does not have to be based on the conduct of the defendant at the time of trial nor does it require a previous attempt by the defendant to disrupt courtroom proceedings or to escape from custody" relies on authority, *Small v. Superior Court* (1992) 79 Cal.App.4th 1000, 1016 (*Small*), that is simply not on point. (See RB:501.) In *Small*, Larry Small, Warden of Calipatria State Prison, petitioned for writ of mandate and/or prohibition after the trial court issued two orders that the warden claimed unduly interfered with his authority and duty to safely operate a maximum security facility. The first

order required Small to alter an attorney visiting room specially constructed for inmate Joseph Barrett, who was charged with the capital offense of murder while serving a life sentence for a previous murder and has the prison system's highest security classification. The second order required Barrett's hands to be unrestrained at pretrial proceedings. The Court of Appeal reversed the trial court's order requiring that Barrett's hands be unrestrained at pretrial proceedings, citing Barrett's extensive violent in-custody history and ability to obtain or make weapons and hide them. (*Id.* at p. 1017.) However, prior to announcing its ruling, the Court of Appeal provided this limitation to the application of its holding:

> At the outset, we want to emphasize the issue of restraints in the courtroom in this case arises in *the context of pretrial proceedings* and the *views we express should not be interpreted to have application to the issue of courtroom restraints during a trial. . . .* With those preliminary remarks in mind, we proceed to our analysis.

(*Id.* at p. 1016, italics added.) Clearly, *Small* has no application to the instant case, a capital trial in which appellant Bryant was forced to wear restraints throughout, including during his testimony.

Likewise, another case respondent relies upon, *People v. Livaditis* (1992) 2 Cal.4th 759, 774, is distinguishable. (See RB:501.) In that case, this Court found the trial court's decision to order the defendant to wear a leg brace was not an abuse of discretion given the defendant's history of escape attempts. Appellant Bryant had no such history. Further, this Court validated the trial court's decision to order Livaditis handcuffed (not visibly) during the testimony of a surviving victim he had held hostage for 13 hours while he killed two other hostages. The decision was not based on a sufficient showing of "manifest need," but rather it was determined to be an acceptable exercise of discretion in order to alleviate the victim's fear

and because the restraint was invisible to the jury and was worn only for a short time. (*Id.* at p. 775.) Those factors are not present in this case.

Respondent also cites *People v. Hawkins* (1995) 10 Cal.4th 920, 944 (see RB:501), in which this Court found the trial court was within its discretion in shackling the defendant because the "defendant's three reported fistfights in prison, together with his extensive criminal history, are sufficient to support the trial court's order to shackle defendant, inasmuch as they demonstrate instances of 'violence or nonconforming conduct' while in custody." Appellant Bryant had no incidents of violence while in custody and thus no instances of "nonconforming conduct."

Lastly, respondent asserts that the trial "court's exercise of discretion will not be reversed on appeal absent manifest abuse." (RB:501.) The cases cited by respondent, *People v. Pride* (1992) 3 Cal.4th 195, 231; *People v. Cox, supra*, 53 Cal.3d at p. 651, stand for proposition that a trial court's order to shackle a defendant will be upheld absent a clearly erroneous decision by the trial court to impose restraints. The word "manifest" it appears superfluous. In any event, the trial court in the instant case did not make its determination in accordance with the views articulated in *Duran* and its progeny or well-established federal law, a "manifest" abuse if there ever was one.

Respondent argues in the alternative that if any error occurred, it was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (*Watson*).[14] (RB:512-513.) In *Deck v. Missouri* (2005) 544 U.S. 622, 633 (*Deck*), the United States Supreme Court extended the prohibition against

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[14] In *Mar, supra,* 28 Cal.4th at p. 1225, fn.7, this Court reversed under the *Watson* standard, but left open for another day whether a "more rigorous prejudicial error test" should be applied.

the use of visible restraints on a criminal defendant to apply to the penalty phase of a capital trial. The high Court reaffirmed the holding of *Holbrook v. Flynn* (1986) 475 U.S. 560, 568, that shackling is "inherently prejudicial," a view in the belief that that practice will often have negative effects that "cannot be shown from a trial transcript." (*Riggins v. Nevada* (1992) 504 U.S. 127, 137 (*Riggins*).) As a result, *Deck* concluded that when a court, without adequate justification, orders the defendant to wear visible restraints before the jury, "the defendant need not demonstrate actual prejudice to make out a due process violation." (*Deck, supra*, 544 U.S. at p. 635.) Rather, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict – in this case, that it did not contribute to appellant Bryant's conviction or to his death sentence. (*Ibid.*, citing *Chapman v. California* (1967) 386 18, 24 (*Chapman*).)

The state cannot carry its burden. Respondent argues the error was harmless because the restraint was not visible to the jurors. (RB:504.) Respondent is wrong. During voir dire, prospective juror number 191 wrote in her questionnaire that she did see something under the sweater of one of the defendants. (1SUPPCT4:1013, 1032.) Additionally, during jury selection, after prospective juror number 397 was excused, the trial court asked her to approach the bench. The trial court asked why she had asked in her questionnaire, "Are they [the defendants] wearing special restraints?" Prospective juror number 397 responded that she believed coappellant Smith was moving in an awkward manner. (10SUPPCT:119-120.) Appellant walked to the witness stand, where he awkwardly sat, unable to lean all the way back in the witness chair. (114RT:15158.) As in *Dyas v. Poole* (9th Cir. 2002) 317 F.3d 934, 937 (cert. den. *sub nom. Poole v. Dyas* (2003) 540 U.S. 937), if one juror came to the conclusion that the defendant

was wearing a restraint, as at least one did in this case, then it is likely that others came to the same conclusion. But even if only one juror was biased by the sight of the restraint, appellant Bryant was prejudiced. (See *Parker v. Gladden* (1966) 385 U.S. 363, 366 [a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"].)

Respondent further argues the error was harmless because, unlike the defendant in *Mar*, who specifically stated on the record that he feared that the law enforcement officer who controlled the stun belt would "push the button," appellant Bryant "never expressed to the court that the REACT belt in any way interfered with [his] testimony." (RB:513.) While appellant Bryant never addressed the Court himself, his attorney made it clear that appellant Bryant knew that the REACT belt could send 50,000 volts of electricity to his kidneys, that he had concerns over who would control the device and that he would rather wear a leg brace than such a device. (63RT:6344-6345.) His fear was clearly communicated by his attorney.

As the high Court affirmed in *Deck* and this Court held in *Mar*, the practice of forcing a defendant to stand trial while wearing restraints such as a REACT belt, visible or not, will have negative effects that "cannot be shown from a trial transcript." (*Deck, supra*, 544 U.S. at p. 635; see *Mar, supra*, 28 Cal.4th at p. 1227-1228.) And visible restraints, as those in this case, have long been held to be "inherently prejudicial" in that it poses such a threat to the "fairness of the factfinding process" that it may be justified by only by "essential state interests such as physical security, escape prevention, or courtroom decorum." (*Deck, supra*, 544 U.S. at p. 628 (citations omitted).)

If *Chapman* is truly applied here, this Court may not hold against appellant Bryant any perceived deficiency of the evidence of what the jury

could see, or the absence of an explicit statement by defendant that he was afraid while wearing the REACT belt. Nor may it hold against appellant Bryant, as respondent urges, that codefendant Settle, also wearing the REACT belt, attained a hung jury. (RB:513-514.) *Chapman* requires that, once federal constitutional error is shown, as it has been shown in this case, the failures of proof that respondent says dooms appellant Bryant's claim are actually burdens of proof respondent bears. (See *Dyas v. Poole, supra,* 317 F.3d at p. 937 [state courts' determination that the jury could not have seen the shackles during trial was unreasonable in the absence of any inquiry to establish the facts concerning what the jury could see; state trial judge had simply made a presumption of fact, and no evidentiary hearing was conducted thereafter by any state court; state court of appeal held against Dyas the absence of evidence of what the jury could see, which was contrary to the requirement of *Chapman* that the prosecution bear the burden of showing harmlessness beyond a reasonable doubt].) Respondent may not shirk its burden by simply asserting that the case "was not at all close." (RB:513.) In this case, respondent bears the burden of establishing beyond a reasonable doubt, inter alia, that none of the jurors saw the REACT belt appellant Bryant was wearing, and that appellant Bryant's ability to assist counsel, to assist in his own defense, and to follow trial proceedings was unimpaired. Respondent bears the burden of establishing beyond a reasonable doubt that the content of appellant Bryant's testimony and his demeanor before the jury was unaffected by the restraint. Respondent bears the burden of establishing that the REACT belt did not negatively affect appellant Bryant. Respondent bears the burden of establishing the jury's penalty phase verdict was not influenced by the trial court's use of the REACT belt on appellant Bryant.

Under *Chapman*, the respondent must show beyond a reasonable doubt that the error, though inherently prejudicial as a matter of constitutional law, was harmless beyond a reasonable doubt in this case. Respondent did not, indeed cannot, carry this burden. Reversal of appellant Bryant's conviction and death judgment are required.

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## VI[15]

## EXTENSIVE SECURITY PRECAUTIONS EMPLOYED THROUGHOUT THE TRIAL IMPROPERLY PREJUDICED APPELLANT BRYANT

Appellant Bryant joins in Argument IV of coappellant Wheeler's opening and reply briefs (WAOB:209-238 and WARB:34-40) and Argument IX of coappellant Smith's opening and reply briefs. (SOAB:247-262 and SARB:107-110.) Appellant Bryant relies on those arguments as well as Argument VI in his opening brief, and has nothing further to add to this issue at this time.

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[15] The relevant argument in the respondent's brief is Argument XXXIII, generally, and subsections A, C and D, specifically.

## VII

## THE TRIAL COURT PERMITTED THE PROSECUTION TO INFLAME THE JURY BY PRESENTING IRRELEVANT AND PREJUDICIAL EVIDENCE OF BAD CHARACTER AND CRIMINAL PROPENSITY

In his opening brief appellant Bryant contends the trial court erred in admitting various pieces evidence that only served to convey to the jury that appellant Bryant was a bad man, doing bad things and thus likely guilty in this case. Respondent counters the trial court committed no error. Appellant replies to respondent's argument regarding each of the evidentiary rulings in turn.

### A. Evidence That The Girlfriends Of Jeff And Stanley Bryant Bribed Rhonda Miller To Refuse To Testify Against Andre Armstrong At His Preliminary Hearing Was Irrelevant To Any Disputed Issue And More Prejudicial Than Probative

Respondent argues that the evidence of the bribery of Rhonda Miller was probative of the issue of why she refused to identify Armstrong at his preliminary hearing on charges arising from the Gentry homicide. (RB:304.) However, Armstrong's guilt of the Gentry shooting was not in dispute. (82RT:9386.) Respondent also argues that the bribe was "circumstantial evidence supporting the inference that members of the Bryant Organization had an interest in the outcome of the preliminary hearing." (RB:304.) Since the defense position was that Armstrong shot Gentry as a solo venture, the bribery would have been relevant to that issue had it been shown that appellant Bryant was behind it. However, the evidence should not have been admitted because there existed no evidence that appellant Bryant, as opposed to his brother Jeff, was involved in the bribery of Miller or in the release of Alvin Brown. Numerous law enforcement personnel as well as former employees stated unequivocally

that Jeff Bryant was in charge of the organization, and it was Jeff Bryant's girlfriend Rollo who offered Miller the bribe. That appellant Bryant was dating the woman who went with Rollo to perform that task has little or no probative value as to the issue of whether appellant Bryant directed the bribe to occur. The prosecution failed to lay the proper foundation for the admissibility of the evidence, and thus the evidence should have been excluded. (See *People v. Lavergne* (1971) 4 Cal.3d 735, 744 [if in doubt, the exercise of discretion should weigh in favor of the defendant].)

In any event, given the statements of other witnesses putting appellant Bryant near the scene either before or after the Gentry shooting, and given the statements of Ken Gentry that came in through other witness that implicated appellant Bryant, the probative value of the evidence regarding the Miller bribe as to appellant Bryant's role in the Gentry shooting was so slight as to be far outweighed by the prejudicial effect of the evidence that whomever was behind the bribe of Miller would bail out a wife-beater to ensure compliance with the offer. (*People v. Crew* (2003) 31 Cal.4th 822, 840 [evidence with very little effect on the issues that tends to evoke an emotional bias against the defendant should be excluded under Evidence Code section 352].) The admission of the evidence was error which denied appellant Bryant a fair trial and due process of law. Respondent has not carried its burden of establishing the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 38 U.S. 18, 24.)

### B. The Attack On Francine Smith By An Unidentified Third Party

Respondent asserts that appellant Bryant has waived his claim that the evidence should have been excluded under Evidence Code section 1101 because there was no trial objection on this ground. (RB:307.) No so. Appellant argues that the evidence should have been excluded under

Evidence Code section 352 (the basis for the trial objection to this evidence) because the evidence was more prejudicial than probative. In support of his claim that the scales tipped heavily on the side of prejudice, appellant Bryant cited the cases discussing the prejudicial nature of other crimes evidence and the elevated showing need before a trial court should admit such evidence. When evidence of other acts is offered to prove a material fact, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812.) "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' . . . 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, italics in original.) Thus, there must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Appellant submits it is not only proper, but necessary, to consider Evidence Code section 1101 and case law discussing that section in evaluating whether the trial court erred in admitting the evidence under Evidence Code section 352.[16]

Appellant maintains the trial court erred under Evidence Code section 352 in admitting the evidence, and that the trial court's error

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[16] Appellant herein makes the same reply as above to respondent's waiver arguments regarding the statements and/or testimony of William "Amp" Johnson, Laurence Walton and Ladell Player, *post*.

deprived appellant Bryant of a multitude of federal constitutional rights. (AOB:254-255.) Thus, the appellate claim is of a kind that required no trial court action by the defendant to preserve it, or the argument does not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely asserts that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. Therefore, appellant Bryant's constitutional arguments are not forfeited on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Respondent argues the beating of Francine Smith by an unidentified third person was done at appellant Bryant's request and that it was relevant to show motive for the instant homicides, i.e., to show appellant Bryant's willingness to use violence to make sure that people did not steal from the narcotics operation. (RB:307-308.) Contrary to respondent's assertion, there existed no evidence that Armstrong intended to "rip off" the narcotics organization. Rather, the prosecution's evidence indicated that Armstrong had been promised $15,000 for shooting Gentry. The evidence further indicated that he had been given $11,150 of that money prior to his death. (1CT:47:13679-13701.) Thus, it is reasonable to infer that his requests for money were to collect on that debt. The "squeeze" Armstrong put on the organization was for what he believed was owed to him. There was no evidence that he intended to steal from the organization.

Respondent further argues that the trial court did not abuse its discretion under Evidence Code section 352 in admitting the evidence because there was "considerable evidence of motive before the jury." (RB:308.) This fact actually militates against the admission of the evidence, since the evidence added little to the prosecution's case, its

admission amounted to an undue consumption of time, and its admission uncreased the risk of confusing the jury with irrelevant and highly prejudicial matters. The trial prejudicially erred in admitting the evidence.

### C. Evidence Relating To Narcotic Sales in 1985 And To Appellant's 1986 Conviction For Conspiracy To Distribute Narcotics

Respondent argues that appellant Bryant has waived this issue by failing to make a specific and timely objection. (RB:309-34.) Not so. While the objection might have been awkwardly worded, it clearly conveyed the fact that the defendants were objecting to matters "going away from the motive to kill Armstrong" and into "matters relating to a drug conspiracy . . . that has been severed out." (82RT:9534.) The "matter" that had been "severed out" was very specific. In 1992, the Honorable J.D. Smith ruled in favor of the defendant's request to sever count 7, which charged that the defendants conspired "to operate a major narcotics sales distribution/transportation business" from the instant case. (1-5RT:366, 35RT:4247.) In so doing, the court found that the entire conspiracy to sell narcotics was not motive for the instant homicides. (35RT:4231-4232.) Specifically, Judge Smith ruled the evidence relating to the narcotic sales inadmissible in that it was "cumulative and goes past motivation" for the instant homicides. (35RT:4232.) Given this context, the objection was clear and the issue preserved. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

As to the merits of appellant Bryant's claim of error, respondent argues appellant Bryant must lose because the "evidence regarding the narcotic investigation and the massive narcotic operation conducted by the Bryant Family in the mid-1980s was highly relevant regarding the motive

for the instant homicides" on the theory that the organization had prospered while Armstrong was in prison for the Gentry homicide, and that Armstrong intended to "squeeze" the Family when he got out of prison. (RB:315-316.) This theory is unsupported by the record. Contrary to respondent's bald assertion that the payments to Armstrong by appellant Bryant while Armstrong was in prison evidenced both this "squeeze" and appellant Bryant's knowledge of Armstrong's threat to collect, the prosecution never sustained it proffer to prove that Armstrong was pressuring appellant Bryant or that appellant Bryant knew of Armstrong's alleged intentions to take over a part of the narcotics organization. To the contrary, as stated above, the payments only indicate that, consistent with the prosecution's theory that Armstrong was a hired hit man for the Gentry homicide, that he was being paid for the task he had completed.

Without that evidentiary link, the prosecution had no foundation for the admissibility of this inflammatory and prejudicial evidence. And contrary to respondent's mantra, the evidence against appellant Bryant *for the instant homicides* was not "overwhelming." (RB:317.) The prosecution sought and achieved, through erroneous rulings by the trial court, to introduce as much irrelevant and prejudicial "bad act" evidence as possible in order to convict appellant Bryant – and they did so because they knew their case rested on the highly suspect testimony of James Williams. That the prosecution successfully introduced inadmissible evidence of other crimes does not make the evidence against appellant Bryant on the instant charges "overwhelming." Rather, the effect of the erroneous introduction of the evidence was to increase strikingly the likelihood of conviction in this case. For all the above reasons and those stated in appellant Bryant's opening brief, reversal is required.

### D. Testimony And Statements Of William "Amp" Johnson, Lawrence Walton And Ladell Player

A tape recording of a police interview with William "Amp" Johnson was played to the jury after his testimony to show his prior inconsistent statements regarding his fear of testifying in this case. (People's Exhibit number 106; 3SUPPCT:10601-10617.) Appellant argues that the taped statement was not sufficiently edited and that portions of the taped statement contained statements that should have been excluded under Evidence Code section 352.[17] (AOB:231-246.) Respondent argues that appellant Bryant has waived the claim by failing to object "on the specific ground (1) that any particular statements(s) in the edited tape recording was not inconsistent with Johnson's trial testimony; and/or (2) that any particular statements(s) violated the provisions of Evidence Code section 1101." (RB:287.)

First, appellant Bryant did object to the taped statement as being not inconsistent with Johnson's trial testimony. Trial counsel for appellant Bryant objected to the taped statement as follows:

> So basically our position is that if the – if this if for impeachment, then the People are restricted to showing something that is consistent or inconsistent and just to play a tape because we have it is inappropriate.

(86RT:10209-10210.)

Second, appellant Bryant did object under Evidence Code section 352: (1) to the evidence of the narcotics operations generally, as discussed

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[17] Respondent erroneously claims appellant Bryant argues the entire tape recording had been admitted. (RB:286.) Not so. Appellant argues that the prosecution proffered the entire tape, that an edited version was played to the jury, but that that version was not edited enough under Evidence Code section 352.

above; (2) to the impeachment of Johnson during his testimony with portions of his taped statements relating to Johnson's perception of the effect of the narcotic sales operations run by the Family on the community in Pacoima (85RT:10006-10009); and (3) to the taped statement as "vague ramblings" of Johnson referring to "they" as bad people who do bad things. (86RT:10188-10195.) The purpose of the objection requirement (and the waiver rule) is to bring errors to the trial court's attention so that they may be corrected or avoided. (See, e.g, *People v. Partida, supra,* 37 Cal.4th at p. 434; *People v. Walker* (1991) 54 Cal.3d 1013, 1023.) That was accomplished in this case. The Evidence Code section 352 objection required the trial court to weigh the prejudicial nature of the evidence against the probative value of the evidence. (Evid. Code, § 352.) The trial court therefore was required to consider and assess the degree of prejudice, and such analysis of prejudice necessarily includes factors contained in Evidence Code section 1101. (See *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344, fn. 5 [although appellant's failure to object on the distinct ground of irrelevancy precludes review on that basis alone, the section 352 objection necessarily implicated the relative probative value of the evidence, and thus its degree of relevance, if any].) Thus, appellant Bryant has not waived the issue.

Regarding the testimony and prior inconsistent statements of Laurence Walton, respondent argues the trial court did not err because of the "high probative value of Walton's testimony on a very important and disputed issue in the case" – i.e., the existence of the Bryant Family Organization. (RB:319.) The defense offered to stipulate to the fact that the defendants "were selling drugs." Respondent asserts that the record reflects at pages 10536-10537 that "the parties refused the offer."

(RB:319.) To the contrary, the record shows only that the defense offered to stipulate and the trial court refused to allow the stipulation because of opening argument of counsel indicated a denial of involvement in narcotic sales. (88RT:10535-10537.) Indeed, the prosecution's case would not have been burdened in any way – indeed, its case would have benefitted to the extent that appellant Bryant would have had to explain the change in position to the jury. The trial court abused its discretion when it disallowed the stipulation because of an argument made by counsel prior to the prosecution's case, as the parties were free to stipulate to such a fact. (See *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 663 [it is entirely proper exercise of discretion for a trial court to accept stipulations of counsel that appear to have been made advisedly].)

Regarding the prior inconsistent statements of Ladell Player, respondent asserts they were more probative than prejudicial on the issue of Player's veracity in that they evidenced a reluctance to testify. (RB:322-323.) However, Player testified that he had to be arrested and brought to court to testify and that he previously told investigators that he would rather testify against John Gotti than testify in the instant case. (86RT:10264, 10345-10347.) Therefore, the probative value of the portions of Player's out-of-court statements in which he said: (1) that he would not testify because he "wanted to go home for Christmas;" (2) that the witness protection program could not protect his parents; and (3) in which he expressed displeasure upon learning the defendants in the instant case would get discovery regarding his statements to police was outweighed by the prejudicial effect of the statements and were not inconsistent with his testimony that he feared testifying in this case.

The trial court's errors, individually and collectively, in admitting evidence of the out-of-court statements of Johnson, Walton and Player over appellant Bryant's objections under Evidence Code section 352 denied appellant Bryant a fair trial and due process of law, and respondent cannot carry its burden establishing the harmlessness beyond a reasonable doubt under *Chapman*. In the objected-to portion of his out-of-court statement, Johnson refers to another homicide and bank robberies being committed by "them," that "they" also sold PCP or "Angel Dust," that the "dope man" in Pacoima corrupts young boys with material wealth, that "they" who committed the instant homicides were cold-hearted because he could not see "anyone killing a child for no reason," and that they bragged about their crimes. (People's Exhibit 106; 3SUPPCT41:10603, 10608, 10611, 10617.) These statements had no probative value on any issue before the trial court, and were highly prejudicial other-crimes/bad character/criminal disposition evidence of the type that would only provoke a jury to convict in order to protect the community. The out-of-court statements of Johnson, Walton and Player were either cumulative or not inconsistent with their testimony, and filled in evidentiary gaps with fear. Reversal is required.

**E. The Attacks on Keith Curry**

Appellant argues that the trial court erred in admitting two attacks on Keith Curry. Appellant argues that (1) the foundational showing for the admissibility of appellant Bryant's alleged admission to the car bomb attack – i.e., that appellant Bryant knew of his estranged wife Tannis's involvement with Curry and was angry about it – was established in violation of the marital privilege; (2) the evidence of the attacks on Keith Curry were irrelevant to the proffered motive for the instant homicides – i.e., that Armstrong was killed because of threats he posed to the drug sales

operation in Pacoima; and (3) the evidence was inadmissible under Evidence Code section 1101. (AOB:246-254.)

Respondent argues the trial court acted within its broad discretion in admitting the evidence as to motive – albeit the secondary motive proffered midway in this case – that appellant Bryant wanted to have Tannis' lovers (Curry and Armstrong) killed and that the predicate facts to the admissibility of this evidence was sufficiently proven. (RB:328-330.) Appellant has already argued herein and in his opening brief about how the prosecution failed to adduce admissible evidence that appellant Bryant knew of Tannis's relationships with Curry and Armstrong, and failed to adduce admissible evidence that appellant Bryant was angry about either relationship, so appellant Bryant will not repeat the argument here. (See, e.g., AOB:259-273, 377-391.) The predicate facts were not established, and the admission of evidence under this theory of motive was patently error. (*People v. Marshall* (1996) 13 Cal.4th 799, 832 [where relevance of evidence depends upon the existence of a foundational fact, proffered evidence is inadmissible unless the trial court determines it is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence].)

Respondent argues that the trial court did not err in admitting the evidence on the issue of identity because "appellant Smith's shooting of Curry shared distinctive common marks with the instant crimes sufficient to raise an inference of identity." (RB:330.) In support of its argument that there existed sufficiently distinct common features of the crimes, respondent argues that "appellant Bryant victimized those who were his ex-wife's lovers, a distinct group." (RB:331.) Again, respondent relies upon a theory of admissibility that is not supported by the record. In any event, as

discussed in appellant Bryant's opening brief at length and not repeated here, the distinctive common marks were insufficient and, as a matter of law, were inadmissible on the issue of identity. (AOB:213-218; compare *People v. Balcom* (1994) 7 Ca.4th 414, 425 [highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense].)

The prosecution needed a different theory of admissibility for the admission of the evidence of the attacks on Curry. There existed no evidence that Curry was attacked because he was a threat to the drug sales operations, which for many years was the single motive for the instant homicides proffered by the prosecution. So the prosecution proffered another motive for the introduction of the evidence of the attacks on Curry. They argued that both Curry and Armstrong were victimized because of their relationship with appellant Bryant's ex-wife. This theory of motive was also inconsistent with the prosecution's long-standing position that Tannis was used by appellant Bryant as a lure to secure Armstrong at a location where he could be killed; indeed, Tannis was prosecuted for the instant homicides on that very theory. (See CT22:6217-6258.)

Appellant has shown how the secondary theory of motive was nothing more than a house of cards designed, as trial counsel argued, to enable the prosecution to inflame and prejudice the jury with the sympathetic presence of a paraplegic. (89RT:10924, 90RT:10948.) The trial court erred under Evidence Code section 1101 and denied appellant Bryant a fair trial and due process of law by admitting such inflammatory and prejudicial evidence and by allowing the prosecution to attain admissibility of prejudicial evidence on factually inconsistent theories. (See

*In re Sakarias* (2005) 35 Cal.4th 140, 160 [state's use of inconsistent and irreconcilable theories in separate trials for the same crimes violates due process].) Since respondent cannot carry its burden of establishing the error was harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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## VIII[18]

## THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY REJECTED APPELLANT BRYANT'S CLAIM OF MARITAL PRIVILEGE

Appellant Bryant contends the trial court erred in rejecting his claim of marital privilege regarding an alleged statement he made to his then-wife Tannis Curry over the telephone concerning the pipe bombing of Keith Curry. (AOB:259-273.) Respondent submits that the trial court properly rejected appellant Bryant's claim of privilege because the statement was not made "in confidence" within the meaning of Evidence Code section 980. (RB:393-399.)

At trial, the prosecution argued for the admission of the evidence, contending that even if a valid marriage existed at the time the statement was made, it was not privileged under Evidence Code section 980 since: (1) Tannis was separated from appellant Bryant and in a relationship with Curry; (2) Tannis was not asserting the marital privilege; and (3) Tannis waived the privilege by conveying the communication to a third party. (94RT:11824-11825.)

On appeal, respondent asserts that the trial court's ruling was based on Evidence Code 980 and cases that interpret the "in confidence" component of the privilege. (RB:395, fn. 54.) As a preliminary matter, because the prosecutor did not attempt to justify admission of the statement on that ground, respondent cannot now assert it as a basis for supporting the trial court's ruling admitting the statement. (See *People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4, citing *People v. Fauber* (1992) 2 Cal.4th 792, 854 and *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.) Secondly, the

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[18] This is designated Argument XII in respondent's brief.

trial court's ruling was not based on those grounds. The trial court erroneously ruled: (1) that the privilege did not apply as there existed no "real marriage" between appellant Bryant and Tannis because of their separation and her involvement with another man; and (2) since appellant Bryant's alleged communication involved a threat to the safety of a third party, the law permitted an exception to the marital privilege similar to the exceptions to the psychotherapist/patient and attorney/client privilege. (101RT:13067-13072.) Appellant Bryant has explained how both of these ruling were incorrect as a matter of law and will not repeat the arguments here. (AOB:262-269.)

Respondent does not dispute appellant Bryant's claim of error regarding the existence of the marriage and the application of the privilege. In fact, it completely ignores the fact that this was the primary basis for the trial court's ruling admitting the statement. This primary ground for admitting the statement was clearly erroneous.

Further, the record belies respondent's claim that the trial court found that the communication between appellant Bryant and Tannis was not made "in confidence" under Evidence Code section 980. The trial court ruled that, assuming there was a marriage, there was no reasonable expectation by either party that the communication would be a privileged one. (101RT:13067-13072.) In so ruling, the trial court found this threat not of the type the privilege was meant to protect. However, Evidence Code section 980 does not exempt from the privilege threats of future harm to a third party made by one spouse to another. There exists no statutory exception to this rule that is equivalent to exceptions to lawyer/client and psychotherapist/patient privileges. (See, e.g., Evid. Code, §§ 956.5 and 1024.) The legislature could have created such an exception to the marital

privilege, but it has not. Since privileges and their exceptions are statutory creations which cannot be altered by judicial interpretation, the trial court was not free to fashion its own exception to the rule. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206; *Roberts v. City of Palmdale* (1993) 5 Ca.4th 363, 373.)

Under Evidence Code section 980, if a valid marriage existed, as it did in the instant case, then the communication was presumed to have been made in confidence, and the burden was on the prosecution to overcome that presumption by a preponderance of the evidence. (*People v. Mickey* (1991) 54 Cal.3d 612, 655; Evid. Code, §§ 115 and 917, subd. (a).) The trial court erroneously and prejudicially failed to conduct this analysis and the prosecution failed to overcome the presumption.

Respondent lists seven factors that it contends support its claim that appellant Bryant's communication to his wife was not "in confidence." (RB:397.) The first three factors relate to appellant Bryant's separation from Tannis and are simply not relevant. The marital privilege survives separation and applies to communications between those who are still legally married (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894-895), and respondent does not dispute that appellant Bryant and Tannis were still legally married when the communication was made.

Another factor relied upon by respondent alleges that appellant Bryant's alleged threat was intended by appellant Bryant to be delivered by Tannis to Keith Curry. (RB:397.) As stated above and in appellant Bryant's opening brief, threats of this kind are not exempt from the marital privilege: the statements by one spouse before the alleged commission of an offense as to what he intended to do, why he intended to do it or how he intended to do it are privileged communications within Evidence Code

section 980. (AOB:263-269; *People v. Dorsey* (1975) 46 Cal.App.3d 706, 719.)

Another factor respondent relies upon is a conclusion by the trial court that everyone in the neighborhood knew of appellant Bryant's threats. (RB:397, citing 101RT:13069.) However, there exists no evidence in the record that appellant Bryant communicated his threat to anyone other than Tannis.

Yet another factor relied upon by respondent, that "appellant Bryant acknowledged to Pierre Marshall his responsibility and involvement in the crippling of Keith Curry as he mimicked the action of a paraplegic" (RB:397) is similarly irrelevant to the claim of marital privilege as to the alleged car bombing of Keith Curry. Mr. Curry was paralyzed in a later and separate shooting. Nor can appellant Bryant's remarks conceivably be considered an "admission" to the Curry shooting in any legal sense. The prosecution proffered that Marshall would testify that appellant Bryant admitted his involvement in that shooting, but no such testimony was elicited from either Marshall or Detective Vojtecky, who testified regarding Marshall's prior inconsistent statements about Marshall's meeting with appellant Bryant. The prosecution never proved up its proffer.

The final factor relied upon by respondent, that Tannis communicated the statement at the beauty salon, (RB:397) is likewise irrelevant to appellant Bryant's claim of privilege. Tannis may very well have waived the privilege as to herself, but appellant Bryant retained his privilege to prevent disclosure of the marital communication. (Evid. Code, §§ 912, subd. (b) and 980.)

None of the cases cited by respondent provide authority for the proposition that prosecution carried its burden of overcoming the

presumption in this case. In *People v. Cleveland* (1991) 32 Cal.4th 704, 743-744, a privileged communication between husband and wife was held not to have been made "in confidence" because the husband had repeated the same statement to others in the presence of his wife, as well as to an investigating officer. In *People v. Mickey, supra,* 54 Cal.3d at p. 654, this Court held that letters a husband wrote to his wife from a Tokyo detention house were not made "in confidence" because the defendant believed the Japanese and/or United States authorities were intercepting and reading all his mail.

In fact, a case cited in *People v. Cleveland, supra*, 32 Cal.4th at p. 744 further supports appellant Bryant's claim. In that case, *People v. Gomez* (1982) 134 Cal.App.3d 874, 879-880 (*Gomez*), the defendant was on trial for shooting the lover of his wife. Over objection, the defendant's ex-wife, Celia, testified to threats made against her lover during the period after defendant and Celia separated and before the parties' marriage was dissolved. Defendant claimed that these communications were "confidential" and should have been excluded. The Court of Appeal ruled that the threats were not confidential because the defendant had made the same threats to others during the several months leading up to the shooting. Thus, *Gomez* stands for the proposition that, while a communication between a husband and wife is presumed to be confidential, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged.

In this case, (1) there is no evidence that appellant Bryant repeated his alleged threat to anyone other than Tannis; and (2) the evidence establishes that he communicated the alleged statement to his wife as a free, private citizen in an unmonitored telephone conversation. There existed no

indicia that appellant Bryant believed the conversation was anything other than private.

Lastly, respondent argues that even if the trial court erred, the error was harmless. (RB:398-399.) In support of its argument respondent again incorrectly asserts that "appellant Bryant claimed responsibility for the crippling of Keith Curry . . . ." (RB:398.) As set forth above, the prosecution never proved up its proffer in that regard. Contrary to respondent's further assertion that the evidence about the attacks on Keith Curry were merely cumulative of the evidence already presented (RB:398-399), the evidence clearly served another improper purpose: appellant Bryant's trial counsel argued the evidence added little if anything to the prosecution's case and was instead designed to prejudice the jury by presenting the sympathetic testimony of a paraplegic. (90RT:10948-10949.) In addition, as argued fully in appellant Bryant's opening brief and not repeated herein, but for the trial court's error in admitting appellant Bryant's alleged admission regarding the car bombing of Mr. Curry, the prosecution would not have been able to establish the factual predicate for the admission of the prejudicial evidence relating to the shooting of Mr. Curry. (AOB:269-273.) For all the reasons stated here and in appellant Bryant's opening brief, reversal of appellant Bryant's conviction and death judgment is required.

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## IX[19]

## THE ERRONEOUS ADMISSION OF PREJUDICIAL HEARSAY EVIDENCE REQUIRES REVERSAL

To the extent that appellant Bryant raises the same specific claims of error in his opening brief, appellant Bryant joins the arguments concerning the same claims of error in the opening and reply briefs of coappellant's Smith and Wheeler. (WAOB:248-255 and WARB:43-46; SAOB196-206, 214-217 and SARB:86-91.) Only one part of respondent's brief warrants further discussion by appellant Bryant – respondent's contention that the erroneous admission of Armstrong's "voice from the grave" constituted harmless error. (RB:288-293.)

### A. The "Voice From The Grave" Of Andre Armstrong

Respondent does not contest appellant Bryant's claim that the admission of the in-custody, tape-recorded police interview of Andre Armstrong regarding a separate mater[20] violated *Crawford v. Washington* (2004) 541 U.S. 36. Rather, respondent contends that any error was harmless. (RB:288-293.) Respondent is incorrect.

In so arguing, respondent misstates appellant Bryant's argument as to why the error was not harmless. Respondent alleges that appellant Bryant "maintains that, without Armstrong's taped statements, there was no evidence of appellant Bryant's involvement in the shooting of Goldman or the murder of Gentry. (BAOB:280.)" Appellant Bryant argued, however,

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[19] Respondent's arguments against appellant Bryant's contentions are contained in Argument VIII of respondent's brief.

[20] Respondent incorrectly asserts that the interview of Armstrong concerned the Ken Gentry shooting. (RB:288.) In fact, Armstrong was interviewed concerning the shooting of Charles Gentry, which was unrelated to the killing of Ken Gentry. (33RT:9409-9413.)

that there was no *admissible* direct evidence of appellant Bryant's involvement in the Goldman or Gentry shootings absent the taped statement of Andre Armstrong. (See AOB:219-221, 280-290, contesting the admissibility of the testimony of Rhonda Miller and the out-of-court statements of Winifred Fisher, Benny Ward and Ken Gentry concerning the Gentry shooting.) Certainly, if the prosecution had had admissible evidence of appellant Bryant's involvement in the Ken Gentry shooting, appellant Bryant would have been brought to trial on that charge; instead, the charge against appellant Bryant was dismissed prior to trial.

Respondent asserts there was "overwhelming evidence that Armstrong believed he was 'owed' by appellant Bryant for taking the 'fall' for the 'hit' on Gentry and that he intended to collect on his debt once released from prison." (RB:290-291.) In support of this assertion, respondent refers to record references that show that appellant Bryant wired Armstrong and his relatives and friends substantial amounts of money and that Armstrong communicated to his friends that he felt appellant Bryant "owed him." (RB:291-292.)

Notably, none of these friends of Armstrong were friends of appellant Bryant, and there not one iota of evidence that Armstrong's puffing to his friends was communicated to appellant Bryant. With regard to the evidence concerning the Ken Gentry killing, appellant Bryant moved that an instruction be given prior to the introduction of this evidence limiting its purpose to showing a connection between Armstrong and one or more of the defendants. (CT:11093-11099.) The trial court ruled that a limiting instruction prior to the admission of the evidence was proper, but expanded the limiting instruction to say the evidence could also be considered as to issues of motive, premeditation and intent with regard to

the charged homicides in this case; a key factor in the court's ruling was the *prosecution's proffer that further evidence would establish that Armstrong's threats were in fact communicated to appellant Bryant.* (RT:8724-8730, 8786-8787, emphasis added.)[21] Respondent cites no evidence – because it cannot – that Armstrong's threats to collect from appellant Bryant were ever communicated to appellant Bryant. Therefore, this "overwhelming evidence" of motive is a red herring.

Further, evidence that appellant Bryant sent money to Armstrong in prison was merely consistent with the prosecution's theory at trial that when Bryant Family employees were arrested, the Bryants took care of them and their families. For example, when David Hodnett and Alonzo Smith were in custody as a result of their activities alleged to have been committed on behalf of the Bryant Family, the prosecution presented evidence that appellant Bryant arranged to send money to their wives, Tonia Buckner and Iris Brock. (87RT:10448-104465, 89RT:10907-10909, 113RT:15182-15189.) Respondent's use of these facts to establish other evidence of motive is incredible especially given the fact there was no evidence that any of the other people provided for were "squeezing" the Bryant family. Thus, rather than other evidence of motive, this evidence shows only that the

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[21] Appellant Bryant made the same argument regarding alleged threats made to Goldman, warning him not to testify in the instant proceeding. The trial court then allowed Goldman to testify regarding implied threats he received prior to his testimony in his case; however, the court ruled that unless the threats were linked to appellant Bryant, that evidence would be limited to the credibility of the witness. (RT:9218-9220, 9226.) No evidence was introduced showing that appellant Bryant directed people to threaten Goldman prior to his testimony.

Bryant Family was living up to its obligation to its employees, as the prosecution claimed at trial.

Finally, respondent asserts that other evidence of motive existed in appellant Bryant's "damning statements acknowledging he had to eliminate Armstrong and Brown." Specifically, respondent points to appellant Bryant's alleged statements that (1) in discussing the state of the Wheeler Avenue house after the homicides, he told Ladell Player that "We had some problems, but we took care of them," and (2) "when discussing Tommy's (James Brown) murder, appellant Bryant told Alonzo Smith, 'Yeah, he [Brown] had to go.'" (RB:292.)

Addressing appellant Bryant's alleged admission to Alonzo Smith first, the statement respondent attributes to appellant Bryant is simply not in the record before this Court. Alonzo Smith's testimony regarding the conversation between himself and appellant Bryant was as follows:

> Q Did you have a conversation with Mr. Bryant about the fact that Tommy Hull was dead?
>
> A Tommy, yeah.
>
> Q And what happened --
>
> A Well, not in that fashion.
>
> Q Explain it to me.
>
> A I mean I had already knew he was in for murders or for murder. I had been down to visit him.
>
> Q You mean Stan Bryant, you had gone to visit him?
>
> A Yeah.
>
> Q Did you have a conversation with him about the fact that tommy was dead and that you didn't trust him and things like that?
>
> A Yeah. Tommy Scammed, Yeah.

Q And did Stan Bryant make some response about what had happened to Tommy Hull?

A He told me he had got killed.

Q Was a statement -- the statement he made to you was that he –

(89RT:10913-10914.) Appellant Bryant's counsel then interposed a leading question objection, and a bench conference was held. The prosecutor proffered that Smith told him (the prosecutor) and Detective Vojtecky that he (Smith) reminded appellant Bryant that Smith had warned appellant Bryant not to trust Tommy and appellant Bryant replied, "Yeah, Tommy, he had to go." (89RT:10914-10915.) Defense counsel then inquired whether there were any reports to that fact; the prosecutor said that two tape recordings in this regard had been turned over to the defense, and the court overruled the objection. (89RT:10915.) Then the following exchange between the prosecutor and Smith occurred:

Q Mr. Smith, did Mr. Bryant indicate to you or tell you that when you were talking about Tommy Hull and the -- reminding him that you did not trust him and he shouldn't trust him, while you were in county jail did Stan Bryant state to you, "yeah, he had to go"?

A In some form, but it wasn't exactly in that manner.

Q Okay. When -- okay. Do you recall what manner it was?

A No, because he wasn't really -- he wasn't really talking about his case. I knew -- I knew about what had happened through people, you know. I'm trying to think of what happened, what really happened.

Q When -- you met me a couple of months ago – you are currently in custody; correct?

Then the prosecutor proceeded to question Alonzo Smith as to whether or not he received any sentencing benefits for his testimony. (89RT:10916-10917.)

Alonzo Smith did not testify that appellant Bryant said what respondent attributes to him, i.e., "Yeah, he had to go." The only person who uttered those words at trial was the prosecutor in his leading question to the witness. (89RT:10916.) In response, Smith testified that appellant Bryant did *not* say that, and that he (Smith) *could not recall exactly what appellant Bryant said.* The prosecutor never presented sworn testimony at appellant Bryant's trial of any prior inconsistent statement by Smith in which Smith reported appellant Bryant's alleged statement. Since no evidence was adduced that Smith made a prior inconsistent statement in this regard, there is no evidence that may be considered for its truth that appellant Bryant made that statement to Smith. (See *California v. Green* (1970) 399 U.S. 149 [evidence of statement made by witness is not made inadmissible by hearsay rule or Confrontation Clause if statement is inconsistent with testimony at hearing and witness is given opportunity to explain or deny prior statement]; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 6 ["It is axiomatic that the unsworn statements of counsel are not evidence."]; *In re Heather H.* (1988) 200 Cal.App.3d 91, 95 [unsworn statements of counsel are not evidence because unsworn testimony in general does not constitute "evidence" within the meaning of the Evidence Code]; *People v. Superior Court (Crook)* (1978) 83 Cal.App.3d 335, 341 [counsel's unsworn statements not evidence].)

Regarding appellant Bryant's alleged statement to Ladell Player, Player said that he had a bad drug habit and would have told the police anything they wanted to hear. (People's Exhibit 110; 3SUPPCT40:10547, 10557, 10567.) At trial, he denied seeing or speaking to appellant Bryant at the courthouse and denied that he had heard appellant Bryant say the alleged statement. (86RT:10261-10263.) Court records indicated that

appellant Bryant had not appeared at the courthouse on the date in question and Detective Vojtecky said he did not verify that appellant was present in court on that date. (111RT:14873, 113RT:15142-15148.) No prior inconsistent statement of Player, in which he allegedly reported appellant Bryant's remark, was played to the jury. Instead, DDA Maurizi alone, whose lack of impartiality has been discussed at length, *ante*, testified that Player reported appellant Bryant's alleged statement to her. Thus, evidence that appellant Bryant allegedly made the statement to Player is not fairly supported by the record.

The prejudicial impact of Armstrong's "voice from the grave" cannot be understated. "The 'voice from the grave' effect is in and of itself a dramatic and emotional trigger." (*United States v. Narciso* (D.C. Mich. 1977) 446 F.Supp. 252, 291, fn. 6.) In addition, "[a]n account of a voice from the grave is easily reconstructed with 20/20 hindsight and virtually impossible to disprove." (See *People v. Thomspon* (1988) 45 Cal.3d 86, 146 (conc. opn. of Mosk, J.). Nor do limiting instructions necessarily mitigate the damage done:

> The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

(*Shepard v. U.S.* (1933) 290 U.S. 96, 104 (citation omitted); see also *People v. Talle* (1952) 111 Cal.App.2d 650, 671 [error in admitting "voice from the grave" evidence not cured by limiting instruction].) Here, Armstrong's words, beyond the reach of attack or impeachment, improperly and

prejudicially supplied the jury with the motive for his death by appellant Bryant's hands.

Finally, as discussed above and more fully in appellant Bryant's opening brief, the erroneous admission of Armstrong's taped statement led to the improper admission of still more inadmissible hearsay regarding Armstrong's belief that the Bryant family owned him and that he planned to collect. (AOB:280-282.) Without the statement and all that was erroneously introduced in its wake, the evidence adduced at trial would have allowed the inference only that Armstrong shot Gentry and Goldman for the Bryant Family and that, like other employees, Armstrong and his family and friends were taken care of by the Bryant Family while he was in prison.

For all of the above reasons, the evidence of motive, apart from Armstrong's statement, is far from "overwhelming." Its admission constituted prejudicial error, requiring reversal of appellant Bryant's conviction and sentence of death.

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## X[22]

## THE TRIAL COURT ERRONEOUSLY ADMITTED OPINION TESTIMONY THAT INVADED THE PROVINCE OF THE JURY

Appellant Bryant argues the trial court erred prejudicially by permitting Detective James Dumelle to testify on redirect examination to his opinion that Jeff Bryant would leave his brother, appellant Stanley Bryant, in charge of Jeff's drug operation while Jeff was in prison. (AOB:294-299.) Respondent argues the evidence was properly admitted because (1) appellant Bryant opened up the door to such opinion in cross-examination; and (2) Detective Dumelle's opinion was proper lay or expert opinion. (RB:410-413.) Respondent argues in the alternative that if any error occurred, it was harmless. (RB:413-414.) Respondent is incorrect in all respects.

Respondent cites no authority that directly supports its position that the prosecution was permitted to ask Detective Dumelle his opinion as to whom he believed Jeff Bryant would leave in charge of running the drug sales organization on the street while he was in prison. Respondent argues that this opinion was properly elicited because Detective Dumelle had been asked on cross-examination whether, from what he knew from his work investigating the drug organization in 1985, Jeff Bryant would still be running it while he was in prison. Respondent relies solely on Evidence Code section 356 and a discussion of same in *People v. Sakarias* (2000) 22 Cal.4th 596, 644 (*Sakarias*). Because the prosecutor did not attempt to justify admission of the testimony on this ground, respondent may not now assert it as a basis for supporting the trial court's ruling permitting the

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[22] This is designated Argument IX in respondent's brief.

testimony. (See *People v. Hines* (1997) 997, 1034, fn. 4, citing *People v. Fauber* (1992) 2 Cal.4th 792, 854 and *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640; *Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 515 [as a general rule, issues not raised in the trial court cannot be asserted for the first time on appeal].)

Even if the prosecutor had attempted to justify admission of the testimony on this ground, it would have been error for the trial court to rule in the prosecution's favor. Evidence code section 356 provides:

> Where part of an *act, declaration, conversation, or writing* is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

(Italics added.) In *Sakarias, supra*, 22 Cal.4th at p. 644, this Court ruled on the whether cross-examination of a police officer regarding defendant's statements opened up the door to parts of the statement that had previously been ruled inadmissible. In the instant case, there existed no "act, declaration, conversation or writing" – at issue was only whether it was permissible for Detective Dumelle to render an opinion on who would be running the drug organization on the street in 1988 while Jeff Bryant was in prison. Evidence Code section 356 and the quoted section of *Sakarias* are simply not relevant to this legal issue.

Detective Dumelle's opinion regarding who Jeff Bryant would leave in charge of street operations in 1988 was not proper lay or expert opinion. It was not proper expert opinion because Detective Dumelle was not qualified as an expert in the "Bryant Family" organization at trial.

Detective Dumelle testified regarding the limited period of time he investigated drug sales in the San Fernando Valley in 1984-1985. He could not have given an informed expert opinion regarding who Jeff Bryant would leave in charge of drug operations in 1988, as he had long since ceased investigating Jeff Bryant's organization.

Nor was Detective Dumelle's opinion proper lay opinion. Lay opinion may properly speak to matters within the personal knowledge of the witness. (Evid. Code, § 702, subd. (a).) In this case, Detective Dumelle testified he "would think" Jeff would need someone outside the prison to help him and that he (Dumelle) believed that Jeff Bryant would leave appellant Bryant in charge of activities outside of prison. (84RT:9707.) However, Detective Dumelle did not himself know whether (1) that Jeff Bryant would leave someone in charge of street operations in 1988 or (2) that Jeff Bryant did in fact leave someone in charge in 1988. Detective Dumelle was improperly allowed to guess that Jeff Bryant did leave someone in charge in 1988 and guess that the person he would leave in charge in 1988 was appellant Bryant. This was simply outside the scope of his personal knowledge and outside the scope of any expertise he may once have had regarding the workings of Jeff Bryant.

The improper opinion testimony of Detective Dumelle was particularly harmful given appellant Bryant's defense: Appellant Bryant testified that when Jeff went to prison, the business was sold to William Settle and that he (appellant Bryant) worked the books for William. Respondent concludes that if error occurred, it was harmless because "[a]ppellant Bryant was identified as the 'boss' while Jeff Bryant was in prison in 1988 by eyewitnesses James Williams, George Smith and Laurence Walton." (RB:300-301.) Those were low-level operators who

may very well have considered appellant Bryant their boss, given his admitted role in the organization and his position as someone with more gravitas with William Settle than they would have. Thus, their belief that appellant Bryant was their "boss" was not inconsistent with appellant's defense. Another indication that appellant Bryant was not the "big boss" of the prosecution's case is indicated by his nickname - according to George Smith, appellant Bryant was known as "Peanut Head." (111RT:14882-14883.) Thus, Detective Dumelle's opinion that appellant Bryant was in charge, given his stature as a law enforcement officer who at one point investigated the organization, surely tipped the balance in favor of the prosecution's case. Reversal is required under either the *Watson*[23] or *Chapman*[24] standard.

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[23] *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

[24] *Chapman v. California* (1967) 386 U.S. 18, 24.

## XI[25]

## THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING IRRELEVANT, INFLAMMATORY, GRUESOME AND CUMULATIVE PHOTOGRAPHS OF THE VICTIMS' BODIES

Appellant Bryant, who raises this issue in his opening brief (AOB:300-311), hereby joins in Argument VII of coappellant Smith's opening and reply briefs on appeal. (SAOB:236-246 and SARB:98-103.) Appellant Bryant has one further point to add that may assist the Court in determining this issue.

Respondent asserts:

> [T]o the extent appellants failed to object in the trial court to the admissibility of the photographs (or X-rays) of the four murder victims on the ground of Evidence Code section 352 (see, e.g., RT 13795-13796 [appellants raise relevance objection to X-ray of baby Chemise but do not raise an objection under Evidence Code Section 352]), their claims of error are waived on appeal. (Evid. Code, § 353, subd. (a); *People v. Raley, supra*, 2 Cal.4th at p. 892.)

(RB:404.)

Appellants have not waived their objections under section 352. Once the trial court overruled appellants' relevance objection, it was required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption, even in the absence of a defense objection under section 352. (See *People v. Geier* (2007) 41 Cal.4th 555, 584 (citation omitted) [evidence admissible under hearsay exception is nonetheless subject to section 352 even when section 352 not raised in the trial court].) This Court may thus decide on the merits whether the admission of the items in question violated section 352 and denied

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[25] This is designated Argument XIII in respondent's brief.

appellants their federal constitutional rights. (See *People v. Partida* (2005) 37 Cal. 4th 428, 433-439 [section 353 does not preclude defendant from arguing that the asserted error in admitting the evidence over section 352 objection has the additional legal consequence of violating due process].) For the reasons stated here and in appellants' opening and reply briefs, reversal is required.

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## XII[26]

## APPELLANT BRYANT WAS DENIED A FAIR AND IMPARTIAL TRIAL BY THE TRIAL COURT'S SUA SPONTE CROSS-EXAMINATION OF APPELLANT BRYANT WHICH UNDERMINED HIS CREDIBILITY

In his opening brief, appellant Bryant maintains the trial court showed bias and denied him a fair trial when the trial court asked him during his cross-examination a series of questions that began with, "Are you having selective memory problems?"[27] (AOB:312-315.)

It must first be noted that in 2006 the trial court presided over a limited remand for record augmentation and settlement proceedings. (10SUPPCT:1-2.) Having read appellant Bryant's brief, the trial court addressed a matter that was not within the scope of this Court's remand. The trial court stated its belief that the record reference to the court as the questioner, referenced above, was an error, made by the court reporter, who is now deceased. It cited in support of its belief other citations to the record in which the words, "THE WITNESS" were used instead of "Q" (the shorthand for question) after the court spoke to, or asked a question of, a witness. One of the trial deputy district attorneys present for this hearing then asserted that he recalled that exact exchange and knew that one of the other prosecutors (who was not then present in court) had asked the

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[26] This is designated Argument XIV of respondent's brief.

[27] Respondent asserts incorrectly that appellant Bryant does not contend that the record reflects the trial court asked appellant Bryant 14 uninterrupted questions on cross-examination. (RB:413.) Appellant Bryant does assert that the record as certified reflects just such an examination of appellant Bryant by the trial court. To the extent appellant Bryant's argument in his AOB was unclear in this regard, it is hereby clarified.

question of appellant Bryant, rather than the trial court.[28] (3/16/06 RCRT:5-25.)[29]

Appellant Bryant maintains the trial court had no jurisdiction in 2006 to make the correction to the record. (*People v. Carpenter* (1995) 9 Cal.4th 634, 646; Cal. Const., art. VI, § 11 [California Supreme Court has exclusive subject matter jurisdiction over capital cases on appeal].) The trial court had the opportunity to correct the record in 1996, when trial counsel were present and participating in record correction proceedings.[30] It did not do so. The only procedure by which the record may be corrected post-certification by the superior court is after this Court issues an order for a hearing on the issue in which counsel can call as sworn witnesses all relevant parties.

Respondent contends appellant Bryant has waived this claim by failing to object at trial. (RB:414.) However, a defendant's failure to object to judicial misconduct does not preclude review when an objection and an admonition could not cure the prejudice caused by such misconduct, or

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[28] The trial court notified appellants prior to the proceedings of its intention to correct the record in this regard. Appellant Bryant objected on jurisdictional grounds prior to the in-court proceedings. (10SUPPCT:1:57-61.)

[29] "RCRT" stands for Record Correction Report's Transcript from the date indicated prior to the abbreviation.

[30] The words in issue occur on page 15492, line 11 of the reporter's transcript on appeal. This very section was corrected during the record correction process involving trial counsel in 1996, in which the word "you" was added on line 12. (RT:15492.) It was during that process that the court and counsel went over the transcript line by line and made numerous corrections to the record. That the trial court and trial counsel had reviewed this very passage and had not corrected the speaker, but rather certified the record as correct.

when objecting would be futile. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 (citations omitted).) An objection could not have cured the harm to such a caustic series of questions that clearly conveyed a disbelief of appellant Bryant's testimony. Also, as commentators have observed, the rule that an appellate court will not consider points not raised at trial does not apply to "[a] matter involving the public interest or the due administration of justice." (9 Witkin, Cal. Procedure (3d ed. 1985), Appeal, § 315, p. 326; see *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [whether or not an appellate court should excuse the lack of a trial court objection is entrusted to its discretion].) This is an issue involving the due administration of justice.

Further, respondent cites *People v. Harris* (2005) 37 Cal.4th 310, 350 (*Harris*) in support of its position that the waiver doctrine should be applied to this claim. (RB:414.) However, *Harris* actually supports appellant Bryant's argument that the Court should reach the merits and hold that prejudicial error occurred in instant case. *Harris* involved the same trial court that presided over this case and involved a claim of judicial bias in manner in which the trial court questioned a testifying defendant. (*Id.* at pp. 310, 346-351.) There, the defendant alleged several claims of judicial bias, and this Court first declined to decide if a failure to object waived the claim of judicial bias and instead reached the merits of the claim, holding that "[a]lthough defendant failed to object to the allegedly improper acts on the grounds of judicial bias or seek the judge's recusal . . . we need not decide whether defendant has forfeited this claim because it lacks merit." (*Id.* at p. 346, citations omitted.) In *Harris*, the trial court asked the following questions of the defendant, without objections, after the prosecution's cross-examination:

Court: When you were in the house, you say you heard a gun go off? Who did you figure was being shot?

Defendant: I thought I was being shot at.

Court: At some point did it dawn on you that perhaps somebody else had been shot in the house?

Defendant: No.

Court: Never did?

Defendant: No.

Court: Did you think that Mr. Canto might be in there?

Defendant: Yes, I figured it was a possibility he was in there.

Court: You didn't see him, though?

Defendant: No.

Court: Did you think the young lady might be in there?

Defendant: No, because I haven't seen her. I didn't see her earlier when I was there.

Court: You didn't think she was home?

Defendant: No, I didn't.

Court: Did you ever call the house later on to see if anybody got killed?

Defendant: No, I didn't.

Court: Why not?

Defendant: Just never crossed my mind.

Court: Didn't?

Defendant: No.

Court: Weren't you curious?

Defendant: I was more distraught.

Court: In the next couple of days did you ever call the house or try to contact Mr. Canto?

Defendant: Like I said, I believe it was the next day that I read the newspaper.

Court: You said two days later.

Defendant: I believe it was either that day or the next day.

Court: It wouldn't be in the next morning's paper since it happened so late.

Defendant: I couldn't say for sure. I couldn't say what day it was.

Court: You never called to find out what happened?

Defendant: No.

Court: Never did?

Defendant: No.

Court: You were ignorant of it until you read it in the paper?
Defendant: Yes.

(*Id.* at pp. 348-350.) On appeal, Harris argued the trial court overstepped its bounds with respect to the tone, form, and number of questions posed. (*Ibid.*) This Court then held, "Were we to reach the merits, we would not endorse all of the trial court's questioning quoted above and, indeed, would find some of it inappropriate." The Court then found no prejudice to the defendant on the facts of that case.

This Court should rule on the merits of appellant Bryant's claim on the record that was certified and filed in this Court. The trial court's track record evidences the same bias claimed herein. The trial court's improper questioning of appellant Bryant deprived him of a fair trial and due process of law in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his rights to a fair trial under the state constitution. Since the error violated appellant Bryant's

federal constitutional rights, the proper standard of review is *Chapman*,[31] rather than *Watson*,[32] as respondent argues. (RB:414.) For all the reasons stated in appellant Bryant's opening brief (AOB:309-311), the state cannot carry its burden of establishing the error was harmless beyond a reasonable doubt. Reversal of his conviction and sentence of death is required.

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[31] *Chapman v. California* (1967) 386 U.S. 18, 24.

[32] *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

## XIII[33]

## THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT BRYANT'S MOTIONS TO SUPPRESS EVIDENCE

### A. Appellant Bryant Had A Legitimate Expectation of Privacy In The Wheeler House And Was Improperly Denied The Right To Challenge The Warrantless Search Of The Premises[34]

Respondent does not contest appellant Bryant's assertion that the search of the Wheeler house was warrantless and not within any exception to the Fourth Amendment's warrant requirement. (AOB:329-337.) Respondent instead argues that, with regard to the Wheeler house, appellant Bryant had no "standing" to challenge the warrantless search of those premises.[35] (RB:206-218.)

In his opening brief, appellant Bryant argues in part that respondent should be estopped from contesting his right under the Fourth Amendment to challenge the warrantless search of the Wheeler house because throughout the course of the prosecution of this case as well as the

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[33] This is designated Argument IV in respondent's brief.

[34] Appellant Bryant uses the phrase "Wheeler house" to refer to the location of the homicides, 11442 Wheeler Avenue in Pacoima, California.

[35] This Court has noted that "[. . .] the United States Supreme Court has largely abandoned use of the word 'standing' in its Fourth Amendment analyses. (See *Minnesota v. Carter* (1998) 525 U.S. 83, 87(Carter )].) ... [¶] In the future, to avoid confusion with the federal high court's terminology, mention of 'standing' should be avoided when analyzing a Fourth Amendment claim." (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.) With this admonition in mind, appellant Bryant will discuss the question of whether the challenged search and seizure violated appellant Bryant's rights under the Fourth Amendment.

prosecution of one-time codefendants in this case, the prosecution presented evidence that appellant Bryant was in charge of and controlled the business conducted on the premises of the Wheeler house. (AOB:321-323.) Appellant Bryant argues that under *United States v. Issacs* (9th Cir. 1983) 708 F.2d 1365, 1367-1368 and *People v. Dees* (1990) 221 Cal.App.3d 588, 596, the government could not argue possession of items found in a location but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent. (AOB:323.)

Respondent argues in part that "there was nothing inconsistent about the prosecution in this case arguing that a defendant (i.e., appellant Bryant) owned items found in a place where he had no reasonable expectation of privacy." (RB:211.) Respondent asserts that appellant Bryant had no reasonable expectation of privacy because the evidence established that the Wheeler house was "used as a 'count house' for the drug operation, no one lived in the house, appellant Bryant was not on the deed for the house, and appellant Bryant gained entry into the house only by calling ahead and being let in."[36] (RB:210-211.)

Respondent's assessment of the prosecution's case leaves out some "key" evidence – i.e., the prosecution presented at trial the testimony of Detective Vojtecky that several keys recovered from appellant Bryant's person matched keys to the Wheeler house. (103RT:13553-13554; see also 15CT:4709 and Statement of Facts in RB:90-91 ["Several of the keys found

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[36] At the hearing on appellant Bryant's suppression motion, the prosecution offered to stipulate to the content of the prior testimony by Williams (which included six preliminary hearings, not all of which are in the record on appeal in this case, and one grand jury proceeding, but argued that the evidence did not establish appellant Bryant's "standing" to challenge the search of the Wheeler house. (34RT4120-4121.)

at appellant Bryant's residence were to the premises at 11442 Wheeler Street."].) That appellant Bryant possessed keys to the well-fortified Wheeler house certainly indicates control over the premises. (See, e.g., 17CT:4678-4688.) Detective Vojtecky also could have testified that appellant Bryant's brother, Jeff Bryant, owned the Wheeler house and that appellant Bryant kept his exercise bicycle at the Wheeler house as well, indicating a personal, as opposed to business, use of the premises. (37CT:10500; 96RT:12148, 102RT:13372-13373.) Yet Detective Vojtecky was precluded from testifying at appellant Bryant's suppression hearing. 34RT:4126-4157.)

Williams testified that appellant Bryant, and no one else, got weekly hair cuts at the Wheeler house and that he used the house for other non-business purposes. (4CT:1030-1031; 96RT:12148.) Williams also testified that appellant Bryant removed items – an adding machine and a money counter – from a bedroom in the house containing a desk and safe, just prior to the homicides – indicating both a possessory interest in the premises and that the premises was used by appellant Bryant for business purposes. (4CT:889-890, 13CT:3528-3530; 13CT:3694; 96RT:12242.) Yet the trial court erroneously precluded Williams from testifying at the hearing on appellant Bryant's motion to suppress. Certainly, Detective Vojtecky would have testified to such if the trial court had not erroneously precluded appellant Bryant from presenting his testimony in this regard. (See 9SUPPCT7:1539-1540 [at preliminary hearing of Andrew Settle, Detective Vojtecky testified that the Wheeler house was being used as a business office].) However, appellant Bryant was unconstitutionally precluded from carrying his burden of proof at the suppression hearing

because the trial court prohibited him from calling both Williams and Detective Vojtecky as witnesses. (34RT:4126-4159.)

Further, the prosecution's position was that appellant Bryant was in charge of the entire drug operation while his brother, Jeff, was in prison. (84RT:9707.) If, as respondent asserts, the prosecution's position was that the Wheeler house was a "count house" for the drug operation and that appellant Bryant was in charge of the drug operation – and therefore in control of who came and went from the Wheeler house – then it is inconsistent to assert that "there was no evidence that appellant Bryant exercised a right to exclude persons from the house." (RB:216.)

Respondent further argues that the trial court did not err in denying appellant Bryant's request to compel the testimony of Williams regarding appellant Bryant's expectation of privacy in the Wheeler house because Williams would have testified that appellant Bryant used the house for illegal purposes and that, ipso facto, society does not recognize as reasonable any expectation of privacy appellant Bryant had in the premises. (RB:211-214.) This is the same argument made by the prosecution below which was accepted by the trial court – i.e., that appellant Bryant had no "standing" to challenge the search of the Wheeler house because no legitimate expectation of privacy could be had in a house where illegal activities occurred. (34RT:4117-4118, 4120, 4147-4148, 4151, 4186.) This is an incorrect statement of law and the crux of the issue before this Court.

The Fourth Amendment protects people, not places, and a person does not forfeit his or her Fourth Amendment rights by using for illegal purposes property in which he or she has a reasonable expectation of privacy. (See *Katz v. United States* (1967) 389 U.S. 347, 351["[T]he Fourth Amendment protects people, not places"]; *United States v. Vega* (5th Cir.

2000) 221 F.3d 789, 794-796 (*Vega*) [regardless of the activity conducted in a residence, one who owns or lawfully possesses or controls property can have a legitimate expectation of privacy by virtue of his right to exclude from the premises].)

Respondent relies on *Carter, supra,* 525 U.S. at pp. 85-86, 91, for its contrary assertion that appellant Bryant could have no reasonable expectation of privacy in the Wheeler premises because it was being used for illegal purposes. (RB:215-218.) *Carter* is inapposite. In that case, the high Court held that two drug dealers visiting an apartment from out of state who used the apartment for 2 ½ hours to package cocaine had no legitimate expectation of privacy for purposes of the Fourth Amendment. (*Id.* at p. 86.) A third defendant, who was the lessee of the sparsely furnished apartment, was not a party to the appeal. (*Ibid.*) The high Court held that the two drug dealers who had been merely present in the home for a short period of time had no reasonable expectation of privacy for purposes of the Fourth Amendment because the two visitors were merely legitimately on the premises with no indicia of a previous relationship with the resident or of acceptance into the household. (*Id.* at p. 90-91.) In contrast to the defendants in *Carter*, appellant Bryant frequented the Wheeler house, which was owned by his brother Jeff Bryant (37CT:10500) – appellant Bryant got his haircut there every week, kept his exercise bicycle there, and maintained a desk, a safe and other tools of the trade in one of the bedrooms there.

Appellant Bryant is simply afforded more protection under the Fourth Amendment in the privacy continuum posited in precedent than respondent suggests. In determining whether a defendant has a legitimate expectation of privacy in searched premises, "[t]he pertinent factors to

consider include whether the defendant has a property or possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises. [Citations.]" (*People v. Thompson* (1996) 43 Cal.App.4th 1265, 1269-1270 (*Thompson*).) "While generally one of these factors alone is insufficient to establish [a legitimate expectation of privacy] of a third party on the premises of another [citations], the greater the number of these factors and the greater their strength shown by the facts of a particular case, the more likely a protectable expectation of privacy will be found." (*People v. Koury* (1989) 214 Cal.App.3d 676, 686.)

With respect to the first of these factors, a property or possessory interest in the place searched is not essential to establish a legitimate expectation of privacy. (*People v. Moreno* (1992) 2 Cal.App.4th 577, 587.) One situation in which courts readily find a reasonable expectation of privacy with respect to premises not owned or possessed by another is that of an overnight guest. (*Minnesota v. Olson* (1990) 495 U.S. 91, 96-97 (*Olson* ).) "[T]he Supreme Court held 'Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.' " (*Moreno, supra*, at p. 583.) "[H]osts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." (*Olson, supra*, 495 U.S. at p. 99.)

Status as an overnight guest, however, is not a prerequisite to assertion of Fourth Amendment rights regarding government action at a residence one does not own or possess. For example, in *Moreno*, the court held that a babysitter who was not an overnight guest had a legitimate expectation of privacy because he controlled the residence, as evidenced by his "likely" exclusive right to exclude others from the household while the child's parent was absent. (*Moreno, supra*, 2 Cal.App.4th at p. 584.) The court analogized to the situation of a "permissive user in temporary control of a vehicle," who has been held to have a legitimate expectation of privacy inside the vehicle. (*Id.* at p. 587, italics omitted.) Since "[c]ourts consistently have given greater Fourth Amendment protection to a residence than to a vehicle," *Moreno* concluded that "all the more reason exists to give protection to a permissive occupant who temporarily controls a residence...." (*Ibid.*, italics omitted.)[37] According to *Moreno*, while satisfaction of the "right to exclude" factor is not required for a legitimate expectation of privacy (*id.* at p. 587, citing *Olson, supra*, 495 U.S. at pp. 98-100), a defendant who satisfies this requirement " 'will in all likelihood have a legitimate expectation of privacy.' " (*Moreno*, at p. 584, quoting *Rakas, supra*, 439 U.S. at pp. 143-144, fn. 12.) The right to exclude need not be premised on a property or possessory right, but may stem from a temporary, informal arrangement such as that between a babysitter and homeowner. (*Moreno*, at p. 584, fn. 3.)

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[37] Respondent seems to assert that the Wheeler house should be considered is a "commercial premises" for purposes of the Fourth Amendment. (RB:217.) This is incorrect. No case holds that a private residence, as opposed to a truly commercial setting such as a junkyard (see *New York v. Burger* (1987) 482 U.S. 691, 700, can be deemed a "commercial setting" for purposes of the Fourth Amendment.

As stated in *Vega*, "the burglar's expectation of privacy loses its legitimacy not because of the wrongfulness of his activity, but because of the wrongfulness of his presence in the place where he purports to have an expectation of privacy." (*Vega, supra*, 221 F.3d at p. 797, italics added.) "Regardless of the activity conducted by [the defendant] at the residence," Vega explained, " 'one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude....' " (*Id.* at p. 797, quoting *Rakas v. Illinois* (1978) 439 U.S. 128, 143-144, fn. 12.)

Additionally, appellant Bryant was "legitimately on [the] premises" because, though he had apparently been using the premises to traffic in illegal narcotics, he nevertheless possessed the householder's permission to be at the house. (*People v. Stewart* (2003) 113 Cal.App.4th 242, 258.) Indeed, appellant Bryant had keys to the residence, was not required to be invited into the residence, used the residence regularly for personal purposes, kept personal possessions at the residence and exercised the right to exclude others from the premises. With the exception of a technical property interest in the residence, all the pertinent considerations support the conclusion appellant Bryant had a legitimate expectation of privacy in the Wheeler house at the time of the search.

For the foregoing reasons as well as those set forth in appellant Bryant's opening brief, since appellant Bryant had a reasonable expectation of privacy in the Wheeler house, the trial court prejudicially erred in failing to suppress evidence gathered in the warrantless search of the premises. Had appellant Bryant's suppression motion been properly granted, the prosecution would not have had available to it any of the physical evidence at the crime scene that corroborated Williams' version of events. It would

not have had available to it the .45 shell casing linked to the handgun found in appellant Bryant's home. It would not been able to establish the link between the address book containing the name "Tommy" and appellant Bryant's fingerprint and the piece of paper found on the body of Brown. It would not have had the 90-minute schedule, which corroborated Williams' testimony regarding appellant Bryant's alleged leadership role in the drug sales operation. Absent the illegally obtained evidence, appellant Bryant's defense, i.e., that he was an employee of the organization and did not participate in the planning or commission of the homicides, would have been much more viable. In short, the state cannot carry it burden of establishing the error was harmless beyond a reasonable doubt.

In the alternative, should this court find appellant Bryant did not carry his burden of proving his reasonable expectation of privacy in the Wheeler house, he was unconstitutionally precluded from doing so by the trial court's refusal to permit appellant Bryant to call James Williams and Detective Vojtecky to the stand in support of appellant Bryant's motion to suppress. (AOB:324-329.)

In either case, reversal is required.

### B. The Trial Court Erred Prejudicially in Denying Appellant Bryant's Motion To Suppress Evidence Seized From His Home

Appellant Bryant has fully set forth the issues in his opening brief on appeal, and has nothing further to add at this point in time.

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## XIV[38]

## JAMES WILLIAMS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THE FAILURE OF THE TRIAL COURT TO SO INSTRUCT REQUIRES REVERSAL; FURTHER, THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT REFUSED TO ORDER THE JURORS TO RECONSIDER THEIR VERDICTS AGAINST APPELLANT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THE INSTRUCTIONS RELATING TO ACCOMPLICE TESTIMONY

Appellant Bryant joins in Argument I of coappellant Smith's opening and reply briefs (SAOB:43-99 and SARB:1-48) and Argument III of coappellant Wheeler's opening and reply brief (WAOB:170-208 and WARB:12-34), and incorporates those arguments by reference as if fully set forth herein. Appellant Bryant argues below only additional points he believes will assist the Court in its evaluation of the issue.

As fully argued in coappellants' briefs, respondent must be estopped from contending on appeal, as it does (RB:358-365), that James Williams was not an accomplice as a matter of law to the instant homicides, since that position is clearly contradicted by its position, taken numerous times during the proceedings below, that Williams was an accomplice in the instant crimes. (WARB:13-15, SARB:2-4.) In further support of this argument, appellant Bryant directs the Court's attention to portions of the record that were received in augmentation in 2006: During the testimony of Williams in the preliminary hearing of William Settle, a one-time codefendant in this case, then prosecutor DDA Janice Maurizi informed the trial court that Williams was an "uncharged accomplice" and that his testimony needed to be corroborated. (9SUPPCT1:181.) In the same proceeding, Williams

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[38] This is designated Argument XI in respondent's brief.

himself testified that he saw himself as part of the group that killed four people and that Detective Vojtecky had informed Williams that he (Williams) was an accomplice to murder. (9SUPPCT:1:392-396.)

To argue now, as respondent does, that Williams had "no idea" people were going to be killed before the homicides occurred (RB:363) strains credulity and is contrary to the long-standing position of the People at trial. Respondent argues for affirmance of appellant's conviction and sentence on a false factual basis, an end inconsistent with the goal of the criminal trial and appellate process as a search for truth: this "end justifies the means" position undermines the reliability of the conviction and sentence, and is inconsistent with the principles of public prosecution and the integrity of the criminal trial system. (See *People v. Sakarias* (2005) 35 Cal.4th 140, 156, 159.)

Further, in support of its argument that Williams was not an accomplice, respondent relies on a report by Senior District Attorney Investigator William Duncan that purports to establish that Williams did not know that homicides were about to be committed for various reasons. (RB:361, 363.) Circumstances surrounding the completion of that report strongly suggests a "deliberate manipulation [by the prosecution] of the evidence put before that jury." (*People v. Sakarias, supra,* 35 Cal.4th at p. 159.)

Called as a defense witness, Investigator Duncan testified that he interviewed Williams on January 25, 1993, at Foothill Police Station, in the presence of DDA Kevin McCormick and DDA Bill Seki, both prosecutors assigned to the instant case, after which Investigator Duncan wrote a report. In that report, Investigator Duncan stated Williams said that, based upon what he (Williams) had seen and heard before the arrival of the victims at

the scene, that he (Williams) believed people were going to die, and that that report was disclosed to the defense. Some two years later, Investigator Duncan was subpoenaed by appellant to testify regarding his 1993 report of his interview of Williams. As a result of that subpoena, Investigator Duncan discovered a "revised" report, written on April 22, 1993. Investigator Duncan further testified that, shortly after sending DDA McCormick the original report, DDA McCormick "instructed" Investigator Duncan to write another report to "clear up problems [which DDA McCormick perceived] with the first report." After being told to revise his report, Investigator Duncan was transferred out to a different unit and assigned to a different case. He then revised his report according to DDA McCormick's instruction to strike the portion of the report that indicated Williams said he knew people were going to die, and in its place write that Williams had "no idea Bryant and the others were going to kill anybody." (111RT:14905-14923.)

To be sure, Inspector Duncan testified that he changed his report to correct the "error" he made in the first report. (111RT:14923-14939.) However, as the Honorable J.D. Smith found, and the record reflects (see appellant Bryant's Arguments I and II), the prosecutorial agencies and agents in this case lost their impartiality in their quest to secure a conviction against appellant Bryant at any cost.

Respondent argues in the alternative that, if the trial court erred in failing to instruct the jury that Williams was an accomplice as a matter of law, the error was harmless because there was adduced sufficient corroborating evidence of appellant Bryant's guilt. (RB:365-369.)

Respondent is incorrect for a number of reasons. Appellant has previously rebutted respondent's argument regarding the weak nature of the

evidence of appellant's guilt of the instant homicides earlier in the brief, and incorporates by reference Arguments III and IX, *ante*. Appellant testified at trial that he was involved in the sale of drugs at the time of the instant homicides. Thus, that he communicated with the victims, who were also drug dealers, and may have communicated with the perpetrators after the fact, does not implicate him in murder itself. Likewise, physical evidence connecting appellant to the Wheeler Avenue house does not establish his guilt of the instant crimes any more than it established the guilt of Anthony Arceneaux[39] and others whose fingerprints and paperwork were found at the scene. Nor is the presence of blood found in appellant's Hyundai evidence that tends to connect him, and him alone, to the instant homicides, since (1) it was not shown to be human blood; and (2) it was adduced that Antonio Johnson, who was placed at the scene of the crime in his El Camino, also drove appellant's Hyundai. (76RT:8447-8448, 8507-8508A, 88RT:10583, 99RT:12845-12850, 12853-12867.) Respondent characterization of reports of appellant Bryant's statements to Ladell Player and Alonzo Smith as "damning" also misses the mark. His statements, assuming arguendo he made them (but see Argument IX, *ante*), indicate no more than he knew of the homicides after the fact and that he concurred, after the fact, with those who were behind the homicides, that it was better for business now that Armstrong and Brown were dead. Such evidence is insufficient as a matter of law to connect appellant to the charged crimes. (Pen. Code, § 1111; see *People v Davis* (1903) 210 Cal.540, 555 [corroborative evidence must connect the defendant to the offense]; *People*

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[39] Anthony Arceneaux was never charged with the instant homicides; he plead guilty to the narcotics conspiracy count. (37CT:10737.)

*v. Kempley* (1928) 205 Cal. 441, 455-456 [corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused]; *People v. Robinson* (1964) 61 Cal.2d 373, 400 [association with other people involved in the crime is insufficient corroboration].) All of appellant's actions after the homicides were equally consistent with his role as an employee of an organization in the drug distribution business.

Further, as fully briefed by coappellants, the trial court's error in failing to instruct that Williams was an accomplice as a matter of law had the additional consequence of depriving appellant of the instruction that Williams' testimony should be viewed with caution. Had the jury been instructed to view Williams' testimony with distrust, at least one juror would have viewed Williams as untrustworthy and that the evidence corroborating his account of appellant's guilt was only slight. In addition, since the jury was instructed to view the testimony of an accomplice with distrust *insofar as it tends to incriminate any defendant* (122RT:16409, italics added), they would not have viewed appellant's testimony with distrust since he did not incriminate any of the defendants. It follows that, under these circumstances, at least one juror would have believed appellant rather than Williams. Respondent cannot carry its burden of establishing the error was harmless beyond a reasonable doubt.

With regard to respondent's contention that appellants have waived claims of instructional error due to a failure to object at trial (RB:378-380), respondent is again incorrect on the law. Challenges to jury instructions affecting substantial rights, such as those challenges raised in appellants' briefs, are not waived even if no objection is made at trial. (Pen. Code, § 1259.)

With regard to respondent's contention that appellant Bryant's failure to join in appellant Smith's request that the trial court order the jury to reconsider the verdicts pursuant to Penal Code section 1161 waived the error (RB:384), it was impossible for appellant Bryant to join in the objection because, as respondent correctly notes, he was not present at the proceeding in which the request was made. (RB:389.) Appellant Bryant incorporates by reference as if fully set forth herein Argument XXX in his opening brief and *post* that his absence from critical proceedings, such as this one, deprived him of myriad constitutional rights. Appellant further submits that this Court retains the jurisdiction to reach the question presented and should do so as to appellant Bryant. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

For all the reasons stated herein and in the joined arguments in coappellants' briefs, appellant Bryant must prevail, and his conviction and sentence must be reversed.

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## XV[40]

## THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT BRYANT'S REQUEST FOR A PRETRIAL HEARING ON THE ADMISSIBILITY OF OTHER CRIMES EVIDENCE; IN ADDITION, THE INSTRUCTIONS PREJUDICIALLY FAILED TO PROPERLY LIMIT THE JURY'S CONSIDERATION OF OTHER CRIMES EVIDENCE

Appellant Bryant argues in his opening brief that the trial court failed under Evidence Code section 403 to make preliminary findings of sufficient foundational facts in the following ways (AOB:377-391):

With regard to the admissibility of evidence concerning the shootings of Ken Gentry and Renard Goldman, a key factor in the court's ruling was the prosecution's proffer that further evidence would establish that Armstrong's threats to collect from appellant Bryant for those shootings were, in fact, communicated to him. (RT:8724-8730, 8786-8787.) Appellant Bryant also objected to the admission of evidence regarding threats received by Goldman prior to his testimony in this case; the court accepted the prosecution's proffer that it would produce evidence that those threats were done at the behest of appellant Bryant. (RT:9218-9220, 9226.) Subsequently, no evidence was introduced at trial showing either that: (1) Armstrong's threats to collect from appellant Bryant were communicated to appellant Bryant; or (2) that appellant Bryant directed people to threaten Goldman prior to his testimony. If appellant Bryant's request for an evidentiary hearing on these preliminary facts had been granted, the inadmissibility of the evidence would have been established pretrial and the jury never would have heard the prejudicial and inflammatory evidence.

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[40] Respondent's arguments relating to this claim are at RB:336-352.

Likewise, the prosecution proffered a theory as to a secondary motive for appellant Bryant to have committed the instant homicides -- he killed or attempted to kill men who slept with his ex-wife. Regarding that theory of admissibility, the trial court ruled that evidence regarding the Keith Curry attacks was relevant and admissible if the prosecution established that: (1) appellant Bryant knew of his ex-wife's relationship with Curry and was unhappy about it; and (2) appellant Bryant knew of his ex-wife's relationship with Armstrong and was unhappy about it. (RT:11288-11289, 11300-11301.) The prosecution represented that they would prove up the latter point, but never did, and the prosecution did not adduce admissible evidence on the former point. Again, if appellant Bryant had been granted a hearing, this extremely prejudicial Curry evidence would not have been aadmitted at appellant Bryant's trial.

Respondent argues that appellant Bryant failed to secure a ruling on his motion for a hearing under Evidence Code section 403. (RB:336-337.) Prior to trial, appellant Bryant filed a motion for an evidentiary hearing on each uncharged crime the prosecution intended to introduce at the guilt phase of trial under Evidence Code, section 1101, subdivision (b). (CT:11079-11092.) During trial, the court repeatedly overruled defense objections to the admission of the above-referenced evidence and indicated that it would, in all instances, simply accept the prosecution's proffer and allow the prosecution to adduce prejudicial other crimes evidence before the evidentiary basis had been established. Any further objections by appellant Bryant would have been futile, and thus the issue is preserved for review. (*See People v. Hill* (1998) 17 Cal.4th 800, 820-821 [defense counsel excused from having to make objections to prosecutorial misconduct where they would be futile]; see also *People v. Arias* (1996) 13 Cal.4th 92, 159;

*People v. Hamilton* (1989) 48 Cal.3d 1142, 1189 and n. 27; *People v. Chavez* (1980) 26 Cal.3d 344, 350, n. 5; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [where trial judge overruled objection in one case, identical objection before same judge in later case would have been futile and therefore objection requirement excused].)

Respondent next argues that, in any event, appellant Bryant was not denied the opportunity to litigate the matters in the trial court because the trial court entertained defense objections on all of these issues during trial. (RB:337-340.) The point of appellant Bryant's claim is that he was denied his right to a hearing during which the foundational underpinnings for the admissibility of inflammatory and prejudicial evidence were determined by the trial court *prior to the evidence being admitted against appellant Bryant.* If he had been afforded such hearing, the prosecutor's failures of proof would have been established and the evidence would not have been admitted. The trial court erred in admitting the evidence based upon proffers rather than testimony and evidence adduced during such a hearing.

Appellant Bryant further argued in his opening brief, inter alia, the trial court prejudicially erred in failing to instruct the jury that it was required to find the existence of the various preliminary facts upon which the admissibility of other crimes evidence concerning the Gentry and Goldman shootings, the Keith Curry attacks, the beating of Francine Smith and the bribe of Rhonda Miller depended. (Evid. Code, § 403, subd. (c)(1) and *People v. Simon* (1986) 184 Cal.App.3d 125, 129.) ]

Respondent argues that appellant Bryant agreed that the CALJIC No. 2.50.1 that was given to the jury served the same purpose as the requested instruction. (RB:342.) This is not a fair reading of the record. Appellant Bryant agreed the two instructions served the same general purpose, but that

does not mean that appellant Bryant agreed to that the standard instruction was adequate to protect appellant Bryant's rights. Indeed, the record shows he continued to argue for the requested instruction. (121RT:16325-16334.)

Respondent also argues that the proposed instruction was flawed in that it instructed the jury that it could consider the Gentry shooting only if it found appellant Bryant was the moving force behind the Armstrong shooting, when evidence of the Gentry shooting "was still relevant if the other head of the Bryant Organization, Jeff Bryant, had hired Armstrong to shoot Gentry." (RB:341-343.) But, as appellant Bryant argued to the trial court, the Gentry shooting was admissible as "other crime" evidence against appellant Bryant only if appellant Bryant, as opposed his brother Jeff, was guilty of the Gentry killing. (121RT:16332-16333.)

Further, the delivery of CALJIC No. 2.50, which purported to limit the use of other crimes evidence, could only have confused the jury because it failed to acknowledge the disputed factual issues underlying the admission of the other crimes evidence in this case, thereby suggesting that evidence of the other crimes evidence was admissible against appellant Bryant regardless of whether the prosecution established the predicate facts upon which the admissibility of the evidence depended. (*People v. Simon, supra*, 184 Cal.App.3d at p. 131.) And, as discussed above, the prosecution failed to prove up its proffers regarding the admissibility of much of the other crimes evidence admitted against appellant Bryant. (See also Argument VII in the AOB and, *ante*, incorporated by reference herein.) The trial court's failure to deliver appellant Bryant's requested instruction was clearly error, and that error was prejudicial. Considering these circumstances, and given the critical impact of the other crimes evidence on this trial, appellant Bryant's conviction and sentence must be reversed.

## XVI[41]

## THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In his opening brief, appellant Bryant argues that the trial court committed structural error by giving a series of CALJIC instructions[42] which lessened the burden of proof required to convict him. (AOB:395-410.)

Appellant Bryant hereby joins in Arguments VII of coappellant Wheeler's opening and reply briefs (WAOB:255-260 and WARB:46) and Argument XII of coappellant Smith's opening brief (SAOB:278-281), regarding the errors associated with CALJIC No. 2.51, and incorporate them by reference as if fully set forth herein.

Contrary to respondent's assertion (RB:435, 446), appellants did not fail to preserve this argument for appeal by failing to object at trial. (See AOB:179-180, fn. 72.) Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, §§ 1259, 1469.) This Court has repeatedly invoked and relied upon section 1259 to reject the People's waiver claims regarding instructional error. (See, e.g., *People v. Dunkle* (2005) 36 Cal.4th 861, 929; *People v. Stitely* (2005) 35 Cal.4th 514, 556, fn. 20; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7; *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503; *People v. Smithey, supra*, 20 Cal.4th at p. 976, fn. 7; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones*

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[41] This is designated argument XVIII in respondent's brief.

[42] Specifically, CALJIC Nos. 1.00, 2.01, 2.02, 2.21.1, 2.21.2, 2.22, 2.27, 2.50, 2.50.1, 2.51 and 8.20.

(1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Certainly, an error affecting the standard of proof affects the defendant's substantial rights. (See *In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Moreover, and again contrary to respondent's assertion (RB:435-436), merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both: (1) induced the trial court to commit the error; and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

For all the foregoing reasons, as well as those set forth in the opening brief, appellant Bryant's conviction and death judgment must be reversed.

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## XVII[43]

## THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

Appellant argues that various instructions[44] were misleading, unsupported by the evidence, constituted improper pinpoint instructions and permitted the jury to draw an irrational permissive inference that appellant Bryant evidenced "consciousness of guilt" of the instant crimes. (AOB:411-421.)

Respondent argues that the issue has been waived for failing to object below and because the error was invited. (RB:438-441.)

First, contrary to respondent's assertion, this argument is cognizable on appeal even though appellant Bryant did not object at trial. For the reasons set forth previously, the instructional errors at issue are reviewable even without objection because the jury instructions affected negatively appellant Bryant's substantial rights. (See Pen. Code, § 1259; Argument XVI, *ante*, incorporated by reference herein.) Second, and also for the reasons set forth previously, the errors were not invited. (*Ibid.*)

With regard to the merits of appellant Bryant's claims, respondent asserts the claims have no merit, or, in the alternative, any error was harmless because the evidence of his guilt was "overwhelming." (RB:441-445.) Appellant Bryant has fully addressed these contentions in his opening brief and in this reply brief in Arguments III and IX *ante*, and has nothing further to add at this time.

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[43] This is designated Argument XIX in respondent's brief.

[44] Specifically, CALJIC Nos. 2.05, 2.06 and 2.52, as well as a special instruction regarding refusal to submit to a handwriting exemplar.

For these reasons, and for the reasons stated in his opening brief, appellant Bryant's conviction and death judgment must be reversed.

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## XVIII[45]

## THE TRIAL COURT COMMITTED AN INSTRUCTIONAL ERROR WHICH UNFAIRLY, UNCONSTITUTIONALLY, AND PREJUDICIALLY BOLSTERED THE CREDIBILITY OF NUMEROUS PROSECUTION WITNESSES WHO TESTIFIED AGAINST APPELLANT BRYANT

Appellant Bryant argues that the delivery of CALJIC No. 2.13 (Prior Consistent or Inconsistent Statements as Evidence), at both the guilt and penalty phases of trial, which directed the jury to consider prior inconsistent or consistent statements of witnesses as evidence of "the truth," but not of "the falsity" of such "facts" unfairly skewed the jury's credibility determination in favor of the prosecution, requiring reversal of his convictions and the special-circumstance finding. (AOB:422-428.)

Respondent contends that these issues have been waived. (RB:452.) Respondent also argues appellant Bryant invited the error because he did object to the language of the instruction, but rather only requested an addition to the instruction that would have instructed the jury that, prior to considering a prior consistent statement, the jury needed to determine that the statement was made prior to any bias or motive to fabricate one. (*Ibid.*)

Respondent is incorrect on both counts. It is well-settled that "[t]he invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for *requesting* or acquiescing in the instruction." (*People v. Moon* (2005) 37 Cal.4th 1, 28, emphasis added; see *People v. Dunkle* (2005) 36 Cal.4th 861, 891.) Thus, even though it appears that, as respondent notes, appellant Bryant requested that the instruction be supplemented (121RT:16237, 16239, 16256-16262), "[b]ecause the record here shows no tactical reason" for such requests, "the People's reliance on

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[45] This is designated Argument XXI in respondent's brief.

the invited error doctrine" must be "reject[ed]." (*Moon, supra*, 37 Cal.4th at p. 28; see also *People v. Wickersham* (1982) 32 Cal.3d 307, 324 [to be deemed "invited error," it must be clear from the record that defense counsel "acted for tactical reasons and not out of ignorance or mistake"].) Here, not only is there no indication whatsoever in the record that defense counsel had a tactical reason for requesting the instruction in question, but counsel could not conceivably have had a plausible reason to give the jury one-sided instructions skewed in favor of the prosecution which made appellant Bryant's conviction of first degree murder with special circumstances more likely. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19.)

Moreover, since the instructional errors presented such a serious threat to appellant Bryant's ability to avoid a conviction of capital murder, they clearly affected his "substantial rights." (Pen. Code, § 1259; see *People v. Stitely, supra*, 35 Cal.4th at p. 556, fn. 20; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [because "defendant's claim . . . is that the instruction is *not* correct in law, and that it violated his right to due process of law," it is "not of the type that must be preserved by objection"; italics in original].) Argument XVI, *ante*, is incorporated by reference as if fully set forth herein. This court can and should reach the merits of appellant Bryant's claim.

On the merits, respondent rejects appellant Bryant's argument that the effect on the jury of the delivery of CALJIC No. 2.13 directed the jury to favor the prosecution's witnesses because the instruction uses the word "may." (See RB 452-453.) However, the instruction expressly permitted the jurors to consider the prior inconsistent statements for their "truth," but, by negative implication (see *People v. Moore* (1954) 43 Cal.2d 517, 526;

AOB 102), did not similarly permit them to consider such statements for their "falsity." However one may choose to characterize the language "may be considered by you" – i.e., as a directive or as permissive – the truism remains that the instruction was plainly, improperly and unfairly one-sided in favor of the prosecution. Although respondent argues that the instruction "is content neutral" (RB 453), as a practical matter any reasonable juror would have interpreted the instructional language explaining that "the purpose of" such evidence was both to "test[] the credibility of the witness" and "as evidence of the truth of the facts as stated by the witness on such former occasion" as essentially telling them how to use it. As a logical proposition, if the court has admitted evidence for a particular stated "purpose," no reasonable juror is going to decide not to use it for such purpose, or not to use it at all.

Respondent also contends that *Wardius v. Oregon* (1973) 412 U.S. 470 has no application to the instant case for the following reasons: the discussion in *Wardius* was limited to reciprocal discovery obligations in the context of a statute that completely barred a defendant from presenting an alibi defense if he or she failed to comply; CALJIC No. 2.13 does not prevent defendant from presenting a defense; and the instruction applies equally to the prosecution and the defense. Respondent concludes, "Thus, *Wardius* is inapplicable, given that CALJIC No. 2.13 is, on its face, equally applicable and beneficial to both the prosecution and the defense." (RB 454-455.)

Appellant has shown how, contrary to respondent's contention, the instant instructional error unfairly skewed the jury's evaluation of the credibility of prosecution witnesses in the prosecution's favor, making conviction far more likely than if the instructions had instead properly been

"a two-way street" (*Wardius v. Oregon, supra,* 412 U.S. at p. 475) in terms of "the balance of forces between the accused and the accuser." (*Id.* at p. 474.) The instructions "'so infected the entire trial that the resulting conviction violates due process'" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72) because they went to the very heart of the jury's duty to evaluate the credibility of the many witnesses relied upon by the prosecution to establish that appellant Bryant was the person responsible for the instant homicides. Because of the "substantial possibility" that the instructional errors – especially when considered together with all of the other errors at the guilt phase – "may have infected the verdict," the entire judgment must be reversed. (*Wardius v. Oregon, supra,* 412 U.S. at p. 479.)

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## XIX[46]

## THE TRIAL COURT'S ERRONEOUS RULINGS DURING GUILT PHASE DELIBERATIONS RELATING TO THE DISCHARGE OF A JUROR AND THE TAKING OF A PARTIAL VERDICT REQUIRES REVERSAL OF APPELLANT BRYANT'S CONVICTIONS AND SENTENCE

Appellant Bryant argues, inter alia, that his rights to a jury trial, to a unanimous verdict by 12 jurors, to due process of law and to a reliable judgment of death guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as parallel provisions to the California Constitution, were violated when the trial court took guilty verdicts on two of the four murder counts in this case, and then substituted an alternate juror to replace an ill juror. (AOB:429-450.)

Respondent argues in part that in *People v. Collins* (1976) 17 Cal.3d 687, 690-694 (*Collins*), "this Court made it clear that the substitution of an alternate juror for an original juror after the submission of the case to the jury is constitutional both under the United State and California Constitutions so long as the reconstituted jury is instructed to start its deliberations anew." (RB:464.) An examination of *Collins* and the other cases relied upon by respondent in support of its contention show that this Court has not yet squarely decided the issue presented here – i.e., whether a capital defendant's state and federal jury trial rights are violated when a partial verdict is taken during guilt phase deliberations to allow for the substitution of a deliberating juror with an alternate juror where the facts the jury necessarily found in reaching its verdict are essentially the same facts the reconstituted jury must find on the remaining counts.

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[46] This is designated Argument XII in respondent's brief.

As previously discussed by both appellant Bryant and respondent, the issue of whether it is proper for the trial court to permit juror substitution following the return of a partial verdict during the guilt phase was raised but not decided because of waiver in *People v. Fudge* (1994) 7 Cal.4th 1075, 1100-1101. The issue in this capital case is fully preserved for review in this Court for the first time, to the best of this party's knowledge.

Respondent relies on *People v. Cunningham* (2001) 25 Cal.4th 926, 1030 (*Cunningham*), *People v. Fields* (1983) 35 Cal.3d 329, 351 (*Fields*) and *People v. Cain* (1995) 10 Cal.4th 1, 65-66 (*Cain*) for its assertion that "it is well-established that a capital defendant's right to a unanimous jury verdict is not violated by the substitution of an alternate juror prior to the penalty phase and that substitution of an alternate juror for purposes of the penalty phase does not require a retrial of the guilt phase evidence or re-weighing of the guilt phase evidence." (RB:467.) These cases are inapposite, because:

> If the guilt phase is not retried, the penalty phase jury, including the new juror, must perforce "accept" the guilt phase verdicts and findings, as they were instructed to do in this case. Those findings determined guilt and truth of the special circumstances beyond a reasonable doubt. It follows that reasonable doubt is not at issue in the penalty phase: the new juror must accept the previous findings were made beyond a reasonable doubt, and the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt or truth of the special circumstances. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238 [at penalty phase the defendant's guilt is conclusively presumed].)

(*Cain, supra*, 10 Cal.4th at p. 66.) In *Fields*, this Court rejected the defendant's claim that "guilt phase includables" were a cognizable group, the exclusion of which makes a jury unrepresentative and unconstitutional

and found that the interest of the state in maintaining a unitary jury for both phases of the trial is sufficient to justify the exclusion of this noncognizable group. (*Fields, supra*, 35 Cal.3d at p. 353.) In articulating the problem with allowing a juror who would not impose the death penalty to be permitted to decide guilt and then be substituted with an alternate who could impose the death penalty if needed, this Court suggested the reasons that substituting a juror during the guilt phase after partial verdicts had been obtained would be improper:

> The proposal before us, however, envisions an alternate joining the jury after it had deliberated on the issues of guilt and special circumstances and reached a verdict. He would be joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty. The resulting deliberations between old members who have already considered the evidence and may have arrived at tentative conclusions on some aspects of the case, and new members ignorant of those discussions and conclusions, would depart from the requirement that jurors "reach their consensus through deliberations which are the common experience of all of them." (*People v. Collins, supra*, 17 Cal.3d 687, 693.)

(*Fields, supra*, 35 Cal.3d 351.)

In fact, this Court in *Collins* recognized that substitution following commencement of deliberations may entrench upon a defendant's right to trial by jury, and, appellant Bryant submits, it must be interpreted to require reversal of appellant Bryant's conviction in this case. In considering the constitutionality of Penal Code section 1089, this Court recognized the delicate balancing act needed between the need to conserve judicial resources and the defendant's right to a jury trial:

> "Trial by jury is an inviolate right and shall be secured to all ...." (Cal. Const., art. I, § 16.) The right is guaranteed as it

> existed at common law at the time the state Constitution was adopted and may not be abridged by act of the Legislature. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287; *People v. Kelly* (1928) 203 Cal. 128, 133.) The Legislature may, however, establish reasonable regulations or conditions on the enjoyment of the right as long as the essential elements of trial by jury are preserved. (*People v. Peete* [1921] 54 Cal.App. 333, 363-364.) Among the essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous. (Cal. Const., art. I, § 16; Code Civ. Proc., § 194; *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929, 932.)

(*Collins, supra*, 17 Cal.3d 692-693.) This Court held that "the foregoing elements of the right to a trial by jury are part of the broader right which additionally requires each juror to have engaged in all of the jury's deliberations. . . . The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them." (*Id.* at p. 693.) This Court concluded that:

> [A] proper construction of section 1089 requires that deliberations begin anew when a substitution is made after final submission to the jury. This will insure that *each of the 12 jurors reaching the verdict has fully participated in the deliberations*, just as each had observed and heard all proceedings in the case. We accordingly construe section 1089 to provide that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew.

(*Id.* at p. 694, italics added.) Thus, under *Collins,* it would have be constitutional for the trial court in the instant case to dismiss the ill juror for good cause *so long as all twelve of the remaining jurors begun deliberations anew as to all counts*. The requirement that juries begin deliberations anew after a juror has been substituted would be rendered

nugatory if the reconstituted jury was, as here, instructed to accept as conclusively established facts that necessarily establish its verdict on the open charges.

In this case, one set of jurors decided two counts, and another set of jurors decided the remaining counts. The alternate juror began deliberations with 11 jurors who had already found appellant Bryant guilty of the Armstrong and Brown homicides. Not only were those jurors not instructed to begin deliberations anew as to those counts, the trial court sealed those verdicts from their consideration. Therefore, the requirement that 12 persons reach a unanimous verdict was not met, since each juror did not engage in all of the jury's deliberations and the verdict reached was not by the consensus through deliberations which were the common experience of all 12 jurors. (*Collins, supra*, 17 Cal.3d at p. 693.) And since the facts the jury necessarily found in reaching its verdicts of appellant Bryant's guilt as to Armstrong and Brown necessitated a finding of guilt on the remaining counts, it cannot be said that the instruction to "begin deliberations anew as to the remaining counts" carried any weight as to the remaining counts, since the verdicts of the 11 original jurors were preordained as to those counts.

The two Court of Appeal cases that have reached the issue in the context of non-capital convictions, *People v. Aikens* (1988) 207 Cal.App.3d 209 (*Aikens*) and *People v. Thomas* (1990) 218 Cal.App.3d 1477 (*Thomas*), do not address the Eighth Amendments need for heightened reliability in capital cases. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 (plur. opn.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.).) Such reliability is undermined when, as here, a new juror, who does not have the benefit of

the deliberation of the original 11, is forced to accept a verdict on two counts so inter-related with the remaining counts that he or she has no meaningful chance to persuade the others to accept his or her viewpoint.

In addition, the Court of Appeal wrongly interpreted and applied this Court's precedent. As the strong dissent in *Aikens* set forth, this Court has held that the process securing a partial verdict before the substitution of a deliberating juror is problematic for the same reasons argued here – to the extent the facts the jury necessarily found in reaching its verdict are essentially the same facts the reconstituted jury must find on the remaining counts, the defendant has been denied his right to a jury trial under the state and federal constitutions. (*Aikens, supra*, 207 Cal.App.3d at p. 215 (dis. opn. of Johnson, J.).) In addition, the *Thomas* court found that the unanimous verdict of 12 otherwise competent jurors as to some of the charges was consistent with the defendant's right to a fair trial by an impartial jury because of a number of factors, agreeing part with *Aikens*, that the trial court "should give paramount consideration to the right of the accused balanced against the state's interest in promoting the efficient administration of justice." (*Thomas, supra,* 218 Cal.App.3d at pp. 1485-1488.) And the precedent of this Court relied upon by the CCA in *Aikens* and *Thomas* discussed setting aside deliberations only – here, the trial court's instruction directed the substituted juror to accept the verdicts reached.

Historically, when faced with the situation of an incapacitated or disqualified juror, courts discharged that juror and declared a mistrial, finding that to do otherwise would violate the accused's right to a jury trial found not only in the Sixth Amendment to the United States Constitution, but a right stretching back to the common law. (See, e.g., *People v. Peete*

(1921) 54 Cal.App. 333, 363-364; *People v. Curran* (Ill. 1918) 121 N.E. 637, 638.) Since then, there have been legislative and judicially created limitations of that right. In the federal courts, Federal Rule of Criminal Procedure 24(c) permits the replacement of a juror only before the commencement of deliberations; once deliberations have begun, the rule requires courts to discharge any remaining alternates. In California, our legislature enacted Penal Code section 1089, which this Court found constitutional with the proviso that all 12 jurors deliberate as to all counts. At some point, the need to preserve judicial resources, as expressed by Penal Code section 1089, must give way to a capital defendant's state and federally protected rights to a unanimous jury and to a reliable verdict. Appellant Bryant submits that this is one such case. Specifically, appellant Bryant hereby modifies his claim to argue that he is entitled to reversal on all counts, since under state and federal law he is entitled to have a unanimous verdict on all counts, reached by consensus by 12 persons through deliberations which are the common experience of all 12 jurors. Thus, appellant Bryant's convictions on all counts must be reversed and the case remanded for a new trial.

With regard to appellant Bryant's claim that appellant Bryant was deprived of his right to a unanimous verdict by 12 jurors on counts 3 and 4 because one of the jurors who rendered that verdict suffered from a disabling medical condition for which the trial court found good cause for excusal (AOB:437-440), appellant Bryant notes that respondent concedes that the record is unclear as to whether the verdict on those counts was rendered before or after the trial court spoke to the ill juror about the juror's condition. (RB:469.) In any event, the verdict was rendered on the same day and with the participation of the juror who was too ill to continue.

(AOB:437-438; 125RT:16923.) Since the right deprived by issue is federal in nature, the burden is on respondent to show, beyond a reasonable doubt, that the juror's disabling medical condition did not prevent him from deliberating. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent cannot so demonstrate. For the reasons argued in his opening brief, appellant Bryant contends he was therefore deprived of this right to a unanimous verdict by 12 jurors.

With regard to appellant Bryant's claim that the trial court interfered with the deliberative process on counts 3 and 4 by taking verdicts on those counts before the jury informed the trial court that final verdicts had been reached (AOB:434-437), respondent argues that the record leaves little doubt that the verdicts as to those counts were "final." (RB:470-474.) Appellant Bryant's argument here is procedural, and he still disagrees, for reasons set forth in his opening brief, that the trial court followed proper procedure. But appellant Bryant agrees that the verdicts were "final" in the sense that 11 of the jurors had made up their minds on counts 3 and 4, and that those 11 jurors necessarily decided appellant Bryant's guilt on the remaining counts, without deliberating with the substituted juror. No instruction to "begin deliberating anew as to the remaining counts " could change that.

For all the foregoing reasons, as well as those set forth in his opening brief, appellant Bryant's convictions must be reversed and his judgment of death vacated.

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## XX[47]

## THE PROCEDURE UTILIZED BY THE TRIAL COURT IN CONDUCTING THE DEATH QUALIFICATION VOIR DIRE DENIED APPELLANT BRYANT HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, AN IMPARTIAL JURY AND A RELIABLE DEATH JUDGMENT

Appellant Bryant argues in his opening brief that the trial court prejudicially erred in denying appellants' joint request for individual, sequestered voir dire. (AOB:451-460.) Respondent argues that: (1) appellants "must be deemed to have abandoned" the request, originally made in 1992, by failing to renew the motion in 1995 before the trial court; and (2) the voir dire conducted by the trial court was, in any event, "reasonable and therefore proper." (RB:235-245.)

First, respondent cites no authority – because it cannot – for the proposition that appellants must be deemed to have abandoned the request for individual sequestered voir dire simply because the original motion, filed before one judge of the superior court, was heard by a different judge of the superior court. The motion was never withdrawn, and counsel for Smith cited to the motion and to *Hovey*[48] when he submitted the matter to the trial court for ruling. (65RT:6626-2227.) The record explicitly establishes that the trial court considered and denied the motion.

Second, respondent does not address or rebut appellant Bryant's claim that the trial court's voir dire procedure in fact denied him his rights to due process, a fair trial, an impartial jury and a reliable death judgment in that the trial court erroneously denied appellant Bryant's motion to excuse a panel of prospective jurors, three of whom decided appellant Bryant's fate,

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[47] This is designated Argument V in respondent's brief.

[48] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

who were contaminated by a highly prejudicial question in open court. (AOB:457-458.) The failure to dispute appellant Bryant's contention should be deemed a concession that the prejudicial error occurred. In his opening brief, appellant Bryant discussed how at least three of the petit jurors heard the trial court ask prospective juror number 217, hypothetically, "What if there was somebody who was so bad and so dangerous that nobody could testify against him unless they got something in return for it? Do you think that might be an appropriate time to give somebody immunity to get them into court?" (RT:7596-7597.) Appellant later challenged for cause not only prospective juror number 217, but the entire venire who was present for the court's questions, arguing that appellant Bryant was prejudiced because the questions led all the jurors who heard them to believe that appellant Bryant was the type of person suggested by the questions. (RT:7605-7606.) The court denied appellant Bryant's challenge. (RT:7606.)

The trial court's characterization of, and his opinion regarding, the defendants' character as "so bad and so dangerous" were irrelevant and inadmissible (Evid. Code, §§ 210, 350,352, 1101 and 1102) and highly prejudicial since they came from a judge. "'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citations], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States* (1946) 326 U.S. 607; see also *United States v. Wolfson* (5th Cir. 1978) 573 F.2d 216, 221 [judge's words "'carry an authority bordering on the irrefutable.' [Citation]"]. "'Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials.' [Citation]." (*People v. Lee* (1979) 92 Cal.App.3d 707, 715-716.) "[I]t is obvious that under any system of jury trials the influence of the trial

judge on the jury is necessarily and properly of great weight, and that *his lightest word or intimation is received with deference, and may prove controlling.*" (*Quercia v. United States* (1933) 289 U.S. 466, 470, quoting *Starr v. United States* (1894) 153 U.S. 614, 626, italics added.) "It is a matter of common knowledge that jurors . . . are very susceptible to the influence of the judge. . . . [J]urors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict." (*People v. Frank* (1925) 71 Cal.App. 575, 581.) Therefore, the trial court abused its discretion in asking the question, despite the fact that it was couched as a "hypothetical," as it clearly communicated to the jury the trial court's belief that the defendants were "so bad and so dangerous." It also abused its discretion in denying appellant Bryant's motion to excuse the prospective jurors who were present when the question was asked.

Appellant was clearly prejudiced by the presence on the petit jury of three jurors who heard the inflammatory and prejudicial characterization of the defendants by the trial court. The question to which appellant Bryant objected was made in front of prospective jurors from whom the alternate jurors were selected. Although the original twelve jurors were selected from among the first 200 prospective jurors, due to the dismissal of numerous sitting jurors during the course of the trial, three of the alternates who were biased by the court's improper question took part in deciding appellant Bryant's fate. (RT:7230-7231, 7245, 7313, 7327, 7420, 7608, 7655, 7670, 7735, 7743, 7747 [Juror Nos. 247, 220, 261].) The question posed by the court and presence of three biased jurors denied appellant Bryant his right to a trial and verdict by an impartial judge and jury. (*Irwin v. Dowd* (1961) 366 U.S. 717, 722; *Tumey v. Ohio* (1927) U.S. 273 U.S.

510, 532; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 [bias or prejudice of even a single juror violates a defendant's right to a fair trial].) (See also, Argument VII in appellant Bryant's opening brief and *ante*, incorporated by reference herein.)

The use of this procedure also violated appellant Bryant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's procedure also lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant Bryant guilty in large part because of his criminal propensity. (*See e.g., Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Further, the procedure so infected the trial as to render appellant Bryant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; *see also McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant Bryant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law that prevents the State from using evidence admitted for a limited purpose as general propensity evidence and excluding the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant Bryant of a state-created liberty interest.

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (*See Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v.*

*Lynaugh* (1989) 492 U.S. 302, 328, *abrogated on other grounds Atkins v. Virginia* (2002) 536 U.S. 304.)

Appellant's conviction and death judgment must be reversed.

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## XXI[49]

## THE TRIAL COURT'S UNLAWFUL EXCLUSION OF THREE PROSPECTIVE JURORS FOR CAUSE REQUIRES REVERSAL OF APPELLANT BRYANT'S DEATH JUDGMENT

In his opening brief, appellant Bryant shows that the trial court committed reversible error in granting three cause challenges issued by the prosecution to prospective jurors who showed conscientious scruples against imposing the death penalty, but who nonetheless stated they would put aside their feelings and follow the law. (AOB:461-486.) Respondent argues appellant Bryant's claims are without merit because the record contains substantial evidence supporting each of the for-cause excusals in that "the three excused jurors not only gave equivocal and conflicting answers on their ability to impose the death penalty, but made statements indicating they could not, in good conscience, vote for death." (RB:246-247.) Respondent alleges that since the three jurors were "extensively questioned during voir dire about his or her views on the death penalty," no additional questioning was required (RB:248) and that "to the extent there may have been conflict or contradiction in the prospective jurors' voir dire answers" . . . "the trial court's determination as to the prospective jurors' true state of mind" is binding on this Court. (RB:253, 257, 262.)

Contrary to respondent's assertions, voir dire of the three jurors contains no affirmative showing that the jurors' views would either preclude death as an option, or otherwise prevent them from following the law; therefore, the jurors were improperly excluded for cause. The trial court's determination of substantial impairment is not binding on this Court because (1) the trial court's voir dire was inadequate and (2) the trial court's

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[49] This is designated Argument VI in respondent's brief.

uneven application of the *Witherspoon/Witt*[50] standard was fundamentally unfair and thus not entitled to deference.

A number of prospective jurors made it "unmistakably clear" that they would automatically vote for one penalty over another, regardless of the evidence, and were accordingly excused for cause. Of course, there is little discretion for the trial court to exercise with respect to such clearly disqualified jurors. (See, e.g., *Witt, supra*, 469 U.S. at p. 423; *Witherspoon, supra,* 391 U.S. at p. 522 and fn.21.)

The court's exercise of discretion becomes significant, however, as to those jurors who are not so "unambiguous" or "unmistakably clear" about their feelings. (*Witt, supra*, at pp. 426, 429.) Under the *Witt* standard, the court must make the more difficult determination of whether those jurors' feelings would "prevent or substantially impair" their ability to follow their oaths and perform their duties as jurors. (*Id.* at p. 423.) The trial court's exercise of discretion in determining whether challenged jurors meet this standard is "subject to essential demands of fairness" (*Hughes v. United States* (6 Cir. 2001) 258 F.3d 453, 457; *Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 504; U.S. Const., Amend. XIV) and may not be arbitrary, capricious or partial (see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977, quoting *People v. Warner* (1978) 20 Cal.3d 678, and authorities cited in *Alvarez*.)

Unfortunately, an examination of the trial court's rulings on challenges for cause in this case to jurors who were not "unmistakably clear" about their feelings or who gave contradictory answers reveals that its application of the *Witherspoon/Witt* standard was not even-handed. To

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[50] *Witherspoon v. Illinois* (1968) 391 U.S. 510n (*Witherspoon*) and *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*).

the contrary, as demonstrated in Argument XXII of appellant Bryant's opening brief and herein, a comparison of the trial court's application of the *Witherspoon/Witt* standard to "life-inclined" and "death-inclined" venire persons whose answers were remarkably similar reveals that its exercise of discretion was arbitrary and capricious. (Cf. *People v. Heard* (2003) 31 Cal.4th 946, 964 [in concluding that trial court improperly excused juror for cause based on particular answer, Court observed that a number of seated jurors provided the same answer].)

In other words, the court's uneven application of the *Witherspoon/Witt* standard was fundamentally unfair, resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas* (1980) 448 U.S. 38, 43) and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon, supra*, 391 U.S. at pp. 520-521). For this reason alone, the death sentence cannot be executed. (*Ibid.*) At the very least, because the court's application of the *Witherspoon/Witt* standard was arbitrary and capricious, its rulings as to prospective jurors numbers 52, 56 and 204 are not entitled to deference. (See, e.g., *People v. Welch, supra*, 5 Cal.4th at p. 234.)

There is another reason why the trial court's rulings are not entitled to deference: the court applied the incorrect legal standard. A trial court abuses its discretion if it based a decision on an incorrect legal standard. (See *People v. Knoller* (2007) 41 Cal.4th 139, 158 [trial court abused its discretion by using wrong standard of implied malice], citing *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [a discretionary order based upon improper criteria or incorrect assumptions must be reversed]; *In re*

*Carmaleta B.* (1978) 21 Cal.3d 482, 496 [ "where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action").

In granting the prosecution's cause challenge as to prospective juror number 56, the trial court stated that the standard it applied was whether there was "really a *reasonable likelihood* she could choose conscientiously between the penalties based on the evidence and so forth." (66RT:6837, emphasis added.) This is simply the incorrect standard, and certainly not the legal equivalent of the "substantial impairment" test of *Witherspoon/Witt*. While the trial court did utter the words "substantially impaired" in making its ruling as to juror number 56, it is clear from the entirety of its ruling as to juror number 56 and the entirety of the voir dire that the trial court erroneously equated the "substantial impairment" standard with a "reasonably likely" standard, at least when it evaluated the qualifications of jurors who exhibits scruples against imposing a death sentence. (See also Argument XXII in appellant Bryant's opening brief and herein.) The record further reflects the trial court's misapplication of the law in excluding prospective juror number 56: in attempting to evaluate juror number 56's fitness under *Witherspoon/Witt*, the trial court asked: "As we look at one another here, are you telling me you would be able to put aside your personal views on this subject matter *and the decide the case based on its facts*, or are you not going to be able to do that?" (65RT:6750.) The correct question under *Witherspoon/Witt*, of course, was whether the juror could put aside his or her feelings about the death penalty *and follow the law*.

Lastly, the Supreme Court's most recent opinion relating to death qualification of jurors, *Uttecht v. Brown* (2007) ___ U.S. ___, 127 S.Ct. 2218, 2007 Daily Journal D.A.R. 7999, is not controlling in this case. In determining that deference was appropriate in that case, the Supreme Court relied upon circumstances which differ significantly from those presented here. Specifically, the Court relied quite heavily upon defense counsel's "volunteered comment that there was no objection" to the prosecution's challenge (127 S.Ct. at p. 2227), not as waiver of the issue but as evidence that there was agreement by defense counsel that the potential juror was not qualified under *Witherspoon* and *Witt*. (127 S.Ct. at p. 2227-2228.) In contrast, rather than acquiescing in the prosecution's challenge as in *Uttecht*, defense counsel here strongly objected to the challenge.

In this case, the trial court failed to apply the correct legal standards in determining whether a juror was excusable under *Witherspoon/Witt*. Therefore, its rulings are not entitled to deference. For the reasons stated in appellant Bryant's opening brief, if the trial court had applied the correct legal standard, it would not have found the prospective jurors to be "substantially impaired." The death judgment must be reversed.

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## XXII[51]

## THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND COMMITTED REVERSIBLE ERROR, BY APPLYING A MORE LENIENT DEATH-QUALIFICATION STANDARD TO PROSECUTION THAN DEFENSE CHALLENGES TO PROSPECTIVE JURORS

In the opening brief, appellant Bryant argued as an additional basis for reversal that the trial judge applied a lesser standard to pro-death jurors, producing "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521 (*Witherspoon*); see also *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*)), in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB:487-493.) Respondent argues that the trial court did nothing more than make a factual finding as to each prospective juror's qualifications under *Witherspoon/Witt*. (RB:263-265.) The trial court's findings are not controlling, however.

Prospective jurors filled out the juror questionnaire in this case without benefit of the trial court's explanation of the law and the decision-making process in a capital sentencing phase. Without understanding what the law is and what rules they were required to follow in a capital sentencing phase, it is impossible for prospective jurors to know whether they would put aside whatever personal views they held regarding the death penalty and follow the law. (See *People v. Heard* (2003) 31 Cal.4th 946, 964 [answer given in juror questionnaire without benefit of trial court's explanation of governing legal principles does not provide adequate basis to support excusal for cause under *Witherspoon/Witt*].) The record evidences that the trial court held those prospective jurors that evidenced qualms

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[51] This designated Argument VII in respondent's brief.

about imposing the death penalty in the questionnaire to their answers, while accepting that those who indicated in the questionnaire that they would automatically impose the death sentence upon conviction for the charged crimes had in fact changed their opinions based upon the trial court's explanation of the applicable law. (AOB:461-493.) In so doing, the trial court's rulings were arbitrary, capricious, and fundamentally unfair; at the very least, his rulings granting the prosecution's challenges for cause prospective juror numbers 52 and 56 and prospective alternate juror number 204 and denying the defense challenges for cause to prospective juror numbers 80 and 82 are not entitled to deference. (*People v. Champion* (1995) 9 Cal.4th 879, 908 [*Witt* must be applied in evenhanded manner]; *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730 [court's exercise of discretion in conduct of death-qualifying voir dire "is subject to the essential demands of fairness"]; *People v. Welch* (1993) 5 Cal.4th 228, 234 [arbitrary or capricious exercise of discretion is abuse of discretion].

Further, as respondent fails to address specifically appellant's claims as to prospective juror number 80, and since its discussion of the trial court's ruling as to number 82 consists of nothing more than isolated quotations from number 82's questionnaire and voir dire answers, followed by perfunctory conclusions that the ruling as to number 82 was appropriate without supporting argument, no further discussion of this aspect of the issue is necessary. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 215, and authorities cited therein ["points 'perfunctorily asserted without argument in support' are not properly raised"]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [reviewing court may pass without consideration point made in appellate brief without supporting argument or authority].)

The trial court's application of a more lenient standard to death-inclined jurors in effect culled the jury "of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), in violation of appellant's Sixth and Fourteenth Amendment rights (*ibid*; accord, *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). Appellant's judgment of death must be reversed.

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## XXIII[52]

## THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER IMPROPER AGGRAVATING CIRCUMSTANCES

Appellant argues, inter alia, that the trial court erred in admitting evidence under Penal Code section 190, factor (b), that he allegedly solicited two prior attempted homicides because the prosecution failed to corroborate accomplice testimony that appellant Bryant solicited each act. (AOB:494-499.) Respondent argues that there existed independent corroboration of both crimes. With regard to the alleged solicitation by appellant Bryant in hiring Walter Compton to kill Sofinia Newsome, respondent argues Compton's testimony in this regard was corroborated by various "facts" not relied upon by the trial court in ruling the testimony admissible. (RB:527.) The correctness of the trial court's ruling must be on the ground stated, not those supplied by respondent for the first time on appeal. (*Ernst v. Searle* (1933) 218 Cal.233, 240-241 [fairness to court and opposing litigant prevent party from raising a new and different theory on appeal inconsistent with its theory at trial]; accord, *Estate v. Stevenson* (1992) 11 Cal.App.4th 852, 865.)

The trial court, after stating several times during the penalty phase that it found it a "close case" as to the existence of sufficient corroboration of Compton's testimony, ruled the following evidence corroborated Compton's testimony: that he (Compton) obtained a firearm and went to the location where the intended victim could be found, coupled with the lack of evidence that appellant Bryant called off the crime. (137RT:18403-18404.) The problem with the trial court's reasoning is that there existed no corroboration that appellant Bryant himself solicited the crime in the first

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[52] This is designated Argument XXVII in respondent's brief.

place. The only evidence of appellant Bryant's alleged involvement in that solicitation was Compton's testimony. Since corroboration was non-existent, the testimony should have been precluded and/or stricken.

Additionally, the trial court's ruling was incorrect in that the crime of solicitation is punishable regardless of whether the person solicited acts or agreed to act – i.e., neither an agreement nor an overt act, necessary for a conspiracy conviction, need be shown in a prosecution for solicitation. (See *People v. Burt* (1955) 45 Cal.2d 311, 314.) Thus, that Compton took steps to carry the crime out is irrelevant and does not supply any corroboration to the solicitation alleged. The trial court erred in admitting Compton's testimony regarding the alleged solicitation by appellant Bryant to kill Sofinia Newsom.

With regard to the alleged solicitation by appellant Bryant of David Hodnett to kill Clarence Johnson, respondent argues sufficient corroboration of Detective Vojtecky's testimony regarding Hodnett's purported prior inconsistent statements regarding the crime existed in that appellant Bryant wired money to Hodnett while Hodnett was in prison and Hodnett refused to testify against appellant Bryant at trial.[53] (RB:526-527.) Again, there is no evidence that appellant Bryant solicited Hodnett. To the extent that the corroboration rested on the testimony of Detective Vojtecky, appellant Bryant was denied a fair trial and due process of law for the reasons stated in Arguments II, IX.B.3. and XVIII in appellant Bryant's opening and reply briefs, incorporated by reference as if fully set forth herein.

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[53] At trial, Hodnett testifies he shot Clarence Johnson for personal reasons. (131RT:17619-17625.)

Respondent argues that any error in admitting aggravating evidence was "harmless since it is not reasonably possible the penalty jury would have returned a verdict of life without the possibility of parole absent the evidence." (RB:528.) Respondent posits the wrong standard of review. Under *Wiggins v. Smith* (2003) 539 U.S.510, 537, the correct standard is whether there was a reasonable probability that, absent the additional aggravating evidence improperly admitted against appellant Bryant, "at least one juror would have struck a different balance" and decided that death was not the appropriate penalty for appellant Bryant. Assuming arguendo the jury believed the testimony of James Williams that appellant Bryant was at the scene of the homicides, appellant Bryant was not an actual shooter in this case. Evidence adduced at trial showed that law enforcement and drug dealers alike considered appellant Bryant's older brother, Jeff, to be in charge and giving the orders. Appellant was a good father and was well-liked by those not involved in the sale of narcotics. Under these circumstances, it is reasonably probable that, absent the evidence that appellant Bryant directly solicited two homicides, at least one juror would have voted for a sentence other than death. (*Ibid.*)

With regard to appellant Bryant's claims that the trial court's instructional errors directed the jury find that appellant Bryant committed prior criminal acts and allowed the jury to consider improperly the circumstances underlying appellant Bryant's prior felony conviction (AOB:499-504), appellant Bryant relies on his briefing and has nothing further to add at this point in time.

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## XXIV

## THE TRIAL COURT ERRED BY REFUSING SEVERAL DEFENSE PENALTY PHASE INSTRUCTIONS AND BY GIVING ITS OWN INCORRECT ANTI-SYMPATHY INSTRUCTIONS

Appellant argues that the trial court erred in rejecting several instructions requested by appellant: (1) that the absence of a mitigating factor could not be considered to be an aggravating factor; (2) a special instruction regarding the scope and proof of mitigation; (3) an instruction that sympathy alone is sufficient to reject death as a penalty; (4) that the jury could return a verdict of life imprisonment without the opportunity for parole even if it failed to find the presence of any mitigating factor; (5) that lingering doubt may be considered by the jury as a factor in mitigation; (6) that the non-unanimity provision of CALJIC No. 8.87 should be stricken and was unconstitutional in its unmodified version; (7) that aggravating factors are limited to those enumerated and that appellant's background may be considered only in mitigation; and (8) by rejecting appellant's sympathy instruction and instead instructing that sympathy for appellant's family could not be considered as a factor in mitigation. (AOB:505-534.)

The bulk of appellant's arguments regarding the denial of appellant's requests for special penalty phase instructions are not specifically addressed by respondent. Instead, respondent contends in a separate argument that the standard instructions given were proper and sufficient. (See RB:538-554.) Respondent appears to have chosen not to respond specifically to appellant Bryant's arguments, though it does respond specifically to coappellant Smith's argument that the trial court erred in failing to give a lingering doubt instruction. (RB:533-537.) Curiously, respondent fails to acknowledge or refute appellant's same claim of error in that regard. (AOB:517-522; RB:533-537.) To the extent that his

arguments remain unrebutted, appellant Bryant relies on the authorities presented in his opening brief on appeal. Appellant will address respondent's arguments against appellant's general challenges to the penalty phase instructions, *post*.

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## XXV[54]

## THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. Appellant argues that the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB:535-538.)

Respondent argues that intercase proportionality is not required by the United States Constitution, relying on *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 (*Pulley*), as well as California cases which have declined to undertake it. (RB:621.)

Appellant acknowledges these state cases, and further acknowledges that these cases are in turn based upon the United States Supreme Court's holding in *Pulley.* However, that was then and this is now. As appellant contends in his opening brief, the intervening 22 years between *Pulley* and the present time have seen the California sentencing scheme become one that demands proportionality review to ensure its constitutional application. This Court should revisit this issue and rule accordingly.

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[54] Respondent addressed this claim in its Argument XXXV.

## XXVI

## THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Appellant Bryant proves his death verdict is unconstitutional because it was not premised on findings beyond a reasonable doubt by a unanimous jury. (AOB:539-572.) Respondent relies on this Court's precedent in arguing that his claim should be rejected. (RB:124-125.) Appellant Bryant writes here only to urge that his claim must be considered in light of *Cunningham v. California* (2007) __ U.S. __, 127 S.Ct. 856. This case, decided early this year, supports appellant Bryant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

As appellant Bryant argues in his opening brief, the *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. In *Blakely,* the United States Supreme Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof

beyond a reasonable doubt. (*Blakely v. Washington*, *supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California*, *supra*, 127 S.Ct. 856, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law, i.e., whether the Sixth Amendment right to a jury trial requires that the aggravating facts used to sentence a non-capital defendant to the upper term (rather than to the presumptive middle-term) be proved beyond a reasonable doubt. The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury *and proved beyond a reasonable doubt*, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" (*id.* at p. 868, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 869.) Justice Ginsburg's majority opinion held that there was a bright-line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the

judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Ibid*, citing *Blakely, supra*, 542 U.S. at p. 305, and fn. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (See *People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto* (2003) 30 Cal.4th 226, 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the factfinding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 869.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "and reflects whether a defendant should be sentenced

to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to be found beyond a reasonable

doubt.[55] Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports appellant Bryant's argument that a sentence must be based on the findings beyond a reasonable doubt by a unanimous jury. In *Brown v. Sanders* (2006) 546 U.S. 212, the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms "aggravating circumstance" or "aggravating factor" to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's*[56] narrowing requirement. See, e.g., *Tuilaepa v. California,* 512 U.S., at 972. This terminology becomes confusing when, as in this case, a State employs the term "aggravating circumstance" to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no

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[55] The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.) merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona*, *supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the 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."

[56] *Furman v. Georgia* (1972) 408 U.S. 238.

question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders,* concluded in *Ring:* "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.) In light of *Brown,* this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

*Kansas v. Marsh* (2006) ___ U.S. ___, 126 S.Ct. 2516 (*Marsh*) deserves mention, if only to show that it has no application to the present issue. The Kansas statute considered in *Marsh* provided: "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law." (Kan. Stat. Ann. § 21-4624(e) (1995), quoted at *Marsh, supra,* 126 S.Ct. at p. 2520.) The Kansas Supreme Court reversed Marsh's death sentence, holding that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, in the event of equipoise, i.e., the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required. (*Id.* at p. 2521.)

The United States Supreme Court reversed the Kansas court's ruling. The High Court deemed the issue to be governed by its ruling in *Walton v. Arizona* (1990) 497 U.S. 639, overruled on other grounds, *Ring v. Arizona* (2002) 536 U.S. 584. (*Marsh, supra*, 126 S.Ct. at p. 2522.) Appellant Bryant's present challenge to the absence of a beyond a reasonable doubt burden of proof from the California sentencing formula was not before the High Court in *Marsh* because, as that court noted, "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate. . . ." (*Marsh, supra,* 126 S.Ct. at p. 2524.) The only question before the High Court in *Marsh* was whether Kansas could require the sentencer to impose a death sentence when it had not found "that the . . . aggravating circumstances [were] not outweighed by any mitigating circumstances." (*Marsh, supra,* 126 S.Ct., at p. 2522.) As such, *Marsh* has no bearing on the issue of California's sentencing formula.

Because the sentencing formula that was used to determine that appellant Bryant should be put to death did not require that the jury make its sentencing determination beyond a reasonable doubt, the sentence of death must be reversed. Appellant Bryant further notes his joinder, as noted in Argument XXXV, *post*, in coappellant's Smith and Wheeler's arguments on similar issues.

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## XXVII

## THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argues that the penalty phase instructions were unconstitutional in that they failed to adequately define the scope of the jury's sentencing discretion and the nature of its deliberative process. (AOB:573-585.) Respondent replies on this Court's precedent in arguing that appellant's claims must be rejected. (RB:538-553.)

Appellant argues that the inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB:605.) Appellant is aware that the Court has rejected this very argument in *People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration in light of two recent high Court opinions.

The United States Supreme Court recently reaffirmed that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1654, 1664] .) Indeed, it has long been recognized:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and

> death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* (1978) 438 U.S. 586, 605; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 323 [jury must be able to give a reasoned moral response to defendant's mitigating evidence].)

This Court has assumed that Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful consideration of all mental states because jurors will somehow understand that factor (k) permits consideration of a defendant's less-than-extreme mental or emotional disturbance as mitigating evidence. (See,. e.g., *People v. Wright* (1990) 52 Cal.3d 367, 443-444.) However, to conclude that factor (k) overrides factors (d) and (g) would be tantamount to declaring the other factors extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a [single] word surplusage . . . be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factors (d) and (g) surplusage.

Finally, the language of factor (k) in no way compelled a juror to interpret it as overriding factors (d) and (g). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death. . . ." (54CT:15821.) There was no reason a juror would necessarily interpret appellant's mental or emotional impairment at the time of the killings or his domination by another – the subject of factors (d) and (g) – as an "aspect of his character." A juror more likely believed that factors (d) and (g) dealt with different subjects that factor (k).

Similarly, in *Brewer v. Quarterman* (2007) ___ U.S.___ [127 S.Ct. 1706], where the prosecutor's argument limited the jury's consideration of mitigating evidence (*id.* at p. 1711 [argument "demphasized any mitigating effect that such evidence should have on the jury's determination"]), our High Court found that the jury was likely to have accepted the prosecutor's reasoning, which required reversal even if the mitigating evidence in *Brewer* was not as strong as in other cases. (*Id.* at p. 1712.) In so doing, the Court rejected the claim that there had to be evidence of a chronic or immutable mental illness before an error that foreclosed consideration of evidence was prejudicial.

> Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime.

(*Id.* at pp. 1712 -1713.) Thus, it found that the Texas courts had "failed to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 1714.)

Here, the instructions foreclosed consideration of mitigation under factors (d) and (g). Neither the instructions nor the argument of counsel informed the jury that the consideration contained therein could be considered elsewhere. When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman*, *supra*, 127 S.Ct. at p. 1675.) Appellant therefore requests that the Court

reconsider its previous opinions in light of *Brewer* and *Abdul-Kabir* and reverse the penalty judgment.

With regard to the remainder of appellant's Argument XXVII, he relies on the state and federal authority cited in his opening brief, and has nothing further to add at this time, other than noting appellant's joinder, as noted in Argument XXXV, *post*, in coappellants Smith's and Wheeler's arguments on similar issues.

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## XXVIII

## RECENT SUPREME COURT JURISPRUDENCE SUPPORTS APPELLANT BRYANT'S CLAIM THAT THE CALIFORNIA DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

Appellant Bryant delineates a number of reasons why California's death penalty statute and instructions fail to pass constitutional muster. (AOB:586-610.) Respondent argues that each of appellant Bryant's attacks on the constitutionality of California's death penalty statute should be rejected since this Court has rejected them previously. (RB:16-626.) Appellant Bryant requests this Court to reconsider its previous rulings. However, two issues deserve this Court's special attention because of recent rulings in the United States Supreme Court.

Appellant Bryant joins in the arguments of coappellants that California's statute violated the Eighth and Fourteenth Amendments because the statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (SAOB:418-421; WAOB:321-326, 333-335.) Coappellants demonstrate that long-established United States Supreme Court precedent holds that to avoid the Eighth Amendment's proscription against cruel and unusual punishment the state must rationally and objectively narrow the class of murderers eligible for the death penalty. (*Ibid.*) This core constitutional principle was most recently reiterated in *Kansas v. Marsh* (2006) __ U.S. __, 126 S.Ct. 2516, where in an opinion by Justice Thomas, the high court held that while states had wide discretion to determine the parameter's of their death penalty laws, a death penalty scheme must at an absolute minimum ensure that the procedure "rationally narrow[s] the class of death-eligible defendants." (*Id.* at pp. 2524-2525.)

Penal Code section 190.2's all embracing special circumstances, together with the Court's ever more expansive interpretation of those

special circumstances, fails to rationally narrow the eligibility pool. In light of the increasing role the United States Supreme Court has given narrowing in its death penalty jurisprudence, it is time this Court did so.

In his opening brief, appellant Bryant argues that California's death penalty is unconstitutional because this Court has failed to apply a limiting construction to section 190.3, subdivision (a). (AOB:587-594.) Most recently in *People v. Blair* (2005) 36 Cal.4th 686, 749, this Court explicitly held that for evidence to be considered "circumstances of the crime," there is no requirement of spatial or temporal connection to the crime. It is apparent that this Court does not believe that there are any limitations necessary on its construction of section 190.3, subdivision (a). For the reasons articulated in his opening brief, appellant Bryant urges this Court to reconsider this holding.

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## XXIX[57]

## THE TRIAL COURT PREJUDICIALLY ERRED BY REPEATEDLY INFORMING THE JURY THAT THE COST OF THE INSTANT TRIAL WAS "ASTRONOMICAL"

The trial court erred in telling the jury that the cost of the trial was "astronomical." (74RT:8059; see also 83RT:9567.) In his opening brief, appellant argues that informing the jury as to the cost of trial had the effect of creating pressure on the jury to convict so as not to waste public resources, regardless of the fact that the cost of trial is not a factor that is relevant to the guilt or innocence of a defendant or to the jury's determination of punishment. (AOB:611-616.) This served to deny appellant the right to a jury trial, to a fair trial, to due process of law and to the right to reliable verdicts in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and to parallel provisions in the state constitution.

Respondent argues that the trial court's statement had "no impact" on the jurors and that, in the alternative, any error was harmless. (RB:611-615.) Appellant Bryant joins in coappellant Smith's Argument XI in his AOB and X (SAOB:273-277 and SARB:110-111) and incorporates by reference those arguments as if fully set forth herein. Regarding the relative strength of the prosecution's case against appellant Bryant, Arguments III and IX, *ante*, and XXXII, *post*, are incorporated by reference herein. The error, standing alone or considered in light of the coercive hold the trial court put on the jury when it appeared they could not reach a verdict as to penalty in this case, clearly communicated to the jury that they were required to reach a verdict in this case. (See Argument XVI in coappellant Smith's opening brief and Argument XIII in his reply brief (SAOB:302-331

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[57] This is designated Argument XXXIV in respondent's brief.

and SAROB:117-123), incorporated by reference herein.) For all the reasons stated herein and in appellant Bryant's opening brief, reversal is required.

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## XXX

## THE TRIAL COURT ERRONEOUSLY EXCLUDED APPELLANT BRYANT AND HIS COUNSEL FROM TRIAL PROCEEDINGS; REVERSAL IS REQUIRED

In his opening brief, appellant Bryant contends that the trial court erroneously held ex parte proceedings from which both appellant Bryant and his counsel were excluded and that appellant Bryant's absence from other critical stages of the proceeding was prejudicial error under both state and federal law. (AOB:617-635.)

Respondent argues that appellant Bryant was not harmed by his absence at the hearing during guilt phase deliberations for codefendant Settle, after the guilt verdicts had been entered against appellant Bryant, when the jury indicated that it was confused about the law of accomplices, because a challenge to the verdicts based on the jury's confusion "was made by counsel for coappellant Smith and rejected by the trial court. . . . Therefore, appellants' [sic] absence from these proceedings did not impede their ability to defend against the charges." (RB:607.) However, respondent also asserts that appellant Bryant waived any claim of error relating to the trial court's denial of coappellant Smith's request to order the jury to reconsider the verdicts as to all defendants "by not objecting to or joining appellant Smith's request." (RB:384; see also RB:389.) Respondent must be estopped from arguing such contradictory positions. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

Assuming arguendo this Court rules respondent is not estopped, the issue is not waived. The record reflects that on June 12, 1995, after the jury sent out the note indicating it was confused on the law of accomplices,

counsel for appellant Bryant "telephonically waived their appearance."[58] (126RT: 17085.) However, defense counsel, through his or her personal conduct in the absence of the defendant, cannot "waive" his or her client's right to have counsel present at all critical stages of the proceeding or the client's right to trial by jury:

> "'Counsel may waive all but a few fundamental rights for a defendant.' [Citation.] ... ' "By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics." ' [Citation.] Included in that narrow exception are such fundamental matters as whether to plead guilty, whether to waive the constitutional right to trial by jury, whether to waive the right to counsel, and whether to waive the privilege against self-incrimination. [Citation.] 'As to these rights, the criminal defendant must be admonished and the court must secure an express waiver; as to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict.' [Citation.]"

(*People v. Hinton* (2006) 37 Cal.4th 839, 873-874, second italics added.)

The right to counsel is the right to be represented by counsel "at all critical stages of the prosecution." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.) Jury instruction is a critical stage of the proceedings. (*People v. Dagnino* (1978) 80 Cal.App.3d 981, 985-988 [court's sending written instructions to jury during deliberation is critical stage].) There is nothing in the record that indicates that appellant Bryant waived his right to have his counsel present at all times while the court was instructing the jury. The absence of appellant Bryant and his counsel during this "critical stage" requires automatic reversal of appellant Bryant's conviction and death

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[58] Counsel for Wheeler and Smith, against whom guilt verdicts had also been delivered, were nonetheless personally present. (126RT:17085.)

judgment. There exists authority suggesting that the deprivation of the right to counsel at a critical stage of the proceedings is cause for automatic reversal (see *United States v. Cronic* (1984) 466 U.S. 648, 659 [a trial is unfair if the accused is denied counsel at a critical stage of trial]), and appellant Bryant asserts per se reversal is required here.

With regard to appellant Bryant's claim that he was improperly and prejudicially denied his right to be present at the numerous in camera hearings held with the trial court and the prosecution only, respondent argues that appellant Bryant's presence at those proceedings would not have benefitted him because he "prevailed" when the trial court found no evidence of infiltration of Bryant organization members in the LADA's office. (RB:309.) Contrary to respondent's assertion, the in camera hearings were held on appellant Bryant's motion to recuse the LADA's office, a motion that appellant Bryant *lost* after the in camera hearing were completed. (See Argument I in the AOB and *ante*.) Respondent does not otherwise address the merits of appellant Bryant's claim in this regard, and appellant Bryant therefore relies on the arguments in his opening brief.

The errors here are clear – this is a death penalty case, and appellant Bryant was precluded from attending many proceedings that shaped his fate. He still has not been given access to transcripts from the in camera proceedings, so he has been denied a meaningful opportunity to fully argue this claim. (See Argument XXXIV in the AOB and *post*.) Nonetheless, on the record available to appellant Bryant, he has shown that respondent has not carried its burden of showing that the errors, singularly or cumulatively, were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## XXXI

## APPELLANT BRYANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Appellant Bryant establishes that the punishment of death for ordinary crimes violates international law and the Eighth Amendment. (AOB:636-640.) Respondent rejects appellant Bryant's argument in one short paragraph, relying on this Court's rejection of the claim. (RB:626.)

Recent developments in Eighth Amendment jurisprudence further support appellant Bryant's claim. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals is cruel and unusual punishment, the Court looked to international law standards as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime").

(*Id.* at p. 575.) Respondent has not answered the merits of appellant Bryant's claim that the use of death as a regular punishment violates international law, as well as the Eighth and Fourteenth Amendments. Appellant Bryant asks this Court to reconsider its position on this issue and to reverse his death judgment.

## XXXII

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Appellant Bryant argues that the cumulative effect of errors at trial require reversal of his conviction and death judgment. (AOB:641-643.) Respondent argues that appellant Bryant waived several claims of error and that "there were no multiple errors to accumulate." (RB:627.)

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-03 [combined effect of individual errors "denied [Chambers ] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"].) The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Id* at p. 290, fn. 3.)

Contrary to respondent's rather cavalier assertion, this was far from an error-free trial. In the six years this case was pending prior to trial, over a half dozen defendants were added to or subtracted from this case; charges of conspiracy to distribute narcotics for sale were added and severed, the entire Los Angeles County District Attorney's office was recused from prosecuting the case and then reinstated when the Court of Appeal reversed the trial court's recusal order. The myriad issues of error argued herein stem in large part from prosecutorial overzealousness. In its efforts to secure a capital conviction against appellant Bryant, the prosecution sought to fabricate evidence that appellant Bryant was a shooter, and then, when it became clear that this tainted evidence would not be admitted at trial, the prosecution successfully sought to introduce irrelevant and prejudicial

evidence, amounting figuratively to "throwing in everything but the kitchen sink." The trial court not only erroneously acquiesced to the prosecution's demands, but it imposed security measures so severe that appellant Bryant was enveloped in an aura of guilt from the start of trial to its conclusion. In the end, appellant Bryant was convicted by the testimony of two men who participated in the homicides and who falsely cast blame on appellant Bryant in a successful effort to save themselves. Such a conviction and death sentence cannot stand.

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## XXXIII

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

Appellant Bryant argues that if any conviction or finding is set aside on appeal, there must be a remand for a new sentencing determination. (AOB:644-645.) Respondent disagrees, arguing harmless error analysis may be conducted should there be a determination of an invalid conviction or special circumstance. (RB:628-629.) Appellant Bryant relies on the argument in his opening brief, and joins in the arguments of coappellants in this regard, as indicated in Argument XXXV, *post*.

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## XXXIV

## THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE APPELLANT BRYANT HAS BEEN DENIED A COMPLETE AND ACCURATE RECORD ON APPEAL, IN VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS

Main Entry: catch–22

Pronunciation: \twen-te-'tü\

Function: noun

Inflected Form(s): plural catch–22's or catch–22s

Usage: often capitalized

Etymology: from Catch-22, paradoxical rule in the novel Catch-22 (1961) by Joseph Heller

Date: 1971

1: a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule <the show-business catch–22—no work unless you have an agent, no agent unless you've worked — Mary Murphy>; also : the circumstance or rule that denies a solution

2 a: an illogical, unreasonable, or senseless situation b: a measure or policy whose effect is the opposite of what was intended c: a situation presenting two equally undesirable alternatives

(http://m-w.com/dictionary/catch-22.)

Appellant Bryant has detailed his failed efforts to obtain a complete and adequate record on appeal in his opening brief. (AOB:646-655.) Respondent, relying on this Court's precedent, argues that appellant Bryant fails to carry his burden of proving that the missing record matters. (RB:630-633.) For the reasons fully stated in appellant Bryant's opening

brief, this "heads I win, tails you lose" cannot meet federal constitutional requirements of due process of law.

> '"It is far better that a defendant be retried than that the state should permit itself to be subject to the criticism that it has denied an appellant a fair and adequate record on appeal." [Citations.] The burden of requiring a new hearing is small indeed compared to the importance of ensuring that justice is done on an adequate record on appeal.' [Citation.]"

(*People v. Cervantes* (2007) 150 Cal.App.4th 1117, 1122, italics omitted.) Appellant Bryant has set forth how lack of record has made it impossible for him to fully argue numerous claims on appeal. (AOB 84, 87, 120, 332, 378, 624.) Under these circumstances, reversal is appropriate and proper.

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## XXXV

## JOINDER BY APPELLANT BRYANT IN CERTAIN ARGUMENTS OF COAPPELLANTS SMITH AND WHEELER

Appellant Bryant was trial and convicted with capital coappellants Donald Smith and LeRoy Wheeler. Their appeals have been joined in this direct appeal. Pursuant to California Rule of Court, rule 8.200(a)(5), appellant Bryant hereby joins the arguments of coappellants Smith and Wheeler as indicated in this brief, *ante*. Further, to the extent the arguments may benefit appellant Bryant and/or supplement the authority contained in his briefing, he joins in the following additional arguments of his coappellants:

Arguments XVI, XX.B., XXI, XXII, XXIII, XXIV, XXV [misnumbered as "XIV" at p. 440 of the SAOB] of coappellant Smith's opening brief (SAOB:302-331, 352-357, 358-442) and Smith's reply arguments to respondent's briefing relating to those claims.

Arguments IX, XI, XII, XIII and XIV of coappellant Wheeler's opening brief (WAOB:267-273, 279-435) and Wheeler's reply arguments to respondent's briefing relating to those claims.

However, appellant Bryant does not join in any characterization of fact made by his coappellants that is antagonistic to appellant Bryant's defense.

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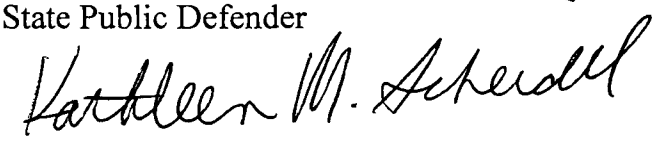
## CONCLUSION

For the foregoing reasons, as well as those stated in appellant Bryant's opening brief and the argument of coappellants that appellant Bryant has joined, his convictions must be reversed and his judgment of death vacated.

DATED: October 30, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Appellant Bryant

## CERTIFICATE OF COUNSEL

## (CAL. RULES OF COURT, RULE 8.6.30(b)(B))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant Stanley Bryant in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 42,949 words in length.

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Attorney for Appellant

## DECLARATION OF SERVICE

Re: People v. Bryant, Wheeler and Smith No. S049596

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

**APPELLANT BRYANT'S REPLY BRIEF**

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

Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

David Goodwin
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(Attorney for appellant Smith)

Conrad Petermann
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(Attorney for appellant Wheeler)

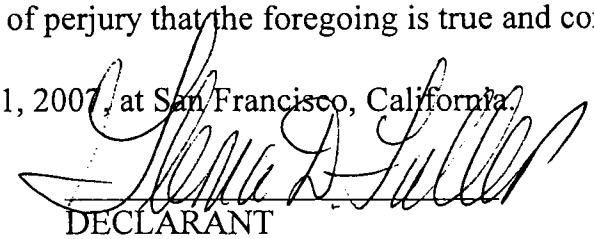
Addie Lovelace
Death Penalty Appeals Clerk
Criminal Courts Building
210 W. Temple Street, Room M-6
Los Angeles, CA 90012

Stanley Bryant
CDC ID # J-83400
San Quentin State Prison
San Quentin, CA 94964

Each said envelope was then, on October 31, 2007 , sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on October 31, 2007, at San Francisco, California.



DECLARANT